Case No. 09-15971

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL RUIZ
Plaintiff - Appellant

vs.

GAP, INC. and VANGENT, INC.
Defendants - Appellees

Appeal From Judgment Entered By
The United States District Court, Northern District of California,
Samuel Conti, District Court Judge
District Court Case No. CV-07-05739-SC

REPLY BRIEF OF APPELLANT JOEL RUIZ

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SUMMARY OF ARGUMENT

Joel Ruiz ("Ruiz") presented substantial evidence to the district court that Defendants Gap, Inc. ("Gap") and Vangent, Inc. ("Vangent") failed to follow industry standards, abide by contractual provisions and to protect his personally identifying information ("PII") from unauthorized disclosure. As a result, Ruiz's expert evidence showed that he and 750,000 other job applicants have a four-to-one increased likelihood of suffering from identity theft. Ruiz also presented expert opinion that the September 2007 laptop theft was not an ordinary property crime, but was the work of a sophisticated thief who targeted PII. Ruiz presented specific evidence to the district court that other job applicants appear to have experienced identity theft after the laptop theft. Ruiz himself has expended time and money monitoring his credit and accounts. As Ruiz stated in his Opening Brief ("Ruiz Br."), such evidence satisfied the elements of his claims and he should have been able to plead all his claims and present them to a jury. Defendants own factual disputes with Ruiz's evidence, while unsupported by the record, nevertheless show the number of material factual issues appropriate for a jury's determination.

Again, Defendants make no attempt to explain how or why "good corporate citizens" failed to follow *any* industry standards or contractual obligations to protect the PII of these job applicants. *Cf.* Brief for the

Chamber of Commerce of the United States of America and the Retail Industry Leaders Association as *Amici Curiae* in Support of Appellees Gap Inc. and Vangent, Inc. for Affirmance ("*Amicus* Br.") at 3. Instead, Defendants' Answering Brief ("Gap Br.") merely rehashes their "no injury" refrain from the lower proceedings as a diversion tactic by claiming that these job applicants have not suffered and will not suffer damage (injury) from losing their PII.

Defendants' arguments, however, are not supported by the record or relevant authority. First, as the district court correctly held, Ruiz's increased risk of identity theft establishes injury-in-fact sufficient to confer Article III standing. Defendants' citations to older opinions outside California that deny standing go against the recent trend, are based on differing laws and facts and are simply unavailing.

Second, the unauthorized disclosure of his PII is sufficiently "serious" to state a constitutional right to privacy claim. The test for seriousness does not, as Defendants argue, focus on whether the disclosure is "intentional" but, rather, on the type of PII that was disclosed. Further, the right to privacy protects against the unauthorized disclosure of the sensitive employment PII Defendants compromised here.

Third, Ruiz has standing to bring a UCL claim. Under both the ordinary meaning of "property" and relevant case law, Ruiz's loss of his PII

constitutes a loss of property. Ruiz's expenditures of time and money to protect him from identity theft constitute a loss of "money." Moreover, Defendants' conduct violated both the unlawful and unfair prongs of the UCL. Not only do the Cal. Civ. Code §§ 1798.81.5, 1798.85 and breach of contract violations provide approved predicates to show the conduct was "unlawful," but the unfair prong is also met since the impact of Defendants' practices outweighed its justifications for providing lax security of the PII.

Fourth, Defendants' rewrite of the text of Cal. Civ. Code § 1798.85(a)(4) as prohibiting "the use of a social security number as a required user ID or login ID" should fail. The ordinary reading of the statute's text clearly show that Defendants failed to comply with its provisions. Section 1798.85's legislative history clearly evinces the intent to provide a private right of action.

Fifth, Ruiz has satisfied the elements of a negligence claim. While Defendants, like many courts, blur the concepts of injury, harm, and damages, an understanding of the distinction between these terms is crucial. Ruiz has established a cognizable injury in the loss of his PII, his privacy, and his increased risk of identity theft. Indeed, the district court's finding that Ruiz met the higher "injury-in-fact" threshold should have established simple injury on the underlying claims. Ruiz also established harm by the loss of control of his PII and any actual misuse of it. Ruiz's mitigation

efforts illustrate harm and prove his damages. Here, Ruiz's expenditures of time and money to prevent identity theft constitute damages, and a remedy of credit monitoring is recoverable under California law. Defendants' narrow construction of California authorities allowing for such monitoring should fail. Moreover, Ruiz's expert opinions satisfied the *Stollenwerk* framework for data breach litigation and should have been presented to a jury. *See Stollenwerk v. Tri-West Healthcare Alliance*, 254 Fed. Appx. 664, 666 (9th Cir. 2007)(*Stollenwerk II*). Defendants' factual disputes with these expert opinions only underscore this point.

Sixth, Ruiz established a breach of contract claim that should have been presented to a jury. Vangent does not contest that Ruiz is a third party beneficiary to the contract with Gap, that it breached the contract at issue, or that Ruiz has suffered damages. Instead, claims that Ruiz has not been damaged (injured) for the admitted breach. This contention, however, ignores the law, pleadings, and evidence in this case. Moreover, not only can Ruiz recover nominal damages for breach of contract, but it is black letter law that consequential damages are also recoverable in the event of such a breach. Ruiz's expenditures of time and money resulting from the breach qualify constitute damages.

Finally, Ruiz's Opening Brief points to numerous improper findings of fact made by the district court, namely, that: (a) Ruiz failed to take

advantage of Gap's credit monitoring offer; (b) other job applicants claimed identity theft; (c) Ruiz presented no evidence of significant exposure and (d) that the district court relied on hearsay testimony. Defendants never refuted these arguments.

Plaintiff is not seeking "automatic liability" here. *Cf. Amicus* Br. at 3. He has alleged valid claims, provided substantial factual evidence and supported expert testimony, all of which were sufficient to plead the claims and reach a jury. The lower court's rulings should be overturned.

ARGUMENT

I. Ruiz Has Satisfied Article III's Standing Requirement

At summary judgment, a plaintiff need not prove standing, but only a genuine question of material fact as to the standing elements. *Central Delta Water Agency v. U.S.*, 306 F.3d 938, 947 (9th Cir. 2002). Ruiz clearly made his requisite showing and the district court correctly found standing. ER 12.[1]

Standing entitles a litigant to have the court determine the merits of a dispute, *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and depends on whether the plaintiff has a "personal stake in the outcome of the controversy." *Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437, 1446 (1993).

[1] The abbreviation "ER" refers to Ruiz's Excerpts of Record filed with his Opening Brief. The abbreviation "RSER" refers to Ruiz's Supplemental Excerpts of Record filed concurrently herewith.

"Personal stake" exists if the plaintiff can show: (1) he personally suffered a concrete injury-in-fact ("injury-in-fact"); (2) the injury is fairly traceable to the challenged conduct ("traceability"); and (3) the injury is likely to be redressed by a favorable decision ("redressability"). *Id*. at 1446. Defendants only challenged injury-in-fact and hence waived any challenge to the other elements.[2] *See, e.g., Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008).

To establish injury-in-fact, there must be an invasion of a legally protected right that is also "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). This requirement is met by *increased risk of future harm*. *See Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004); *Central Delta*, 306 F.3d at 947; *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001). The severity

[2] Regardless, Ruiz satisfies these elements. "To satisfy the traceability requirement, a class action plaintiff must allege a distinct and palpable injury to himself." *Easter v. American W. Fin.*, 381 F.3d 948, 961 (9th Cir. 2004). Ruiz has demonstrated his injury and that it is a result of Defendants' conduct. ER 682; Ruiz Br. 19; § V.A. *infra*. In order for an injury to be redressable, a plaintiff must show it is "likely that a favorable court decision will redress the injury to the plaintiff." *Delano Farms Co. v. California Table Grape Com'n,* No. 1:07-CV-1610, 2009 WL 3586056, at *19 (E.D. Cal. Oct. 27, 2009) (citing *Lujan,* 504 U.S. at 560). Plaintiff seeks credit monitoring so that instances of identity theft and fraud can be detected and the reimbursement of time and money spent in repairing their credit or accounts once such fraud is detected. ER 1203. If successful, Plaintiff will have achieved the desired monitoring and reimbursement and their claims will be redressed.

of the injury is immaterial. *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 (1973). Ruiz had his PII exposed, lost the privacy of his PII, and faces a significant increased risk of identity theft as a result of Defendants' misconduct.

As the district court correctly held increased risk of identity theft alone establish an injury-in-fact. ER 12. Specifically, the district court found that Ruiz's expert evidence indicating a "four-to-one general increased likelihood [of] actual fraud victimization" showed injury-in-fact. ER 12. Defendants nevertheless point to opinions outside California that go against the trend and deny standing based on different laws and facts. Gap Br. 20–21. The district court correctly ignored these rulings as other courts, including the Ninth and Seventh Circuits, have done. *See Central Delta*, 306 F.3d at 947; *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007); *Covington*, 383 F.3d at 633; *see also Caudle v. Towers, Perrin, Forster & Crosby, Inc.,* 580 F. Supp. 2d 273, 280 (S.D.N.Y. 2008).

