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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

ALABAMA DOE, INDIANA DOE, and MISSOURI DOE, Individually, and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

GILEAD SCIENCES, INC.,

Defendant.

Case No.: 20-CIV-03699

DEFENDANT GILEAD SCIENCES, INC.'S NOTICE OF HEARING ON DEMURRER AND DEMURRER TO PLAINTIFFS' CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Filed Concurrently with Notice of Hearing on Motion to Strike and Motion to Strike the Class Allegations; Memorandum of Points and Authorities in Support Thereof*]

Date: December 11, 2020
Time: 9:00 a.m.
Judge: Hon. Danny Chou
Dept.: 22

Complaint Filed: September 1, 2020

NOTICE OF HEARING ON DEMURRER AND DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 11, 2020, at 9:00 a.m., in Department 22 of the above-entitled Court, located at 1050 Mission Road, Courtroom K, South San Francisco, California 94080, before the Honorable Danny Chou, Defendant Gilead Sciences, Inc. ("Gilead") will and hereby does demur to each and every cause of action in Plaintiffs' Class Action Complaint on the ground that each and every cause of action does not state facts sufficient to constitute a cause of action pursuant to California Code of Civil Procedure section 430.10(e).

This demurrer is based on this notice of demurrer and demurrer, the memorandum of points and authorities contained herein; any reply papers that Gilead may file; all pleadings, records, and papers filed in this action; and such further arguments as may be presented to the Court at or prior to the hearing on the demurrer.

Dated: October 20, 2020

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Kenneth L. Chernof*
Kenneth L. Chernof
Angel Tang Nakamura
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Gilead Sciences, Inc. ("Gilead") manufactures pharmaceutical products, including products that can help prevent a person from contracting human immunodeficiency virus ("HIV"). As part of its commitment to those who may be interested in these products, Gilead established a free and voluntary support program, called Advancing Access®, which provides eligible enrollees with information and financial or insurance support to help them access the HIV-prevention products they want and need. Plaintiffs Alabama Doe, Indiana Doe, and Missouri Doe ("Plaintiffs") allege that they obtained prescriptions for Gilead's HIV-prevention products, voluntarily enrolled in the program, and gave Gilead their preferred mailing address for written communications.

This lawsuit concerns a letter relating to this program that Gilead sent to Plaintiffs (the "Mailer"), and more specifically it concerns the return address printed on the envelope, which read "HIV Prevention Team." The gravamen of Plaintiffs' Class Action Complaint ("Complaint" or Compl.") is that the return address language caused them harm or put them at risk of harm because it references HIV prevention.

The Complaint is noteworthy more for what it does not allege than what it does allege. To be sure, the Complaint speculates about what *could* happen to someone *if* certain unidentified third parties noticed and actually viewed the letter, the return address, and the addressee, and then made certain inferences about the connection between the Mailer and the addressee's sexual orientation or sexual practices or their concern about HIV prevention, and then acted adversely to Plaintiffs based on that information. The Complaint further speculates that, if all of the above actually occurred, it might then be possible that someone could lose their job, or home, or access to healthcare. **But, critically, the Plaintiffs do not allege that anything of the sort happened to them.**

Plaintiffs do not allege that even one person noticed or viewed the Mailer and the return address. They do not allege that anyone made any inferences about their sexuality or anything else. They do not allege they have lost their jobs, their homes, or their healthcare. Over six months have passed since the Mailer was sent. If any of these things were going to happen to the Plaintiffs, they

would have happened by now. Plaintiffs' inability to make these essential allegations confirms that they cannot state facts sufficient to establish a cause of action.

This is not the first time Plaintiffs have pursued these claims. This lawsuit reasserts claims that Plaintiffs initially brought, and then abandoned, in federal court. *Alabama Doe, et al., v. Gilead Sciences, Inc.*, No. 3:20-cv-03473 (N.D. Cal. May 21, 2020). Gilead moved to dismiss that complaint on the same grounds contained herein, as well as for lack of standing. Rather than trying to refute Gilead's motion to dismiss, Plaintiffs dismissed their claims in federal court and refiled in this Court. But beyond adding a Missouri plaintiff, Plaintiffs did almost nothing to amend their previous complaint, and the Complaint in this action remains subject to dismissal.

Gilead understands that Plaintiffs object to the return address on the Mailer, and Gilead has discontinued it. Gilead is proud to have long been a dedicated partner in the fight against HIV and AIDS, and it is committed to continuing to do so through its products and programs. But on the facts and circumstances alleged in their Complaint, Plaintiffs have no viable claims, and the applicable statutes and case law require that the Complaint be dismissed.

I. FACTUAL BACKGROUND

Gilead manufactures and markets pharmaceutical products for the prevention and treatment of HIV, including pre-exposure prophylaxis ("PrEP") products, which may reduce the risk of contracting HIV through sexual activity. Compl. ¶¶ 1, 4. Gilead established a free and voluntary support program, known as Advancing Access, pursuant to which eligible enrollees may obtain financial assistance from Gilead for commercial insurance co-pay costs or for the full cost for PrEP medications if uninsured, as well as other insurance-related support.

