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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

GILEAD SCIENCES, INC.,

Defendant.

Case No.: 3:20-cv-03473-JCS

NOTICE OF MOTION AND MOTION OF DEFENDANT GILEAD SCIENCES, INC. TO DISMISS CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Judge: Hon. Joseph Spero
Date: September 25, 2020
Time: 9:30 a.m.
Ctrm: F

Action Filed: May 21, 2020

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 25, 2020, at 9:30 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Joseph Spero, located at 450 Golden Gate Avenue, San Francisco, CA 94102, 15th Floor, Courtroom F, Defendant Gilead Sciences, Inc. ("Gilead") will and hereby does respectfully move for an order dismissing Plaintiffs' Class Action Complaint ("Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that Plaintiffs lack standing under Article III of the United States Constitution, and the Complaint fails to state any claim upon which relief can be granted.

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

Dated: August 17, 2020

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Kenneth L. Chernof*
Kenneth L. Chernof

Attorneys for Defendant
GILEAD SCIENCES, INC.

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PRELIMINARY STATEMENT

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 at risk for HIV and use these products, Gilead established a free and voluntary support program, called Advancing Access. Through this program, Gilead provides enrollees with information and financial or insurance support to help them access the HIV-prevention products they want and need. Plaintiffs Alabama Doe and Indiana Doe (collectively, "Plaintiffs") allege they obtained prescriptions for Gilead's HIV-prevention products, voluntarily enrolled in the support program, and provided Gilead with their preferred mailing address for written communications.

This lawsuit concerns a letter (the "Mailer") relating to this program that Gilead sent to Plaintiffs, and more specifically it concerns the return address printed on the envelope, which read "HIV Prevention Team." The gravamen of Plaintiffs' Complaint 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 in some detail 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 would be possible that someone could lose their job, or home, or access to healthcare. **But, critically, the Plaintiffs do not allege anything of the sort happened to them.** They do not allege that anyone at all 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 access to healthcare.

Plaintiffs' inability to make these essential allegations confirms both that they lack Article III standing to bring this case and that they cannot state any cause of action upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1), (6). These are not merely pleading problems that can be remedied by an amended complaint. If Plaintiffs could have made the necessary allegations to bring this lawsuit, they would have. Indeed, as of the date of this brief, over four months have already passed since the Mailer was sent, yet neither Plaintiff can allege a single fact demonstrating that anyone even viewed the Mailer, much less that they suffered any adverse impact.[1]

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.

FACTUAL BACKGROUND

Gilead researches, develops, manufactures, and markets pharmaceutical products, including products used for the prevention and treatment of HIV. Complaint ("Compl.") ¶ 1. Gilead's products include those in the category known as pre-exposure prophylaxis ("PrEP"), which may be taken to reduce the risk of contracting HIV through sexual activity. Gilead has established programs to assist consumers with financial limitations in paying for products, including those for HIV PrEP. Of relevance here, Gilead offers its free and voluntary Advancing Access program, wherein enrollees may obtain financial assistance from Gilead for commercial insurance co-pay costs or the full cost for uninsured individuals for PrEP medications, as well as other insurance-related support, such as benefits investigations.

In April 2020, Gilead mailed the Mailer to Plaintiffs, who had enrolled in the Advancing Access program. *See id.* ¶¶ 2, 12–13, 43–44, 47. The Mailer displayed the Plaintiffs' names and the mailing addresses they provided to Gilead, a return address of "HIV Prevention Team, 1649 Adrian

[1] Nor can these defects be cured by a "better" plaintiff, i.e., one who can allege their mail was viewed by someone and that they actually suffered an injury. No such person has appeared. But even then, the case would fail for the additional reasons discussed below and could not proceed as a class action because the Court would have to determine the circumstances of each such individual.

Road, Burlingame CA 94010," and the tagline "The latest from Gilead Sciences." *Id.* ¶ 7. Plaintiffs allege they received the Mailer and subsequently commenced this action. *Id.* ¶¶ 43–44.

LEGAL STANDARDS

I. DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Plaintiffs bear the burden of establishing standing to invoke the subject matter jurisdiction of this Court. *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008). To do so, Plaintiffs must satisfy the "case or controversy" requirement of Article III of the United States Constitution, which requires them to establish (1) an injury-in-fact that is (2) fairly traceable to the challenged action of the defendant and (3) redressable by a favorable ruling from the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). An injury-in-fact must be concrete, particularized, and "actual or imminent" rather than conjectural or hypothetical. *Id.* "In the class action context, the named plaintiff must show that she personally has suffered an injury, not just that other members of the putative class suffered the injury." *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 846 (N.D. Cal. 2012) (citing *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003)).

II. DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). It requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." *Twombly*, 550 U.S. at 556. Where a court is unable to infer more than a mere possibility of the alleged misconduct based on the pleaded facts, the plaintiff has not demonstrated they are entitled to relief, and the action is subject to dismissal. *Iqbal*, 556 U.S. at 678–79.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING BECAUSE THEY FAIL TO ALLEGE A COGNIZABLE INJURY-IN-FACT

Plaintiffs allege four theories of harm in an effort to establish an injury-in-fact sufficient to justify Article III standing: (1) emotional harm, (2) increased risk of future harm, (3) loss of value in Plaintiffs' confidential personal information, and (4) lost benefit of the bargain. *See* Compl. ¶¶ 45–47. None of these theories as pleaded are sufficient to confer standing.