Defendants marginalize Ruiz's increased risk and other alleged injuries by labeling it as "minute" and by fruitlessly attacking Ruiz's reliance on *Central Delta*. Gap. Br. at 21–23. *Central Delta* held that, like here, "monetary compensation may well not adequately return plaintiff[] to [his] original position," and Defendants' conduct may cause "harms that are frequently difficult or impossible to remedy." *Central Delta*, 306 F.3d at

950. Ruiz's PII, including his Social Security Number ("SSN"), has already been compromised. Obtaining a new SSN or monitoring credit for instances of identity theft, and the attendant anxiety that accompanies such endeavors, are not compensable by monetary compensation alone.

Ruiz has already suffered an injury-in-fact. This is not merely a fear of future identity theft case. He cannot be returned to his original position as he has also lost the privacy of his PII and had his PII exposed. Standing is thus satisfied. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 73-74 (1978); *In re Propulsid Prod. Liab. Litig.,* 208 F.R.D. 133, 139 (E.D. La. 2002); *Sutton v. St. Jude Med. S.C., Inc.,* 419 F.3d 568, 574 (6th Cir. 2006).

II. Defendants' Unauthorized Disclosure of PII is Sufficiently Serious To State The Invasion of Privacy Claim

Courts recognize that unauthorized disclosures of PII involving sensitive information like SSNs, are the types of "serious" intrusions that violate the constitutional right to privacy. Ruiz Br. 17-20; *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 26 (1994).

A. Ruiz Is Not Required To Show "Intentional" Conduct To Establish a "Serious" Invasion

It is undisputed that Ruiz has established the first two elements of a right to privacy claim for his PII: (1) a legally protected privacy interest; and

(2) a reasonable expectation of privacy.[3] *Cf. Hill*, 7 Cal. 4th at 26 *with* ER 1460. Defendants attack the "seriousness" of the invasion and seek to create two additional elements: (a) an intentional disclosure of PII, (b) for defendant's own benefit. Gap Br. at 50.

California law does **not** require a plaintiff to show *intentional* disclosure of PII to establish seriousness. Rather, courts analyzing whether a privacy invasion is "serious," focus on the type of PII involved and the resulting consequences of disclosure.[4] *See Janvrin Holdings Ltd. v. Hilsenrath*, No. C 02-1068 CW, 2007 WL 2155702, at *2 (N.D. Cal. July 26, 2007) (sustaining privacy claim because private information compromised); *see also Valley Bank of Nevada v. Superior Court,* 542 P.2d 977, 979 (Cal. 1975) (financial affairs and the details of personal life); *Alch v. Superior Court*, 165 Cal. App. 4th 1412, 1427 (2008) ("name and work history information" goes well beyond that which courts have found to be

[3] Although waived at the lower court, *see Silvas,* 514 F.3d at 1007*,* Ruiz has nevertheless demonstrated a legally protected privacy interest in his PII. ER 1460; *Watkins v. Autozone Parts, Inc.*, No. 08-CV-01509-H (AJB), 2008 WL 5132092, *7 (S.D. Cal. Dec. 5, 2008). Ruiz also established a reasonable expectation of privacy in his PII. ER 16; *Watkins*, 2008 WL 5132092, at*7.

[4] Defendants erroneously rely on the extreme facts of *Sanchez-Scott v. Alza Pharmaceuticals*, 103 Cal. Rptr. 2d 410 (Cal. Ct. App. 2001) for the standard by which privacy claims are sustained. However, not every privacy claim involves a doctor permitting a male salesperson to be present during a physical examination of a partially disrobed patient. *Id*. at *376. Such a narrow reading is absurd and eviscerates the claim.

serious); *Watkins*, 2008 WL 5132092, at *7 (unauthorized use of telephone numbers is serious not because "intentional" but because defendants used PII for profit without disclosure); *accord Shqeirat v. U.S. Airways, Inc*., 515 F. Supp. 2d 984, 998 (D. Minn. 2007) (SSN disclosure sufficient to support invasion of privacy claim). Instead, California courts hold that unauthorized disclosure of PII is sufficiently serious if the information is particularly sensitive.[5]

Moreover, Defendants ignore that in the employment context, the constitutional right to privacy protects sensitive information like Ruiz's.[6] *El Dorado Sav.& Loan Assn. v. Superior Court*, 190 Cal. App. 3d 342, 345 (1987) (right to privacy in employee records); *Board of Trustees v. Superior* Court, 119 Cal. App. 3d 516, 525-26 (1981); *see also Detroit Edison Co. v. NLRB*., 440 U.S. 301, 319 (1979). For instance, in *Puerto v. Superior Court*, the court noted that disclosure of certain types of PII, such as *financial*

[5] Even if a "benefit" is required, Defendants admit that they submitted the applicant information to analyze geographic hiring trends. ER 420-21. Moreover, in today's economy, companies like Defendants treat PII as a commodity to use for their own benefit. *See, e.g.,* T. Soma, ET AL, *Corporate Privacy Trend: The "Value" of Personally Identifiable Information ("PII") Equals the "Value" of Financial Assets*, 15 RICH. J.L. & TECH. 11, at *1-3 (2009).

[6] California employment laws are applicable to job applicants. *See Thompson v. Borg-Warner Protective Serv. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at *8 (N.D. Cal. Mar. 11, 1996).

details or *personnel information*, are sufficiently "serious" to state a privacy claim. *See* 158 Cal. App. 4th 1242, 1253-54 (2008).

Here, Ruiz gave Defendants the types of information discussed by *Puerto* – information not publicly available because of its potential for misuse.[7] As such, the disclosure of the sensitive PII Ruiz provided Defendants is sufficiently "serious" to state a privacy claim.[8] Dismissal of the claims was, thus, inappropriate.

III. Ruiz Adequately States A Claim For Violation Of The UCL

A. The Exposure of PII and Time and Money Spent Constitute "Lost Money or Property" Sufficient to Confer Standing

Under §17204, and the cases interpreting it, Ruiz adequately alleged UCL standing by showing that the exposure of his PII and expenditures of time and money constituted "lost money or property."

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[7] *Loder v. City of Glendale*, 927 P.2d 1200, 1230 (Cal.), *cert. denied*, 522 U.S. 807 (1997), is unavailing since *Puerto* and other authorities make clear that compromised SSNs are not "insignificant or *de minimis* invasions."

[8] Old Navy, LLC, the Gap subsidiary to which Ruiz applied, cited *Puerto* in its amicus brief in *Pineda v. William-Sonoma Stores, Inc*., 178 Cal. App. 4th 714 (2009), and argued that "zip codes" were not sufficiently serious for a privacy claim because they were "publicly available or obtainable through other permissible means." No. D054355, 2009 WL 2820512, at *19 (Cal. Ct. App. Jul. 13, 2009). Thus, under Old Navy's own standard, disclosure of SSNs, sensitive information not made publicly available, is sufficiently serious to state a privacy violation.

1. The Exposure of Ruiz's PII Constitutes "Lost Property"

"Property," is defined broadly as "any valuable right or interest protected by law." Ruiz B. 25-27.[9] Defendants have failed to adequately explain why "property" should not be given its plain meaning. Instead, they ignore the body of existing law defining property (which would include PII) and instead claim that UCL standing should not be satisfied by "virtually anything intangible" since it would "eviscerat[e] the California UCL's additional requirement [to that of Article III] that a plaintiff must have 'lost money or property.'" Gap Br. at 44. First, the law holds that information has value. Second, Ruiz merely seeks to interpret "property" according to the plain meaning as defined by other courts. Finally, *Troyk v. Farmers Group, Inc.,* 171 Cal. App. 4th 1305, 1348 (2009), directly refute Defendants' argument by holding that it is immaterial that the "injury-in-fact" and "lost money or property" are one and the same.

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[9] *See also Thorne v. El Segundo*, 726 F.2d 459 (9th Cir.1983), *cert. denied*, 469 U.S. 979 (1984)); *People v. Dolbeer*, 214 Cal. App. 2d 619, 622-23 (1963); *People v. Parker*, 217 Cal. App. 2d 422, 426 (1963); *State v. Mayze*, 622 S.E.2d 836, 841 (Ga. 2005); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. Rev. 133, 159-160 (1991)(modern society transformed PII into valuable property); Soma, *supra* at *1 (PII has quantifiable value); *see also Amicus* Br. at 2 (information has value).

2. The Time and Money Ruiz Expended Constitutes "Lost Money"

California courts have repeatedly held that expenditures of time and money similar to those here are sufficient to confer standing. *See* Ruiz Br. 22. Moreover, Ruiz seeks injunctive relief, not restitution. Thus, arguments regarding his eligibility for restitution under §17203 are irrelevant. *Cf.* Gap Br. at 42-43. Regardless, the California Supreme Court views restitution under §17203 and standing under §17204 as two distinct concepts. *In re Tobacco II Cases*, 46 Cal.4th 298, 320 (2009). Defendants' argument would bar victims of unfair business practices from seeking injunctive relief unless they are *also* entitled to restitution – thereby defeating the UCL's goals and remedial scheme. Ruiz Br. at 24.