In April 2020, Gilead mailed the Mailer to Plaintiffs, who had enrolled in the Advancing Access program and provided their mailing address to Gilead. *See id.* ¶¶ 2, 5. The Mailer displayed the Plaintiffs' names and their mailing addresses, a return address of "HIV Prevention Team, 1649 Adrian Road, Burlingame CA 94010," and the tagline "The latest from Gilead Sciences." *Id.* ¶ 7. Plaintiffs allege they received the Mailer. *Id.* ¶¶ 45–47. No Plaintiff alleges that any third person noticed or viewed the Mailer sent to them, and no Plaintiff alleges they suffered any harm.

II. STANDARD OF REVIEW

A demurrer should be sustained when the complaint "does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 430.10(e). A demurrer tests the sufficiency of the pleadings by raising questions of law. *Whitcombe v. Yolo Cty.*, 73 Cal. App. 3d 698, 702 (1977). To survive, a complaint "must contain a statement of facts which, without the aid of other conjectured facts not stated, shows a complete cause of action." *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal. App. 2d 116, 122 (1958).[1] Contentions, deductions, or conclusions of law do not suffice, nor do general assertions of liability that do not sufficiently identify the wrongdoing relied on by the plaintiff. *Am. States Ins. Co. v. Nat'l Fire Ins. Co.*, 202 Cal. App. 4th 692, 696 n.1 (2011); Z*umbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 8 (1972).

Importantly, where statutory remedies are invoked, the facts must be pleaded with particularity. *Carter v. Prime Healthcare Paradise Valley LLC*, 198 Cal. App. 4th 396, 410 (2011).

III. ARGUMENT

A. Plaintiffs' CMIA Claim Should Be Dismissed Because Plaintiffs Fail to Allege any "Release" and "Disclosure"

The Confidentiality of Medical Information Act ("CMIA") provides a private right of action only for plaintiffs who can allege both that (1) the defendant "released" confidential medical information and (2) the defendant violated a substantive provision of the statute. Cal. Civ. Code § 56.36(b) ("[A]n individual may bring an action against a person or entity who has negligently ***released*** confidential information or records concerning him or her ***in violation of this part***."). Under controlling case law, Plaintiffs do not meet either of these requirements.

1. Plaintiffs Do Not Allege a "Release" of Medical Information

As a threshold prerequisite to maintaining any private right of action under the CMIA, Plaintiffs must allege that there has been a "release" of medical information. *See* Cal. Civ. Code § 56.36(b). But they have not done so here. The Court of Appeal has repeatedly held that in order to satisfy the "release" requirement, a plaintiff must allege with particularity that their medical information was ***actually viewed*** by a third party. *E.g.*, *Sutter Health v. Super. Ct.*, 227 Cal. App.

[1] All emphasis added and internal quotation marks and citations omitted unless otherwise noted.

4th 1546, 1557 (2014). This is because Section 56.36(b) (and also Section 56.101, which uses the same "release" language"[2]) only establishes liability when a breach of confidentiality has occurred, and the mere negligent loss or transmission of information—without evidence of actual "viewing"—does not constitute a breach of confidentiality. *Id.* The Court of Appeal has been unambiguous on this point in multiple cases. In *Sutter Health*, the Court stated:

> No breach of confidentiality takes place **until an unauthorized person views the medical information**. It is the medical information, not the physical record (whether in electronic, paper, or other form), that is the focus of the [CMIA].

Id. And in *Regents*, the Court held that there was no actionable loss of confidentiality where plaintiff "cannot allege her information was improperly **viewed or otherwise accessed**" and where she "[could] not allege her medical records were, **in fact, viewed** by an unauthorized individual." *Regents of Univ. of Cal. v. Super. Ct.*, 220 Cal. App. 4th 549, 554, 570 (2013), *as modified on denial of reh'g* (Nov. 13, 2013). As other courts have affirmed in equally pointed language, this means that:

> there can be no liability for negligent release of [confidential information] under sections 56.101 and 56.36 absent allegations, and subsequent[] proof, that the [information] has been **actually viewed** by a third party.

Falkenberg v. Alere Home Monitoring, Inc., No. 13-CV-00341-JST, 2014 WL 5020431, at *3 (N.D. Cal. Oct. 7, 2014); *Eisenhower Med. Ctr. v. Super. Ct.*, 226 Cal. App. 4th 430, 434 n.3 (2014) ("The plaintiff in *Regents* could not maintain her cause of action because she could not allege that her medical records had, **in fact, been viewed** by an unauthorized person."). This holds true whether a plaintiff seeks actual or nominal damages under Section 56.36(b). *See Sutter Health*, 227 Cal. App. 4th at 1559 ("[N]ominal damages are not available if the injury—the confidentiality breach—has not occurred.").

Sutter Health is particularly instructive here. In that case, a thief stole from the defendant an unencrypted computer containing patient medical information. The Court dismissed the CMIA claim because there was no allegation that the thief actually viewed the information on the computer

[2] *See Sutter Health*, 227 Cal. App. 4th at 1558 (same standard applies to both Sections, and failure to plead an actual "viewing" for Section 56.101(a) constitutes a failure to do so for Section 56.36(b)); *Regents*, 220 Cal. App. 4th at 554 (same); *Falkenberg*, 2014 WL 5020431, at *3 (same).

(even though it was in the thief's possession). *Id.* at 1550. Similarly, in *Regents*, a hard drive containing medical information was stolen from the defendant's employee, but because the plaintiff could not plead facts demonstrating that anyone had in fact viewed the stolen information, she failed to allege "the confidential nature" of her medical information was breached as a result of the healthcare provider's negligence, and the Court dismissed her CMIA claim. 220 Cal. App. 4th at 570. In both cases, the Court of Appeal refused to speculate into whether anyone might have viewed information absent specific allegations plausibly demonstrating an "in fact" "viewing."

