IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANDRE KYLES and DIANE TAYLOR, on behalf of themselves and all others similarly situated, Plaintiffs, v. STEIN MART , INC., a Florida corporation, and SOCIAL ANNEX, INC. (d/b/a, ANNEX CLOUD), a Delaware corporation, Defendants.	CASE NO. 1:19-cv-00483-CFC **JURY TRIAL DEMANDED**

PLAINTIFFS' OMNIBUS BRIEF IN OPPOSITION TO DEFENDANT SOCIAL ANNEX, INC.'S AND DEFENDANT STEIN MART, INC.'S MOTIONS TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT

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I. NATURE AND STAGE OF PROCEEDINGS

This is a class action brought by Plaintiffs, individually and on behalf of similarly situated consumers (the "Class"), including but not limited to consumers that made purchases from Defendant Stein Mart, Inc.'s ("Stein Mart") online store, whose sensitive personal and non-public information—including their (1) names; (2) addresses; (3) email addresses; and (4) payment card information (consisting of, *inter alia*, card numbers, expiration dates, and security codes ("CVV numbers")) (collectively, "Personal Information")—was accessed and captured from Stein Mart's and/or Annex's systems by unauthorized users during at least four different periods of time between December 28, 2017 and July 9, 2018 (the "Data Breach"). ¶ 1.[1]

The Complaint alleges causes of action resulting from the Data Breach, including claims for negligence, negligence per se, breach of implied contract, unjust enrichment, violations of the Missouri Merchandising Practices Act (codified as Mo. Ann. Stat. § 407.020(1), *et seq*.) ("MMPA"), and violations of the South Carolina Unfair Trade Practices Act (codified as S.C. Code Ann. § 39-5-20(a), *et seq*.) ("SCUTPA"). *See* ¶¶ 94-158. Plaintiffs allege that Stein Mart and Annex failed to take adequate measures to protect their Personal Information, and failed to disclose that their systems and/or websites were susceptible to a cyber-attack. *See, e.g.*, ¶¶ 4-7, 39, 41, 58, 60, 69-70, 92, 102, 110, 120, 123, 145, 152. Stein Mart and Annex also allegedly failed to inform Plaintiffs and the Class that their information was compromised for months after learning of the Data Breach. *See, e.g.*, ¶¶ 42, 46-47, 55. Plaintiffs' and Class members' Personal Information was compromised and/or subjected to actual fraud and misuse due to the Data Breach. As a result, they were forced to use their own resources to remedy the fraud against them

[1] Unless otherwise indicated, all references herein to "¶ __" refer to the enumerated paragraphs of Plaintiffs' Class Action Complaint (D.I. 1) ("Compl."), filed on March 8, 2019.

and/or prevent future incidents of misuse. In this regard, Plaintiffs have alleged palpable misuse of their compromised Payment Information, and have been injured.

On May 10, 2019, Defendant Social Annex, Inc. ("Annex") filed its Motion to Dismiss Plaintiffs' Class Action Complaint (D.I. 14) and Brief in Support of Motion to Dismiss Plaintiffs' Class Action Complaint (D.I. 15) ("Annex Br."), and Defendant Stein Mart, Inc. (individually, "Stein Mart," and collectively with Annex, "Defendants") filed its Motion to Dismiss Class Action Complaint (D.I. 16) and Opening Brief in Support of Motion to Dismiss Class Action Complaint (D.I. 17) ("Stein Mart Br."). On June 5, 2019, the parties filed a Stipulation and Proposed Order Permitting Plaintiffs to File a Single Omnibus Answering Brief in Response to Defendants' Motions to Dismiss (D.I. 18) ("Omnibus Stipulation"), which this Court granted on June 6, 2019 (D.I. 19) ("Omnibus Order"). Pursuant to the Omnibus Order granting the Omnibus Stipulation, Plaintiffs Andre Kyles and Diane Taylor ("Plaintiffs") hereby file a single omnibus brief of no more than 40 pages in response to both Defendants' motions to dismiss. As set forth below, Defendants' arguments for dismissal are unpersuasive, and their motions to dismiss should be denied.

II. SUMMARY OF ARGUMENT

(1) This Court has both general and specific personal jurisdiction over Stein Mart that comports with Due Process because Stein Mart, among other things, operates a retail store in Wilmington, Delaware, has purposely availed itself of doing business in Delaware, and regularly sells and ships products to consumers in Delaware through its online store.

(2) Plaintiffs adequately plead injury-in-fact and, in turn, damages sufficient to establish standing under Article III, as well as damages in support of their common law and

MMPA claims entitling them to monetary relief as measured by, *inter alia*, benefit of the bargain losses and diminution of value of Personal Information.

(3) Plaintiff Kyles adequately alleges a claim under the MMPA.

(4) Plaintiffs' allegations satisfy Rule 8's liberal pleading standard. Plaintiffs are not required at the motion to dismiss stage to know the technical inner corporate interactions/workings and business relationship between Annex and Stein Mart.

(5) Negligence per se claims may be based on the FTC Act.

(6) California's economic loss rule applies and does not bar Plaintiffs' negligence and negligence per se claims.

(7) Plaintiffs have adequately alleged impoverishment and that they conferred a benefit on Annex; therefore, their unjust enrichment claims are sufficiently alleged.

(8) The existence of an implied contract is a question of fact for the jury not properly decided on a motion to dismiss. Nonetheless, Plaintiffs have alleged sufficient facts to plead their breach of implied contract claims.

(9) SCUTPA claims may be brought on a classwide basis, and Plaintiff Taylor's allegations satisfy each element required to plead a claim under SCUTPA.

III. STATEMENT OF FACTS

Stein Mart is a national specialty retailer of designer and name-brand fashion apparel, which sells its products directly to consumers through its online store on its website, as well as through its physical retail locations. ¶¶ 20, 29, 43. Annex is a third-party vendor that offers a service to online merchants/retailers (including Stein Mart) that enables consumers to log onto merchants'/retailers' websites using their accounts with separate websites (such as Facebook and Amazon), to make online purchases. *See, e.g.*, ¶ 31. Annex failed to implement reasonable

security measures to protect Plaintiffs' and other Class members' Personal Information that it obtained or otherwise had access to by way of its services for purchases made on Stein Mart's website. *See, e.g.*, ¶¶ 42-57. Between at least December 28, 2017 and July 9, 2018, criminals were able to breach Annex's system on at least five different dates (May 19, June 1, June 5, and July 8-9 2018), and had the ability to access, view, and download the Personal Information of Plaintiffs and an unknown but presumably prodigious number of other individuals. ¶¶ 1, 42-57, 51. Indeed, one online news story reported that as many as 6.42 million consumers were potentially affected by the Annex Data Breach. ¶ 53.

Months before notifying consumers of the Data Breach, Stein Mart filed a notice of the Data Breach with the Vermont Attorney General, which stated that Annex had informed Stein Mart that Annex's system was accessed by hackers who captured information entered during the checkout process by customers who placed or attempted to place orders on Stein Mart's website. The compromised information included, *inter alia*, extremely sensitive financial information such as debit/credit card numbers, expiration dates, and card security (CCV) codes. ¶¶ 42-44. Stein Mart waited at least two months from the date it purportedly first learned of the Data Breach—and more than eleven months from its occurrence—before notifying its customers that their Personal Information was potentially compromised. ¶ 55. Upon information and belief, to date, Annex has never sent letters or any other form of communication notifying consumers affected by the Data Breach.

The Data Breach is one of the latest in a number of recent high-profile data breaches. ¶¶ 5, 71. Given the slew of recent data breaches, companies are aware of the grave security threats associated therewith. ¶¶ 70-72, 113. Stein Mart, through operation of its online store, maintains highly sensitive Personal Information that can be—and has been—used for

nefarious purposes by third parties, such as perpetrating identity theft and making fraudulent purchases. ¶ 59. Indeed, Stein Mart's website guarantees customers that it will protect their sensitive Personal Information, and that purchases on its website are made pursuant to its "Secure Shopping Guarantee." ¶ 40. In turn—and by way of the service Annex offers that facilitates such online purchases on Stein Mart's website—Annex knew or should have known of Stein Mart's guarantee. Nonetheless, both Defendants failed to adequately secure consumers' Personal Information, which inevitably resulted in, and was the legal and proximate cause of, the Data Breach and Plaintiffs'/Class members' losses. ¶¶ 6, 12, 19, 22, 24, 28, 45, 77, 82, 103, 107-08, 113-14, 123-25, 131, 140-41, 156.

As a result of the Data Breach, cyber criminals and fraudsters have misused and will continue to misuse consumers' sensitive personal and financial information to make fraudulent purchases and engage in other fraud. *See, e.g.*, ¶¶ 6-7, 15, 16, 57, 77, 78. This has and will continue to result in significant harm, including: (1) the costs of and time spent resolving fraudulent charges; (2) loss of time and money obtaining protections against future identity theft; (3) financial losses related to the purchases made at Stein Mart that Plaintiffs and Class members would not have made had they known of Defendants' careless approach to cybersecurity; (4) lost control over the value of personal information; (5) unreimbursed losses; (6) losses and fees relating to exceeding credit and debit card limits, balances, and declined transactions; (7) harm resulting from damaged credit scores and information; and (8) other harm resulting from the misuse of stolen Personal Information. ¶¶ 77, 103, 114. Stein Mart concedes as much in its letters notifying Plaintiffs and Class members of the Data Breach because it warned of the very real threat that it would result in fraudulent charges, identity theft, and other similar risks by

further instructing letter recipients to "closely review [her] payment card statements for any unauthorized charges." *See, e.g.*, ¶¶ 12, 57, 81.