Defendants fail to adequately address Ruiz's authority demonstrating that expenditures of time and money confer standing. Ruiz Br. 22-25. Instead, they seek to sweep these decisions aside based on a misreading of *Walker v. Geico Ins. Co.,* 558 F.3d 1025 (9th Cir. 2008). *Walker* does not "suggest[] that the only type of action that may be brought under the UCL is one for restitution." *Fulford v. Logitech, Inc.*, No. C-08-2041, 2009 WL 1299088, at *1 (N.D. Cal. May 8, 2009). Such a holding is inconsistent with the UCL's, requirement for standing, that the plaintiff only have "'suffered injury in fact and [ ] lost money or property.'" *See id.* Rather, *Walker*, distinguished that the type of loss cognizable under the UCL is a loss of

"money or property" in which the plaintiff has "either prior possession or a vested legal interest." *Id.*; *see also Walker*, 558 F.3d at 1027. Neither of the respective plaintiffs in *Walker* or *Buckland* had actually "lost money or property" of any sort. *Fulford*, 2009 WL 1299088, at *1; *Buckland v. Threshold Enters., Ltd.,* 155 Cal. App. 4th 798, 818 n.11 (2007). Further, to the extent *Walker* is read as Defendants suggest, respectfully, the holding was wrong. [10] Ruiz Br. at 23-24.

Defendants' other citations are equally unhelpful. For instance, *Buckland* did not hold that only an action for restitution is available under the UCL. *Id*. In *Buckland*, the plaintiff "artificially created" standing by purchasing the product to pursue a UCL action. *Buckland*, 155 Cal. App. 4th at 818, n. 11. Obviously, such unique facts are inapplicable here. In *Citizens of Humanity v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1 (2009), the court held the alleged "loss of goodwill" (not at issue here) did not constitute "lost money or property." Finally, in *Troyk.,* 171 Cal. App. 4th at 1348, the court actually found that payments of money, as in this case, sufficiently alleged "lost money". *Id.* at 1348.

[10] Specifically, *Walker* relied on the concept of restitution in §17203 as explained in *Korea Supply Co. v. Lockheed Martin Corp.,* 63 P.3d 937 (Cal. 2003) and *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706 (2000) neither of which, perforce, discuss what "lost money or property" means since those words do not appear in §17203.

B. Ruiz Showed That Defendants' Conduct Was Unlawful and Unfair

The UCL prohibits "unfair competition," which is broadly defined as encompassing any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." *Lozano v. AT&T Wireless Serv., Inc.,* 504 F.3d 718, 731 (9th Cir. 2007) (quoting *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tele. Co.,* 20 Cal. 4th 163 (1999). Unlawful business practices prohibited by the UCL are "any practices forbidden by law, be it civil or criminal, federal, state or municipal, statutory, regulatory or court-made", regardless of whether private enforcement is available for the predicate law. *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994).

Courts follow one of two tests regarding unfair business practices. The *Cel-Tech* test requires that "unfairness . .. . 'be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Lozano*, 504 F.3d at 735. *The South Bay* test weighs a practice's "impact on its alleged victim . . . against the reasons, justifications and motives of the alleged wrongdoer." *Id.* (citing *South Bay Chevrolet v. General Motors Acceptance Corp.,* 72 Cal. App. 4th 861, 886 (1999)). Courts may apply either or both of these tests. *Lozano,* 504 F.3d at 735.

Here, Ruiz alleged violations of Cal. Civ. Code §§ 1798.81.5, 1798.85 and breach of contract as approved predicates for his UCL claim. *See*

Saunders, 27 Cal. App. 4th at 839; *Gabana Gulf Distrib., Ltd. v. Gap Int'l Sales, Inc.,* No. C 06-02584 CRB, 2008 WL 111223 (N.D. Cal. Jan. 9, 2008). Additionally, Ruiz alleged that Defendants violated pertinent government guidelines regarding the protection of PII issued by the Federal Trade Commission ("FTC") and the California Department of Consumer Affairs. ER 1222, 1251. Further, Ruiz's alleged unfair business practices satisfy both tests. Under *Cel-Tech*, Ruiz enumerated unfair practices tethered to legislative policies declared in California law. ER 1292. Under *South Bay*, Ruiz alleged that the impact of Defendants' practices outweighed the justifications for Defendants' lax security. *Id*. Accordingly, the district court abused its discretion in not granting Ruiz leave to allege the UCL claim.[11]

IV. Defendants Required Ruiz to Provide SSN to Access the Application Website

Defendants' argument rewrites California Civil Code § 1798.85(a)(4) in an attempt to escape the ordinary meaning of "access" and "website" by re-drafting the statute to only "prohibit[] the use of a social security number as a required user ID or login ID …." Gap. Br. at 51. However, the statute

[11] In any event, Defendants failed to dispute that their actions were "unlawful" or "unfair" and hence waived these arguments. *See, e.g., Silvas*, 514 F.3d at 1007.

does not limit its application to "user ID" or "login ID". Ruiz Br. at 50-51 (quoting statute).

Pursuant to the ordinary, contemporary and common meaning of "access" and "website," as supported by Ruiz's authorities, Defendants required Ruiz to transmit his SSN to access the job application website. Ruiz Br. at 50-55. Defendants incorrectly (and without support) argue that its requirement for an SSN to begin the application process is a "mundane transmission" [12] that is not the type of transmission contemplated by the statute. Gap Br. at 52. The legislature did not view it as a "mundane transmission," as the statute seeks to prevent this very type of transmission because the use of SSNs without more (i.e., a password or unique personal identification number or other authentication device) greatly increases the risk of identity theft.

A. Civil Code § 1798.85 Allows a Private Right of Action

California Civil Code §1798.85, by its legislative history and stated public policy rationale, provides for private civil enforcement. *See*

[12] The very use of this phrase highlights how little protection Defendants feel SSNs deserve. Decades ago, when identity theft was not the risk it is today, when laws were not crafted to curtail their use as drivers' license or school identification numbers, perhaps the transmission of SSN could be deemed mundane. But the use of SSNs, especially under this statute, renders the transmission of SSNs as anything but "commonplace". *Cf.* Mundane, Merriam-Webster Online Dictionary, http://www.aolsvc.merriam-webster.aol.com/dictionary/mundane (last visited Dec. 7, 2009).

Goehring v. Chapman Univ., 121 Cal. App. 4th 353, 375 (2004) ("The question of whether a regulatory statute creates a private right of action depends on legislative intent.").

For instance, the purpose of the bill was considered to be "a modest effort to *allow the victim to assertively deal* with the consequences of identity theft …." ER 763 (legislative history of Civil Code §1798.85)(emphasis added). Moreover, the private right of litigation is supported by the legislature's desire to provide for "costs and attorney fees to the *prevailing plaintiff*." ER 762-63 (emphasis added). The statute was drafted to promote the sharing of the risk of financial loss "by those who benefit from the collection and dissemination of personal information, financial and otherwise." ER 760-61; *see also* ER 763 (entity with control of the circumstance that gave rise to mischief bears the risk). Despite no explicit enforcement mechanism, the legislature clearly envisioned individuals holding violators responsible. *See Shamsian v. Department of Conservation*, 136 Cal. App. 4th 621, 634-636 (2006) (refusing to deny a citizen's private right of action in the absence of an express limitation or the legislative's intent to confer exclusive enforcement powers on the attorney general).

In determining whether an implied right of action exists, some courts apply the public policy test laid out in *Middlesex Insurance Co. v. Mann*,

177 Cal. Rptr. 495, 503 (1981) and *Jacobellis v. State Farm Fire & Cas. Co.*, 120 F.3d 171, 174 (9th Cir. 1997) which find an employed right of action where: (1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy appears to be needed to assure the effectiveness of the statute. Plaintiff is an intended beneficiary of the statute and belongs to the class of persons the statute was meant to protect– those required to submit SSNs to access a website lacking proper security protocols. A private remedy will promote compliance by employers that would otherwise escape prosecution.

Moreover, a private right of action is necessary to assure the effectiveness of the statute's purpose of protecting those who transmit SSNs from the risks of identity theft. Since the statute was passed to allow a "victim to assertively deal with the consequences of identity theft" and to force "those who benefit from the collection and dissemination of personal information" to share in "the risk of financial loss" (ER 762-63), the goal of identity theft protection requires a method of enforcement that can compensate persons like Ruiz. *See Jacobellis*, 120 F.3d at 174 ("the protection of insureds and promotion of awareness of earthquake insurance coverage as intended by the legislature necessitates a method of enforcement that compensates aggrieved insureds.")