Plaintiffs fail to plead any facts (much less with the required particularity) to show that a third party actually viewed their information, nor could they do so consistent with *Sutter Health* and the other cases discussed above. Plaintiffs do not even attempt to allege that any third party "in fact viewed" any information about them. To the contrary, they studiously avoid making any such allegation. Alabama Doe alleges only that the Mailer was sent to his workplace, that it "was accessible to anybody who came into the mail room," and that he is "worried and concerned about who may have seen the [Mailer]", Compl. ¶ 45; Indiana Doe alleges only that he "feels vulnerable and is worried about who may have seen the [Mailer]," *id.* ¶ 46; and Missouri Doe alleges only that the Mailer was placed on top of the mailboxes in his apartment building and that he "feels vulnerable and is worried about who may have seen the [Mailer]," *id.* ¶ 47. All three Plaintiffs use the same formulaic "worry" language, but make no allegations regarding an "actual viewing."

Plaintiffs' inability to allege that a single other person viewed the Mailer forecloses their claim. Their speculation about whether an unknown third party "may have seen the mail," *id.* ¶¶ 45–47,[3] is not the same as an "actual viewing." The thieves in *Sutter Health* and *Regents* also might have seen the stolen information. But just as the Court of Appeal declined the invitations in those cases to indulge in plaintiffs' speculations about whether their information could have been viewed, this Court should decline to do so as well. *Am. States*, 202 Cal. App. 4th at 696 n.1 ("[W]e do not assume the truth of contentions, deductions or conclusions of law.").

[3] Plaintiffs' unsupported boilerplate language that Gilead disclosed information to others, Compl. ¶ 10, is contradicted by their own allegations that they know of no one who saw the Mailer.

Plaintiffs do not plead facts sufficient to demonstrate an actual viewing of their information and thus fail to allege the negligent release of medical information under Section 56.36(b), and on this basis alone their CMIA claim must be dismissed.[4]

2. Plaintiffs Do Not Allege a "Disclosure" of Medical Information

Even if Plaintiffs had alleged a "release" of medical information, they would still be required to allege that Gilead had committed a substantive violation of the CMIA. *See* Cal. Civ. Code § 56.36(b) (private claims only for a "violation"). Plaintiffs attempt to meet that requirement by alleging that Gilead acted "in violation of California Civil Code § 56.102." Compl. ¶ 65. Section 56.102 provides that "a pharmaceutical company may not disclose medical information provided to it without first obtaining a valid authorization from the patient." Cal. Civ. Code § 56.102(b). The facts alleged do not as a matter of law constitute a "disclosure" in violation of that provision.

Although "disclosure" is not defined by the CMIA, the Court of Appeal has confirmed it means that the defendant must have *intended to affirmatively disclos*e medical information to an unauthorized third party:

> Section 56.10[5] prohibits disclosure of medical information except when the disclosure is permitted under the [CMIA]. Disclosure is not defined in the statute, but the context and ordinary meaning suggest that **disclosure occurs when the health care provider affirmatively shares medical information with another person or entity**.

[4] The CMIA claim also fails because Plaintiffs have not alleged any facts to show that the Mailer contained "medical information," as required to establish a claim under the CMIA. "[U]nder the CMIA[,] a prohibited release by a health care provider must include more than individually identifiable information but must also include information relating to medical history, mental or physical condition, or treatment of the individual." *Eisenhower*, 226 Cal. App. 4th at 437. The only information about Plaintiffs alleged to be on the outside of the Mailer was Plaintiffs' address. That, without more, does not constitute medical information because the address does not relate to Plaintiffs' "medical history, mental or physical condition, or treatment." Cal. Civ. Code § 56.05(j). Nor does the mere presence of a return address from Gilead's "HIV Prevention Team" describe Plaintiffs' medical history, diagnosis, or care. *See Eisenhower*, 226 Cal. App. 4th at 435 ("[T]he fact that an individual's name is on a list released by doctor X or clinic Y is sufficient to violate the law because then it is assumed that the individual was a patient of the latter at some point" would "not comport with the plain and reasonable meaning of the statute and would render meaningless the clause 'regarding a patient's medical history, mental or physical condition, or treatment.'").

[5] Although *Sutter Health* analyzed the term "disclosure" under California Civil Code Section 56.10, that provision contains nearly identical language as Section 56.102: "A provider of health care, health care service plan, or contractor shall not disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization." Cal. Civ. Code § 56.10(a). Therefore, these and other cases assessing the meaning of "disclosure" under Section 56.10 are directly applicable to Section 56.102.

Sutter Health, 227 Cal. App. 4th at 1555–56. And in *Regents*, the Court agreed that "'disclose' . . . denot[es] in the context of the CMIA . . . an affirmative act of communication." 220 Cal. App. 4th at 564.

Sutter Health is particularly applicable here. It also involved an alleged breach of confidential medical information, one in which "a thief stole a health care provider's computer containing the medical records of about four million patients," thereby potentially exposing it to unauthorized third parties. 227 Cal. App. 4th at 1550. However, since there was no allegation that the defendant **intended** to disclose the information **to the thief**, there could be no CMIA claim:

> Sutter Health did not **intend** to disclose the medical information **to the thief**, so there was no affirmative communicative act by Sutter Health to the thief.