A. Emotional Harm

The Complaint alleges that "Plaintiffs and Class Members have suffered and will continue to suffer embarrassment, humiliation, frustration, anxiety, emotional distress, and fear . . . *as a result of the disclosure of their HIV-related information*." *Id.* ¶ 45 (emphasis added). But neither Plaintiff alleges that any of their "HIV-related information" was actually viewed by or disclosed to anyone, much less that such disclosure caused them any emotional harm. And when "[i]t is unclear from the face of the complaint what information was **actually disclosed** to third parties that would lead Plaintiff to suffer emotional harm," a plaintiff has failed to meet their burden to demonstrate a cognizable injury. *See Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 WL 5509848, at *3 (N.D. Cal. Nov. 11, 2011) (emphasis added).

Neither Plaintiff alleges that anyone viewed or even noticed the Mailer and its return address and their name, much less made any connection between the wording of the return address and the addressee, much less reacted in any way or took any action to acknowledge they had seen the Mailer and its return address, much less gave either Plaintiff any reason to believe they had seen it, much less engaged in any changed behavior towards Plaintiffs. If Plaintiffs could have alleged any of this, they surely would have. Quite to the contrary, Alabama Doe alleges only that "he walked into the mail room [at his workplace] and found the envelope with the 'HIV Prevention Team' return address," that "the envelope was accessible to anybody who came into the mail room," and that he is "worried and concerned about who may have seen the mail." Compl. ¶ 43. To be clear: he does not allege that a single person actually saw anything with regard to the Mailer. The same is true of Plaintiff Indiana Doe, who alleges only that "[h]e was appalled when he received the HIV

Prevention [Mailer] as it revealed in plain view that he is concerned with HIV prevention" and that he "feels vulnerable and is worried about who may have seen the mail." *Id.* at ¶ 44.

Fairly stated, what Plaintiffs are really alleging is not that their information was actually viewed by or disclosed to anyone or that such disclosure caused them harm. Rather, they speculate that someone could have noticed the Mailer, and that person could have made assumptions based on the return address, and they are concerned about that. But no matter how sincere, a worry that is not founded on factual allegations cannot be the basis for establishing a cognizable injury-in-fact sufficient to invoke the jurisdiction of this Court. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (purpose of the imminence requirement for injury is "to ensure that the alleged injury is not too speculative for Article III purposes"). Without more, Plaintiffs "ha[ve] not sufficiently alleged a particularized harm as a result of Defendant's conduct." *Low*, 2011 WL 5509848, at *3; *see also Holly v. Alta Newport Hosp., Inc.*, No. 2:19-cv-07496-ODW (MRWx), 2020 WL 1853308, at *6 (C.D. Cal. Apr. 10, 2020) (patient's allegations that she suffered "emotional harm and distress and has been injured in her mind and body" from alleged disclosure of her personal information were too sparse and conclusory to support her claims for damages); *Lujan*, 504 U.S. at 561 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."). Plaintiffs therefore cannot establish Article III standing under a theory of emotional harm.

B. Increased Risk of Future Harm

Lacking any cognizable present harm, Plaintiffs pivot and allege instead that they are at increased risk of incurring some harm *in the future*, even if that has not happened as of now. While there are circumstances where an allegation of future harm may confer standing, it is only so if Plaintiffs can demonstrate that "the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation marks omitted) (quoting *Clapper*, 568 U.S. at 414 & n.5). Far from meeting that standard, Plaintiffs here allege only an unsubstantiated and, at this point, highly remote possibility of a future injury. But "[a]llegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (emphasis in original, quotation marks and citation omitted).

More specifically, the Complaint alleges that Plaintiffs "are at increased risk for losing employment, housing, access to health care, and even violence or other trauma as a result of the disclosure of their HIV-related information." Compl. ¶ 45. As an initial matter, Plaintiffs cannot plausibly allege any increased risk of some future harm when they do not even allege that a single person (*e.g.*, coworker, landlord, friend, family member) saw the Mailer. *See Low*, 2011 WL 5509848, at *3 (plaintiff could not establish standing based on future harm because plaintiff failed to allege "that his sensitive personal information has been exposed to the public"); *Yunker v. Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013 WL 1282980, at *5 (N.D. Cal. Mar. 26, 2013) (no standing based on future harm where plaintiff "has not alleged that anyone has breached [defendant]'s servers" to access his personal information). If Plaintiffs cannot allege that anyone saw the Mailer, then what would be the source of their future harm?

But just as importantly, while some of these potential future harms could certainly be alarming were they to materialize, their potential for materializing is purely speculative and not supported by any factual allegations. The Complaint contains no allegations showing these future harms are "certainly impending" or that there is a "substantial risk" they will occur. In fact, Plaintiffs allege the Mailer was sent in April 2020 (*see* Compl. ¶ 7), yet in the more than four months (and counting) that have elapsed, neither one alleges they lost their job, home, or healthcare or have been the victim of violence or trauma. It is therefore implausible to speculate that, having not happened to date, any of those harms remain a substantial risk, much less that they are certainly impending. Plaintiffs therefore do not have standing based on an increased risk of future harm.