Defendants cite decisions where an implied private right of action was rejected because the legislature *never considered* or *specifically deleted* a private right of action from the statute and/or created another enforcement mechanism. *See Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 555 (1992) (legislature specifically removed provision); *Remington Invs., Inc. v. Hamedani*, 55 Cal. App. 4th 1033, 1041 (1997) (legislature never discussed the need for private right); *Moradi-Shalal v. Firemen's Fund Ins. Cos.*, 46 Cal.3d 287, 300 (1988) (legislature made "no mention . . . of a possible private civil remedy."); *Vikco Ins. Serv., Inc. v. Ohio Indem. Co.*, 70 Cal. App. 4th 55, 64-66 (1999) (legislature created another mechanism of enforcement). These citations are inapplicable. Moreover, that a companion statute included a private right of action does not negate one under §1798.85. *Cf.* Gap Br. at 55 with *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1114 (1987) ("Nor does the fact that the California legislature expressly provided for private rights of action in certain articles of its Government Code necessarily indicate a legislative intent to preclude private actions to vindicate rights granted by other parts of the Code."). Statutes with related common law causes of action should have a private right of action. *See Crusader Ins. Co. v. Scottsdale Ins. Co.* 54 Cal. App. 4th 121, 126-133 (1997). §1798.85 is merely defining a preexisting common law duty (n.14, *infra*), thus, an implied private right of action is

appropriate. *Jacobellis*, 120 F.3d at 175 (finding an implied a private right of action because it was "merely defin[ing] a specific duty and responsibility in addition to those existing at common law."). Summary judgment was thus inappropriate.

V. Ruiz Sufficiently Met the Requirements for Negligence To Defeat Summary Judgment

Defendants' conduct in utterly failing to follow industry data security standards was negligent. Ruiz has proven the required elements under California law: (1) duty,[13] (2) breach, [14] (3) causation,[15] and (4) damages. [16]

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[13] Defendants' duty, to properly safeguard the PII, arose from industry guidelines promulgated by, *inter alia*, the FTC, California statutes, (ER 1205-07), as well as the common law duty to protect the privacy of (actual or prospective) employees' PII. § II.A, *supra*

[14] Defendants breached their duty by failing to follow industry standards which allowed the theft of PII. *Cf.* ER 1217 *with Amicus* Br. at 3 ("companies acted in an exemplary manner *after* a criminal stole two laptops computers….)(emphasis added). That Defendants failed to refute the breach of duty undermines *Amicus'* arguments. This case is *not* about a "good corporate citizen" which has conducted itself in an "exemplary manner" and still were "unfortunate enough to have data stolen." *Cf. Amicus* Br. at 2-3, 14. This is a case where Defendants have tacitly admitted to having failed the applicants and made the theft of the PII possible.

[15] Ruiz testified that, but for Defendants' breach of duty, he would not have suffered the injury and harm or incurred the claimed damages. ER 797, 1217.

[16] Despite the standard for negligence, Defendants focused their argument below on "damage." ER 859-64. The error has its roots in the conflation of injury, harm, and damages—an error perpetuated by the lower court. *See, e.g.,* ER 16 (discussing damages in context of injury); *id.* (mixing harm and damage); *Amicus* Br. at 5, 12 (mixing injury and harm). This confusion is

See, *e.g.*, *Carrera v. Maurice J. Sopp & Son*, 177 Cal. App. 4th 366, 377 (2009). Duty, breach and causation were undisputed below (and here) and hence are waived. ER 859-64; *see, e.g., Silvas*, 514 F.3d at 1007. Instead, Defendants disputed whether Ruiz's damages theory is recognized under California law and, if so, whether it was sufficiently stated. However, damages are different from injury (at the core of the lower court's ruling). Regardless, Ruiz proved both. Ruiz seeks to hold Defendants accountable[17] for their negligent conduct and to deter future negligence, which could result in further exposure of PII.[18] Ruiz has shown a triable case of negligence.

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further compounded by citations to cases that either address concepts other than the one at issue or those that also confuse these three concepts. To continue clarification, Ruiz discusses the decisions in the accurate context despite the incorrect use by Defendants or courts.

[17] *Amicus* accuses Ruiz of placing the "specter of strict liability" over companies. *Amicus* Br. at 10. That is not so. Strict liability is only allowed in California in the context of animals, products liability, and ultra-hazardous activities. *See Drake v. Dean,* 15 Cal. App. 4th 915, 921 (1993); *Anderson v. Owens-Corning Fiberglas Corp*., 810 P.2d 549, 552-53 (Cal. 1991); *Pierce v. Pacific Gas & Elec. Co*., 166 Cal. App. 3d 68, 85 (1985). Plaintiff throughout this case has not sought to expand the concept of strict liability to include data breaches, but rather has sought to hold Defendants liable under a traditional theory of negligence. *See Drake*, 15 Cal. App. 4th at 923 (stating a cause of action of strict liability is separate from a cause of action for negligence); ER 1216-17.

[18] *See, e.g.*, Restatement (Second) of Torts §901(c) (1979) (one purpose of damages in tort is to punish wrongdoers and to deter wrongful conduct).

A. Ruiz Has Alleged An Injury

Under California law, "injury" is "the invasion of any legally protected interest of another." *Jordache Enter., Inc. v. Brobeck, Phleger & Harrison*, 56 Cal. Rptr. 2d 661, 663, 667 (Cal. App. 2d Dist. 1996) (*Jordache*)), *rev'd on other grounds*, 18 Cal. 4th 739 (1998) (*Jordache II*). Ruiz showed a cognizable injury from the loss of privacy of his PII, having his PII exposed, and suffering an increased risk of identity theft. This satisfies injury under California law.

The district court itself found that Ruiz's increased risk of identity theft alone establishes "injury-in-fact" under Article III. *See* § I, *supra*. The threshold for injury-in-fact under Article III is higher than the standard to show simple injury under common law. Thus, the district court erred in finding that Ruiz had standing but not suffered injury. *Compare Lujan,* 504 U.S. at 560 (injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'") *with Jordache*, 56 Cal. Rptr. 2d at 667 ("injury" is "the invasion of any legally protected interest."); *see*, *e.g., Sierra Club v. Morton,* 405 U.S. 727, 734 (1972) ("the 'injury in fact' test requires more than an injury to a cognizable interest"). As such, the district court's ruling that Ruiz had suffered an injury-in-fact also should have established injury on the underlying claims.

B. Ruiz Showed A Triable Issue of Harm

"Harm" is "the existence of loss or detriment in fact *of any kind* to a person resulting from *any cause*," Restatement (Second) of Torts, § 7 (1)-(3), cmts. a-b (1965), and occurs when:

> the *detriment resulting to him from acts or conditions which impair*… his *pecuniary advantage*, his *intangible rights*, … or his *other legally recognized interests*.

Restatement (Second) or Torts §7, cmt. b (emphasis added); *Jordache*, *supra.* Plaintiff has met this definition of harm.

In this case, Ruiz and the putative class have suffered a detriment which has impaired their pecuniary advantage in that they have lost an opportunity to secure their PII because of Defendants' breach. *See generally*, Restatement (Second) Torts, §7 cmt. b (citing *Haynam v. Laclede Elec. Coop., Inc*., 889 S.W.2d 148, 152 (Mo. App. 1994)(negligent failure to provide a service letter resulted in lost opportunity to secure worthwhile employment). This loss of the pecuniary advantage is alleged as damages herein. *Accord* Restatement (Second) Torts §§910, 917. Ruiz and the putative class also have lost a pecuniary advantage as measured by the intrinsic value of their PII. *See* § III.A.1, *supra*; *cf.* Restatement (Second) Torts §911, cmt. b, e *with* n. 5,9,20 *supra* (identity has discernable intrinsic and market value). Moreover, Plaintiff has an intangible property right in his PII which has been impaired by the breach of duty and consequent

theft. *See* § III.A.1, *supra*.[19] Ruiz alleged that he suffered present appreciable harm via a detrimental change in condition to his intangible property right when his PII was physically lost and he was no longer able to control the access to his PII. Ruiz Br. at 29. Additionally, Putative class members had instances of identity theft. *Id.* Finally, Ruiz and the putative class have also suffered a detriment to their "other legally protected interests" by virtue of their loss of privacy. *See* § II.A, *supra*; *see also* Restatement (Second) Torts, §1 (1965)(defining interest). Plaintiff and the putative Class have lost control of their PII and/or suffered actual misuse of PII resulting from Defendants' actions. This is an appreciable and present harm as it demonstrates an impairment to their pecuniary advantage, their intangible property rights and legally recognized right to privacy. This is sufficient under California law. Ruiz Br. 29-30; *see also Davies v. Krasna*, 14 Cal.3d 502 (1975)(appreciable harm occurred upon exposure of confidential information); *Federal Trade Comm'n v. Neovi, Inc*., 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008)(harm need not be monetary).

Defendants' citation to dismissal opinions for lack of "harm" all misapply the Restatement definition of harm. *See, e.g.,* Gap Br. 37. For

[19] In fact, Symantec Corporation's Norton brand has created a software application that values a person's identity on the black market. Risk Assessment Tool, Norton 2010, http://everyclickmatters.com/victim/assessment-tool.html.

example, *Key*, cited for "harm", was actually analyzing "injury-in-fact". *Key*, 454 F.Supp.2d at 685. Plaintiff adequately pled and proved harm as defined by the Restatement and adopted by California law.

C. Time and Money Spent in Mitigation Supports Negligence

Given that Ruiz's mitigation efforts prove evidence of his damages allegations, Defendants' arguments against injury or harm in this context are unhelpful. Gap Br. 31-34. Confusion of these concepts is further compounded by Defendants' citations to cases that either address concepts other than damages or that they, themselves, misstate three concepts.

