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SUPERIOR COURT FOR 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, v. GILEAD SCIENCES, INC., Defendant.	Case No. 20-CIV-03699 **CLASS ACTION** MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO PLAINTIFFS' CLASS ACTION COMPLAINT Date: December 11, 2020 Time: 9:00 a.m. Dept.: 22 Judge: Hon. Danny Y. Chou Complaint filed September 1, 2020

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I. INTRODUCTION

Plaintiffs, on behalf of themselves and the Class Members they propose to represent, respectfully submit this Memorandum of Points & Authorities in Opposition to Defendant's Demurrer to Plaintiffs' Complaint. None of Gilead's arguments on demurrer survive the well-pleaded and largely undisputed facts at issue. These facts establish that Gilead violated statutory and common law obligations to protect Plaintiffs and the proposed Class Members from the reckless disclosure of confidential medical information ("CMI") related to HIV treatment.

II. FACTUAL BACKGROUND

Gilead develops, sells, and markets prescription drugs, including drugs for the treatment and prevention of HIV. Gilead's product list includes Truvada and Descovy, the only FDA-approved drugs available for pre-exposure prophylaxis ("PrEP"), the prescribed medication regimen for people who want to avoid contracting HIV. (Compl. ¶¶ 1-4, 34.) Gilead operates a patient-assistance program for its PrEP drugs known as the Advancing Access Program ("AAP"). (*Id.* ¶ 5.) Patient-assistance programs benefit patients and drug manufacturers. Patients receive access to treatment that may otherwise be inaccessible to them because of high cost or lack of FDA-approved alternatives, while drug companies make sales not otherwise possible, expand their customer base, and secure patient loyalty.

In exchange for services offered through the AAP, including discounted drugs through a co-pay coupon card, Compl. ¶ 35, Plaintiffs agreed to share their CMI, including medical history and HIV status, with Gilead. (*Id.* ¶ 37.) Gilead promised to keep all patient medical information obtained confidential. (*Id.* ¶ 36 ("On the Enrollment Form, Gilead states: '**Patient confidentiality is of primary importance to us. All patient information will remain confidential.**' (Emphasis added.)").[1] In addition, according to Gilead's privacy statement, "Gilead acknowledges its commitment to comply with the EU-US and Swiss-US Privacy Shield Principles ('Principles')". Gilead stressed these privacy provisions to advance its business interests. Gilead acknowledged that "personal information" went well-beyond HIV test results to include any "(i) Inferences drawn from other Personal Information …, to create a profile reflecting your preferences, characteristics, behavior, attitudes and abilities." *Id.* In reliance on these assurances, Plaintiffs enrolled in the AAP.

[1] *See* Advancing Access Terms and Conditions at https://www.gileadadvancingaccess.com/financial-support/gilead-copay-card; Gilead's Privacy Statement at https://www.gilead.com/privacy-statements; Enrollment Form, https://services.gileadhiv.com/content/pdf/gilead_enrollment_form.pdf.

They neither agreed nor expected that mail from the company would publicly associate them with HIV.

Nonetheless, Gilead intentionally selected a list of recipients from the AAP to receive a letter from their HIV Prevention Team. (Compl. ¶ 39.) Gilead designed the envelopes and stamped them with "**HIV Prevention Team**" in a bold red font as the return address with the specific intention that it be seen. Gilead then intentionally released this information—and all the inferences that the label portends—through the U.S. Postal Service, where it was viewed by postal workers, mail carriers, family members, roommates, neighbors, employers, co-workers, or anyone with occasion to see unopened mail. (*Id*. ¶¶ 39, 45-47.) None of those persons had any right or reason to be privy to Plaintiffs' CMI. The resulting loss of control over their sensitive and personal information has caused Plaintiffs to suffer ongoing distress and anxiety.

III. LEGAL STANDARD

A demurrer must be denied when the complaint alleges sufficient facts to state a cause of action under any possible legal theory. *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 872 (2012). All material facts properly pleaded must be taken as true. *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992, 998 (2009). The court must also accept as true "facts that may be implied or inferred from those expressly alleged." *Marshall v. Gibson, Dunn & Crutcher*, 37 Cal. App. 4th 1397, 1403 (1995). The court must "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." *Evans v. City of Berkeley*, 38 Cal. 4th 1, 6 (2006). "[T]he question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." *Alcorn v. Anbro Eng'g, Inc*., 2 Cal. 3d 493, 496 (1970).