Plaintiffs' experiences are similar to those of other Stein Mart and Annex online customers across the country. Each of the Plaintiffs received a letter from Stein Mart informing them "about an incident involving one of [Stein Mart's] third-party vendors, Annex … that may involve some of [their Personal] [I]nformation," and that "Annex Cloud informed Stein Mart that they had detected … unauthorized code that had been added to the code used by Annex Cloud to enable logins … and could have captured information entered during the checkout process by customers who placed or attempted to place orders on [Stein Mart's] website." ¶¶ 11, 23. Although the letters were all dated around November 13, 2018, Stein Mart notified the Vermont Office of Attorney General of the Data Breach no later than September 14, 2018, which indicates that both Stein Mart and Annex were aware of the Data Breach at least as of that date. *See* ¶¶ 13-14.

In May 2018, Plaintiff Taylor confirmed with Bank of America that two fraudulent charges had been made on her account using her debit card. ¶ 15. The debit card used to make the fraudulent charges was the same one Plaintiff Taylor used to make purchases on Stein Mart's website, www.SteinMart.com, via Annex's services. ¶ 16. As a result of the fraudulent charges, on or about May 9, 2018, Bank of America cancelled the debit card hackers used to make fraudulent transactions and mailed Plaintiff Taylor a new debit card. ¶ 17. Prior to that incident, Plaintiff Taylor had never before experienced credit card fraud or identity theft with respect to that debit card. Furthermore, Plaintiff Taylor does not have a previous history of being victimized by payment card fraud. ¶ 18.[2]

[2] As further discussed in footnote 13 *infra*, Plaintiffs' counsel recently learned that Plaintiff Kyles experienced fraudulent charges on the same account she had used to make purchases from Stein Mart's website. While these new facts are not plead in the operative complaint, this new

Plaintiff Taylor, and thus likely members of the Class, have experienced actual fraud and palpable misuse of their sensitive Personal Information due to the Data Breach. ¶¶ 7-8. Making matters worse, to date both Defendants have failed to take appropriate measures to assist affected customers. *See* ¶ 9. Instead, Stein Mart has simply told consumers to carefully monitor their accounts. *Id*. In contrast to what is and has been frequently made available to consumers in recent data breaches, Defendants have not offered or provided any monitoring service or fraud insurance to date. *Id*. Neither Defendant has offered Plaintiffs and Class members credit monitoring, compensation, identity theft insurance coverage, or other remedies for their losses, to date. *Id*. As a result, Plaintiffs and Class members have been forced to incur costs and expend hours of their personal time protecting against additional misuse of their data and fraud. *Id*.

IV. STANDARDS OF REVIEW

A. FED. R. CIV. P. 12(b)(1) Standard

To determine whether a plaintiff has Article III standing, courts must look to guiding principles laid out in prior case law. *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014).[3] "At the pleading stage, [a complaint need only contain] general factual allegations of injury resulting from the defendant's conduct … for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

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development nullifies Defendants' arguments that Plaintiff Kyles lacks Article III standing and that her MMPA claim fails.

[3] Unless otherwise indicated, all internal citations are omitted and all alterations are added.

B. FED. R. CIV. P. 12(b)(2) Standard

"The determination of personal jurisdiction requires a two-part analysis. It must be determined if Delaware's long arm statute confers jurisdiction and, if it does, whether the assertion of personal jurisdiction complies with due process." *Reach & Assoc. P.C. v. Dencer*, 269 F. Supp. 2d 497, 502 (D. Del. 2003). Delaware's long arm statute provides that personal jurisdiction is proper over any nonresident who, in person or through an agent:

> (1) Transacts any business or performs any character of work or service in the State;
> (2) Contracts to supply services or things in this State;
> (3) Causes tortious injury in the State by an act or omission in this State;
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
> (5) Has an interest in, uses or possesses real property in the State ….

10 *Del. C.* § 3104(c)(1) & (2) ("Delaware's Long-Arm Statute")). The constitutional basis requires the court to determine whether the exercise of jurisdiction comports with the defendant's right to due process. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Under the Due Process Clause, a defendant is subject to the jurisdiction of the federal judiciary when the defendant's conduct is such that it should "reasonably anticipate being haled into court there." *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Personal jurisdiction over a nonresident defendant is proper when either specific or general jurisdiction exists. *See Dollar Sav. Bank v. First Sec. Bank of Utah, N.A.*, 746 F.2d 208, 211 (3d Cir. 1984). General jurisdiction exists when the defendant's contacts with the forum are "continuous and systematic," whether or not the contacts relate to the litigation. *See BP Chems. Ltd. v. Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000) (quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984)). "Specific personal jurisdiction exists when the defendant has

'purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or related to those activities.'" *Id.* (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985)).

C. FED. R. CIV. P. 12(b)(6) Standard

"Federal Rule of Civil Procedure 8(a)(2) requires 'only a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 548 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations …." *Id*. The court must "accept all factual allegations in the complaint as true and, examining for plausibility, 'determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 249 (3d Cir. 2017). In addition, "in cases such as corporate fraud, a plaintiff cannot be expected to have personal knowledge of the details of corporate internal affairs and thus the Third Circuit has relaxed FED. R. CIV. P. 9(b) when factual information is peculiarly within the defendant's knowledge or control." *DiMare v. Metlife Ins. Co*., 369 F. App'x 324, 330 (3d Cir. 2010).

V. ARGUMENT

A. This Court has Personal Jurisdiction over Stein Mart

1. *Delaware's Long-Arm Statute Confers Personal Jurisdiction over Stein Mart Because it Maintains and Operates a Retail Store in Delaware*

Stein Mart spends more than four pages arguing that this Court lacks personal jurisdiction over it, while conveniently omitting any mention that it operates a retail store in Wilmington, Delaware.[4] This continuous physical and business presence in Delaware establishes personal

[4] *See* Stein Mart's online "store locator" search, showing retail store location at Wilmington

jurisdiction over Stein Mart in Delaware pursuant to **four** separate subsections of Delaware's Long-Arm Statute: (i) it irrefutably establishes that Stein Mart "transacts any business" and/or "performs any character of work" in Delaware, which satisfies subsection (1); (ii) it establishes that Stein Mart "contracts to supply … things" in Delaware, which satisfies subsection (2); (iii) it establishes that Stein Mart "regularly does or solicits business" and/or "engages in … persistent course of conduct" in Delaware, which satisfies subsection (4); and (iv) it undeniably establishes that Stein Mart "has an interest in, uses" and "possesses real property" in Delaware, which satisfies subsection (5). *See* 10 *Del. C.* §§ 3104(c)(1), (2), (4), (5). Any one of these, in isolation, is sufficient to establish personal jurisdiction in Delaware, and nothing further is required. Nonetheless, Delaware's Long-Arm Statute also confers personal jurisdiction over Stein Mart by way of Stein Mart's sale of consumer goods to consumers in Delaware through operation of its online store. Such business contacts with Delaware creates personal jurisdiction pursuant to subsections (1), (2), (4), and (5) of Delaware's Long-Arm Statute. *See* 10 *Del. C.* §§ 3104(c)(1), (2), (4), (5).

2. *Stein Mart Maintains and Operates a Retail Store in Delaware; Therefore, This Court has General Personal Jurisdiction over Stein Mart that Comports with Due Process*

Courts have found that conducting business in a particular state by maintaining and operating a store or office in that state gives rise to general personal jurisdiction.[5] Thus, by

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Concord Pike, 4221 Concord Pike Wilmington, DE 19803, accessible at: https://www.steinmart.com/store-locator/all-stores.do (last visited June 7, 2019).

[5] *See, e.g.*, *Twentieth Century Fox Film Corp. v. iCraveTV*, Nos. Civ.A. 00-121 and 00-120, 2000 U.S. Dist. LEXIS 11670, 2000 WL 255989, * 4 (W.D.Pa. Feb. 8, 2000) (general personal jurisdiction where defendant "maintain[ed] an office and an agent in [the forum] on an ongoing basis, entering into contractual relationships in [the forum]"); *Consol. Rail Corp. v. Grand T. W. R. Co.*, 592 F. Supp. 562, 566 (E.D. Pa. 1984) ("By maintaining an office in Philadelphia staffed by a sales agent in order to solicit business for itself, [Defendant] has purposefully availed itself of the privilege of conducting activities within the forum State, and should reasonably anticipate

maintaining a retail store in Delaware—and operating as a retail merchant in Delaware selling goods to Delaware consumers—Stein Mart cannot deny that it (1) maintains a "continuous and systematic" physical and business presence in Delaware, *Fibre Corp.*, 229 F.3d at 259, and (2) "purposefully avails itself of the privilege of conducting activities within" Delaware, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), such that it should "reasonably anticipate being haled into court" in Delaware. *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Indeed, courts within the Third Circuit have consistently held that "[t]he standard to establish general jurisdiction is roughly approximate to **finding a physical presence** within the state, although such 'entrance' is not necessary." *Lay v. Bumpass*, No. 3:11-cv-1543, 2012 U.S. Dist. LEXIS 111728, at *12-13 (M.D. Pa. Aug. 6, 2012) (emphasis added).[6] Here, Stein Mart irrefutably maintains a physical presence in Delaware, and therefore general personal jurisdiction exists.