"Damages", the final element of the negligence claim, refers to the "sum of money[20] awarded to a person injured by the tort of another." Restatement (Second) of Torts § 12A (1965); *id.* at § 902. Since injury can occur without harm, so too can nominal damages be incurred without harm. *Id.*; *see also Chao*, 540 U.S. at 621 (citing Restatement (Second) of Torts §621).

The damages Ruiz seeks are the classic type properly sought in negligence claims: a plaintiff "whose legally protected interests have been endangered by the tortious conduct of another" and/or "who has already suffered injury by the tort of another is entitled to recover for expenditures

[20] Defendants note that damage is often equated to injury yet distinct from the concept of damage**s** but nevertheless continue to use those terms interchangeably. Gap Br. at 58-59.

reasonably made in a reasonable effort to avert" threatened or further harm.[21] Restatement (Second) of Torts § 919 (1979). Courts have held that time and money spent monitoring bank accounts, requesting credit reports, purchasing monitoring services, and attempting to mitigate/prevent harm constitutes damages. Ruiz Br. 33; *see also Jones v. Commerce Bancorp, Inc.*, No. 06 Civ. 835(HB), 2006 WL 1409492 at*2 (S.D.N.Y. May 23, 2006); *Kuhn v. Capital One Fin. Corp.*, No. 05-P-810, 2006 WL 3007931, at *3 (Mass App. Ct. Oct. 23, 2006); *Davies,* 14 Cal. 3d at 515; *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 825 P.2d 714, 720 (Wash. Ct. App. 1992); *Fanin v. U.S. Dept. of Veterans Affairs*, 572 F.3d 868, 873 (11th Cir. 2009); *Jordan v. Equifax Info. Serv., LLC*, 410 F. Supp. 2d 1349, 1356 (N.D. Ga. 2006). Ruiz has incurred compensable and cognizable damages by spending time and money monitoring his credit. ER 605-06, 1044-60. Indeed, Defendants specifically advised Ruiz and members of the putative class to take such timely and costly actions. ER 220. Having done so, his time and expense should be compensable.

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[21] Defendants confuse the Restatement's definition by arguing that mitigation is aimed at reducing *damages*. Gap Br. at 60. But the Restatement is clear. The goal is to avert further *harm*. *Accord Simon T. v. Miller*, No. B185299, 2006 WL 2556217, *7 (Cal. App. Sept. 6, 2006)("injured party entitled to recover…sums expended to prevent or mitigate harm to any legally protected interest.").

D. Ruiz's Experts Support His Right to Trial

Stollenwerk II outlined the types of expert testimony necessary to survive summary judgment in data breach litigation. 254 Fed. Appx. at 666; Ruiz Br. 32-33 (discussing tests outlined in *Stollenwerk I*, *Stollenwerk II*, and *Caudle*). There the expert failed to quantify the risk or show why credit monitoring was necessary. *Stollenwerk II*, 254 Fed. Appx. at 666-67. Here, regardless of Defendants' rhetoric, Ruiz and his expert provided testimony and evidence meeting the *Stollenwerk* and the *Caudle* factors. *See* Ruiz Br. at 34 (summarizing the expert proof); ER 682.

It is undisputed that: (a) PII was electronically stored and stolen; (b) SSNs are sensitive personal information; and (c) the theft of nearly 800,000 SSNs is a significant exposure of same. The laptop was not secured, as required, and the personal data was not encrypted. ER 380-81. Dr. Ponemon opined that the thief targeted the data. ER 693-95. Van Dyke outlined the rational basis for concern of misuse and identity theft *and* quantified the significant increased risk as four-to-one that a data breach will lead to actual fraud victimization.[22] ER 682. Moreover, demonstrating why monitoring

[22] *Amicus* seeks to attack the weight of this expert testimony by relying on a study that the lower court implicitly found unreliable and unhelpful. *Cf.* ER 35 with *Amicus* Br. at 13-14, n.4. *Amicus* is not permitted to introduce additional evidence – especially one specifically rejected by the lower court. *See Wiggins Bros. Inc. v. Department of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981).

was necessary, Ruiz presented evidence why he, and many putative class members, were prevented from accepting the free credit monitoring offered by Gap. ER 618, 832, 1055-60. Finally, Van Dyke provided a detailed analysis of how Gap's free services offered "inferior prevention or detection of potential fraud." ER 685. In other words, what was lacking in *Stollenwerk* and *Caudle* exists in the record below. Thus, summary judgment was inappropriate.

Defendants minimize the record by arguing factual inaccuracies[23] and labeling the experts' testimony as "generic statistics . . . based on speculation." Gap Br. 35. As Defendants' own citations show, differences in factual interpretations, and the weighing of expert testimony, are jury questions. Gap Br. at 35 (citing *Viterbo v. Dow Chem. Co*., 826 F.2d 420 (5th Cir. 1987) (holding "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."); *see also Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 596 (1993)("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of

[23] Defendants have self-certified an absence of identity theft by the class. That is an issue genuinely in dispute. Ruiz Br. 17. This self-certification, they claim, undermines Dr. Ponemon's risk assessment and Van Dyke's foundation. Gap Br. 35. Defendants made these same arguments below which were rejected. RSER 54-61; ER 6.

countering expert testimony); Ruiz Br. at 48-49. Below, Defendants unsuccessfully tried to strike Ruiz's expert testimony, ER 6, and since they failed to cross-appeal that decision they cannot now augment their rights by seeking the rejection of Ruiz's experts through back-door methods. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (2002).

Even if their challenge is appropriate, Ruiz amply demonstrated (and the district court found) that both experts have the requisite qualifications and foundations for their relevant and reliable reports. ER 6; RSER 31-45. While Defendants attack the weight of the experts' reports, such weighing is only proper at trial after cross examination of the expert. *Cf.* Gap Br at 35 *with Bieghler v. Kleppe*, 633 F.2d 531, 534 (9th Cir. 1980). Despite the law and record, Defendants seek the ratification of the district court's inappropriate findings of fact and the inappropriate weighing of expert testimony against hearsay.[24] Ruiz Br. 48. Their efforts should be rejected.

E. Credit Monitoring Is a Viable Theory Under California Law

The *Stollenwerk* cases and *Caudle*, analyzing credit monitoring to medical monitoring, outlined the necessary elements for a credit monitoring remedy. *Cf.* Ruiz Br. 32-33 *with* Gap Br. 36 ("no court has ever adopted

[24] Plaintiff challenged the district court's ruling as impermissibly weighing expert testimony against hearsay. Ruiz Br. at 48. Defendants only denied that such weighing happened. They do not challenge that White's testimony regarding the investigation reports was hearsay. Gap Br. at 35, n.11. Thus, the issue of hearsay is conceded.

such an approach."). As noted above, Ruiz met the tests set out in those cases.[25] *See* § V.D, *supra*; Ruiz Br. 34. That *other* plaintiffs in *other* cases with *other* records have not met their obligation[26] does not mean that Ruiz has not met his burden here.

When the exposure dictates, "specific monitoring beyond that an individual should pursue as a matter of general good sense and foresight", California law permits such. *See Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 825 (Cal. 1993)(citing *Miranda v. Shell Oil Co.*, 17 Cal. App. 4th 1651, 1655 (1993)). Here, as Van Dyke discussed, the additional step of monitoring of one's credit and bank activity in the face of a targeted data theft *is* good sense and foresight. ER 685-87. Defendants, however, claim that *Potter* and *Miranda* do not aid Ruiz here because "public policy concerns are not implicated by the circumstances of this case." Gap Br. at 37. Respectfully, this completely ignores the importance of secure PII to individuals, businesses and the economy as a whole.

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[25] *Stollenwerk II*, did not hold that credit monitoring was invalid under Arizona law. *Cf.* Gap. Br. at 41, n.14.

[26] Given that the *Melancon* PII accidentally fell off a truck, there were no allegations of misuse or that the data was targeted. *Melancon v. Louisiana Office of Student Fin. Assistance*, 567 F. Supp. 2d 873, 876 (E.D. La. 2008). Hence there was no "exposure" and the plaintiff could not develop the record satisfying *Stollenwerk* or *Caudle*. *Accord Giordano v. Wachovia Secs., LLC*, No. 06-476 (JBS), 2006 WL 2177036., at *1 (D.N.J. July 31, 2006) (USPS package lost); *Kahle v. Litton Loan Serv., LP*, 486 F. Supp. 2d 705, 712 (S.D. Ohio 2007) (failure to allege data targeted).

1. California Public Policy Supports Credit Monitoring

Data breaches and identity theft have a crippling effect on individuals and detrimentally impact the entire economy. *See* Soma, *supra*, at *3-4, 21, 44-45; ER 221, 264-67. In the face of these realities, Defendants boldly argue that California only values the public *medical* health interest and not the public *financial* health. *Cf.* Gap Br. at 38. They are wrong. *See Blum v. Fleishhacker*, 21 F. Supp. 527, 532 (N.D. Cal. 1937)(public policy of promoting the feeling of "quiet security without which the transactions of the business world cannot be successfully carried on."); *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 82 (2004)(right to privacy is "a fundamental principle of public policy" against private employers); *Soma*, at *45-47 (consumer confidence in the security of PII is essential to current business climate); *see also* § IV.A, *supra* (discussing legislative purpose behind §1798.85).