Id. at 1556. Because the plaintiff could allege "no affirmative communicative act" by the defendant to disclose information to the unauthorized third party, the CMIA claim requiring disclosure had to be dismissed as a matter of law. *See id.* at 1555–56.

Plaintiffs do not allege that Gilead intended to disclose any information about Plaintiffs or made any affirmative communicative act to any third party whatsoever. At most, Plaintiffs allege that Gilead sent *to Plaintiff*s a letter relating to a program they were participating in. Thus, that the mailing address deliberately provided *by Plaintiff Alabama Doe*[6] resulted in the letter arriving at his workplace cannot possibly be transmogrified into evidence of an intent *by Gilead* to make any sort of disclosure to third parties at that workplace. *See id.* at 1556. The same is equally true with regard to Indiana Doe and Missouri Doe, neither of whom allege that Gilead *intended to disclose* any confidential medication information about them to third parties. Plaintiffs have therefore not alleged a disclosure in violation of Section 56.102, and their CMIA claim must be dismissed.

3. Plaintiffs Alabama Doe, Indiana Doe, and Missouri Doe Cannot Bring a California CMIA Claim

Although Plaintiffs have failed to plead the essential elements of a CMIA claim, thereby mandating dismissal, their claim must be dismissed for the additional reason that out-of-state

[6] Plaintiff Alabama Doe expressly alleges that he provided Gilead with his workplace address (which Gilead then used) because that would enhance his privacy comfort level. *See* Compl. ¶ 45.

Plaintiffs lack standing to bring a claim under the California CMIA. We are aware of no case where a non-resident has been permitted to seek damages under the CMIA, either individually or as a named plaintiff in a class action. This is likely because the CMIA contains no provision—express or otherwise—indicating it provides a remedy for non-California residents. And the Supreme Court has made clear that "we presume the Legislature did not intend a statute to be operative, with respect to occurrences outside the state, . . .unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history." *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011). The only "occurrence" that could give rise to a CMIA claim here is an actual viewing of the Plaintiffs' medical information by unauthorized persons. Of course, Plaintiffs do not allege that anyone actually viewed their information. But to the extent they speculate about the possibility of that happening, it is only with regard to housemates or coworkers in out-of-state jurisdictions. The alleged violation would thus have occurred beyond the reach of the CMIA.

B. The UCL Claim Should Be Dismissed Because Plaintiffs Lack Standing, They Have Alleged No Violation, and There is Nothing to Restitute or Disgorge

1. Plaintiffs Lack Statutory Standing to Bring a UCL Claim

To establish standing under the California Unfair Competition Law ("UCL"), Plaintiffs must allege they have "suffered injury in fact and [have] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204; *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 321–22 (2011). "The lost money or property requirement means plaintiff must demonstrate some form of economic injury such as surrendering more or acquiring less in a transaction, having a present or future property interest diminished, being deprived of money or property, or entering into a transaction costing money or property that was unnecessary." *Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1093 (N.D. Cal. 2018).

Plaintiffs allege no loss of money or property from the alleged privacy violation. They do not (and cannot) allege that they lost any money or property by enrolling in Gilead's ***free*** program or by authorizing mailings. *See, e.g., In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011

WL 4403963, at *14 (N.D. Cal. Sept. 20, 2011) (no UCL standing when "there is no dispute that Plaintiffs did not pay for [defendants' services], but instead used it 'free of charge.'").

To the extent Plaintiffs attempt to establish standing based on "the loss of [Plaintiffs'] legally protected interest in the confidentiality and privacy of their personal information," Compl. ¶ 73, that argument has been rejected: "Numerous courts have held that a plaintiff's 'personal information' does not constitute money or property under the UCL." *In re iPhone*, 2011 WL 4403963, at *14; *see also Gonzales*, 305 F. Supp. 3d at 1093 ("[T]he sharing of names, user IDs, location and other personal information does not constitute lost money or property for UCL standing purposes."); *Archer v. United Rentals, Inc.*, 195 Cal. App. 4th 807, 816 (2011) ("fail[ure] to demonstrate how [the] privacy violation translates into a loss of money or property . . . is fatal to plaintiffs' UCL class claim"). The UCL claim should be dismissed for lack of standing.

2. Plaintiffs Cannot State a Claim Under Any Prong of the UCL

Even if Plaintiffs had statutory standing, they cannot state a claim under the UCL. The Complaint alleges that Gilead engaged in "unlawful, unfair or fraudulent, and deceptive acts and practices with respect to the sale and advertisement of the services purchased by Plaintiffs and Class Members," by representing that "[a]ll patient information will remain confidential." Compl. ¶¶ 6, 69. These allegations do not meet the requirements of any prong of the UCL.

Unlawful. Plaintiffs cannot state a claim under the UCL for "unlawful" business acts because they fail to allege any predicate violation of law. *See In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797, 841 (N.D. Cal. 2020) ("[T]o be 'unlawful' under the UCL, Defendants' conduct must violate another 'borrowed' law."). The claim must identify a "particular section of the statutory scheme which was violated" and "*describe with . . . reasonable particularity the facts supporting violation.*" *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993). The Complaint does not specify the "borrowed" law(s) or statutory schemes on which Plaintiffs predicate their UCL claim. To the extent Plaintiffs base their UCL claim on any other claims in the Complaint, it fails along with those claims as set forth in the other sections of this demurrer.