Furthermore, in order to open and operate a retail store in Delaware, Stein Mart had to comply with Delaware business licensure, certification, and registration requirements, including but not limited to (1) obtaining a General Business License from the Delaware Division of Revenue, (2) calculating its Unemployment Insurance liability paid to the Delaware Division of Unemployment Insurance, (3) routinely paying Unemployment Insurance liability to the

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being haled into court here."); *Glenn v. Lewis*, Civil Action No. 08-cv-2582, 2009 U.S. Dist. LEXIS 4112, at *8 (D.N.J. Jan. 20, 2009) (finding "personal jurisdiction … [b]y maintaining an office … Defendant purposefully directed his activities at residents of the forum and invoked the benefits and protections of the State's laws"); *Gucci Am. v. Bank of China*, 768 F.3d 122, 135-36 (2d Cir. 2014) (general jurisdiction over foreign bank with branch office in New York, even though it had only four branch offices in United States and conducted only small portion of its worldwide business in New York).

[6] *William Rosenstein & Sons Co. v. BBI Produce, Inc.*, 123 F. Supp. 2d 268, 274 (M.D. Pa. 2000) ("The standard for establishing general jurisdiction is fairly high, and requires that defendant's contacts be of the sort that approximate physical presence"); *Mohler v. Golden 1 Credit Union*, No. 4:17-CV-02261, 2018 U.S. Dist. LEXIS 212937, at *8 (M.D. Pa. Dec. 17, 2018) ("general jurisdiction requires that a defendant's contacts with the forum state be of the sort that approximate physical presence.").

Delaware Division of Unemployment Insurance, (4) submitting a completed Foreign Qualification form with the Delaware Division of Corporations along with a Certificate of Existence issued by that state or jurisdiction, (5) availing itself and complying with mandates from the Delaware Department of labor, (6) routinely paying Delaware state taxes, and (7) complying with a myriad[7] of additional State of Delaware licensing/certification/or registration requirements.[8] Thus, Stein Mart cannot rationally dispute that it "purposefully avails itself of the privilege of conducting activities within" Delaware, *Hanson*, 357 U.S. at 253, and therefore general personal jurisdiction is established. As such, no further jurisdictional inquiry is required to establish this Court's personal jurisdiction over Stein Mart.

3. *Stein Mart Sells and Ships Goods to Consumers in Delaware; Therefore, this Court has General Personal Jurisdiction Over It*

General personal jurisdiction also exists because Stein Mart ships goods to consumers in Delaware. This Court has previously held that it has personal jurisdiction over merchants that sell and ship goods to Delaware. *See Moore v. Little Giant Indus., Inc.*, 513 F. Supp. 1043 (D. Del. 1981), *aff'd*, 681 F.2d 807 (3d Cir. 1982).

Stein Mart sells consumer goods to consumers in Delaware through its online store. In *Moore*, this Court was presented with facts analogous to those present here, where the defendant—a company headquartered in Utah—shipped an allegedly defective ladder to a consumer's home in Delaware. *Id.* at 1045-46. Unlike Stein Mart, the Utah-defendant did not have a retail store or any other physical presence in Delaware. *See id*. at 1045. Nonetheless, this Court held that the defendant's act of shipping goods to a consumer in Delaware established

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[7] *See* Index of State of Delaware Business Licenses and Registrations, accessible at: https://firststeps.delaware.gov/topics/ (last visited June 7, 2019).

[8] *See* Checklist to Open a Business in Delaware, accessible at: https://firststeps.delaware.gov/get-your-license/ (last visited June 7, 2019).

liability under subsection (2) of Delaware's Long-Arm Statute[9] (as discussed above), *see id*. at 1046-48, and that its exercise of personal jurisdiction did not offend due process, explaining as follows:

> A state has no less an interest in providing its residents with a forum in which to litigate claims arising from defective goods **if a manufacturer ships his goods into the state** than if he (or his agent) physically enters the state to deliver them. In either case, **the manufacturer is serving the market in the state and is deliberately injecting his goods into the stream of commerce there**. The Court concludes, therefore, that with regard to Delaware's interest in adjudicating this dispute, exercise of jurisdiction over the defendant in this case would not be incompatible with the Due Process Clause …. There is ample support for predicating jurisdiction on a single "contact" between a nonresident defendant and the forum State. As the Delaware Supreme Court has stated, the Delaware long-arm statute "(establishes) jurisdiction over nonresidents on the basis of a single act…."

Id. at 1049 (emphasis added).[10] The Court reached this conclusion even though "[t]he only contact with Delaware was defendant's shipment of the ladder into the state." *Id*. at 1046. Thus, the facts present here are much stronger than those present in *Moore* because Stein Mart has a continuous, physical, business presence in Delaware by operating a retail store in Wilmington. This is yet another way Plaintiffs have established personal jurisdiction over Stein Mart.

4. *This Court Also Has Specific Jurisdiction Over Stein Mart*

Similarly, Stein Mart's sale and shipment of goods through its online store to consumers in Delaware establishes specific jurisdiction. "Personal jurisdiction is properly exercised over a

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[9] In so holding, this Court explained that Delaware's Long-Arm Statute establishes personal jurisdiction even if only one act or occurrence transpired: "This holding is consistent with the Delaware Supreme Court's analysis of the Delaware long-arm statute as a 'single act' statute, a type of long-arm statute establishing jurisdiction over nonresidents on the basis of a single act done or transaction engaged in by the nonresident within the state." *Moore, Inc*., 513 F. Supp. at 1048.

[10] *See also, e.g., LWR Time, Ltd. v. Fortis Watches, Ltd*., No. 3:10-cv-1923, 2012 U.S. Dist. LEXIS 98288, at *29-30 (M.D. Pa. July 16, 2012) (finding personal jurisdiction over nonresident defendant that shipped watches to Pennsylvania, even though defendant did "not maintain an office, bank account, telephone number, post-office box, employee, or any property within Pennsylvania").

defendant using the internet to conduct business in the forum state." *Gourmet Video, Inc. v. Alpha Blue Archives, Inc.*, No. 08-2158 (MLC), 2008 U.S. Dist. LEXIS 87645, at *8 (D.N.J. Oct. 29, 2008) (citing *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003)). "[A] defendant purposefully avails itself of the forum state where the defendant **conducts business with the forum state's residents** and **knowingly ships its products to the forum state**." *Id.* (emphasis added) (citing *L'Athene, Inc. v. Earthspring LLC,* 570 F. Supp. 2d 588, 593-94 (D. Del. 2008)). Thus, "[w]hen a defendant's website is specifically designed to commercially interact with the residents of a forum State, specific jurisdiction is proper because that defendant has purposefully availed itself of doing business with the forum State." *Earthspring LLC*, 570 F. Supp. 2d at 593.

In light of the foregoing authority, by operating an online store and shipping goods to consumers in Delaware, Stein Mart "purposely availed" itself of doing business in Delaware such that specific jurisdiction exists.[11] This conclusion is consistent with the holding in *Earthspring*, where this Court held that it had jurisdiction over a defendant that "operated a website accessible in Delaware, received orders and payments from customers in Delaware and shipped their products to Delaware." *Id*.

* * *

For all of the reasons set forth in §§ V(A)(1)-(4), *supra*, this Court has both general and specific personal jurisdiction over Stein Mart. However, should the Court disagree, Plaintiffs

[11] *See also Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper …. Different results should not be reached simply because business is conducted over the Internet.").

respectfully request leave to conduct jurisdictional discovery to establish personal jurisdiction over Stein Mart.[12]

B. Plaintiff Kyles Alleges Injury-in-Fact Sufficient to Demonstrate Article III Standing, as well as Cognizable Damages for Plaintiffs' Common Law and MMPA Claims

1. *Plaintiff Kyles Has Demonstrated Standing Under Article III*

Annex argues that Plaintiff Kyles lacks standing because she fails to allege cognizable injury. Annex Br. at 6-9. In order to invoke federal subject matter jurisdiction, a plaintiff must demonstrate that she has Article III standing, which merely requires her to allege that she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548 (quoting *Lujan*, 504 U.S. at 560). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way," and in order to be "concrete," the injury "must actually exist." *Id*.

Annex argues that Plaintiff Kyles lacks standing because she did not allege "whether her Personal Information was in fact compromised, accessed by unauthorized individuals, and/or thereafter used in an unauthorized manner," and allegations of increased risk of fraud are insufficient. Annex. Br. at 6-7.[13] This argument focuses solely on the future injury component of

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[12] "[C]ourts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is clearly frivolous." *Toys "R" Us*, 318 F.3d at 456. "If a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between the party and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained." *Id*.

[13] As alluded to in footnote 2, above, on June 6 Plaintiff Kyles informed Plaintiffs' counsel—and provided documentation showing—that she experienced at least seven fraudulent charges on

standing while ignoring Plaintiff Kyles' allegations of actual, concrete and particularized injury in the form of (1) benefit of the bargain losses, and (2) diminution in value of Personal Information.

Specifically, Plaintiff Kyles alleges that she was injured in the amount equal to the difference in value between products the purchase of which is protected by reasonable data privacy and security practices and procedures (which Plaintiffs and Class members paid for and intended to receive) and the inadequate products the purchase of which is not protected by reasonable data privacy and security practices and procedures (which Plaintiffs and Class members received by virtue of the Data Breach). ¶ 131. Plaintiffs also allege that protection of their Personal Information was material to them and that they would not have made purchases from Stein Mart (which were conducted using Annex's services) had they known about both Defendants' lax data security. ¶¶ 77, 103, 114, 118, 154. It is well settled that such "benefit of the bargain" losses are appropriate remedies for contract and unjust enrichment claims related to a data breach.[14] Notably, in such instances, courts have not required that the plaintiffs plead

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the account she used to make purchases from Stein Mart's website, two of which were in the amounts of $2,556 and $1,889. This new development nullifies Defendants' arguments that Plaintiff Kyles lacks Article III standing and that her MMPA claim fails. Should the Court be inclined to dismiss any of Plaintiff Kyles' claims based on the allegations in the current complaint, Plaintiffs respectfully request that it be without prejudice.

