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CLERK, U.S. DISTRICT COURT
4/21/2021
CENTRAL DISTRICT OF CALIFORNIA
BY: CW DEPUTY

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

**JENNIFER MULLINIX, PATRISIA
VELA, and OMAR OROZCO,
individually and on behalf of all others
similarly situated,**

Plaintiffs,

v.

**US FERTILITY, LLC and DOES 1–100,
inclusive,**

Defendants.

Case No.: SACV 21-00409-CJC (KESx)

**ORDER GRANTING IN PART
DEFENDANT’S MOTION TO
DISMISS [Dkt. 9]**

I. INTRODUCTION

Plaintiffs Jennifer Mullinix, Patrisia Vela, and Omar Orozco bring this putative class action against Defendant US Fertility, LLC and unnamed Does in relation to a data breach. (Dkt. 1-1 [Complaint, hereinafter “Compl.”].) On March 3, 2021, Defendant

1 removed to this Court. (Dkt. 1 [Notice of Removal].) Before the Court is Defendant’s
2 motion to dismiss the Complaint. (Dkt. 9-1 [hereinafter “Mot.”].) For the following
3 reasons, Defendant’s motion is **GRANTED IN PART**.¹

4
5 **II. BACKGROUND**

6
7 Defendant is a network of fertility practices throughout the United States,
8 comprising of 55 locations across 10 states. (Compl. ¶ 1.) In February 2017, Plaintiff
9 Mullinix visited Defendant’s clinic in Columbia, Maryland. (*Id.* ¶ 6.) In April 2019,
10 Plaintiffs Vela and Orozco visited Defendant’s clinic in Westminster, California. (*Id.*
11 ¶ 7.) During their visits, Plaintiffs provided Defendant with personal information. (*Id.*
12 ¶¶ 6–7.) On January 8, 2021, Plaintiffs received a letter from Defendant which informed
13 them that a data breach had compromised their personal information, including names,
14 addresses, dates of birth, and Social Security numbers. (*Id.*) Plaintiffs assert that this
15 data breach “has caused and placed Plaintiffs at imminent, immediate and continuing risk
16 of financial harm and identity theft, as well as the misuse of their sensitive health
17 information.” (*Id.*)

18
19 As a result, Plaintiffs assert claims for (1) breach of contract, (2) breach of the
20 covenant of good faith and fair dealing, (3) negligence per se, (4) negligence,
21 (5) violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code
22 § 17200, *et seq.*, (6) violation of California’s Consumer Legal Remedies Act (“CLRA”),
23 Cal. Civ. Code § 1750, *et seq.*, (7) violation of California’s Consumer Privacy Act
24 (“CCPA”), Cal. Civ. Code § 1798.150, *et seq.*, (8) violation of Maryland’s Consumer
25 Protection Act (“MCPA”), Md. Code Comm. Law § 13-301, *et seq.*, and (9) violation of

26
27
28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for April 26, 2021, at 1:30 p.m. is hereby vacated and off calendar.

1 Maryland’s Personal Information Protection Act (“PIPA”), Md. Code Ann. § 14-3501, *et*
2 *seq.* (*Id.* ¶¶ 49–149.)

3 4 **III. LEGAL STANDARD**

5
6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
7 sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for
8 failure to state a claim is not whether the claimant will ultimately prevail, but whether the
9 claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco*
10 *Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Rule 12(b)(6) is read in conjunction with
11 Rule 8(a), which requires only a short and plain statement of the claim showing that the
12 pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6)
13 motion, the district court must accept all material allegations in the complaint as true and
14 construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*,
15 32 F.3d 1382, 1384 (9th Cir. 1994).

16
17 However, “the tenet that a court must accept as true all of the allegations contained
18 in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
19 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that while
20 a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
21 allegations, courts “are not bound to accept as true a legal conclusion couched as a factual
22 allegation” (citations and quotes omitted)). Dismissal of a complaint for failure to state a
23 claim is not proper where a plaintiff has alleged “enough facts to state a claim to relief
24 that is plausible on its face.” *Twombly*, 550 U.S. at 570. In keeping with this liberal
25 pleading standard, the district court should grant the plaintiff leave to amend if the
26 complaint can possibly be cured by additional factual allegations. *Doe v. United States*,
27 58 F.3d 494, 497 (9th Cir. 1995).