IV. ARGUMENT

A. Plaintiffs Have Sufficiently Pleaded Multiple Violations of the California Confidentiality of Medical Information Act

Plaintiffs have sufficiently pleaded claims under the California Confidential of Medical Information Act ("CMIA"), Cal. Civ. Code §§ 56.101(a), 56.102, 56.36(b). It is undisputed that Plaintiffs' CMI was blatantly, and without excuse, broadcast on envelopes sent through the mail to Plaintiffs' homes and places of work. This is precisely the kind of conduct the CMIA forbids. *See Loder v. City of Glendale,* 14 Cal. 4th 846, 859 (1997). Despite the undisputed facts supporting Plaintiffs' CMIA claims, and without ever bothering to explain or justify its conduct, Gilead suggests that (1) there was no "release" of confidential information, Dem. at 11; (2) there was no

"disclosure" of confidential information, Dem. at 14; and (3) Plaintiffs lack standing, Dem. at 15-16. All of these arguments rest on the same denial of what is obvious: Plaintiffs and the proposed Class Members were personally and quite publicly linked to HIV, a highly stigmatizing medical condition, because of Gilead's reckless conduct.

1. The CMIA's Protection of CMI

The CMIA imposes an affirmative obligation on regulated entities like Gilead to protect the CMI they amass in the conduct of their business.[2] Gilead is in violation of duties imposed by the CMIA in sections 56.101, 56.102, and 56.36(b).[3] Section 56.101(a) of the CMIA requires pharmaceutical companies to maintain medical information "in a manner that preserves the confidentiality of the information contained therein."[4] Specifically, section 101(a) provides remedies and penalties against any pharmaceutical company, or other health care provider, that "negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information." Section 102(b) furthermore imposes a duty on pharmaceutical companies

[2] Gilead does not dispute that it is a "pharmaceutical company" within the meaning of the CMIA.

[3] Plaintiffs' Complaint lists as its first cause of action a violation of CMIA, Cal. Civ. Code § 56, *et seq.* It specifies sections 56.102 and 56.36 but does not specifically list section 56.101(a) under this formal cause of action. Where section 56.102 requires both an "unauthorized disclosure" and a "release" of confidential information to constitute a violation remedied through section 56.36, section 56.101(a) only requires a "release" of such information through negligent storage, preservation, or disposition of the confidential information. The facts as pleaded, including the specific claims for negligence *per se* under section 56.101(a), and the CMIA claim stated under the first cause of action, provide sufficient notice to Defendant that Plaintiffs' section 56.101(a) claim is pleaded. *See Garris v. Mitchell*, 7 Cal. App. 2d 430, 435 (1935) (no merit in demurrers where "several causes of action have been improperly united or are not separately stated"). Indeed, Gilead's argument against "release" proves such notice, as it explicitly notes that standards of release in sections 56.36(b) and 56.101(a) are equivalent. (Dem. at 12 n.2.) However, Plaintiffs are prepared to amend the complaint to cure any deficiency so perceived by the Court in this respect. *See* 49A Cal. Jur. 3d Pleading § 159; *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 967 (1992).

[4] Gilead relegates to a footnote a token argument that reference to "**HIV Prevention Team**" on the envelopes does not constitute CMI within the meaning of the CMIA. (Dem. at 14 n.4.) Gilead's claim is not well taken. Reference to **HIV Prevention Team** is plainly information "regarding . . . medical history, mental of physical condition, or treatment." § 56.20. *See also Eisenhower Med. Ctr. v. Superior Court*, 226 Cal. App. 4th 430, 434 (2014) ("[T]he very fact that a person is or was a patient of certain health care providers, such as an AIDS clinic, is more revelatory of the nature of that person's medical condition, history, or treatment."). Nor does it matter if the information is accurate or not. *Brown v. Mortensen*, 51 Cal. 4th 1052, 1071 (2011). Gilead is well aware of the stigma related to HIV. *See* "The State of HIV Stigma Study," https://stories.gilead.com/articles/glaad-and-gilead-release-inaugural-us-survey-on-hiv-stigma (July 26, 2020), *and* Gilead privacy statements regarding "personal information," include "inferences" likely to be drawn from that information. *See supra*, note 1.