[14] *See, e.g., Resnick v. AvMed, Inc*., 693 F.3d 1317, 1328 (11th Cir. 2012) (endorsing benefit of the bargain damages in data breach case on unjust enrichment claim, on allegations that health insurer failed to use money for data security in accordance with privacy notices); *In re Anthem, Inc. Data Breach Litig*., 2016 U.S. Dist. LEXIS 70594, at *124 (accepting benefit of the bargain theory of damages); *Weinberg v. Advanced Data Processing, Inc*., 147 F. Supp. 3d 1359 (S.D. Fla. 2015) (following *Resnick* in data breach case against medical payment processor); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1224 (N.D. Cal. 2014) (denying motion to dismiss restitution claim where plaintiffs alleged they paid more for Adobe products than they would have paid had they known that Adobe was not providing the reasonable security it represented); *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1105 (N.D. Cal. 2010) (allowing benefit of the bargain damages in case involving public disclosure of sensitive information from AOL); *cf. Svenson v. Google Inc.*, No. 13-cv-04080-BLF, 2015 U.S. Dist. LEXIS 43902, at *11-15

precisely what portion of the purchase price went towards data privacy. *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 U.S. Dist. LEXIS 70594, at *124 (N.D. Cal. May 27, 2016) ("[W]here the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used[.]").

Consistent with the foregoing opinions, Plaintiffs allege that a portion of the monies they paid to Stein Mart when purchasing products from its website were to be used by Stein Mart to pay for the administrative costs of reasonable data security measures to protect purchases made online, which necessarily includes Annex's services provided to facilitate purchases made on Stein Mart's website. ¶¶ 128, 130. Thus, Annex receives a direct benefit from facilitating purchases made on Stein Mart's website. Because Stein Mart and, in turn, Annex, did not use Plaintiffs' monies for the purpose of securing their Personal Information, Plaintiffs have suffered an injury-in-fact in the form of actual benefit of the bargain damages in an amount equal to the difference in value between what they contracted for (products whose purchase was protected by reasonable data security measures) and what they received (products whose purchase was not). ¶ 131.

Moreover, Plaintiff Kyles also alleges an additional and separate category of damages that constitutes injury-in-fact and demonstrates Article III standing: injury in the form of loss of control over, and lost value of, his Personal Information. *See, e.g.*, ¶¶ 7, 77, 103, 114, 156.

(N.D. Cal. Apr. 1, 2015) (allegations of unauthorized use of personal information sufficient to show contract damages under a benefit of the bargain theory); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1166 (D. Minn. 2014) (accepting damages theory alleging that plaintiffs "would not have shopped" had they known about Target's data security issues); *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 198 F. Supp. 3d 1183, 1201 (D. Or. 2016) (holding that benefit of the bargain damages are "generally accepted in the emerging area of data breach litigation.").

Plaintiffs have also pleaded that their Personal Information is "valuable" and useful to third parties. ¶¶ 58, 62. Courts have recognized such diminution of value of personal information as cognizable contract damages in the context of data breach litigation.[15] Each of Plaintiff Kyles' "benefit of the bargain" and/or "diminution in value" allegations, alone, are more than sufficient to constitute an "identifiable trifle of injury," and thus satisfy the "very generous" "contours of the injury-in-fact requirement." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982).

2. *Plaintiffs' Injury Allegations Also Establish Cognizable Damages for their Negligence, Negligence Per Se, Breach of Implied Contract, and MMPA Claims*

The cases cited, and detailed allegations discussed, above—holding that allegations of actual, concrete and particularized injury, in the form of (1) benefit of the bargain losses, and (2) diminution in value of Personal Information, are sufficient to allege damages—also establish that Plaintiffs have adequately alleged damages in support of their Negligence, Negligence Per Se, and Breach of Implied Contract claims. Furthermore, Plaintiff Taylor also alleges that she (and similarly situated Class members) experienced fraudulent charges on her Bank of America debit card, and as a result, had to cancel her card and have Bank of America mail her a new debit card. ¶¶ 15-19. It is well settled that the time and effort data breach victims spend on eradicating fraudulent charges are cognizable damages for pleading common law claims sufficient to defeat a motion to dismiss. *See, e.g., Remijas v. Neiman Marcus Grp.*, LLC, 794 F.3d 688, 697 (7th Cir. 2015) (holding that the time and money spent addressing a data breach constitute actionable damages

[15] *In re Anthem, Inc. Data Breach Litig.*, 2016 U.S. Dist. LEXIS 70594, at *129-32; *see also Facebook Privacy Litig. v. Facebook, Inc.*, 572 F. App'x 494, 496 (9th Cir. 2014) (loss of sales value of personal information sufficient to show damages for breach of contract and fraud claims); *Svenson v. Google Inc.*, No. 13-cv-04080-BLF, 2015 U.S. Dist. LEXIS 43902, at *11-15 (N.D. Cal. Apr. 1, 2015) (diminution of value of personal information sufficient to show contract damages for pleading purposes).

for common law claims).[16] As such, Plaintiffs' actual fraud, "benefit of the bargain" and/or "diminution in value" allegations sufficiently plead damages for each of their common law claims, and Stein Mart's argument that Plaintiffs failed to allege actual damages (Stein Mart Br. at 8-12) should be denied.

For these same reasons, Stein Mart's contention that Plaintiffs Kyles' MMPA claim should be dismissed because she failed to plead "non-speculative, pecuniary harm or out-of-pocket costs" (Stein Mart Br. at 16)[17] should similarly be rejected because, as explained above, Plaintiffs allege "benefit of the bargain" damages and "diminution in value" of their Personal Information. Stein Mart's reliance on *Kuhns v. Scottrade, Inc.*, 868 F.3d 711 (8th Cir. 2017), in support of its contention that benefit-of-the-bargain damages do not satisfy the MMPA is unavailing. Stein Mart Br. at 16. The court in *Scottrade* did not hold that the plaintiff failed to allege ascertainable loss, in isolation; instead, the court held that the plaintiff failed to allege "an

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[16] Stein Mart's reliance on *Hannaford*, *Sony*, and *SuperValue* (*see* Stein Mart Br. at 8-9) is inapposite because the courts in each of those cases interpreted the negligence and damages law of states other than those at issue here. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.* ("*In re Hannaford*"), 613 F. Supp. 2d 108, 167 (D. Me. 2009) ("Unless the plaintiffs' loss of time reflects a corresponding loss of earnings or earnings opportunities, is not a cognizable injury under Maine law of negligence."); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig*, 903 F. Supp. 2d 942, 963 (S.D. Cal. 2012) ("Under California law, appreciable, nonspeculative, present harm is an essential element of a negligence cause of action …."); *In re SuperValu, Inc., Customer Data Sec. Breach Litig.*, No. 14-MD-2586 ADM/TNL, 2018 U.S. Dist. LEXIS 36944, at *34 (D. Minn. Mar. 7, 2018) ("data breach cases decided under Illinois law … insufficient to state an actionable injury"). In similar vein, the portion of *Scottrade* that Stein Mart quotes is from the court's analysis of the plaintiffs' contract claims, not negligence claims. *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 718 (8th Cir. 2017) ("failed to plausibly allege the actual damage that is an element of a breach of contract claim").

[17] To plead an MMPA claim, Plaintiffs must merely "show that they 1) purchased merchandise (which includes services) from defendants; 2) for personal, family, or household purposes; and 3) suffered ascertainable loss of money or property; 4) as a result of an act declared unlawful under section 407.020." *George v. Omega Flex, Inc.*, Civil Action No. 2:17-cv-3114-MDH, 2018 U.S. Dist. LEXIS 123354, at *7 (W.D. Mo. July 24, 2018). Stein Mart only challenges the "ascertainable loss" element of Plaintiffs' MMPA claim, and therefore concedes that the remaining elements are successfully pleaded. As such, Plaintiffs address only the ascertainable loss element.

ascertainable pecuniary loss … **in relation to the plaintiff's purchase** … **of** … **merchandise**" *only because* the plaintiff did not purchase any merchandise from Scottrade. *Id.* at 719 (emphasis added). Here, in contrast, Plaintiffs allege that they—and all Class members—provided their Personal Information to Stein Mart w*hen making purchases of merchandise on its online store*, and that Personal Information was then accessed by unauthorized users due to Stein Mart's failure to adequately secure it, which caused Plaintiffs to suffer the multiple types of damages discussed above. ¶¶ 3, 16, 20, 43, 77, 103. 114, 128, 139, 145, 156. These allegations are sufficient to satisfy the low threshold of pleading damages under the MMPA; nothing further is required. *See, e.g., In re Tft-Lcd Antitrust Litig.*, Nos. M 07-1827 SI, 1827, 2011 U.S. Dist. LEXIS 105153, at *21 (N.D. Cal. Sep. 15, 2011) ("The [MMPA's] fundamental purpose is the 'protection of consumers …. Requiring a plaintiff to specify his losses with the precision … would undoubtedly prevent numerous otherwise-deserving plaintiffs from recovering for a defendant's unlawful acts.").