1 **IV. ANALYSIS**

2
3 **A. Breach of Contract & Breach of the Covenant of Good Faith and Fair**
4 **Dealing**
5

6 Defendant moves to dismiss Plaintiffs’ breach of contract and breach of the
7 covenant of good faith and fair dealing claims because Plaintiffs have failed to allege the
8 existence of a contract. (Mot. at 4.) The existence of a contract between the parties is an
9 essential element of both a breach of contract and breach of the covenant of good faith
10 and fair dealing claims. *See Richman v. Hartley*, 224 Cal. App. 4th 1182, 1186 (2014)
11 (breach of contract); *Smith v. City and Cnty. of San Francisco*, 225 Cal. App. 3d 38, 49
12 (1990) (breach of the covenant of good faith and fair dealing); *Kumar v. Dhanda*, 198
13 Md. App. 337, 345 (2011).²
14

15 While Plaintiffs generally allege that they “entered into an express contract with”
16 Defendant, (Compl. ¶ 50), they fail to “allege the specific provisions in the contract
17 creating the obligation the defendant is said to have breached.” *Young v. Facebook, Inc.*,
18 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011). Plaintiffs allege that the Privacy Statement
19 of Defendant’s website formed “a part of its contract with Plaintiffs and Class Members.”
20 (Compl. ¶ 51.) This Privacy Statement, however, explicitly states that it applies “only to
21 USFertility.com” and that the individual clinics “are not subject to this Privacy Policy.”
22 (Dkt. 9-2 [Privacy Statement].) This Privacy Policy does not apply to Plaintiffs’ claims
23 because Plaintiffs allege that they provided their personal information during in-person
24 clinic visits, not through the website. (Compl. ¶¶ 6–7.) Plaintiffs do not identify any
25 other specific provision that Defendant allegedly breached. Because Plaintiffs may be
26

27
28 ² Breach of the covenant of good faith and fair dealing is generally not recognized as an independent
cause of action, but instead is “merely part of an action for breach of contract.” *Cook v. Nationwide Ins.*
Co., 962 F. Supp. 2d 807, 820 n.11 (D. Md. 2013).

1 able to allege additional facts in support of their contract claims, they are **DISMISSED**
2 **WITH FOURTEEN DAYS LEAVE TO AMEND.**

3 4 **B. Negligence & Negligence Per Se**

5
6 Defendant next moves to dismiss Plaintiffs' claims for negligence and negligence
7 per se. As an initial matter, under California and Maryland law "negligence per se is not
8 a separate cause of action, but rather an evidentiary presumption that a party failed to
9 exercise due care in certain limited circumstances." *Ward v. Litton Loan Servicing, LP*,
10 2012 WL 13024081, at *5 (C.D. Cal. Apr. 10, 2012); *In re Marriott Int'l, Inc., Consumer*
11 *Data Sec. Breach Litig.*, 2020 WL 6290670, at *21 (D. Md. Oct. 27, 2020). Accordingly,
12 Plaintiffs' claim for negligence per se is **DISMISSED WITH PREJUDICE**.³

13
14 To state a claim for negligence, Plaintiffs must allege (1) that Defendant was under
15 a duty to protect the plaintiff from injury, (2) that Defendant breached that duty, (3) that
16 Defendant's breach caused the loss or injury suffered by plaintiff, and (4) that Plaintiffs
17 suffered actual loss or injury. *Vasilenko v. Grace Family Church*, 3 Cal. 5th 1077, 1083
18 (2017); *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 495 (2011). Defendant
19 argues that Plaintiffs have failed to allege the existence of a duty and actual injury or
20 harm and that the negligence claim is barred by the economic loss doctrine. The Court
21 disagrees.

22 23 **1. Duty**

24
25 Plaintiffs allege that Defendant owed them a duty to safeguard their personal and
26 medical information as consistent with medical privacy statutes and industry standards.

27
28 ³ The Court will consider Plaintiffs' negligence per se arguments in its evaluation of their negligence claim.