specifically, that forbids them from "disclos[ing] medical information provided to it without first obtaining a valid authorization from the patient." To enforce those obligations, the CMIA creates a private right of action to remedy violations. Section 56.36 of the Act provides that injured parties may bring an action to recover "nominal damages of one thousand dollars ($1,000)" without having to prove that "that the plaintiff suffered or was threatened with actual damages," § 56.36(b)(1), and may further recover "[t]he amount of actual damages, if any, sustained by the patient," § 56.36(b)(2).

2. Gilead "Released" Plaintiffs' CMI in Violation of the CMIA

Under both sections 56.101(a) and 56.102(b), "when suing for nominal damages, plaintiffs do not have to prove they 'suffered or [were] threatened with actual damages,' Cal. Civ. Code § 56.36(b)(1), but they must plead that an unauthorized third party viewed or accessed their confidential information." *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*, 2020 WL 2214152, at *7 (S.D. Cal. May 7, 2020). To meet this standard, Plaintiffs need only plead facts "that could give rise to the inference that their medical information has been viewed by an unauthorized third-party." *Id.* Here, Plaintiffs have pleaded that Gilead stamped their CMI on the outside of envelopes in clear and conspicuous font and color addressed to Plaintiffs. Gilead then sent those envelopes through the United States postal system where postal employees would necessarily view them. Those envelopes were then delivered to the homes and business addresses of the Plaintiffs where family members, co-workers, neighbors, and any random passersby could view them. (Compl. ¶¶ 44-47.) Plaintiffs further allege that such persons did in fact view them. (*Id.* ¶ 10.) No postal workers nor any family members, co-workers, neighbors, or passersby were authorized to access Plaintiffs' confidential CMI. And Gilead had no legal authorization or basis to release this information. The release of Plaintiffs' CMI was indisputably the result of Gilead's own negligence and recklessness. These facts are more than sufficient to "give rise to the inference that their medical information has been viewed by an unauthorized third-party." *Id.*

3. CMI Was Also "Disclosed"

Under section 56.101(a), Plaintiffs are not required to allege any affirmative act of disclosure to establish liability: "The plain text of the statute does not require an affirmative disclosure by the medical provider to create liability" but instead creates a remedy against whoever "negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information." *In re Solara Medical Supplies,* 2020 WL 2214152, at *7 (quoting § 56.101(a)); *see also Regents of Univ. of California v. Superior Court*, 220 Cal. App. 4th 549, 568 (2013) ("Finally,

we reject the Regents' argument that a private cause of action under sections 56.101 and 56.36, subdivision (b), must include pleading and proof of an affirmative disclosure by the health care provider…").

Section 56.102(b) does require an act of disclosure to trigger liability. "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." *Sutter Health v. Super Ct.*, 227 Cal. App. 4th 1546, 1555-56 (2014). The *Sutter* Court expressly distinguished between when information is "**given to**" rather than "**stolen by**" the unauthorized person. *Id.* at 1556. ("Here, there is no dispute that the computer was **stolen by**, not **given to**, the unauthorized person.") (emphasis added). The violation is in the act or acts undertaken by the discloser that affirmatively transfer the CMI to an unauthorized recipient. In *Sutter* and *Regents*, the two cases on which Defendant builds its entire demurrer against the CMIA claims, the medical information was **stolen by** a thief (on encrypted hard drives no less). Here, Gilead affirmatively chose to stamp **HIV Prevention Team** on the outside of envelopes linked to Plaintiffs' names and addresses and then **transfer** those envelopes to U.S. postal employees with the knowledge that they would then be **delivered** to Plaintiffs' homes and workplaces. These are clear, communicative acts that gave Plaintiffs' CMI to unauthorized recipients.[5]