C. Plaintiff Kyles States a Claim Under the MMPA

1. *Plaintiff Kyles Sufficiently Alleged that Annex Failed to Adequately Secure her Personal Information and Notify her of the Data Breach*

Annex also attacks Plaintiff Kyles' MMPA claim, arguing that it fails because she did not allege "the time, place and content" of Annex's "false representations." Annex Br. at 14-16. By doing so, Annex focuses solely on affirmative misrepresentations while ignoring well settled law that omissions can form the basis of MMPA claims. *See, e.g.*, *Owens v. GMC*, 533 F.3d 913, 922 (8th Cir. 2008) (stating that MMPA claims can be based on material omissions). To plead the omission of material fact for purposes of the MMPA, Plaintiff Kyles must merely show "any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her."

15 C.S.R. 60-9.110(3). The Complaint is replete with allegations of Annex's failure to act and/or disclose facts it knew or should have known, including but not limited to:

(1) Annex's failure to adequately safeguard Personal information, (¶¶ 22, 28, 39, 41, 58, 75, 82, 139);

(2) Annex's failure to implement or maintain adequate data security measures, (¶¶ 4-7, 63, 69, 70, 76, 100, 102, 106-08, 110, 120, 122, 124, 132, 137, 139);

(3) that Annex knew (or should have known) it lacked adequate security, (¶¶ 67, 68, 73, 101, 113);

(4) that Annex knew (or should have known) of the serious threat posed by data breach incidents as well as the importance of safeguarding customers' Personal Information such that its failure to implement adequate security measures created a grave risk that Plaintiff Kyles would experience harm, (¶¶ 59, 61, 67, 68, 70, 71, 73, 99, 100, 113); and

(5) that Annex knew—as of September 14 or October 25, 2018—of the Data Breach for a substantial period of time, but failed to notify Plaintiffs and the Class while continuing to allow them to submit their Personal Information through Annex's unsecure system, (¶¶ 13, 14, 25, 26, 145).

Courts have consistently held that such allegations are sufficient to state material omissions actionable under the MMPA. For instance, when assessing the sufficiency of omission allegations in support of the plaintiff's MMPA claim, the Western District of Missouri held that allegations defendant "knew or should have known of the [d]efect," knew or should have known of the defect as of certain dates, and knew of the defect "through public sources" constituted "all that is required of Plaintiffs under Rule 9(b) at this stage of the proceedings." *Williams v. FCA US LLC*, No. 17-CV-00844-W-DW, 2018 U.S. Dist. LEXIS 223505, at *18 (W.D. Mo. Apr. 16, 2018). Similarly, as explained in numbers (1)-(5) above, Plaintiffs allege Annex knew—but failed to inform them—of, among other things, the defect in its data security measures, that it acquired this knowledge through public sources relating to industry standards for data security practices and/or recent data breach incidents, and the dates upon which Annex became aware of

the Data Breach underlying their claims. Based on the reasoning in *Williams*, nothing further is required to state a claim under the MMPA.

Indeed, this reasoning applies with equal force in the data breach context where courts routinely hold that allegations a breached-company failed to inform data breach victims of its inadequate security measures states a claim for an actionable omission under MMPA. For example, in *In re Sony Gaming Networks & Customer Data Security Breach Litigation*, 998 F. Supp. 2d 942 (S.D. Cal. 2014), the "plaintiffs' MMPA claim was premised on **Sony's alleged material omissions regarding the security of its network**, omissions that allegedly induced plaintiffs" to purchase Sony's products. *Id*. at 1000 (emphasis added). The court in that case explained that "because [p]laintiffs have alleged that Sony's omissions were deceptive and/or unfair because Sony mislead consumers into believing their Personal Information was secure," it found that "[p]laintiffs sufficiently alleged [claims] … under the MMPA." *Id*.

2. *Annex's Remaining Arguments Against Plaintiff Kyles' MMPA Claim are Equally Unavailing*

Annex makes two additional arguments why Plaintiff Kyles' MMPA claim fails. Both are incorrect. First, Annex argues that Plaintiff Kyles fails to allege she purchased or leased any merchandise from Annex. Annex Br. at 17-18. To the contrary, however, the Complaint is teeming with allegations that Plaintiffs and Class members made purchases of consumer goods from Stein Mart's website using Annex's services. ¶¶ 2, 3, 16, 20, 31, 43, 77, 103, 114, 128, 139, 145, 156. That the merchandise was purchased from Stein Mart's website using Annex's services (rather than from Annex) does not absolve Annex of liability under the MMPA because "the MMPA 'contemplates that other parties, **besides the direct purchasers or contracting party**, who suffer damages resulting from the violator's prohibited conduct under the Act are included in those eligible to receive restitution.'" *In re Lithium Ion Batteries Antitrust Litig*., No. 13-MD-

2420 YGR, 2014 U.S. Dist. LEXIS 141358, at *113 (N.D. Cal. Oct. 2, 2014) (emphasis added) (quoting *Gibbons v. J. Nuckolls, Inc*., 216 S.W.3d 667, 669 (Mo. 2007)).

Second, Annex erroneously argues that Plaintiff Kyles cannot bring her MMPA claim on behalf of absent class members who are not Missouri residents who did not make any purchases in Missouri. Annex Br. at 18-20. Multiple courts have held the exact opposite. For instance, in *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380 (E.D. Pa. 2010), a neighboring court within the Third Circuit explained as follows:

> [Defendant]'s second argument, that **the MMPA applies only to intrastate activities or to those having intrastate effects**, is also misplaced. GSK and the plaintiffs dispute the meaning of the most recent Missouri case to address this issue … There, **the defendant argued that the MMPA does not apply to consumers located in states other than Missouri or to business conducted outside Missouri** …. [T]he words "trade" or "commerce" as used in … the MMPA are defined … as including "any trade or commerce **directly or indirectly affecting the people of this state**." … The court then concluded that, because defendant had engaged in deceptive acts and conducted his business within Missouri, **the lower court did not err in awarding restitution to his non-Missouri victims**. Here, … plaintiffs have alleged that [Defendant] directed its advertising and marketing efforts to Missouri … This conduct falls within the literal wording of the MMPA …. Therefore, [Defendant]'s motion to dismiss plaintiffs' Missouri consumer protection claims is denied.

Id. at 415-16 (emphasis added).[18] The foregoing facts that the *GlaxoSmithKline* court found to be dispositive are highly analogous to those present here where Plaintiffs allege that Stein Mart sells products to, and directs marketing and advertising efforts at, consumers in all states, including Missouri. Thus, the MMPA does extend to Class members outside of Missouri.

D. Plaintiffs' Allegations Readily Satisfy Rule 8

Annex argues that Plaintiffs' failed to satisfy Rule 8 because "neither plaintiff alleges that she had any contact whatsoever with … purchased any goods or service from … [or] provided

[18] Analyzing *State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 796-97, 801 (Mo. Ct. App. 2003) (court found that claims of out-of-state-plaintiffs could be brought under the MMPA, where plaintiff alleged that defendant's "business had numerous ties to Missouri").

any Personal Information … to Social Annex." Annex Br. at 9. Annex is incorrect. Plaintiffs allege that they made purchases from Stein Mart's online store, which were facilitated by the login service that Annex provides to Stein Mart, and that through those transactions Annex came into possession of their Personal Information that was then hacked during the Data Breach. ¶¶ 95, 128-29. Furthermore, the Complaint is teeming with detailed factual allegations and quotes from the letters *sent by Stein Mart* stating that it was Annex's system that was breached by the hackers, and that *Annex informed Stein Mart* that Stein Mart's customers' Personal Information was accessed from its systems. ¶¶ 42-57. Annex's contention that Plaintiffs are required to plead with some form of unexplained heightened level of specificity the technological connection between consumers making purchases on Stein Mart's website using Annex's services to do so, and Annex's involvement in those transactions, not only disregards the requirements of Rule 8, it affronts common sense. *See, e.g.*, *DiMare*, 369 F. App'x at 330 ("a plaintiff 'cannot be expected to have personal knowledge of the details of corporate internal affairs' and thus [the Third Circuit] has 'relaxed [FED. R. CIV. P. 9(b)] when factual information is peculiarly within the defendant's knowledge or control.'").

E. The FTC Act Has Been Found to Constitute Adequate Support for a Negligence Per Se Claim

Annex's sole basis for challenging Plaintiffs' negligence per se claim is that it fails because the FTC Act upon which it is based does not provide a private right of action. Annex Br. at 11. This argument ignores multiple opinions from courts within the Third Circuit uniformly holding that the lack of a private right of action under federal statutes does not, in itself, preclude a claim for negligence per se based on a violation of such statutes.[19] Annex

[19] *See, e.g.*, *Sharp v. Artifex, Ltd.*, 110 F. Supp. 2d 388, 393 (W.D. Pa. 1999) ("none of the three statutes provided for a private right of action but stated that this did not necessarily preclude a negligence per se claim"); *Maresca v. Mancall*, No. 01-5355, 2003 U.S. Dist. LEXIS

also conveniently omits mention that at least one court within the Third Circuit recently held in another data breach case where the plaintiff alleged a negligence per se claim based on the breached-Defendant's violation of the FTC Act "that [the FTC Act] has been found to be adequate support for a plausible claim for negligence per se asserted … against a retailer whose data breach caused damages" and thus denied the defendant's motion to dismiss to the extent it argued that the "[FTC Act] does not support a claim for negligence per se." *First Choice Fed. Credit Union v. Wendy's Co.*, Civil Action No. 16-506, 2017 U.S. Dist. LEXIS 20754, at *13 (W.D. Pa. Feb. 13, 2017). Thus, Annex's arguments on this point are unavailing.