C. Loss of Value in Confidential Personal Information

Plaintiffs next contend they have a cognizable injury in the form of the alleged "loss of value in their confidential personal information when the envelope from the HIV Prevention Team was sent to their mailing address." Compl. ¶ 46. It is not clear from the face of the Complaint what economic "value" Plaintiffs believe their confidential information has (or even what confidential personal information to which they might be referring). However, to the extent Plaintiffs assert that their personal information "has an independent economic value," such an allegation is "too abstract

and hypothetical to support Article III standing." *Low*, 2011 WL 5509848, at *4. Plaintiffs must "adequately connect this value to a realistic economic harm or loss that is attributable to [defendant]'s alleged conduct." *In re Facebook Internet Tracking Litig.*, 140 F. Supp. 3d 922, 931 (N.D. Cal. 2015). Thus, "[i]n order to show injury in fact under this theory, [plaintiffs] must establish both the existence of a market for [their] personal information and an impairment of [their] ability to participate in that market." *Svenson v. Google Inc.*, No. 13-CV-04080-BLF, 2016 WL 8943301, at *9 (N.D. Cal. Dec. 21, 2016). Here, Plaintiffs allege neither.

Absent any allegations that Plaintiffs' "personal information became less valuable as a result of the breach or that they attempted to sell their information and were rebuffed because of a lower price-point attributable to the security breach," courts repeatedly reject loss of value in personal information as a cognizable injury. *In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 954 (D. Nev. 2015); *see also Pruchnicki v. Envision Healthcare Corp.*, 439 F. Supp. 3d 1226, 1235 (D. Nev. 2020) (lost value of information not a cognizable injury where plaintiff "present[ed] no cogent allegations of a market for her information and provide[d] no ascertainable loss to her own ability to sell her information"); *In re Facebook*, 140 F. Supp. 3d at 931–32 (plaintiffs failed to show "that they personally lost the opportunity to sell their information or that the value of their information was somehow diminished" after the breach); *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1088 (E.D. Cal. 2015) ("Plaintiff has not alleged that he intended to sell his [information], that he plans to sell it in the future, that he is foreclosed from doing so because of the Data Breach, or that the data breach reduces the value of the [information] he possesses"); *In re Uber Techs., Inc., Data Sec. Breach Litig.*, No. ML 18-2826 PSG (GJSx), 2019 WL 6522843, at *5 (C.D. Cal. Aug. 19, 2019) (alleged "'loss of value of [plaintiff's] information,' without any more details, is 'too abstract and speculative to support Article III standing'" (quoting *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1029 (N.D. Cal. 2012)); *Yunker*, 2013 WL 1282980, at *4 (no standing because plaintiff "d[id] not allege [he] attempted to sell his [information], that he would do so in the future, or that he was foreclosed from entering into a value for value transaction relating to his [information], as a result of [defendant]'s conduct").

D. Lost Benefit of the Bargain

Finally, Plaintiffs allege injury based on "the lost benefit of their bargain with Gilead." Compl. ¶ 47. 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 Assistant Privacy Litig.*, No. 19-CV-04286-BLF, 2020 WL 2219022, at *23 (N.D. Cal. May 6, 2020); *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. ¶ 86. This conclusory allegation is insufficient because Plaintiffs do not allege they paid Gilead or provided any money or other consideration for Gilead's Advancing Access program with "adequate privacy safeguards." *Compare In re Google Assistant*, 2020 WL 2219022, at *23 (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 (rejecting benefit of the bargain theory because "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 reasonable 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 Assistant*, 2020 WL 2219022, at *23.

For these reasons, Plaintiffs have not alleged any cognizable injury-in-fact, and the Complaint must be dismissed for lack of Article III standing.[2]

II. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Complaint should also be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs have failed to state any claim upon which relief can be granted.

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

The Confidentiality of Medical Information Act ("CMIA") sets forth permissible uses of "medical information," and establishes the requirements for a private right of action for violations