These public *financial* health concerns are supported by *Miranda* and *Potter*. 17 Cal. App. 4th at 1660 (public policy found if: (1) possible economic savings realized by the early detection; (2) deterrence; and (3) elemental justice); *Potter*, 6 Cal. 4th at 1008 (same). Ruiz demonstrated (and defendants did not refute)[27] how these important public interests

[27] Defendants also failed to refute that California Civil Code §3333, applies outside the health arena, and supports credit monitoring. Ruiz Br. 37; Restatement (Second) of Torts §§919, 924 (1979). Each applicant's desire

support credit monitoring under California law. *Cf.* Ruiz Br. 36 *with* Gap Br. at 38 n.12. California's public policy of protecting the financial stability and fiscal integrity of individuals and the economy at large is promoted by credit monitoring here.

2. *Potter* Supports Credit Monitoring

Potter held that a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances. *Potter*, 6 Cal. 4th at 1004-05. Similarly, a claim for credit monitoring seeks to recover costs of future periodic credit examinations to facilitate the early detection and treatment of identity theft caused by plaintiff's exposure to data thieves. To require actual identity theft before awarding monitoring, as the district court did, places the cart before the horse. *Cf.* ER 13. Defendants have not challenged this claimed error, but by claiming that *Potter* would not support monitoring outside cancer cases, they ignore *Miranda*'s application of Civil Code §3333 to non-medical cases.[28] *See* n.28, *supra*; *Potter*, 6 Cal. 4th at 1006.

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to avoid further harm, the obligation to expend funds in the present and future to address the exposure, and monitoring, are different manifestations of the harm brought about by the exposure. *See Miranda,* at 1658-59.

[28] Putting aside that *Potter* did not limit its ruling to cancer, Defendants only respond to cases approving monitoring where no present medical diagnosis existed by arguing that these cases were still not for financial

Potter recognized that a defendant's conduct can create the need for future monitoring (even in the absence of physical injury) without creating a new tort but simply accepting damages when liability is established under traditional tort theories of recovery. *Potter*, 6 Cal. 4th at 1007. Allowing compensation for monitoring costs does not require courts to speculate about the probability of future injury because it merely requires courts to ascertain the probability that the far less costly remedy of supervision is appropriate. *Id.* at 1008. *Potter* explicitly noted that medical monitoring should be recognized because it bridges the gap between science and the law. *See id.* Similarly, credit monitoring bridges the gap between technology and the law.

Aas does not dictate otherwise as there plaintiff sought to recover the cost to repair construction defects that has not yet damaged other property. *Aas v. Superior Court*, 24 Cal. 4th 627, 635 (2000). To analogize the *Aas* facts, the construction defect is Defendants' security failures and the other property damage (injury) is the loss of privacy, exposure of PII, and increased risk of identity theft. Unlike *Aas* where property damage had not yet occurred, here, the damage (injury) has already occurred. §V.A, *supra*. Moreover, as Ruiz pointed out, and Defendants ignored, the *Aas* opinion

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monitoring. *Cf.* Ruiz Br. 35*with* Gap Br. at 38, n.12; 39 at 13. Monitoring in California is not for cancer alone and an extension to credit monitoring is supported by law and public policy.

relied primarily on the economic loss rule, *id.* at 636, neither applicable here[29] nor raised below and is thus waived. *See Silvas*, 514 F.3d at 1007.

Finally, Defendants' claim that *Aas* "refused to extend *Potter* to other cases involving future, speculative harm." Gap. Br. at 38. This assertion is wrong[30] for two reasons. One, Ruiz has pled a present actual harm. § V.B, *supra*. Two, Defendants' quoted language from *Aas*'s refusal to extend dicta in *Potter* to recognize a court's "broad, general role in supervising the disbursement of tort recoveries", i.e. *court-supervised* medical monitoring, and does not negate *private* credit monitoring sought here. *Aas*, 24 Cal. 4th at 652 n.16. *Aas* noted, however, that a negligent performance of a contractual obligation, like here, resulting in damage to the property or economic interests of a person (whether or not in privity), like here, supports

[29] The economic loss rule is concerned with drawing a distinction between tort and warranty law and applies when plaintiff is seeking the loss of the benefit of the bargain through tort. *Aas*, 24 Cal. 4th at 639; *North Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 777, n.8 (1997). Defendants and *Amicus* are wrong and Ruiz has not brought suit for strict liability seeking his lost bargain while evading a warranty claim by filing in tort. *Cf. Amicus* at 4; Gap Br. at 2. His is a simple claim for negligence.

[30] So too is *San Diego Gas & Electric Co. v. Superior Court*, a poor fit here. 92 P.2d 669, 694 (Cal. 1996)(health effects of electromagnetic radiation). Research into health effects was incomplete and under *Potter*, plaintiff there could not allege that reliable medical or scientific opinion supported risk of cancer. *Id.* Ruiz, by contrast, provided reliable expert opinion of the significant risk of future identity theft.

recovery if the defendant was under a duty, like here, to protect those interests. *Aas*, 24 Cal. 4th at 644.

3. Ruiz Satisfied *Potter*

Potter held that costs of medical monitoring are compensable items of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, *Potter* outlined five factors which Ruiz has met. *Cf. Potter*, 6 Cal. 4th at 1009 with Ruiz Br. at 39-40. Under *Potter*, it is for the jury to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring. *Id.* A jury should have made a similar conclusion here.

Defendants ridicule Ruiz when he states that this multi-factor test cannot mechanically be applied outside of the medical arena. Gap. Br. at 40. But Ruiz does so not because of difficulty in satisfying the *Potter* factors but because the factors, as-is, are an ill-fit to *credit* monitoring and must be modified. For example, the data thieves here did not use toxic chemicals to gain access to Vangent's offices. That is why *Stollenwerk* and *Caudle* slightly modified medical monitoring elements to suggest parameters for

credit monitoring. §V.D, *supra*. In any event, Ruiz's evidence and expert testimony meet[31] the *Potter* test and he has sufficiently alleged and proven a triable issue of fact. Ruiz Br. at 40.

As a final effort against credit monitoring, Defendants inappropriately attack select findings of Ruiz's experts taken out of context. *Cf.* Gap Br. 41 *with* Ruiz Br 7, 10, 48. They attack their weight, import, and application and seek to extrapolate certain conclusions based on these reports. These arguments should be made to the jury and not this Court. § V.D., *supra*. Defendants' self-serving view of the evidence *creates*, and does not *defeat*, the existence of triable issues. That Defendants opted to re-cast their ad hoc response to hundreds of class members claiming identity theft into an "elaborate tracking system" does not negate the evidence and testimony proffered by Ruiz to the contrary. *Cf.* Gap Br. at 6 *with* Ruiz Br. at 47. That Defendants filed a declaration of Gap's Director of Loss Prevention *after* the close of discovery to provide *new* testimony also does not render the

[31] A four-to-one increase in risk is not an "unquantified risk" as Defendants claim. Gap. Br. at 40. Moreover, *Potter* did not admonish against the "extraordinary remedy of monitoring costs" but instead *rejected* amicus curiae's fears regarding future litigation should monitoring costs be permitted. *Cf. id*. *with Potter*, 863 P.2d at 825 and *Toxic Injuries Corp. v. Safety-Kleen Corp.*, 57 F.Supp.2d 947, 953 (C.D. Cal. 1999)(recovery of monitoring damages is not contingent upon a showing of a present injury or upon proof that injury is reasonably certain to occur in the future but merely a showing that the probability that the far less costly remedy of medical supervision is appropriate).

declaration "unrefuted" since Plaintiff's first opportunity to refute such would have been at trial. *Cf.* Gap Br. at 34, n.10 *with* ER 393, 571, 674; Ruiz Br. 45-47. That Defendants opted to minimize and ignore evidence of damages Ruiz presented with legal rhetoric underscores the need for a jury's review. *Cf.* Gap Br. at 33-34, 41 *with* Ruiz Br. at 47.

F. Defendants' Authorities Are Unhelpful

Ruiz presented expert opinion stating that the theft at issue was substantially likely for the data not the hardware. ER 693-95; Ruiz Br. 34. He presented expert opinion regarding the quantified and substantial increase in risk. ER 682-87. Finally, he provided evidence of actual identity theft suffered by the Class. ER 393, 571, 674. Defendants ignore this evidence and self-servingly seek to paint the record with the broad brush of other data breach cases decided under different laws, based on different pleadings, using different facts, and confusing the different concepts.

The facts of these other data breach cases, however, lack *any* allegations or evidence that they involved anything more than mere property thefts. *See Kahle v. Litton Loan Serv. LP*, 486 F.Supp.2d 705 at 706 (S.D. Ohio 2007) (six unmarked hard drives and $60,000 in equipment stolen); *Caudle,* 580 F.Supp.2d at 282 (failed to show laptops stolen for data); *Melancon*, 567 F.Supp.2d at 874-75 (E.D. La. 2008)(no evidence that PII was compromised or accessed); *Stollenwerk I*, 2005 WL 2465906, at *4 (D.