F. The Economic Loss Rule Does Not Bar Plaintiffs' Negligence and Negligence Per Se Claims

Both Defendants make arguments based on the economic loss rule ("ELR"). Annex argues that Plaintiffs' negligence claims fail because they allege only economic loss, citing a thirty-one year old Third Circuit opinion that applied Delaware's ELR. Annex Br. at 10-11 (quoting *Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 539 (3d Cir. 1988)). Stein Mart argues that Plaintiffs' negligence and negligence per se claims are both barred by the ELR and, in support, cites cases applying four different states' ELRs without providing any analysis of which is the applicable rule and/or how it applies to Plaintiffs' claims. *See* Stein Mart Br. at 12-14.[20] Oddly, both Defendants apply multiple states' ELRs but fail to conduct a choice of law

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11968, at *5 (E.D. Pa. June 19, 2003) ("courts in Pennsylvania have recognized that the absence of a private right of action in a statutory scheme does not necessarily preclude the statute's use as the basis of a claim of negligence per se."); *McCain v. Beverly Health and Rehab. Services*, No. 02-657, 2002 U.S. Dist. LEXIS 12984, 2002 WL 1565526, at *1 (E.D. Pa. July 15, 2002) ("[T]he lack of a private cause of action is not enough to preclude the use of the relevant policies expressed in the [OBRA] statutes and regulations."); *see also id.* ("A statute may still be used as the basis for a negligence per se claim … despite the absence of a private right of action").

[20] *See id*. (citing *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175 (3d Cir. 2008) (applying **Pennsylvania's** ELR); *Longenecker-Wells v. Benecard Servs. Inc*, 658 F. App'x 659, 661 (3d Cir. 2016) (same); *In re TJX Companies Retail Sec. Breach Litig.*, 564 F.3d 489,

analysis to determine which state's ELR applies to the present case, and by doing so ignore fundamental choice of law principles establishing that California's—not Delaware's—ELR applies to Plaintiffs' claims and does not bar either of their negligence claims.

1. *Delaware's Choice of Law Standards and Analysis Establish that California's Economic Loss Rule Applies*

To begin, this Court has consistently explained that when it sits in diversity jurisdiction, as it does in the present case, "the choice-of-law provisions of the forum state, Delaware, apply." *Collins & Aikman Corp. v. Stockman*, No. 07-265-SLR-LPS, 2010 U.S. Dist. LEXIS 3818, at *12-14 (D. Del. Jan. 19, 2010). In a recent data breach case in the District of Colorado, the court was faced with the same question posed here: which state's economic loss rule applied to the plaintiffs' negligence claims arising out of a data breach. *See Gordon v. Chipotle Mexican Grill, Inc*., 344 F. Supp. 3d 1231, 1243 (D. Colo. 2018). Like here, the court was sitting in diversity jurisdiction and thus applied the choice of law principles of the forum (Colorado). *Id*. at 1245. Like Delaware, "Colorado follows the [Second] Restatement [of Conflicts] and applies the law of the state with the most significant relationship to the occurrence and the parties." *Id.*; *compare Stockman*, 2010 U.S. Dist. LEXIS 3818, at *14 ("Delaware follows the Second Restatement of Conflicts"). Thus, the District of Colorado employed the same choice-of-law standard that this Court uses and held that in data breach cases such as this one, "the place where the defendant's conduct occurred" has the most significant relationship under the Restatement's test, and therefore its law applied. *Chipotle*, 344 F. Supp. 3d at 1245. The court reasoned that because the

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499 (1st Cir. 2009), *as amended on reh'g in part* (May 5, 2009) (applying Massachusetts' economic loss doctrine); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 973 (S.D. Cal. 2014), *order corrected*, No. 11MD2258 AJB (MDD), 2014 WL 12603117 (S.D. Cal. Feb. 10, 2014) (applying California economic loss doctrine); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 531 (N.D. Ill. 2011) (applying Illinois economic loss doctrine); *In re SuperValu*, 2018 WL 1189327, at *13 (same).

breached-defendant was headquartered in Colorado, the defendant's conduct that led to the breach occurred in Colorado, so its ELR applied. *Id.*

Because this Court also utilizes the Restatement test, the analysis in *Chipotle* is persuasive here, and this Court should apply the law of the state where the Data Breach occurred, which—pursuant to *Chipotle*—is the state where Annex is headquartered because it was Annex's systems that were breached. ¶ 44. Because Annex is headquartered in California, California's ELR should apply. Therefore, all of the cases cited by Defendants applying the ELRs of states other than California are inapposite and their arguments should be denied.

2. *Annex's Economic Loss Rule Argument Fails*

In support of its ELR argument, Annex relies on a case applying the Delaware ELR principle that "[a]bsent **privity of contract**, a party may not maintain a cause of action sounding in negligence to recover for purely economic loss." Annex Br. at 10. As explained above, however, California's ELR applies, not Delaware's, and it is well settled in California jurisprudence applying California's ELR that "[p]rivity of contract is no longer necessary." *S. Cal. Gas Leak Cases*, 227 Cal. Rptr. 3d 117, 119 (Cal. 2017). Thus, Annex's argument that Plaintiffs' negligence claims fail because "neither has adequately alleged she is in privity of contract with … Annex" is unavailing. Annex Br. at 10.[21]

3. *California's Economic Loss Rule Does Not Bar Plaintiffs' Negligence and Negligence Per Se Claims*

Stein Mart argues that the ELR bars Plaintiffs' negligence based claims, but does not apply California law in support. Stein Mart Br. at 12-14. Under California law, "[i]n the absence of (1) personal injury, (2) physical damage to property, (3) **a special relationship existing**

[21] Annex argues only that privity of contract is required for Plaintiffs to adequately plead their negligence claims, without making any additional economic loss rule based arguments. As such, the foregoing authority establishing that privity is not required to avoid California's economic loss rule is sufficient to defeat Annex's argument.

between the parties, or (4) some other common law exception to the rule, recovery of purely economic loss is foreclosed." *Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc*., 315 F. App'x 603, 605 (9th Cir. 2008) (emphasis added) (quoting *J'Aire Corp. v. Gregory*, 598 P.2d 60, 62-63 (Cal. 1979). For the reasons set forth below, Plaintiffs' claims fall within California's "special relationship" exception to the ELR.

In evaluating whether the "special relationship" exception applies, courts must consider six factors, the absence or presence of any one of which is not determinative:

> (1) the extent to which the transaction was intended to affect the plaintiff,
> (2) the foreseeability of harm to the plaintiff,
> (3) the degree of certainty that the plaintiff suffered injury,
> (4) the closeness of the connection between the defendant's conduct and the injury suffered,
> (5) the moral blame attached to the defendant's conduct and
> (6) the policy of preventing future harm."

J'Aire Corp., 598 P.2d at 62-63 (1979). Each of these factors shows that Plaintiffs had a "special relationship" with Stein Mart, and is discussed in turn below:

- *First*, the very purpose of the Data Breach was for hackers to access Plaintiffs' Personal Information, which affected Plaintiffs, as discussed above.

- *Second*, (1) Stein Mart's own website's "Secure Shopping Guarantee," and (2) letters to Plaintiffs and Class members notifying them of the breach, both explicitly acknowledge the foreseeability of harm to Plaintiffs in the event of unauthorized access by hackers and/or a data breach. ¶¶ 40, 45.

- *Third*, as discussed above (*see* §V(B), *supra*), Plaintiffs have, in fact, already suffered multiple types of injuries. *See, e.g.*, ¶¶ 4, 7, 8, 10, 15-19, 22, 28, 77-80, 82, 103, 114, 124-25, 131, 140-41, 156.

- *Fourth*, but for Defendants' failure to implement adequate security measures to protect Plaintiffs'/Class members' Personal Information, the Data Breach would not have occurred. *See, e.g.*, ¶¶ 4-7, 22, 28, 39, 41, 58-82, 100, 102, 106-08, 110-11, 113, 120, 122-24, 132, 137, 139-41, 145-47, 149, 152, 154.

- *Fifth*, Stein Mart is a publicly traded company that operates more than 260 stores in 29 states—and reported profits of $39.5 million in 2018—yet it failed to implement basic, industry standard, FTC-mandated data security measures, that come at negligible costs, in

order to protect consumers that shop at its discount clothing stores from having their Personal Information accessed by hackers is, facially, immoral and inexcusable.

- *Sixth*, Plaintiffs alleged more than twenty paragraphs pertaining to the recent spike in data breach incidents, the industry standards for data security, and the FTC and PCI DSS standards for maintaining data security, all of which are aimed at, and embody the public policy of, preventing future data breaches. *See, e.g.*, 58-82.

As such, a special relationship applies here, and California's ELR does not bar Plaintiffs' negligence and negligence per se claims. Indeed, at least one other court has held that California's ELR did not bar the plaintiffs' negligence claims in a data breach case similar to this one. *See, e.g., In re Experian Data Breach Litig.*, No. SACV 15-1592 AG, 2016 WL 7973595, at *8 (C.D. Cal. Dec. 29, 2016) (denying motion to dismiss negligence claim under California's economic loss rule).

G. Plaintiffs' Unjust Enrichment Claim is Adequately Plead

1. *Plaintiffs Allege Sufficient Facts of Impoverishment*

Stein Mart argues that Plaintiffs' "benefit of the bargain" damages—i.e., an amount equal to the difference in value between the products and services offered with the reasonable data privacy and security practices … and the inadequate products and services without reasonable data privacy and security practices—are insufficient to establish the "impoverishment" element of unjust enrichment. Stein Mart Br. at 14. Stein Mart is incorrect for multiple reasons.