[2] Plaintiffs have not alleged, nor could they under controlling Ninth Circuit precedent, that standing exists merely because they assert a claim for statutory damages under the Confidentiality of Medical Information Act ("CMIA"). "A plaintiff does not necessarily meet the concrete injury requirement 'whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Patel v. Facebook, Inc*., 932 F.3d 1264, 1270–71 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 937 (2020) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016)). Rather, a violation of such a statute may establish an injury-in-fact only where "'the statutory provisions at issue were established to protect [the plaintiff's] concrete interests'" and the "violations alleged in this case actually harm, or present a material risk of harm to, such interests.'" *Id.* (quoting *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) (alteration in original)). Importantly, the alleged harm or risk of harm must be one that the statute was "designed to vindicate." *Id.* at 1274–75. But here, Plaintiffs do not and cannot allege that Gilead's actions led to a harm or a material risk of harm that the CMIA was intended to address. This is because, as explained more fully below in Section II.A, the only harms that the CMIA's private right of action seeks to remedy—whether by way of actual or statutory damages—are those that occur when an unauthorized person has *actually viewed* the confidential medical information, and no such allegation is made here. *See Sutter Health v. Superior Court*, 227 Cal. App. 4th 1546, 1557, 1559 (2014) ("[n]o breach of confidentiality takes place until an unauthorized person views the medical information," and "nominal damages are not available if the injury—the confidentiality breach—has not occurred"). Under these circumstances, the Ninth Circuit rejects standing. *See, e.g.*, *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 783 (9th Cir. 2018) (no standing where alleged FCRA violation did not result in third party viewing protected information). Indeed, as the *Patel* court emphasized: "[I]n *Bassett* . . . . [w]e held that even if the FCRA created a substantive right to the nondisclosure of a consumer's private financial information to identity thieves, [a] parking garage's failure to redact the credit card's expiration date did not impact this substantive right, because no one but the plaintiff himself saw the expiration date. We therefore concluded that the plaintiff had failed to allege a concrete injury-in-fact. . . . [The] violation did not cause a disclosure of the consumer's private financial information, the substantive harm the FCRA was designed to vindicate." *Patel*, 932 F.3d at 1271, 1274–75 (citations and quotation omitted). The same is true here.

of the Act. *See generally* Cal. Civ. Code §§ 56.10 *et seq.* Assessing Plaintiffs' CMIA claim here requires some navigation of the interplay between the separate CMIA private right of action and violation sections, respectively, upon which they rely. *See* Compl. ¶¶ 58, 60.

First, Plaintiffs have asserted a claim under the CMIA's section authorizing a private right of action. *See* Cal. Civ. Code § 56.36(b). That section authorizes claims only for violations of the CMIA that result in the "release" of confidential information. *Id.* ("[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." (emphasis added)). Accordingly, Plaintiffs' first hurdle is to allege a "release" of medical information, as the courts have defined that term.

Second, if a Plaintiff can allege such a release, then they can bring a claim, but only if they can also allege a violation of a substantive provision of the CMIA. *Id.* (allowing claims for a "violation of this part"). Here, Plaintiffs allege that Gilead's mailing violated section 56.102(b), which 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) (emphasis added). Thus, Plaintiffs' second hurdle is to allege an unauthorized "disclosure" of medical information in violation of section 56.102(b), as that term has been defined by the courts.

The case law makes clear that Plaintiffs meet neither the "release" or "disclosure" requirements.[3]

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

As a 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. State and federal courts in California have repeatedly explained that, to allege an actionable "release" under section 56.36(b), a plaintiff must allege the relevant information was actually viewed by a third party: "No breach of confidentiality [under section

[3] Plaintiffs' CMIA claim seeks statutory and actual damages under section 56.36, subsections (b)(1) and (b)(2), respectively. As discussed above (*see supra* Section I.A), Plaintiffs have not adequately pleaded an injury-in-fact and are thus not entitled to actual damages under section 56.36(b)(2). Defendants will not rehash those arguments here. The Court, however, should dismiss Plaintiffs' claim under the CMIA to the extent that they seek actual damages for this additional reason.

56.36(b)] takes place **until an unauthorized person views the medical information**." *Sutter Health v. Superior Court*, 227 Cal. App. 4th 1546, 1557 (Ct. App. 2014) (emphasis added); *see also Falkenberg v. Alere Home Monitoring, Inc.*, No. 13-CV-00341-JST, 2014 WL 5020431, at *3 (N.D. Cal. Oct. 7, 2014) ("[T]here can be no liability for negligent release of [confidential medical information] under sections 56.101 and 56.36 absent allegations, and subsequent[] proof, that the [medical information] **has been actually viewed by a third party**." (emphasis added)). The Court of Appeal applied the same reasoning in *Regents of University of California v. Superior Court*, holding there is no loss of confidentiality where plaintiff "cannot allege her information was improperly **viewed or otherwise accessed**." 220 Cal. App. 4th 549, 554 (Ct. App. 2013) (emphasis added), *as modified on denial of reh'g* (Nov. 13, 2013); *see also Eisenhower Med. Ctr. v. Superior Court*, 226 Cal. App. 4th 430, 434 n.3 (Ct. App. 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." (emphasis added)). 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.").

In *Sutter Health*, 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 or anyone else actually viewed the information on the computer (even though it was undeniably in the thief's possession and they could have viewed it). *Id.* at 1557. Similarly, in *Regents*, a hard drive containing medical information was stolen as part of a home invasion robbery of the defendant's employee, but because the plaintiff could not plead facts demonstrating that anyone had in fact viewed the stolen information, she had 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. *Regents*, 220 Cal. App. 4th at 570.

Despite this consistently applied requirement, Plaintiffs do not allege that any third party "actually viewed" any information about them. Plaintiffs' inability to allege that a single member of their family, friends, or anyone else viewed the Mailer is fatal to their claim. At most, they speculate

that a third party "may have seen the mail." Compl. ¶¶ 43, 44.[4] But to credit this bare allegation that some unknown person potentially *may* have seen it, without more, does not meet the pleading requirements of the CMIA and would require "too many layers of speculation . . . to overcome the deficiency in [the] complaint." *Regents*, 220 Cal. App. 4th at 570 n.15.