Unfair. The Complaint summarily contends that Gilead's alleged "unfair and deceptive practices and acts" were "immoral, unethical, oppressive, and unscrupulous." Compl. ¶ 70. To state

a claim for "unfair" practices under the UCL, however, a plaintiff must "allege facts sufficient to show Defendant['s] business practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Harmon v. Hilton Grp.*, No. C-11-03677 JCS, 2011 WL 5914004, at *9 (N.D. Cal. Nov. 28, 2011). Plaintiffs plead no facts showing that Gilead's conduct should be regarded as such; to the contrary, they allege the Mailer was part of a free educational/prevention campaign designed to support them. Plaintiffs therefore cannot state a claim under UCL's unfair prong. *See Mackell v. Wells Fargo Home Mortg.*, No. 16-CV-04202-BLF, 2017 WL 373077, at *9 (N.D. Cal. Jan. 26, 2017) (dismissing UCL claim that "does not offer any allegations or arguments supporting that [defendant]'s alleged [conduct] was against public policy, immoral, unethical, oppressive, or unscrupulous").

Fraudulent. Where a plaintiff's claims sound in fraud or misrepresentation, the California Supreme Court has held that the phrase "as a result of," as it is used in the UCL's standing provision, "imposes an *actual reliance* requirement." *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009); *see also Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010) (actual reliance requirement extends to any UCL claim where "the predicate unlawfulness is misrepresentation and deception"). Here, Plaintiffs do not allege that Gilead engaged in fraudulent business practices, let alone that they actually relied on any misrepresentations made by Gilead. Accordingly, Plaintiffs cannot state a claim under the "fraudulent" prong of the UCL. *See In re Tobacco*, 46 Cal. 4th at 326 (holding that named plaintiff must demonstrate actual reliance on allegedly fraudulent statement to sustain UCL claim).

3. Plaintiffs Are Not Entitled to Restitution

The UCL provides only for equitable monetary remedies, such as restitution or disgorgement, and not actual damages: "Neither compensatory nor punitive damages are available under the UCL." *Ozeran v. Jacobs*, 798 F. App'x 120, 122 (9th Cir. 2020) (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003)). Plaintiffs seek restitution for their UCL claim, Compl. ¶ 74, but they allege no basis for restitution here. The Supreme Court has limited the scope of an order for restitution "as one compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken." *In re*

Google, 457 F. Supp. 3d at 840 (quoting *Korea Supply*, 29 Cal. 4th at 1144). "[R]estitution under the UCL must 'restore the status quo' by 'returning to the plaintiff' funds taken from him or 'benefits in which the plaintiff has an ownership interest.'" *Id.* Plaintiffs do not allege that Gilead took money from Plaintiffs at all, much less through an unfair business practice, and thus cannot obtain restitution.

C. Plaintiffs' Negligence Causes of Action Fail for Multiple Reasons

1. Plaintiffs Have Failed to Allege Simple Negligence

Plaintiffs have not alleged a claim based on negligence. The Complaint alleges that Gilead "owed duties of care to protect the disclosure of Plaintiffs' and Class Members' private medical information," breached its duties, and that as a direct result, "Plaintiffs and Class Members have suffered or will suffer damages, including embarrassment, humiliation, frustration, anxiety, emotional distress, and fear, and are at increased risk for losing employment, housing, access to health care, and even violence or other trauma." Compl. ¶¶ 76–80. These allegations do not satisfy the requirements for a negligence claim under the common law of Indiana, Alabama, or Missouri.[7] Although the common elements of a negligence claim are duty, breach of duty, proximate cause, and compensable damages, *see Bader v. Johnson*, 732 N.E.2d 1212, 1216–17 (Ind. 2000); *Prill v. Marrone*, 23 So. 3d 1, 6 (Ala. 2009); *Scher v. Sindel*, 837 S.W.2d 350, 355 (Mo. Ct. App. 1992), each state has unique negligence jurisprudence, and so we address each Plaintiff's claim separately.

Indiana. The Indiana negligence claim fails first because Indiana law does not impose a legal duty on Gilead to safeguard his personal information. *Haywood v. Novartis Pharms. Corp.*, 298 F. Supp. 3d 1180, 1191–92 (N.D. Ind. 2018), *appeal dismissed*, No. 18-1328, 2018 WL 3868755 (7th Cir. May 14, 2018) ("[T]he relationship between a pharmaceutical corporation and a person seeking assistance with their co-payments is not similarly close to justify imposing a duty."). Accordingly, the negligence claim fails for lack of a duty owed.

Second, Indiana recognizes the economic loss doctrine, which bars negligence claims that assert purely economic losses without any physical harm. *See Bamberger & Feibleman v.*

[7] Plaintiffs' common law claims are governed by the law of their home state. Nonetheless, we also address the common law jurisprudence of California in footnotes to each such section.

Indianapolis Power & Light Co., 665 N.E.2d 933, 938 (Ind. Ct. App. 1996) ("[W]hen there is no accident and no physical harm so that the only loss is pecuniary in nature, courts have denied recovery under the rule that purely economic interests are not entitled to protection against mere negligence."). Plaintiffs have not alleged an accident or physical harm.