As an initial matter, it is well settled that "impoverishment … is not critical to an unjust enrichment claim" and does not require that the plaintiff suffer an actual financial loss, "because restitution may be awarded based solely on the benefit conferred upon the defendant, even in the absence of an impoverishment suffered by the plaintiff." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010). Moreover, courts throughout the country have uniformly held that benefit of the bargain losses are an appropriate remedy for unjust enrichment claims related to a data

breach.[22] Notably, in such instances, courts have not required that plaintiffs plead precisely what portion of the purchase price went towards data privacy, which Stein Mart erroneously contests Plaintiffs are obligated to do. *Compare* Stein Mart Br. at 14-15, *with In re Anthem, Inc. Data Breach Litig*., 2016 U.S. Dist. LEXIS 70594, at *124 ("[W]here the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used[.]").

Consistent with these authorities, Plaintiffs allege that a portion of the monies they paid to Stein Mart for products were to be used by Stein Mart and/or Annex to pay for the administrative costs of reasonable data security measures. ¶ 130. Because Defendants clearly did not sufficiently use Plaintiffs' monies for that purpose, Plaintiffs have suffered actual benefit of the bargain damages in an amount equal to the difference in value between what they contracted for (products who purchase was protected by reasonable data security measures) and what they received (products whose purchase was not). ¶ 131. These allegations are sufficient to establish the "not critical" element of impoverishment.

2. *Plaintiffs Adequately Allege they Conferred a Benefit on Annex*

Annex argues that Plaintiffs' unjust enrichment claims fail because they did not allege that they conferred a benefit on Annex. Annex. Br. at 13-14. Once again, this argument ignores Plaintiffs' allegations that:

(1) the online purchases from Stein Mart's website that underlie this action were *all* conducted using Annex's services, (¶¶ 2, 3, 11, 12, 23, 24, 43, 44, 45);

(2) Annex possessed the Personal Information that was accessed by unauthorized users because it offered services that facilitated purchases made on Stein Mart's website, (¶¶ 3, 11, 12, 14, 23, 26, 43, 44);

(3) it was Annex's system that was hacked, (*id.*);

[22] *See supra* note 13 (collecting cases uniformly holding that allegations of "benefit of the bargain" damages are sufficient to defeat motions to dismiss, particularly in data breach cases).

(4) a portion of the monies they paid to Stein Mart for products were to be used by Stein Mart and/or Annex to pay for the administrative costs of reasonable data security measures, (¶ 130);

(5) because Defendants did not use Plaintiffs' monies for that purpose, Plaintiffs have suffered actual benefit of the bargain damages in an amount equal to the difference in value between what they contracted for (products who purchase was protected by reasonable data security measures) and what they received (products whose purchase was not), (¶ 131).[23]

From these allegations it necessarily follows that Annex is compensated by Stein Mart for the services it provides to facilitate sales on Stein Mart's website, and that at least a portion of the revenue Stein Mart earns from selling products to Plaintiffs and the Class is used by Stein Mart to pay Annex for its services. Plaintiffs are not required to plead with specificity the technological workings of Annex's login services, nor how Stein Mart compensates Annex for providing that service. *See, e.g.*, *DiMare*, 369 F. App'x at 330 ("a plaintiff 'cannot be expected to have personal knowledge of the details of corporate internal affairs' and thus [the Third Circuit] has 'relaxed [FED. R. CIV. P. 9(b)] when factual information is peculiarly within the defendant's knowledge or control.'"). Thus, at the motion to dismiss stage, Plaintiffs' "short and plain" allegations of Annex's business relationship with Stein Mart, the benefits they conferred on both Defendants, and Defendants' failure to adequately secure their Personal Information are sufficient; nothing further is required. Moreover, Delaware courts have recently explained—when assessing a "direct relationship" for purposes of pleading a claim for unjust enrichment—that "if a nonparty to a contract **knowingly facilitates prohibited activities**, a claim for unjust enrichment may survive a motion to dismiss." *Lyons Ins. Agency, Inc. v. Kirtley*, No. N18C-09-040 CLS, 2019 Del. Super. LEXIS 136, at *6 (Del. Super. Ct. Mar. 18, 2019) (emphasis

[23] Unjust enrichment claims have been allowed to proceed in data breach cases where plaintiffs allege that the money they paid to defendants should have been used, in part, to pay for adequate data security. *See, e.g.*, *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 198 F. Supp. 3d at 1201; *In re Anthem, Inc. Data Breach Litig.*, 2016 U.S. Dist. LEXIS 70594, at *167-75; *Resnick*, 693 F.3d at 1328.

added).[24] Because Plaintiffs allege that Annex "facilitates" purchases on Stein Mart's website and failed, either independently or in conjunction with Stein Mart, to adequately secure such transactions, their unjust enrichment claims are sufficiently alleged.

H. Plaintiffs' Claim for Breach of Implied Contract Should Survive

As an initial matter, it is axiomatic that "the question of whether an implied contract [exists] … is a question of fact for the jury." *Pinderski v. Commonwealth Tel. Enters., Inc*., No. 3:05cv2657, 2006 U.S. Dist. LEXIS 50783, at *6 (M.D. Pa. July 25, 2006).[25] Thus, Annex's argument that Plaintiffs failed to allege an implied contract is premature and cannot be properly adjudicated on a motion to dismiss. Nonetheless, for sake of argument, "[a] claim for breach of contract under Delaware law requires three elements: (1) the existence of the contract, whether express or implied; (2) the breach of an obligation imposed by that contract; and (3) the resultant damage …." *Evolved Wireless, LLC v. Apple, Inc.*, Civil Action No. 15-542-JFB-SRF, 2019 U.S. Dist. LEXIS 27870, at *20 (D. Del. Feb. 21, 2019) (quoting *Avaya Inc., RP v. Telecom Labs. Inc*., 838 F.3d 354, 390 (3d Cir. 2016)). Plaintiffs readily satisfy these three elements.

First, they allege a contractual relationship with *both Defendants*, whereby Plaintiffs "agreed to the release of their sensitive Personal Information to Defendants to be used in connection with their provision of online retail and payment services," and in exchange, "Defendants agreed … (1) to provide online retail and payment services to Plaintiffs and Class members; (2) to take reasonable measures to protect the security and confidentiality of Plaintiffs'

[24] *See also id.* at *7 (denying defendant's motion to dismiss plaintiff's unjust enrichment claim where "Plaintiff alleges [Defendant] used [Plaintiff's] confidential information for [third-party's] benefit.").

[25] *See also A.P.S., Inc. v. Standard Motor Prods*., 295 B.R. 442, 454 (D. Del. 2003) ("Where a meeting of the minds is contested … determination of the existence of a contract is a question of fact."); *In re Hannaford Bros. Customer Data Sec. Breach Litig*., 613 F. Supp. 2d 108, 118 (D. Me. 2009) (holding that whether an implied contract exists is a question of fact for the jury).

and Class members' Personal Information; and (3) to protect Plaintiffs' and Class members' Personal Information in compliance with federal and state laws and regulations and industry standards." ¶ 118. Second, Plaintiffs explicitly allege that "Defendants materially breached their implied contracts with Plaintiffs and Class members by failing to implement adequate data security measures" (¶ 120), and suffered damages as a result (¶¶ 122-25). These allegations readily satisfy FED. R. CIV. P. 8's requirement that Plaintiffs set forth a "short and plain statement" of the existence of a contract, breach thereof, and damages; nothing further is required.

Indeed, many courts have denied motions to dismiss implied contract claims in data breach cases where the plaintiffs simply alleged the elements of an implied contract claim.[26] In one such case involving facts similar to those present here, the First Circuit—while noting that "[t]he existence of such an implied contract is determined by the jury"—explained as follows:

> When a customer uses a credit card in a commercial transaction, she intends to provide that data to the merchant only. Ordinarily, a customer does not expect – and certainly does not intend – the merchant to allow unauthorized third-parties to access that data. A jury could reasonably conclude, therefore, that an implicit agreement to safeguard the data is necessary to effectuate the contract.

Id. at 159. Similarly, in *In re Michaels Stores Pin Pad Litigation*, 830 F. Supp. 2d 518 (N.D. Ill. 2011), the district court denied the defendant's motion to dismiss the plaintiffs' implied contract

[26] *In re Hannaford Bros. Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108, 118 (D. Me. 2009) (denying motion to dismiss implied contract claim in data breach case); *See, e.g.*, *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 3:15-MD-2633-SI, 2017 WL 539578, at *16 (D. Or. Feb. 9, 2017) (denying motion to dismiss implied contract claim); *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d at 1176-77 (same); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 531 (N.D. Ill. 2011) (same); *Savidge v. Pharm-Save, Inc.*, 3:17-CV-00186-TBR, 2017 WL 5986972, at *9 (W.D. Ky. Dec. 1, 2017) (same); *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 675 (E.D. Pa. 2015) (holding plaintiff's breach of implied contract claim survived a motion to dismiss when he pled that Coca-Cola, "through privacy policies, codes of conduct, company security practices, and other conduct, implicitly promised to safeguard his [personal information] in exchange for his employment.").

claim because the facts evidenced the parties' intent to create "an implicit contractual relationship between Plaintiffs and [Defendant], which obligated [Defendant] to take reasonable measures to protect Plaintiffs' financial information and notify Plaintiffs of a security breach within a reasonable amount of time." *Id*. at 531. Again, Annex's contention that Plaintiffs are required to plead with some form of unexplained heightened level of specificity the technological connection between consumers making purchases on Stein Mart's website using Annex's services to do so, and Annex's involvement in those transactions, is not required at this stage. *See*, *e.g.*, *DiMare*, 369 F. App'x at 330 ("a plaintiff 'cannot be expected to have personal knowledge of the details of corporate internal affairs' … when factual information is peculiarly within the defendant's knowledge or control.'").