Because the Complaint contains no allegations that any third party actually viewed any information related to the Mailer, Plaintiffs have not pleaded the negligent release of medical information under section 56.36(b), and their CMIA claim must be dismissed.[5]

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). Plaintiffs attempt to meet that requirement by alleging that Gilead acted "in violation of Cal. Civil Code § 56.102." Compl. ¶ 58. 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). However, the facts alleged do not as a matter of law constitute a "disclosure" in violation of that provision.

[4] Plaintiffs allege generally that Gilead "revealed . . . information of patients . . . to their family, friends, roommates, landlords, neighbors, mail carriers, and complete strangers," Compl. ¶ 10, but Plaintiffs' actual factual allegations provide no evidence to support this boilerplate language.

[5] 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 (finding that patients' names, medical record numbers, ages, dates of birth, and last four digits of their social security numbers did not constitute "medical information" under the CMIA because such information did not relate to the plaintiffs' medical history or treatment). 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) (definition of "medical information"). The mere presence of a return address from Gilead's "HIV Prevention Team" does not change this analysis because it did not describe Plaintiffs' medical history, diagnosis, or care. *See Eisenhower*, 226 Cal. App. 4th at 435 (finding "the 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'").

Although "disclosure" is not defined by the CMIA, California courts have repeatedly interpreted it to mean the defendant must have *intended to affirmatively disclos*e medical information *to an unauthorized third party*. Thus, in *Sutter Health*, the California Court of Appeal found that "disclosure occurs when [a defendant] affirmatively shares medical information with another person or entity." 227 Cal. App. 4th at 1555–56 (citation omitted). Where a defendant "did not intend to disclose the medical information to the [third party], . . . no affirmative communicative act by [defendant] to the [third party]" exists. *Id.* at 1556; *see also Farhood v. StrataCare, LLC*, Case No. B279993, at 8 (Cal. Ct. App. Apr. 23, 2019) [Request for Judicial Notice ("RJN") Ex. A] ("To whom the affirmative communicative act is directed is a crucial factor in determining whether the disclosure is authorized."); *Regents*, 220 Cal. App. 4th at 564 ("'disclose' . . . denot[es] in the context of the CMIA . . . an affirmative act of communication").[6]

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. But, "[a] disclosure to an authorized recipient—such as the patient—does not violate the [CMIA]." *Farhood*, Case No. B279993 at 8 [RJN Ex. A]. Thus, in *Farhood*, the defendant mailed a statement of benefits to the plaintiff at a credit union instead of his home address, and someone at the credit union opened the letter containing the plaintiff's medical information. The court found that even though the letter ended up in the unintended hands of someone at the credit union, who then had access to plaintiff's medical information, the mailing did not qualify as a disclosure in violation of the CMIA because "it was a disclosure to Farhood, not to the credit union." *Id.*

Similarly, Plaintiffs' concern here seems to be that although they gave their preferred mailing address to Gilead and Gilead thereafter relied on it and used it, the letter may have, at some point during its journey, been viewed by a third person and that person might have drawn inferences

[6] Although *Sutter Health* and *Farhood* analyzed the term "disclosure" under Cal. Civ. Code § 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.

from it. Whether those unalleged and unknowable assertions are true or not does not mean that Gilead intended to make an affirmative disclosure to that third party, or anyone else. *Farhood*, and logic, foreclose such inferences under the CMIA. For example, that the mailing address deliberately provided *by Plaintiff Alabama Doe*[7] resulted in the letter arriving at his workplace where someone theoretically could have scrutinized it cannot possibly be transmogrified into evidence of an intent *by Gilead* to make any sort of disclosure to third parties at that workplace. *See Sutter Health*, 227 Cal. App. 4th at 1556 ("disclosure . . . implies an affirmative communicative act. . . . *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.*" (emphasis added)).

Plaintiffs have not, therefore, alleged a disclosure as required to show a violation of section 56.102, and their CMIA claim must be dismissed.

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

Even if Plaintiffs had pleaded the essential elements of a CMIA claim—which they have not—their claim must be dismissed for the additional reason that out-of-state Plaintiffs Alabama Doe and Indiana Doe 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 California 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) (quotation marks and citation omitted). As discussed above, 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

[7] 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. ¶ 43.

speculate about the possibility of that happening, it is only with regard to people in their home jurisdictions of Alabama and Indiana (namely, their housemates or coworkers). Under those circumstances, the alleged violation would have occurred in those jurisdictions and would be beyond the reach of the CMIA.

B. Plaintiffs' UCL Claim Should Be Dismissed Because They Lack Statutory Standing, They Have Alleged No Violation, and There is Nothing to Restitute or Disgorge (Count II)

1. Plaintiffs Lack Statutory Standing to Bring a UCL Claim

To establish statutory standing under the UCL, a plaintiff must allege that he has "suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204; *see Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011). "The lost money or property requirement means plaintiff must demonstrate some form of economic injury such as surrendering more or acquiring less in an 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) (quotation marks omitted).