Third, "actual damages" is an essential element of an Indiana negligence claim, and the threat of future harm will not suffice. *See Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 638–39 (7th Cir. 2007). The Complaint alleges only "emotional distress." Compl. ¶ 80. Indiana applies a "modified impact rule" which states that "[w]hen . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of the kind and extent normally expected to occur in a reasonable person . . . a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff." *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991). But this rule still requires a physical impact, although it need not result in a physical injury. *Ross v. Cheema*, 716 N.E.2d 435, 436–37 (Ind. 1999). Indiana Doe does not allege, nor could he, any physical impact.

Alabama. Alabama law does not address the duty or economic loss doctrines with the same specificity. However, like Indiana, Alabama requires that a plaintiff plead and establish "actual loss or damages" as an essential element of a cause of action. *See Ex parte Stonebrook Dev., L.L.C.*, 854 So. 2d 584, 589 (Ala. 2003). Alabama applies the "zone of danger test" to "limit[] recovery for emotional injury to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *AALAR, Ltd. v. Francis*, 716 So. 2d 1141, 1147 (Ala. 1998). Alabama Doe alleges no physical impact, nor that any emotional injuries were caused by an actual imminent risk of physical harm.

Missouri. Missouri recognizes the economic loss doctrine. *Dannix Painting, LLC v. Sherwin-Williams Co.*, 732 F.3d 902, 905–06 (8th Cir. 2013) ("The economic loss doctrine prohibits a commercial buyer of goods from seeking to recover in tort for economic losses that are contractual in nature."). Plaintiffs do not allege any physical harm. And while Missouri recognizes a common law tort of negligent infliction of mental distress unaccompanied by physical injury, a

"plaintiff must show a medically diagnosed condition that resulted from the negligent act." *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. 2006). Missouri Doe's claim fails because he makes no allegation of a medically diagnosed condition resulting from the Mailer.[8]

2. Plaintiffs Have Failed to Allege Negligence Per Se Because Plaintiffs Do Not Identify Any Corresponding Violation of Statutory Law

Plaintiffs' negligence per se claim must be dismissed for the additional reason that they have failed to adequately allege Gilead violated a statute setting forth an independent duty of care under either Alabama, Indiana, or Missouri law.[9] These states impose the same requirement that a plaintiff allege and establish that a defendant violated a statute imposing such an independent duty. *See, e.g.*, *Dickinson v. Land Developers Constr. Co.*, 882 So. 2d 291, 302 (Ala. 2003) ("To establish negligence per se, a plaintiff must prove: (1) that the statute the defendant is charged with violating was enacted to protect a class of persons to which the plaintiff belonged; (2) that the plaintiff's injury was the kind of injury contemplated by the statute; (3) that the defendant violated the statute; and (4) that the defendant's violation of the statute proximately caused the plaintiff's injury."); *Chappey v. Ineos USA LLC*, No. 2:08-CV-271, 2009 WL 790194, at *2 (N.D. Ind. Mar. 23, 2009) (similar); *Gipson v. Slagle*, 820 S.W.2d 595, 597 (Mo. Ct. App. 1991) (similar).

Thus, whether under Alabama, Indiana, or Missouri law, a plaintiff must adequately allege the defendant violated a statute to sustain a negligence per se claim. To the extent Plaintiffs'

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[8] Likewise, Plaintiffs cannot prevail on their negligence claim under California law. Plaintiffs must allege appreciable, non-speculative harm proximately caused by Gilead's breach. *See, e.g.*, *Int'l Engine Parts, Inc. v. Feddersen & Co.*, 9 Cal. 4th 606, 614 (1995). California recognizes two theories of "[t]he negligent causing of emotional distress" as part of "the tort of negligence." *Burgess v. Super. Ct.*, 2 Cal. 4th 1064, 1072 (1992). The "bystander" theory does not apply here because it requires plaintiffs to plead their emotional distress was caused by witnessing the physical injury of another. *Id.* The "direct victim" theory allows for the recovery of "damages for negligently inflicted emotional distress" in the absence of physical injury or impact," *id.* at 1074, but only if plaintiffs can plead "serious emotional distress" which exists only if "an ordinary, reasonable person would be unable to cope with it," Judicial Council of California Civil Jury Instructions (2017), CACI No. 1620. Plaintiffs have provided only a conclusory listing of emotional injuries, and have failed to plead facts to support their claim for emotional distress damages.

[9] Plaintiffs' negligence per se claim would be dismissed under California law, if it were applicable. "[N]egligence per se is not a separate cause of action [under California law] but is the application of an evidentiary presumption provided by Cal. Evid. Code § 669." *Carson v. Depuy Spine, Inc.*, 365 Fed. App'x 812, 815 (9th Cir. 2010). Because negligence per se is not an independent cause of action, courts routinely dismiss the claim. *See, e.g.*, *Ebrahimi v. Mentor Worldwide LLC*, No. CV 16-7316-DMG (KSx), 2017 WL 4128976, at *6 (C.D. Cal. Sept. 15, 2017).

negligence per se claim relies in conclusory fashion on California Health and Safety Code Section 120980, the claim must be dismissed because the Mailer does not reveal information subject to that statute. Section 120980 applies to "[a]ny person who negligently discloses results of an HIV test . . . to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply." Cal. Health & Safety Code § 120980(a). Plaintiffs do not allege the Mailer revealed any test results or even the existence of an HIV test. Because Plaintiffs fail to allege a violation of Section 120980(a), the negligence per se claim should be dismissed to the extent it relies on that statute. And to the extent the claim relies on the CMIA, it must be dismissed because Plaintiffs do not adequately allege a violation of that statute as detailed above.