1 (Compl. ¶¶ 17–21, 89–99.) District courts have found comparable allegations sufficient
2 to survive motions to dismiss negligence claims. *See Stasi v. Inmediata Health Grp.*
3 *Corp.*, 2020 WL 6799437, at *7–9 (S.D. Cal. Nov. 19, 2020) (finding a duty to protect
4 medical and personal information in company’s possession); *In re Facebook, Inc.,*
5 *Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 799 (N.D. Cal. 2019) (finding a
6 duty because “Facebook had a responsibility to handle its users’ sensitive information
7 with care”).

8
9 Defendant argues that Plaintiffs have failed to allege a special relationship which
10 would require Defendant to protect their information from third parties. (Mot. at 12–13.)
11 When assessing whether a special relationship exists, California courts apply the
12 following factors: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty
13 that the plaintiff suffered injury, (3) the closeness of the connection between the
14 defendant’s conduct and the injury suffered, (4) the moral blame attached to the
15 defendant’s conduct, (5) the policy of preventing future harm, and (6) the extent of the
16 burden to the defendant and consequences to the community of imposing a duty to
17 exercise care with resulting liability for breach and the availability, cost, and prevalence
18 of insurance for the risk involved. *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968).

19
20 Applying the factors here, the Court concludes that it is plausible that Defendant
21 owed a duty to protect Plaintiffs’ information. Plaintiffs allege that they have lost money
22 and time due to the data breach. (Compl. ¶¶ 100–01.) Plaintiff Vela alleges that she
23 received a phone call from an unknown person who knew her name and social security
24 number. (*Id.* ¶ 7.) It is foreseeable that these alleged harms would result from the
25 exposure of their personal and medical information to hackers. “While the chance that
26 Plaintiffs will actually suffer identity theft is unknown and has likely decreased over
27 time, it is reasonable to infer that persons whose information was compromised in such a
28 manner would, at the very least, spend some time and/or effort to detect or prevent

1 identity theft.” *Stasi*, 2020 WL 6799437, at *8. Defendant can also be reasonably said to
2 bear some “moral” blame for failing to protect Plaintiffs’ personal and medical data that
3 Plaintiffs entrusted to it. Further, “imposing a common law duty on companies that
4 possess personal and medical information to safeguard that information further promotes
5 a policy, statutorily recognized, of preventing identity theft and protecting the
6 confidentiality of medical information.” *Id.* Finally, the burden of imposing such a duty
7 is not likely high given that both state and federal law already impose such protections.
8 Accordingly, Plaintiffs have sufficiently alleged duty.

9 10 **2. Actual Injury or Harm**

11
12 Defendant also argues that Plaintiffs have failed to allege actual injury or harm.
13 (Mot. at 14.) “In data breach cases involving negligence claims, district courts have
14 found it sufficient to allege out-of-pocket expenses in purchasing identity theft protection
15 services to show damages.” *Stasi*, 2020 WL 6799437, at *11. Time and effort spent
16 responding to a data breach may also plausibly show damages. *Id.* at *10. While
17 Plaintiffs do not provide great detail on out-of-pocket expenses or how they expended
18 time and effort after receiving notice of the data breach, (*see* Compl. ¶ 100), at this early
19 stage in litigation Plaintiffs have alleged plausible damages of lost time and out-of-pocket
20 expenses.

21 22 **3. Economic Loss Doctrine**

23
24 Defendant also argues that Plaintiffs’ negligence claim is barred by the economic
25 loss doctrine. Under the economic loss doctrine, “purely economic losses are not
26 recoverable in tort.” *NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1023, 1028
27 (E.D. Cal. 2013) (citation omitted). The economic loss rule separates the law of contract
28 and the law of tort by “requir[ing] a purchaser to recover in contract for purely economic