Faced with a similar set of facts (envelopes that on their face linked plaintiffs to HIV treatment) and a similar legal question (whether there was "actual disclosure" of CMI), the court in *Doe One v. Caremark, LLC*, 348 F. Supp. 3d 724 (S.D. Ohio 2018), found that plaintiffs' CMI was disclosed. In rejecting the defendant's argument that there was no allegation of "actual disclosure" because the plaintiffs did not "name [a] specific individual who *actually* saw the information," the court stated the obvious:

> Plaintiffs in both cases have alleged that, at a minimum, this protected information was actually disclosed to Fiserv employees who participated in preparing envelopes for mailing, which included the mailing of health information and pharmacy cards, and to U.S. Postal Service employees who delivered the letters, and others[.]

[5] Gilead attempts to construe, with misplaced emphasis, the *Sutter* Court's words to impose a novel specific intent requirement into the statute, so that "disclosure" requires the discloser to intend to disclose the CMI to some specified person. (Dem. at 15.) This reading contradicts the plain meaning of the statute, which does not even mention any prospective recipient, merely the lack of authorization. § 56.102(b) ("[A] pharmaceutical company may not disclose medical information provided to it without first obtaining a valid authorization from the patient."). But even under this invented, higher bar, Gilead's argument fails, as, at the very least, Gilead intended to disclose the information in the return address and mailing address specifically to the postal workers and any individuals at Plaintiffs' homes and businesses who handle the mail.

Id. at 730; *see also Doe v. Aetna Life Insurance Co*., No. 18-979, 2018 WL 6829728, at *5 (M.D. Fla. Dec. 27, 2018) (denying dismissal of privacy claims for HIV status disclosed by mail).

4. Out-of-State Plaintiffs May Avail Themselves of California Remedies When Injured by California Residents Acting in California

As a final gambit, Gilead argues that the Alabama, Indiana, and Missouri Plaintiffs lack standing to bring CMIA claims. Gilead does so by importing an extraterritoriality doctrine applied in some cases regarding the California Unfair Competition Law ("UCL") where the conduct giving rise to UCL liability occurred almost *entirely* out of state.[6] (Dem. at 16); *see Sullivan v. Oracle Corp*., 51 Cal. 4th 1191, 1208 (2011). The relevant inquiry for the *Sullivan* Court was specifically whether the limited conduct in California was itself unlawful. *Id.* The violation alleged here under sections 56.101(a) and 56.102 of the CMIA relies on conduct that took place *within* California. The address for the AAP is "La Jolla, CA"; Gilead's headquarters where decisions regarding the AAP were presumably made is in Foster City, California, Compl. ¶ 1; and the letters sent out from the **HIV Prevention Team** clearly and conspicuously list as the return address "Burlingame, CA," *id*. ¶ 7. These allegations make clear that the failure to protect confidential information and the unauthorized disclosure of that information occurred *in California* as a result of the negligence and recklessness of a California resident acting in California. The fact that non-residents were the victims of Gilead's reckless conduct has no legal bearing on the reach of the law. *See, e.g., Clothesrigger, Inc. v. GTE Corp*., 191 Cal. App. 3d 605, 616 (1987) (allegations of fraudulent and unfair charges imposed by California company on nonresidents state a claim); *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1065 (1999) (applying California securities law to claims brought by out of state residents). Defendant points to no language in the statute that limits the reach of the CMIA to California residents. Indeed, cases have applied the CMIA to California companies on claims brought by non-residents. *See, e.g., In re Solara Medical Supplies*, 2020 WL 2214152, at *1-2.[7]

[6] Defendant does not raise this theory of extraterritoriality with regards to the UCL claim itself, perhaps in light of how ludicrous a claim of no California conduct would look when an agreement with a California company with a California address on the agreement is directly at issue.

[7] Defendant's argument here is similar to its later unsupported and summary assumption that California common law does not apply. (Dem. at 19 n.7.) Plaintiffs articulate why California law should apply to the common law claims in the choice-of-law analysis below, but note that it would equally apply to the application of the CMIA claims.