Plaintiffs have not alleged any loss of money or property attributable to the alleged privacy violation. Plaintiffs do not allege, nor can they allege, that they lost money or property by enrolling in Gilead's Advancing Access 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) (dismissing plaintiffs' UCL claim for lack of standing because "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. ¶ 66), that argument has been repeatedly rejected: "Numerous courts have held that a plaintiff's 'personal information' does not constitute money or property under the UCL." *In re iPhone Application*, 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 (Ct. App. 2011) (holding that plaintiffs' "fail[ure] to demonstrate how [the] privacy violation translates into a loss of money or property . . . is fatal to plaintiffs' UCL class claim"). Plaintiffs' UCL claim should be dismissed based on lack of standing alone.

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

Even if Plaintiffs had alleged injury sufficient to establish statutory standing, Plaintiffs 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," including "representing that Gilead would adequately protect Plaintiffs' and Class Members' confidential medical information from unauthorized disclosure and release." Compl. ¶ 62. For the reasons discussed below, 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*, 2020 WL 2219022, at *29 ("[T]o be 'unlawful' under the UCL, Defendants' conduct must violate another 'borrowed' law"). The Complaint does not specify the "borrowed" law(s) on which Plaintiffs predicate their UCL claim. To the extent Plaintiffs base their UCL claim on any of the other causes of action in the Complaint, Plaintiffs' UCL claim fails along with those claims as set forth in the other sections of this motion.

Unfair. The Complaint summarily contends that Gilead's alleged "unfair and deceptive practices and acts" were "immoral, unethical, oppressive, and unscrupulous." Compl. ¶ 63. 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) (Spero, J.) (quotation marks omitted). Plaintiffs have failed to plead any facts showing that Gilead's conduct should be regarded as such. Absent such facts, Plaintiffs 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 in part because plaintiff "does not offer any allegations or arguments supporting that [defendant]'s alleged [conduct] was against public policy, immoral, unethical, oppressive, or unscrupulous" (quotation marks omitted)). As Plaintiffs allege, the communication here was part of a free educational / prevention campaign, in which Plaintiffs voluntarily enrolled, designed to support them.

Fraudulent. "A 'fraudulent' business act or practice is one in which members of the public are likely to be deceived." *Missud v. Oakland Coliseum Joint Venture*, No. 12-02967 JCS, 2013 WL 812428, at *22 (N.D. Cal. Mar. 5, 2013) (Spero, J.). UCL claims based on the fraudulent prong "trigger the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure." *Id.* (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)). Plaintiffs do not allege that Gilead engaged in fraudulent business practices, let alone with the specificity required by Rule 9(b). Accordingly, Plaintiffs cannot state a claim under the "fraudulent" prong of the UCL. *See id.* at *24 (noting insufficient factual allegations to support UCL fraud claim where "[p]laintiff has not alleged the particular statements made, by whom they were made, when and where they were made, and why each such statement was likely to deceive a reasonable consumer").

3. Plaintiffs Are Not Entitled to Restitution

The UCL provides only for equitable 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 (*see* Compl. ¶ 67), but they do not allege there is any basis for restitution here. The California 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 Assistant*, 2020 WL 2219022, at *28 (quotation marks omitted) (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 Claims Fail for Multiple Reasons (Count III and IV)

1. Plaintiffs Have Failed to Allege Simple Negligence

Plaintiffs have not, and cannot, allege 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. ¶¶ 69–73. These allegations do not satisfy the requirements for a negligence claim under the common law of either Indiana or Alabama, the Plaintiffs' home states.[8] Although the basic elements of a negligence claim in both states 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), each state has unique negligence jurisprudence, and thus we address each Plaintiff's negligence claims separately.

Indiana. The Indiana negligence claim fails first because Gilead did not owe a duty to safeguard his personal information. Under Indiana law, "a pharmaceutical corporation has [no] general duty to safeguard an individual's personal information from disclosure." *Haywood v. Novartis Pharm. Corp.*, 298 F. Supp. 3d 1180, 1191–92 (N.D. Ind. 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."), *appeal dismissed*, No. 18-1328, 2018 WL 3868755 (7th Cir. May 14, 2018). Gilead thus owed no general duty, and Plaintiffs do not allege any specific duty owed by Gilead. 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.*

[8] 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, a showing of "actual damages" is an essential element of a negligence claim under Indiana law, and the threat of future harm will not suffice. *See Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 638–39 (7th Cir. 2007). Beyond the non-cognizable "increased risk" injuries discussed above, the Complaint alleges "emotional distress" as a result of Gilead's alleged negligence. Compl. ¶ 73. 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. *See Ross v. Cheema*, 716 N.E.2d 435 (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 specificity of Indiana law. 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 cannot prevail on a claim for emotional injuries because there is no allegation of a physical impact, nor that any emotional injuries were caused by an actual imminent risk of physical harm.[9]