1 loss due to disappointed expectations, unless he can demonstrate harm above and beyond
2 a broken contractual promise.” *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979,
3 988 (2004). The law in Maryland is substantially the same. *See Pulte Home Corp. v.*
4 *Parex, Inc.*, 174 Md. App. 681, 736–37 (2007). Here, Plaintiffs have not alleged mere
5 “disappointed expectations” arising from a contract with Defendant. They have alleged a
6 harm “above and beyond” a broken contractual promise through the exposure of their
7 personal information. Additionally, courts have “found that time spent responding to a
8 data breach is a non-economic injury, that when alleged to support a negligence claim,
9 defeats an economic loss doctrine argument.” *See Stasi*, 2020 WL 6799437, at *7 (citing
10 *In re Solara Medical Supplies, LLC Customer Data Security Breach Litig.*, 2020 WL
11 2214152, at *4 (S.D. Cal. 2020) (involving theft of medical information); *Bass v.*
12 *Facebook, Inc.*, 394 F. Supp. 3d 1024, 1039 (N.D. Cal. 2019) (involving the hack of non-
13 financial personal information).

14
15 Accepting Plaintiffs’ allegations as true and construing them in Plaintiffs’ favor,
16 the Court finds that they have sufficiently alleged a claim for negligence.

17 18 **C. UCL and CLRA Claims**

19
20 Defendant argues that Plaintiffs lack standing to bring claims under the UCL and
21 CLRA because they have not asserted a loss of money or property. (Mot. at 16.) To
22 bring a claim under the UCL or CLRA a plaintiff must allege that “they personally lost
23 money or property as a result of . . . unfair competition.” *Bass*, 394 F. Supp. 3d at 1039
24 (citations and quotation marks omitted). “A plaintiff may (1) surrender in a transaction
25 more, or acquire in a transaction less, than he or she otherwise would have; (2) have a
26 present or future property interest diminished; (3) be deprived of money or property to
27 which he or she has a cognizable claim; (4) be required to enter into a transaction, costing
28

1 money or property, that would otherwise have been unnecessary.” *Kwikset Corp. v.*
2 *Superior Court*, 51 Cal. 4th 310, 323 (2011).

3
4 Plaintiffs have failed to allege facts which support a loss of money or property
5 sufficient to bring a claim under the UCL or CLRA. Plaintiffs argue that they did not
6 receive the “benefit of their bargain” with Defendant because they did not receive data
7 security. (Mot. at 14–19.) As previously noted, however, Plaintiffs have failed to allege
8 sufficient details about their “bargain” with Defendant and Defendant’s website Privacy
9 Statement does not apply to the data at issue. While Plaintiffs assert a general contractual
10 agreement with Defendant, (Compl. ¶ 50), Plaintiffs’ Complaint fails to allege in any
11 detail what Plaintiffs paid to Defendant, what services Defendant provided in return, or
12 what promises Defendant made regarding data security. Without more, the Court cannot
13 ascertain what data security Defendant should have provided as part of its bargain with
14 Plaintiffs. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 986
15 (N.D. Cal. 2016) (“Plaintiffs allege (1) that Defendants promised to undertake reasonable
16 data security measures in accordance with the law, (2) that some portion of Plaintiffs’
17 plan premiums went towards data security, and (3) that Defendants failed to undertake
18 the promised data security measures.”). Accordingly, Plaintiffs’ UCL and CLRA claims
19 are **DISMISSED WITH FOURTEEN DAYS LEAVE TO AMEND.**

20 21 **D. CCPA**

22
23 Defendant next argues that Plaintiffs’ CCPA claim should be dismissed because
24 Defendant is exempt from liability as a “business associate.” (Mot. at 17.) Under the
25 recently-enacted business associate exemption, the CCPA does not apply to “[a] business
26 associate of a covered entity governed by the privacy, security, and data breach
27 notification rules issued by the United States Department of Health and Human Services,
28 . . . to the extent that the business associate maintains, uses, and discloses patient

1 information in the same manner as medical information or protected health information
2 as described [above].” Cal. Civ. Code § 1798.146(a)(3). According to Defendant’s
3 Privacy Statement, Defendant is a “Business Associate” of the individual clinics which
4 are covered by the Health Insurance Portability and Accountability Act (“HIPAA”).
5 Defendant does not dispute this.