B. Plaintiffs Have Sufficiently Pleaded a Violation of the UCL

1. Plaintiffs Have Standing Under the UCL

The UCL confers a private right of action to "any 'person who has suffered injury in fact and has lost money or property' as a result of unfair competition." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320-31 (2011) (quoting Cal. Bus. & Prof. Code § 17204). A plaintiff may suffer an economic injury cognizable under the UCL if they "(1) surrender in a transaction more, or acquire in a transaction less, then he or she otherwise would have; [or] (2) have a present or future property interest diminished …." *Id.* at 323. Plaintiffs allege both that (1) Gilead's actions caused the loss of the benefit of the bargain such that they received less than they bargained for when they agreed to permit Gilead to possess and use their CMI, Compl. ¶ 50, and (2) Gilead's actions diminished the value of their property interests in their CMI, *id.* ¶ 49.

The CMI that Plaintiffs provided to Gilead in exchange for benefits under the AAP was extensive. The agreement permitted Gilead to obtain CMI directly from Plaintiffs' healthcare providers, including doctors, pharmacists, and insurers. This included their medical conditions, history, and HIV status or treatment.[8] This information is highly sensitive, highly personal, highly confidential, and strictly protected by statutory schemes such as the CMIA and HIPAA to guard against its unauthorized disclosure. The limitations on disclosing such information cause this type of data to be scarce and therefore of high economic value to a pharmaceutical company like Gilead. This explains why Gilead would agree to provide economically valuable benefits to Plaintiffs in exchange for Plaintiffs' CMI.[9] Indeed, Gilead's willingness to enter into this transaction directly belies Gilead's principal argument here that Plaintiffs have suffered no economic loss. As alleged, Gilead denied the benefit of the bargain Plaintiffs made with their CMI and, further, impaired the value of that CMI through its unauthorized disclosure.

"Courts in California have consistently held that benefit of the bargain damages represents economic injury for purposes of the UCL." *In re Solara Medical Supplies*, 2020 WL 2214152, at *9. Plaintiffs entered into these agreements and shared their CMI with Gilead on the promise that "[p]atient confidentiality is of primary importance to [Gilead]. All patient information

[8] *See* Enrollment Form at 2, https://services.gileadhiv.com/content/pdf/gilead_enrollment_form.pdf.

[9] The unique economic value of the CMI provided by Plaintiffs to Gilead is an issue that will be explored in discovery. This data appears to be used for marketing, product development, and analysis and advancement of Gilead's business interests. *See* Gilead's Privacy Statement, https://www.gilead.com/privacy-statements.

will remain confidential." (*See* Enrollment Form.) Gilead did not uphold its end of the agreement, meaning that Plaintiffs "acquired less in their transactions with [Gilead] than they would have if [Gilead] had sufficiently protected their Personal Information." *In re Solara*, 2020 WL 2214152 at *9. This harm is sufficient economic loss to confer UCL standing. *See id.*; *see also In re Yahoo! Inc. Customer Data Security Breach Litigation*, 313 F. Supp. 3d 1113, 1131 (N.D. Cal. 2018) ("Such benefit-of-the-bargain losses are sufficient to allege 'lost money or property,' and thus standing, under the UCL."); *In re LinkedIn User Privacy Litigation*, 2014 WL 1323713, at *6 (N.D. Cal., Mar. 28, 2014) (allegations of misrepresentations regarding privacy policies that consumer relied on in signing agreement "are sufficient to establish standing under the UCL").[10]

Furthermore, Plaintiffs' CMI decreased in value as a result of its being recklessly disclosed. *See, e.g, In re Anthem, Inc. Data Breach Litigation*, 2016 WL 3029783, at *14 (N.D. Cal. May 27, 2016) (courts recognized "that plaintiffs had sufficiently pleaded economic injury by claiming 'that their [personal identifying information] was stolen' [and publicly disclosed]"); *see also Svenson*, 2015 WL 1503429, at *5 ("diminution in value of her personal information" was a cognizable economic harm). The extent of both economic injuries—the loss of the benefit-of-the-bargain and diminution of value—will be more fully determined through discovery.