[9] 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

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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 (Count IV) 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 or Indiana law.[10] Both states impose the same requirement that a plaintiff allege and establish that a defendant violated a statute imposing such an independent duty. "[T]here is no Alabama tort cause of action known as negligence per se. Rather, negligence per se is merely a subsidiary doctrine of negligence whereby a party is considered negligent as a matter of law because it acted in violation of a statute which was designed to prevent the type of harm that occurred." *Costine v. BAC Home Loans*, 946 F. Supp. 2d 1224, 1233 (N.D. Ala. 2013) (dismissing negligence per se claim) (citing *Parker Bldg. Servs. Co. v. Lightsey*, 925 So.2d 927, 930–31 (Ala. 2005)). Under Alabama law, "[t]o 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." *Benefield v. Int'l Paper Co.*, No. CIV A 2:09CV232-WHA, 2009 WL 2601425, at *5 (M.D. Ala. Aug. 21, 2009) (citing *Dickinson v. Land Developers Constr. Co.*, 882 So.2d 291, 302 (Ala. 2003)). And under Indiana law, "[t]he unexcused violation of a statutory duty constitutes negligence *per se* 'if the statute or ordinance is intended to protect the

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theories of "[t]he negligent causing of emotional distress" as part of "the tort of negligence." *Burgess v. Superior Court*, 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.

[10] 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) (citing *E.J. v. United States*, 2013 U.S. Dist. LEXIS 163185, at *9, 2013 WL 6072867 (N.D. Cal. Nov. 14, 2013)).

class of persons in which the plaintiff is included and to protect against the risk of the type of harm which has occurred as a result of its violation.'" *Chappey v. Ineos USA LLC*, No. 2:08-CV-271, 2009 WL 790194, at *2 (N.D. Ind. Mar. 23, 2009) (quoting *Kho v. Pennington*, 875 N.E.2d 208, 212–13 (Ind. 2007)). Whether under Alabama or Indiana law, a plaintiff must adequately allege the defendant violated a statute to sustain a negligence per se claim.[11]

Plaintiffs have alleged only in conclusory fashion, however, that Gilead breached duties under (1) the Health Insurance Portability and Accountability Act (42 U.S.C. §§ 1320d *et seq*.) ("HIPAA") (*see* Compl. ¶ 75); (2) Cal. Health & Safety Code § 120980 (*see* Compl. ¶ 76); and the CMIA, Cal. Civ. Code § 56.102 (*see* Compl. ¶ 76). Plaintiffs have not, however, alleged facts sufficiently establishing violations of any of these statutes.

HIPAA.[12] Plaintiffs cannot predicate their negligence per se claim by relying on a violation of HIPAA because, simply put, Gilead is not subject to HIPAA. HIPAA regulates how "covered entities" and "business associates" must protect the privacy and security of "protected health information" ("PHI"), as each of those terms is defined under 45 C.F.R. § 160.103. "Covered entities," in brief, include only healthcare plans, healthcare clearing houses, and healthcare providers involved in specific types of electronic transactions related to billing insurance, while "business associates" are, generally speaking, entities who provide services involving PHI for a covered entity. *See* 45 C.F.R. § 160.103. Pharmaceutical companies generally are not covered entities or business associates under HIPAA because they do not bill insurance on behalf of patients or conduct services for covered entities. Plaintiffs do not allege, much less establish, that Gilead meets the narrow definitions of either of these types of entities subject to HIPAA.[13]

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[11] Although Plaintiffs' negligence per se claim should be barred as non-cognizable under California law, Defendants note that the same basic rule applies under California law when negligence per se is applied under evidentiary rules. *See* Cal. Evid. Code § 669(a) ("The failure of a person to exercise due care is presumed if . . . [h]e violated a statute, ordinance, or regulation of a public entity.").

[12] "Indiana state law claims that rely on HIPAA as the basis for establishing negligence are not cognizable because utilizing them in such a way would circumvent HIPAA's enforcement mechanisms." *Haywood*, 298 F. Supp. 3d at 1191. Thus, Indiana Doe's negligence per se claim should also be dismissed to the extent it relies on a violation of HIPAA.

[13] Even if Gilead was subject to HIPAA, Plaintiffs fail to allege which HIPAA requirement Gilead purportedly violated and allege only generally that "Gilead had a duty to implement reasonable

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Cal. Health & Safety Code § 120980. To the extent Plaintiffs' negligence per se claim relies on Cal. Health & Safety Code § 120980, the claim must be dismissed because the Mailer does not reveal information subject to that statute. Section 120980 provides that "[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" is subject to civil penalties. 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 § 120980(a), the negligence per se claim should be dismissed to the extent it relies on that statute.

CMIA. Finally, Plaintiffs' negligence per se claim must be dismissed to the extent it relies on a violation of the CMIA because Plaintiffs have failed to adequately allege a violation of that statute. Plaintiffs' failure in this regard is detailed above.

D. Plaintiffs' Breach of Contract Claim Fails (Count V)

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, 718 (Ala. 2010); *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 894 (Ind. Ct. App. 2007).[14] The only contractual-based damages Plaintiffs allege are the lost benefit of their bargain. But, as discussed above, Plaintiffs have failed to allege that the value of the Advancing Access program after the Mailer was sent is less than what it was before the alleged sending. Plaintiffs enrolled in the Advancing Access program to reduce their prescription co-pays or otherwise receive patient assistance or information, and received what they bargained for, while they paid nothing.

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safeguards to protect Plaintiffs' and Class Members' medical information." Compl. ¶ 75. If Plaintiffs are relying on the security safeguards HIPAA requires, those safeguards only relate to electronic, not physical, PHI. *See* 45 C.F.R. § 164.302. This case concerns a physical Mailer.