Ariz. Sept. 6, 2005) (*Stollenwerk I*), *aff'd*, *Stollenwerk II*, 254 Fed. Appx. At 666 (9th Cir. 2007)(a range of hardware stolen); *Shafran v. Harley-Davidson, Inc.*, No. 07-01365, 2008 WL 763177 (S.D.N.Y. Mar. 20, 2008)(laptop merely misplaced). Here, however, Ruiz proved data theft and the loss of his SSN.

A second set of cases involved a failure to plead the loss of confidential PII. *Willey v. J.P. Morgan Chase, N.A.*, No. 09-civ-1397, 2009 WL 1938987, at *10 (S.D.N.Y. July 7, 2009)(PII not involved in data theft); *McLoughlin v. People's United Bank, Inc.*, No. 3:08-cv-00944, 2009 WL 2843269, at *1 (D. Conn. Aug. 31, 2009) (unclear whether back-up tapes were stolen or misplaced); *Guin v. Brazos Higher Educ. Serv. Corp.*, No. Civ. 05-668, 2006 WL 288483, at *5 (D. Minn. Feb. 7, 2006)(no evidence that PII was on stolen laptop); *Shafran,* at *1 (laptop did not contain SSNs and pleading lacked allegations of misuse).

Third, cases where credit or debit card numbers were disclosed are unhelpful as these numbers can be easily changed thereby nullifying the risk. *See Aliano v. Texas Roadhouse Holdings*, No.07-4108, 2008 WL 5397510, *1 (N.D. Ill. Dec. 23, 2008)(failure to truncate credit card numbers);[32] *In re*

[32] *Aliano* was based on a specific requirement of "actual damages" under FACTA, *id.* at *2, not binding on negligence claims. However, "actual damages" is broad enough to "include some disclosure of private information or some sort of 'negative action' against the plaintiff." *Id.* at *3. The record here supports this definition of "actual damages" and *support*

Hannaford Bros. Co. Customer Data Sec. Breach Litig., 613 F. Supp. 2d 108, 132 (D. Me. 2009)(only debit and credit card information stolen, and plaintiffs canceled their accounts and created new ones).[33] As Van Dyke stated, the results of compromised SSNs, as those alleged here, is more serious than credit/debit card loss. ER 683-84, 1208.

Moreover, Defendants emphasize *Pisciotta*, which was decided under Indiana law,[34] which unlike California law, contains no framework[35] for medical monitoring upon which a credit monitoring remedy could rest. *Pisciotta*, 499 F.3d at 637. Additionally, reliance on *Pisciotta* is mistaken as

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Ruiz's claim as there has been "some disclosure of private information" here.

[33] On reconsideration, this opinion was impliedly overruled when the issue of time and money spent in mitigation was certified to the Maine Supreme Court. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, MDL 1954, 2009 WL 3193158, at *3 (D. Me. Oct. 5, 2009).

[34] Decided under Indiana law, the *Shames-Yeakel* decision raises some doubt on *Pisciotta*'s analysis of the same law years earlier and places doubt on *Forbes*' analysis of liability for institutions to whom PII is entrusted. *Shames-Yeakel v. Citizens Fin. Bank*, No. 07-c-5387, 2009 U.S. Dist. LEXIS 75093, *37-38 (N.D. Ill. Aug. 21, 2009).

[35] Reliance on other opinions from jurisdictions where monitoring is unavailable are similarly unavailing. *See Hendricks v. DSW*, 444 F.Supp.2d 775, 780 (W.D. Mich. 2006) (monitoring unavailable under Michigan law); *Ponder v. Pfizer*, 522 F. Supp. 2d 793, 798 (M.D. La. 2007) (monitoring unavailable under Louisiana civil code without physical injury); *Belle Chasse Auto. Care, Inc. v. Advanced Auto Parts, Inc.*, No. 08-1568, 2009 WL 799760, at *3 (E.D. La. Mar. 24, 2009) (same). *Forbes* is further impacted by Minnesota authority that limited a plaintiff's recovery for loss of time in terms of earning capacity or wages. *Id.* at 1020-21.

it was based on a failure in the pleadings not found here, *i.e*. the plaintiffs failed to allege that they *or* class members suffered identity theft and only alleged that they suffered *potential* economic damages. *Cf. id.* at 632; *see also Forbes v. Wells Fargo Bank*, 420 F. Supp. 2d 1018, 1020 (D. Minn. 2006) (no allegation or evidence[36] of actual misuse of stolen PII); *accord Aliano*, 2008 WL 5397510, at *3 ("information security law claims are not viable absent actual theft of private information"). Ruiz provided evidence of *actual and present* economic damages to himself and identity theft to class members. ER 383, 571, 674; *accord Stephens v. Omni Ins. Co.*, 159 P.3d 10, 25 (Wash. Ct. App. 2007)("time and expense" of investigating possible impact to credit rating sufficient for injury). Evidence here shows actual misuse of class member[37] PII. ER 693-95; *see also* Ruiz Br. 11.

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[36] Many opinions failed to discuss any evidence and thus seemingly were rendered without formal discovery. *Kahle*, 486 F.Supp.2d at 705 (summary judgment filed upon removal); *Melancon*, 567 F. Supp. 2d at 873 (summary judgment filed immediately upon consolidation); *Key*, 454 F.Supp.2d at 685 (upon removal); *Giordano*, 2007 WL 2177036 at *1 (same); *Forbes*, 420 F. Supp. 2d at 1020-21. This further undermines the logic of their application here.

[37] *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) is unhelpful here as standing was specifically found by the district court and injury adequate pled and proven by Ruiz. *See* § 1, *supra*. Moreover, standing opinions have limited utility in determining if a genuine issue of material fact exists. *Cf. Kahle*, 486 F.Supp.2d at 711-12 *with* Gap Br. at 37 (citing *Key* and *Giordano* which were dismissed for lack of standing).

Finally, Defendants argue that the threat of future injuries[38] cannot support a negligence claim under California law. Gap. Br. 24-25. First, Plaintiff has pled a present injury. Two, Defendants' opinions concern the "economic loss rule," which is inapplicable here.[39] §V.E.2, *supra*. Accordingly, summary judgment on the negligence claim should be reversed.

VI. Ruiz Has Established A Breach Of Third-Party Beneficiary Contract Claim

When a contract is breached a plaintiff is entitled to damages from the mere breach of the contract and can receive additional damages flowing from injuries beyond the mere breach. *See* Cal. Civ. Code §§ 3300, 3360; Restatement (Second) of Contracts § 346 (1)-(2), cmt. a-b (1981). For damages beyond nominal, plaintiff must show: (1) a contract; (2) plaintiffs performance or excuse for nonperformance;[40] (3) defendant's breach; and

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[38] Moreover, unlike here, *Forbes* had no present injury to support a damages theory of monitoring. *Cf.* §V.D., *supra* (expert quantifying future risk) *with Forbes*, 420 F. Supp. 2d at 1021 (failure to show reasonably certain future injury); and *cf.* ER 380-81 (data stolen not encrypted or otherwise protected) *with Kahle*, at 707 (stolen hard drives had several layers of security making access impossible).

[39] Even if the Court were to find any products liability decisions instructive, California law allows a plaintiff to recover for the fear of future injuries. *See Kahn v. Shiley, Inc*., 217 Cal. App. 3d 848, 856 (4th Dist. 1990).

[40] As a third-party beneficiary, Ruiz had no performance obligation under the contract. *See Schumm v. Berg,* 231 P.2d 39 (Cal. 1951).

(4) injury/damage to plaintiff resulting therefrom. *See Troyk*, 171 Cal. App. 4th at 1352. In this case, Ruiz has established triable issues of fact on all of the elements of his breach of third party beneficiary contract claim, including any variation of the fourth element.[41]

A. Ruiz Is A Third Party Beneficiary Of The Contract

A plaintiff can prove that they are a third party beneficiary by showing that there is a contract that benefits them. *See Gulf Ins. Co. v. Hi-Voltage Wire Works, Inc.*, 388 F.Supp.2d 1134, 1136-37 (E.D. Cal. 2005). A third-party beneficiary, whether or not expressly named, can enforce a contract intended for its benefit. Cal. Civ. Code § 1559. Intent to benefit can be demonstrated by showing the plaintiff is one of a class for whose benefit the contract was expressly made. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1192-94 (2008); *Prouty v. Gores Tech. Group*, 121 Cal. App. 4th 1225, 1232-37 (2004).

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[41] California courts intermittently use injury, damage, and damages as the fourth element of a contract claim. *See Troyk*, 171 Cal. App. 4th at 1352; *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006); *Silicon Image, Inc. v. Analogix Semiconductor*, 642 F.Supp.2d 957, 964 (N.D. Cal. 2008); Cal. Civ. Jury Instruction 10.92 (2009). Notably, the jury instructions, and its authority, identify the last element as harm, damage, and damages. *See* Calif. C.J.I., §303. This mixed use is in error as injury and damage, while they have similar meanings, are different from harm and damages. *Cf. Troyk*, 171 Cal. App. 4th at 1352. Regardless, Defendants never argue that Plaintiff has filed to plead or prove contract damages. Their focus is on damage (injury) which they intermittently confuse with harm.