Furthermore, Annex misconstrues Plaintiffs' allegations by contesting that Plaintiffs failed to allege that it "does business with consumers at all or that either of them had any contact with [Annex]." Annex Br. at 12. To the contrary, the Complaint specifically alleges that Plaintiffs and Class members made purchases from Stein Mart's online store, each of which was conducted using Annex's login service (¶¶ 2, 3, 11, 12, 23, 24, 43, 44, 45), and that the Personal Information they entered while making those transactions was accessed from Annex's system by unauthorized users (¶¶ 3, 11, 12, 14, 23, 26, 43, 44). In fact, the Court need not look any further than paragraph 43 to see that Annex's argument blatantly ignores Plaintiffs' allegations:

> 43. As discussed above, the notice explained that Annex is a company that provides a service used by websites that enable consumers to use their user name and password from other websites—such as Facebook and Amazon—to log in to internet merchants' websites, such as Stein Mart's website, to make online purchases thereon, **and that Annex's system was accessed by unauthorized users who were able to capture customers'/consumers' Personal Information, including payment card information, entered on Stein Mart's website while making online purchases**.

¶ 43 (emphasis added). Thus, the Complaint alleges not only that "Annex does business with consumers," but also that hackers gained access to Plaintiffs' and the Class' Personal Information on Annex's systems, which Annex possessed due to facilitating the checkout process for purchases made from Stein Mart's online store. *See, e.g.*, ¶¶ 11, 23, 43; *see also* ¶ 103 (Plaintiffs allege they suffered "financial losses related to the purchases made at Stein Mart … through the use of Annex's services."). These allegations sufficiently allege Annex's business dealings with Plaintiffs and Class members. Annex's argument is particularly perplexing given that the letter Stein Mart sent to customers informing them of the Data Breach explicitly stated that *Annex* informed Stein Mart that it detected unauthorized code added to the code "used by Annex … to enable logins" that "could have **captured information entered during the checkout process … on [Stein Mart's] website**." ¶ 11 (emphasis added). By virtue of Annex agreeing to provide a service to consumers that facilitates their execution of purchases from Stein Mart's online store, Annex implicitly agreed to secure consumers' Personal Information conveyed to it during such transactions.

For all of these reasons, Annex's motion to dismiss Plaintiffs' implied contract claims is unavailing and should be denied.

I. Plaintiff Taylor's SCUTPA Claim Should Survive

1. *SCUTPA Claims May Be Brought on a Classwide Basis*

As an initial matter, Both Defendants argue that "recent case law demonstrates" that SCUTPA claims cannot be brought in a representative capacity (e.g., via class actions). Stein Mart Br. at 20; *see also* Annex Br. at 20. But at least two courts have very recently held the exact opposite: that SCUTPA's representative capacity ban does not bar class action SCUTPA claims. For instance, in *Ulta Beauty*, the defendants made the same argument that Stein Mart asserts here: "that the class claim under the … SCUTPA … should be dismissed because the

SCUPTA expressly prohibits class actions." *Smith-Brown v. Ulta Beauty, Inc.*, No. 18 C 610, 2019 U.S. Dist. LEXIS 30460, at *39 (N.D. Ill. Feb. 26, 2019). Quoting Justice Scalia's opinion in *Shady Grove Orthopedic Associations, P.A. v. Allstate Insurance Company,* 559 U.S. 393 (2010), the Northern District of Illinois disagreed, denied the defendants' motion to dismiss the SCUTPA claim, and held instead

> This Court agrees with those decisions holding that the fact that a class action bar is included within a consumer protection statute does not make it any more substantive than if it were found instead among the state's rules of procedure …. The class action mechanism is merely a way of joining numerous plaintiffs' claims together in order to adjudicate them more efficiently; a law permitting it or prohibiting it is procedural, not substantive, because it does not alter the nature of the claim or the right that gives rise to it …. Defendants' motion to dismiss is denied as to the SCUTPA claim.

Ulta, 2019 U.S. Dist. LEXIS 30460, at *41-42 (quoting at *Shady Grove*, 559 U.S. at 416-17). At least one other court is in accord. *See In re Packaged Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1086 (S.D. Cal. 2017) ("SCUTPA class-action bar is a procedural rather than substantive rule … Defendants Motion to Dismiss is DENIED as to this issue."). Therefore, both Defendants' arguments in this regard should be denied.

2. *Plaintiff Taylor's Allegations Satisfy Each Element of her SCUTPA Claim*

Stein Mart also argues that Plaintiff Taylor's SCUTPA claim should be dismissed because she fails to allege (1) that Stein Mart engaged in an unfair or deceptive act, (2) ascertainable loss, and (3) that Stein Mart's conduct had an adverse impact on the public interest. *See* Stein Mart Br. at 17-20. In South Carolina, a plaintiff asserting a private right of action under the SCUTPA must allege that "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Health Prom. Specs., LLC v. S.C. Bd. of Dent.*, 403 S.C. 623, 638

(S.C. 2013). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive …. An act is 'deceptive' when it has a tendency to deceive." *Id*.

As an initial matter, Stein Mart concedes that "SCUTPA does not define the term 'ascertainable loss of money or property.'" Stein Mart Br. at 19. Therefore, Stein Mart's recitation of the Third Circuit's definition is not binding. For the reasons explained above, Plaintiffs have, in fact, alleged multiple types of pecuniary losses. *See* §V(B), *supra*. Thus, Stein Mart's ascertainable loss contention is without merit.

Next, Stein Mart argues that Plaintiffs failed to allege that it engaged in unfair or deceptive conduct. "A plaintiff may show that unfair or deceptive acts or practices have an impact upon the public interest by demonstrating a potential for repetition." *Bahringer v. ADT Sec. Servs.*, 942 F. Supp. 2d 585, 594 (D.S.C. 2013) (citing *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906, 908 (S.C. 1989)). "The potential for repetition is generally demonstrated in one of two ways: '(1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Id.* (quoting *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, 502 (S.C. Ct. App. 2006)).

Plaintiffs readily satisfy both of these methods of showing public interest impact. Data breaches are incidents that have occurred countless times in the past, and they continue to occur with growing frequency. ¶¶ 5, 58. The FTC has acknowledged the continuing threat of data breaches that all companies constantly face, and published guidelines for what constitutes reasonable data security to protect against the threat. ¶ 65. Stein Mart cannot dispute that data breaches have occurred in the past, nor that they will continue to occur in the future absent the implementation of adequate data security measures. Furthermore, to date, Stein Mart's website

still lists its "Secure Shopping Guarantee," which will continue to mislead consumers into believing that transactions on its website are safe. ¶ 40. Therefore, Plaintiffs have sufficiently shown that (1) Stein Mart's failure to adequately secure their Personal Information is unfair, (2) Stein Mart's website's guarantees to consumers that their Personal Information is secured is deceptive, and (3) both have the potential for repetition such that they impact the public interest.

Moreover, it is well settled that a business' failure to implement adequate data security measures, and resulting data breaches, both offends public policy and is immoral, unethical and oppressive.[27] For instance, in *Buckley*, the court denied the breached-defendant's motion to dismiss the plaintiff's unfair practices claims and held that its failure to adequately secure plaintiffs' sensitive information offended public policy and was immoral, unethical and oppressive based on the following analysis:

> [Defendant] received sensitive personal information that could result in significant financial harm to [Plaintiff] if mishandled. [Defendant]'s alleged failure to take reasonably adequate security measures constitutes an unfair act because it knowingly and foreseeably put [Plaintiff] at a risk of harm from data theft and fraudulent . . . activity and this harm allegedly occurred. Accordingly, the Court denies [Defendant]'s motion to dismiss [Plaintiff]'s … claims based on unfair practices.

Buckley v. Santander Consumer USA, Inc., No. C17-5813 BHS, 2018 U.S. Dist. LEXIS 53411, at *12 (W.D. Wash. Mar. 29, 2018). The same facts are present here: Stein Mart received the Personal Information of consumers who purchased goods from its website, Stein Mart was aware that the Personal information was highly sensitive (¶ 59)—and of the importance of safeguarding

[27] *See, e.g., In re TJX Companies Retail Sec. Breach Litig.*, 564 F.3d 489, 495-96 (1st Cir. 2009) (finding company's "lack of security measures" constitutes an "unfair practice"); *Veridian Credit Union v. Eddie Bauer, LLC*, C17-0356JLR, 295 F. Supp. 3d 1140, 2017 U.S. Dist. LEXIS 186201, 2017 WL 5194975, at *13 (W.D. Wash. Nov. 9, 2017) (inadequately securing such sensitive consumer information constituted an 'unfair act'").

it (¶¶ 61, 68, 71)—therefore, its failure to adequately secure that information constitutes an unfair act because it knowingly put Plaintiffs' at risk of harm from identity theft.

For all of these reasons, Plaintiffs have adequately alleged both the potential for repetition and that Defendants' failure to secure their Personal Information was immoral, unethical and oppressive such that their SCUTPA claims should survive.

VI. CONCLUSION

For all of these reasons, the Court should deny both Annex's Motion to Dismiss Plaintiffs' Class Action Complaint (D.I. 14), as well as Stein Mart's Motion to Dismiss Class Action Complaint (D.I. 16). If the Court grants any part of either Defendants' motion, Plaintiffs respectfully request that it do so without prejudice and grant Plaintiffs leave to amend pursuant to Rule 15(a)(2) to cure any deficiencies. Plaintiffs also seek an opportunity to conduct personal jurisdiction discovery if the Court deems their allegations to be insufficient.

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Respectfully submitted,

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