[14] California contract claims also require damages. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000) ("breach of contract claim requires a showing of 'appreciable and actual damage.' . . . [N]ominal damages, speculative harm, or threat of future harm [do not suffice]." (citation omitted)). The "economic value" theory of damages is not cognizable. *Low*, 900 F. Supp. 2d at 1028 ("theory that [plaintiffs'] 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").

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 (Count VI)

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.[15] The Complaint here appears to assert a claim for public disclosure of private facts. *See* Compl. ¶¶ 88–90 (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 and Indiana[16] 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) (quotation marks omitted).[17] 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.

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[15] *E.g., Considering Homeschooling v. Morningstar Educ. Network*, No. SACV-0600615-CJC(ANx), 2008 WL 11413459, at *6 (C.D. Cal. Aug. 6, 2008) ("common law right to privacy is generally analyzed under four categories...: intrusion into private affairs, public disclosure of private facts, placing the plaintiff in a false light, and appropriating the plaintiff's name or likeness").

[16] *Compare Westminster Presbyterian Church of Muncie v. Yonghong 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, 1073–74 (Ind. Ct. App. 1995) ("Indiana recognizes the tort of public disclosure of private facts.").

[17] 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 (Ct. App. 2013).

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) (citations omitted); *see Munsell v. Hambright*, 776 N.E.2d 1272, 1282 (Ind. Ct. App. 2002). 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 (Count VII)

Under Alabama and Indiana law, the existence of an express contract precludes a claim for unjust enrichment. *See, e.g.*, *Kohl's Indiana, L.P. v. Owens*, 979 N.E.2d 159, 168 (Ind. Ct. App. 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). Because Plaintiffs here allege that they "entered into binding and enforceable contracts with Gilead," Compl. ¶ 83, they cannot state a claim for unjust enrichment.[18]

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) (citations and quotation marks omitted). And under Indiana law, "to 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). Here, the Complaint alleges that "Plaintiffs and Class Members conferred a monetary benefit on Gilead in the form of amounts paid for HIV drugs." Compl. ¶ 93. But Plaintiffs do not allege they paid anything *to Gilead*. To the contrary, any benefit

[18] The same is true under California law. While California "does not recognize a separate cause of action for unjust enrichment," *Brodsky v. Apple Inc.*, No. 19-CV-00712-LHK, 2020 WL 1694363, at *14 (N.D. Cal. Apr. 7, 2020), "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) (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (Ct. App. 2014)). Courts "have repeatedly held that '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*, 2020 WL 1694363, at *15. Plaintiffs have not pleaded facts suggesting that their alleged contracts with Gilead may be unenforceable or invalid.

conferred was from Gilead *to Plaintiffs* because Plaintiffs were enrolled in a free program which provides patient assistance. The unjust enrichment claim must be dismissed.

CONCLUSION

Gilead respectfully requests that the Court dismiss Plaintiffs' Complaint.

Dated: August 17, 2020

ARNOLD & PORTER KAYE SCHOLER LLP

By: */s/ Kenneth L. Chernof*
Kenneth L. Chernof
Angel Tang Nakamura
Stephanie N. Kang
Cassandra E. Havens

Attorneys for Defendant
GILEAD SCIENCES, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that on August 17, 2020, the foregoing document was filed with the Clerk of the U.S. District Court for the Northern District of California, using the court's electronic filing system (ECF), in compliance with Civil L.R. 5-1. The ECF system serves a "Notice of Electronic Filing" to all parties and counsel who have appeared in this action, who have consented under Civil L.R. 5-1 to accept that Notice as service of this document.

Dated: August 17, 2020

/s/ Kenneth L. Chernof
Kenneth L. Chernof

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

GILEAD SCIENCES, INC.,

Defendant.

Case No.: 3:20-cv-03473-JCS

[PROPOSED] ORDER GRANTING MOTION OF DEFENDANT GILEAD SCIENCES, INC. TO DISMISS CLASS ACTION COMPLAINT

Judge: Hon. Joseph Spero
Date: September 25, 2020
Time: 9:30 a.m.
Ctrm: F

Action Filed: May 21, 2020

Pending before this Court is the Motion of Defendant Gilead Sciences, Inc. ("Gilead") to Dismiss Class Action Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), as well as Gilead's Request for Judicial Notice. Having considered the briefs, the California Court of Appeal opinion properly subject to judicial notice, and any argument of counsel, and finding good cause shown, **IT IS HEREBY ORDERED AS FOLLOWS:**

The Court **GRANTS** Gilead's Request for Judicial Notice and takes judicial notice of the California Court of Appeal opinion attached as Exhibit A to that Request.

The Court **GRANTS** Gilead's Motion to Dismiss Class Action Complaint in its entirety because Plaintiffs lack standing under Article III of the United States Constitution, and the Complaint fails to state any claim upon which relief can be granted. Plaintiffs' Class Action Complaint is hereby **DISMISSED** without leave to amend.

IT IS SO ORDERED.

Dated: _____, 2020

_____
Hon. Joseph Spero
United States District Judge