Gap entered into an agreement that provided PII for Vangent to analyze. ER 452, 466-72. Vangent expressly agreed to protect PII obtained from Gap. This express agreement's only conceivable purpose was to benefit Ruiz and the putative class. ER 452-53. Neither Defendant gained from agreeing to the term – but Ruiz did. There is a strong analogy between the contract in this case and *Amaral*, as in both cases the parties agreed to a provision which did not benefit either of them, and neither lost anything if the term was breached. *Cf.* 163 Cal. App. 4th at 1192-94.

Defendants' intent to benefit Ruiz and the Class is further evidenced by the parties' reciprocal indemnification agreements involving suits brought by third parties enforcing their legally protected rights—a superfluous right if third parties had no rights under the contract. ER 458-59. Evidence of indemnification, under *Prouty*, supports a third party beneficiary relationship. *Cf.* 121 Cal. App. 4th at 1232-37.

B. Vangent Implicitly Concedes Breach

Vangent has never argued that it did not breach the contract with Gap and as such has waived the issue. *See Silvas*, 514 F.3d at 1007. Nonetheless, Vangent failed to secure Ruiz's personal data according to the technical standards established in the contract and to employ additional commercially reasonable efforts, as required under the contract, to protect Ruiz's PII. *Cf. Amicus* Br. at 2-3 *with* ER 380-81, 453, 489-90. Based on

this record, and the fact that improved security occurred only after the breach, ER 516-518, summary judgment was inappropriate. *Cf. Amicus* Br. at 3 (noting exemplary efforts after breach).

C. The Breach of the Contract Supports Nominal Damages

Ruiz has pled and proven injury from the mere breach of contract. Ruiz Br. 56-57. As codified "[w]hen a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages." *See* Cal. Civ. Code § 3360; *Troyk*, 171 Cal. App. 4th at 1352, n.36. This is because "the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages." *See Sweet v. Johnson*, 337 P.2d 499, 500 (Cal. Ct. App. 1959). Such damages are *presumed* as a matter of law. *See Silicon Image*, 642 F.Supp.2d at 964-65; California C.J.I., §360.

In *Silicon Image*, the court allowed the defendant's counterclaim to go forward to a jury on nominal damages based solely on the existence of a breached contract. *See* 642 F. Supp. 2d at 964-65. Ruiz has established a contract breach. *See supra* VI(B). Under the same reasoning there is no reason why Ruiz should not, at minimum, be allowed to present to a jury that he suffered nominal damages as a result of Vangent's breach.

Vangent's opposition is not persuasive because it fails to adequately distinguish *Ross v. Frank W. Dunne Co.*, 260 P.2d 104 (Cal. Ct. App. 1953),

its progeny, or Cal Civ. Code § 3360 which hold that nominal damages are presumed as a matter of law upon showing a breach. *See Silicon Image*, 642 F.Supp.2d at 964-65. Plaintiff's claim should have reached a jury. *See id.*[42]

D. Ruiz Has Established Injuries Beyond The Mere Breach

Courts deny motions for summary judgment when the plaintiff has suffered injuries beyond the defendant's mere breach. *See Britz Fertilizers, Inc. v. Bayer Corp.*, No. 1:06-CV-00287, 2009 WL 3365851, at *27 (E.D. Cal. Oct. 16, 2009); *California Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785, 793 (Cal. 1955). As a result of the breach Ruiz suffered the injuries of lost privacy, increased risk of identity theft and, exposure of his PII to third parties. ER 682-84; 693-95. Ruiz's injuries are supported by evidence in the record and are beyond future risk or the time and money spent protecting his identity. Defendant's citations rejecting mitigation expenses as cognizable injury missed the point. Gap Br. at 57-58 and n. 20.[43]

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[42] The *Amicus* glosses over the crux of this case: Defendants breached contractual obligations which required the protection of PII. *Compare Amicus Br.* 1-16 *with* ER 380-81, 453, 489-90, 516-18, 1211-13, 1218-19.

[43] Defendants' citations are further distinguishable. *See Forbes*, *supra* §V.G.; *Hendricks*, *supra* §V.G.; *Shafran*, *supra* § V.G.; *Willey*; *supra* § V.G.; *Cherny v. Emigrant Bank*, 604 F. Supp. 2d 605, 609 (S.D.N.Y. 2009) (only alleging improper dissemination of e-mail address and not PII); *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 713-14 (E.D. La. 2009) (data negligently disposed, found, and returned to plaintiff); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 304-05

Moreover, Defendants' reliance on *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000) is also misplaced. There, replacement workers claimed Pirelli breached a contract (promising that replacement workers would not be laid off) when less senior replacement workers other than the plaintiffs were laid off. *Id.* at 1014. While the plaintiffs suffered no injury/damage when other workers were laid off, they did suffer injury/damage months later upon their own layoff. *Id.* at 1015. Here, Ruiz is claiming direct injury, (s*ee* ER 682-84, 693-95), and not indirect injury based on what has happened to non-parties. Since the plaintiffs in *Aguilera* were ultimately found to have suffered their injury when Pirelli actually laid off the plaintiffs (and breached the agreement) this court should find that Ruiz suffered an injury when Vangent breached the agreement intended for Ruiz's benefit.

1. Ruiz Is Entitled To Recover His Mitigation Costs

Since Ruiz has established all elements[44] of a breach, of contract claim, including "injury to plaintiff resulting therefrom," he is entitled to

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(E.D.N.Y. 2005) (information was sold to another business, not stolen by a criminal); *Smith v. Chase Manhattan Bank, USA, N.A.*, 741 N.Y.S.2d 100, 101, 103 (N.Y. App. Div. 2002) (same); *Levine v. DSW Inc.*, No. 586371 (Ohio Ct. C.P. County of Cuyahoga Aug. 19, 2008) (no allegations of stolen SSN).

[44] Defendants mix harm and damage throughout their brief. Plaintiff has already identified his injuries and damages. The harm realized by his

show evidence of damages, including his consequential damages for mitigation. *See Troyk*, 171 Cal. App. 4th at 1352. The measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." *See* Cal. Civ. Code § 3300. Damages that naturally arise from the breach of contract, or which might have been reasonably foreseeable, are compensable. *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal.App.3d 442, 456 (1990). Since the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the losses incident to such effort be carried by the wrongful party. *See id.* at 460-61. This has been a generally accepted principal of contract law since the Restatement (First) of Contracts § 336 cmt. e (1932). *See Walpole v. Prefab Mfg. Co.*, 230 P.2d 36, 46 (Cal. Ct. App. 1951) (a person is entitled to recover all reasonable and necessary expenses incurred by reason of a breached contract); *Stockton Heartwoods, Ltd. v. Bielski*, No. 4:04CV1675, 2006 WL 571983, at *3 (E.D. Mo. Mar. 8, 2006). Defendants never refute that Ruiz's mitigation damages were incurred as a result of the data breach or that these damages were not foreseeable. *See* ER 604-07, 817-18.

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contract claim is his loss of dominion and control of his PII and any actual misuse of his PII. *See also* § V.B., *supra*.

The mitigation damages Ruiz seeks are not new and have been approved by California courts. *See* ER 604-06; *see, e.g., Brandon II*, 277 Cal.Rptr. at 50-51; *see also generally Witriol v. LexisNexis Group*, No. C05-02392 MJJ, 2006 WL 4725713, at *6 (N.D. Cal. Feb. 10, 2006)("the value of the time spent" in seeking to prevent or undo the harm a compensable act of mitigation). While damages in the context of a data breach case may be innovative,[45] Ruiz's request for damages for the time and money spent mitigating his damages as a result of the Defendant's breach are not. Accordingly, summary judgment on Ruiz's third party beneficiary contract claim should be reversed.

CONCLUSION

For the foregoing reasons, the district court's rulings: a) dismissing the privacy claim, b) denying leave to add a UCL claim, c) granting summary judgment on the claims for negligence, violation of § 1798.85, and breach of contract, and d) making inappropriate factual findings, should be reversed.

Dated: December 7, 2009

s/ Rosemary Rivas
Rosemary Rivas

[45] Indeed, Vangent acknowledged in its contract with Gap that "due to the unique nature of Personal Data… there may be no adequate remedy at law for a breach of its obligations … with respect to Personal Data…." ER 454.

CERTIFICATE OF TYPE-VOLUME

I certify that the foregoing brief is proportionately-spaced, has a typeface of 14 points and, according to my word processing software (Microsoft Word), contains 12,252 words. Concurrently filed with this Reply Brief is a Motion To Exceed Type-Volume Limitation Pursuant To Circuit Rule 32-2.

Dated: December 7, 2009

s/ Rosemary Rivas
Rosemary Rivas

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 7, 2009.

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Executed at San Francisco, California on December 7, 2009.

s/ Rosemary Rivas
Rosemary Rivas