D. Plaintiffs' Breach of Contract Cause of Action Fails

Plaintiffs cannot state a claim based on breach of contract. Most obviously, they fail to allege the essential element of contract damages. *Ex parte Indus. Dev. Bd. of City of Montgomery*, 42 So. 3d 699, 717–18 (Ala. 2010); *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 894 (Ind. Ct. App. 2007); *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010).[10] The only contractual-based damages Plaintiffs allege are the lost benefit of their bargain, but they allege no "bargain."

In privacy breach cases, plaintiffs who assert benefit of the bargain losses are required to allege they paid or otherwise provided consideration to the defendant for confidentiality or the protection of their information as opposed to the underlying product or service. *In re Google*, 457 F. Supp. 3d at 834; *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013).

Plaintiffs do not allege they provided any money or consideration at all, much less in exchange for privacy protection. They merely allege they "received services provided by Gilead's Advancing Access program that became less valuable than Gilead advertised when Gilead provided those services without adequate privacy safeguards." Compl. ¶ 92. This conclusory allegation is

[10] California contract claims also require damages. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000) ("[A] breach of contract claim requires a showing of appreciable and actual damage. . . . [N]ominal damages, speculative harm, or the threat of future harm [do not suffice]."). The "theory that . . . personal information has independent economic value is unsupported by decisions of other district courts, which have held that unauthorized collection of personal information does not create an economic loss." *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012).

insufficient because Plaintiffs do not allege they paid Gilead or provided any money for Gilead's program, much less for privacy safeguards. *Compare In re Google*, 457 F. Supp. 3d at 834 (rejecting benefit of the bargain theory where "Plaintiffs have not alleged that they paid anything to Defendants for [their service]"), *and In re LinkedIn*, 932 F. Supp. 2d at 1093 (same; "the [complaint] fails to sufficiently allege that Plaintiffs actually provided consideration for the security services which they claim were not provided"), *with In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1130 (N.D. Cal. 2018) (permitting benefit of the bargain losses where plaintiff paid for premium service and would not have paid "had he known that Yahoo's email service was not as secure as Defendants represented"), *and In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 WL 3029783, at *14 (N.D. Cal. May 27, 2016) (plaintiffs paid premiums for insurance that defendants represented would be protected by security).

In fact, the allegations in the Complaint show Plaintiffs received the full benefits of the *free* program and any bargain they entered into. Plaintiffs allege they were "prescribed Gilead's HIV-related medications" and they were "enrolled in Gilead's Advancing Access program"—a patient support program that helps patients with monetary and other support to access medications. Compl. ¶¶ 2–3. Because Plaintiffs do not allege that it cost them any money to enroll in the free Advancing Access program, "it cannot be said that Plaintiffs received less than what they paid for—they appeared to have paid nothing." *In re Google*, 457 F. Supp. 3d at 834.

Moreover, Plaintiffs allege no contractual term that was allegedly violated, and broad statements in a company privacy policy are not found to be additional contract terms. *See, e.g.*, *Lovell v. P.F. Chang's China Bistro, Inc.*, No. C14-1152RSL, 2015 WL 4940371, at *3 (W.D. Wash. Mar. 27, 2015) ("The scope and terms of that contract were limited, however, and there is no indication that it included the alleged promise to safeguard plaintiff's financial data and/or to monitor audit logs on a daily basis."); *Bishop v. Shorter Univ., Inc.*, No. 4:15-CV-0033-HLM, 2015 WL 13753710, at *7 (N.D. Ga. June 4, 2015) ("[B]road statements of company policy do not generally give rise to contract claims.").

E. Plaintiffs' Invasion of Privacy Claim Fails

Plaintiffs generally allege a claim for invasion of privacy. States that recognize this tort identify different types of privacy claims and impose different requirements for each type of claim. *See, e.g., Considering Homeschooling v. Morningstar Educ. Network*, No. SACV-0600615-CJC(ANx), 2008 WL 11413459, at *6 (C.D. Cal. Aug. 6, 2008). The Complaint here appears to assert a claim for the version known as public disclosure of private facts. *See* Compl. ¶¶ 94–96 (alleging "Gilead published private facts," the disclosure of which "would be offensive to a reasonable person," and that "is not a matter of legitimate public concern").

To the extent they allow the claim at all, Alabama, Indiana,[11] and Missouri adopt the Restatement (Second) of Torts' definition of public disclosure of private facts: Namely, "when a person gives 'publicity' to a matter that concerns the 'private life' of another, a matter that would be 'highly offensive' to a reasonable person and that is not of legitimate public concern." *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 966 (Ind. Ct. App. 2001).[12] Publicity "means that the matter is made public by communicating it to a large segment of the public, or to so many persons that the matter must be regarded as substantially certain to become public knowledge. There is no invasion of privacy by publicity of a private matter if the matter is communicated only to a single person or to a small group of persons." *S.B. v. Saint James Sch.*, 959 So. 2d 72, 98 (Ala. 2006); *see also Munsell v. Hambright*, 776 N.E.2d 1272, 1282 (Ind. Ct. App. 2002) (similar); *Balke v. Ream*, 33 S.W.3d 589, 594 (Mo. Ct. App. 2000) (similar). Plaintiffs cannot satisfy the "publicity" element because the Complaint does not allege that a single person (other than Plaintiffs) saw the Mailer, let alone "a large segment of the public."