6
7 Instead, Plaintiffs argue that Defendant is not exempt because “the compromised
8 information here included Social Security numbers and other nonmedical information.”
9 (Dkt. 11 [Opposition] at 20.) The Court disagrees. Medical information or protected
10 health information, as defined by the statute, includes information related to an
11 individual’s healthcare “[t]hat identifies the individual” or “to which there is a reasonable
12 basis to believe the information can be used to identify the individual.” 45 C.F.R. §
13 160.103; *see* Cal. Civ. Code § 1798.146(b) (incorporating definitions from 45 C.F.R. §
14 160.103). This clearly includes Social Security numbers and other nonmedical
15 information which was provided in relation to an individual’s healthcare, as was the case
16 here. Because Defendant is an exempt business associate, the Court need not address the
17 CCPA’s statutory requirements. Plaintiffs’ CCPA claim is **DISMISSED WITH**
18 **PREJUDICE.**

19 20 **E. PIPA**

21
22 Defendant argues that Plaintiffs’ PIPA claim must be dismissed because the statute
23 does not provide an independent cause of action. (Mot. at 20–21.) Defendant is
24 incorrect. PIPA states that “[a] violation of this subtitle . . . [i]s subject to the
25 enforcement and penalty provisions contained in Title 13 of this article,” Md. Code Ann.,
26 Com. Law § 14-3508. Title 13 provides that “any person may bring an action to recover
27 for injury or loss sustained by him.” *Id.* § 13-408. This is further supported by the fact
28 that other courts have entertained independent PIPA claims. *See, e.g., In re Marriott*

1 *Int'l, Inc., Consumer Data Security Breach Litig.*, 440 F. Supp. 3d 447, 486–87 (D. Md.
2 2020). Accordingly, Defendant’s motion to dismiss is **DENIED** as to Plaintiffs’ PIPA
3 claim.

4
5 **F. MCPA**

6
7 Defendant finally moves to dismiss Plaintiffs’ MCPA claim. To state a claim
8 under MCPA, a plaintiff must plead that “(1) the defendant engaged in an unfair or
9 deceptive practice or misrepresentation, (2) the plaintiff relied upon the
10 misrepresentation, and (3) doing so caused the plaintiff actual injury.” *Palermino v.*
11 *Ocwen Loan Servicing, LLC*, 2015 WL 6531003, at *2 (D. Md. Oct. 26, 2015) (citation
12 omitted). Because MCPA claims sound in fraud, they are subject to Rule 9(b)’s
13 heightened pleading standard. *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 781
14 (4th Cir. 2013).

15
16 Under Rule 9(b), a plaintiff alleging fraud must “state with particularity the
17 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); *see Kearns v. Ford*
18 *Motor Co.*, 567 F.3d 1120, 1145 (9th Cir. 2009). The plaintiff must set forth the “who,
19 what, when, where, and how” of the alleged misconduct. *See Vess v. Ciba-Geigy Corp.*
20 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
21 1997). Plaintiffs’ allegations fail to this standard. Defendant’s Privacy Statement is the
22 only alleged misrepresentation Plaintiffs identify but, as described above, the Privacy
23 Statement does not apply here. Accordingly, Plaintiffs’ MCPA claim is **DISMISSED**
24 **WITH FOURTEEN DAYS LEAVE TO AMEND.**

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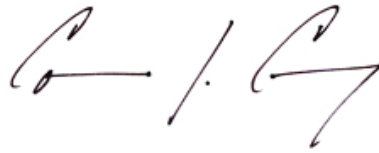
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1 **V. CONCLUSION**

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3 For the foregoing reasons, Defendant’s motion to dismiss is **GRANTED IN**
4 **PART**. Plaintiffs’ breach of contract, breach of the covenant of good faith and fair
5 dealing, UCL, CLRA, and MCPA claims are **DISMISSED WITH FOURTEEN DAYS**
6 **LEAVE TO AMEND**. Plaintiffs’ negligence per se and CCPA claims are **DISMISSED**
7 **WITH PREJUDICE**. Plaintiffs may amend their claims by **May 5, 2021**. If Plaintiffs
8 opt not to amend their claims, Defendant shall submit its answer by **May 12, 2021**.

9
10 DATED: April 21, 2021



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12 _____
13 HON. CORMAC J. CARNEY

14 UNITED STATES DISTRICT JUDGE
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