F. Plaintiffs' Unjust Enrichment Claim Fails

Under Alabama, Indiana, and Missouri law, the existence of an express contract precludes a claim for unjust enrichment. *See Kohl's Indiana, L.P. v. Owens*, 979 N.E.2d 159, 168 (Ind. Ct. App.

[11] *Compare Westminster Presbyterian Church of Muncie v. Cheng*, 992 N.E.2d 859, 868 (Ind. Ct. App. 2013) ("[P]ublic disclosure of private facts is not a recognized cause of action in Indiana."), *with Nobles v. Cartwright*, 659 N.E.2d 1064, 1073 (Ind. Ct. App. 1995) ("Indiana recognizes the tort of public disclosure of private facts.").

[12] California law also "requires publicity; disclosure to a few people in limited circumstances does not violate the right." *Ignat v. Yum! Brands, Inc.*, 214 Cal. App. 4th 808, 820 (2013).

2012) ("When the rights of the parties are controlled by an express contract, recovery cannot be based on a theory implied in law."); *Mantiply v. Mantiply*, 951 So. 2d 638, 656 (Ala. 2006) (same); *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010) (same). Because Plaintiffs here allege that they "entered into binding and enforceable contracts with Gilead," Compl. ¶ 89, they cannot state a claim for unjust enrichment.[13]

In any event, under Alabama law, "to succeed on a claim of unjust enrichment, the plaintiff must show that the defendant holds money which, *in equity and good conscience,* belongs to the plaintiff or holds money which was improperly paid to defendant because of *mistake or fraud.*" *Flying J Fish Farm v. Peoples Bank of Greensboro*, 12 So. 3d 1185, 1193 (Ala. 2008) (emphasis in original). And under Indiana and Missouri law, "[t]o prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991); *Howard*, 316 S.W.3d at 436 (same).

The Complaint alleges that Plaintiffs paid "for HIV drugs." Compl. ¶ 99. But they do not allege they paid anything *to Gilead*. Any benefit conferred was from Gilead *to Plaintiffs* because they enrolled in a free program which provides them assistance. This claim must be dismissed.

G. Missouri Doe's Claim Under Mo. Rev. Stat. § 191.656 Fails

Missouri Doe does not state a claim under Missouri Revised Statutes Section 191.656 because he does not allege, as he must, that Gilead disclosed Missouri Doe's "HIV infection status or the results of any individual's HIV testing." Mo. Rev. Stat. § 191.656(1)(1). Plaintiffs do not allege the Mailer revealed any test results or even the existence of an HIV test. That the statute also prohibits the disclosure of "HIV infection status" does not salvage Missouri Doe's claim. He does not allege what his HIV infection status is or how the Mailer indicates that status. And he admits

[13] California "does not recognize a separate cause of action for unjust enrichment." *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 119 (N.D. Cal. 2020). Although "the court could construe the unjust enrichment claim 'as a quasi-contract claim seeking restitution,'" *Azad v. Tokio Marine HCC-Med. Ins. Servs. LLC*, No. 17-CV-00618-PJH, 2017 WL 3007040, at *8 (N.D. Cal. July 14, 2017), "a plaintiff may not plead the existence of an enforceable contract and simultaneously maintain a quasi-contract claim unless the plaintiff also pleads facts suggesting that the contract may be unenforceable or invalid," *Brodsky*, 445 F. Supp.3d at 133. Plaintiffs have not alleged that any contracts with Gilead may be unenforceable or invalid.

that he enrolled in the Advancing Access program, which provides assistance to those "who are prescribed its medications, including those taking medications to **prevent** HIV," Compl. ¶ 3, and that Gilead's HIV-prevention medications are for "**[p]eople who do not have HIV** and who want to prevent acquisition of HIV," *id.* ¶ 4. Based on these allegations, his enrollment in the program implies that his HIV infection status was **negative**. This dooms his claim for two reasons. First, the statute cannot plausibly be read to prevent disclosure of a person's HIV-negative status. Second, the Mailer does not reveal his HIV status, and certainly does not imply an HIV-positive status. Because the Mailer did not reveal Missouri Doe's HIV status, this claim must be dismissed.

H. Missouri Doe's MMPA Claim Fails

Missouri Doe's Missouri Merchandising Practices Act ("MMPA") claim must be dismissed because he cannot allege "[a]n ascertainable loss of money or property," which is "an essential element of a cause of action brought under the MMPA." *Thompson v. Allergan USA, Inc.*, 993 F. Supp. 2d 1007, 1012 (E.D. Mo. 2014). To determine whether a plaintiff has suffered an ascertainable loss under the MMPA, Missouri courts apply the "benefit of the bargain" rule, which "awards a prevailing party the difference between the value of the product as represented and the actual value of the product as received." *Id.* But because Missouri Doe does not allege he paid any money for privacy safeguards, *see supra* section D, his MMPA claim fails. *See Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1057–58 (E.D. Mo. 2009) (dismissing claim that "defendant's failure to employ adequate security measures coupled with its false promises to protect confidential information constituted unlawful and/or unfair practices under the MMPA" because plaintiff "fails to plead that plaintiff paid anything of value for the purchase or lease of merchandise").

IV. CONCLUSION

Gilead respectfully requests that the Court dismiss the Complaint with prejudice. This is Plaintiffs' second attempt. If they could have pleaded a viable cause of action, they would have done so by now.

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