2. Gilead's Conduct Was Unlawful and/or Unfair Under the UCL

Gilead further attacks Plaintiffs' allegations that Gilead engaged in unfair competition because Plaintiffs do not allege that Gilead's disclosure of Plaintiffs' confidential HIV-related information constitutes unlawful or unfair practices. On the contrary, Plaintiffs have pleaded that Gilead has engaged in both unlawful and unfair business practices. "The UCL's scope is broad. By defining unfair competition to include any "*unlawful* ... business act or practice" (§ 17200, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949 (2002), *as modified* (May 22, 2002); *see also Antman v. Uber Technologies, Inc.*, 2015 WL 6123054, *6 (N.D. Cal. Oct. 19,

[10] Moreover, even were Gilead's contention that non-monetary exchanges cannot predicate economic losses assumed *in arguendo,* federal courts applying the UCL have found loss of the benefit of the bargain to ground standing for claims at the pleading stage involving privacy violations for services that were offered for free. *See, e.g., Svenson v. Google Inc.*, No. 13-04080, 2016 WL 8943301, at *13 (N.D. Cal. Dec. 21, 2016) ("To the extent that Google argues that concrete injury cannot be demonstrated in regard to a free product—here, access to the Wallet and Google Play platforms with the attendant Privacy Policies contained in the TOS—the Court disagrees."); *see also In re Facebook Privacy Litig.*, 192 F. Supp. 3d 1053, 1059 (N.D. Cal. 2016) (finding sufficient injuries for Article III standing for privacy violations without payments).

2015) ("Generally, violation of almost any law may serve as a basis for a UCL claim."). Plaintiffs have alleged a violation of the CMIA and numerous common law violations sufficient to ground the unlawful prong of the UCL. (Compl. ¶ 69); *see In re Solara Medical Supplies,* 2020 WL 2214152, at *11 (CMIA claims predicate UCL); *Corona v. Sony Pictures Entm't, Inc.*, 2015 WL 3916744 (C.D. Cal. June 15, 2015) (negligence and CMIA claims predicate UCL).

Plaintiffs also allege that Gilead's conduct was "unfair" under the UCL. (Compl. ¶ 70.) "The 'unfair' prong of the UCL creates a cause of action for a business practice that is unfair even if not proscribed by some other law." *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 989 (N.D. Cal. 2016). "Unfair" conduct includes "immoral, unethical, oppressive, unscrupulous, or substantially injurious conduct by Defendants *or*" allegations that defendants' conduct violated an established public policy. *Id.* at 990 (emphasis in original). The public policy of protecting CMI is well-established in California law. *See id.* (citing *In re Adobe Systems, Inc. Privacy Litigation,* 66 F. Supp. 3d 1197, 1228 (N.D. Cal. 2014)). Moreover, Gilead's disclosure of Plaintiffs' CMI in breach of its promises to protect that data is sufficiently "immoral, unethical, oppressive, unscrupulous, or substantially injurious conduct" to allege a claim under the UCL. *See Svenson,* 2015 WL 1503429, at *9 ("Svenson's allegations regarding Google's policy of disclosing personal information in connection with all App purchases, in violation of its own privacy policies …. [establish] a UCL claim under the unfair prong as well as under the unlawful prong.").

3. Plaintiffs Have Requested Appropriate Injunctive Relief under the UCL.

Finally, Gilead takes issue with Plaintiffs' request for restitution under the UCL. Firstly, "the fact that Plaintiffs have sufficiently pleaded benefit of the bargain losses also establishes that Plaintiffs may seek restitution under the UCL." *In re Anthem,* 162 F. Supp. 3d at 985–86. Secondly, Plaintiffs have demanded broader injunctive relief than simply restitution "including, but not limited to injunctive relief, restitution, and attorneys' fees and costs." (Compl. ¶ 74.) Section 17203 of the UCL provides for injunctive relief in general and section 17204 does not limit a claim based upon the type of injunctive relief requested. Gilead's arguments are both wrong as a matter of law and premature until a factual record can be established to show the benefit of the bargain losses Plaintiffs suffered in providing their CMI to Gilead.

C. Plaintiffs Sufficiently Pleaded Negligence and Negligence Per Se Claims under California Law

Plaintiffs have alleged that Gilead had a duty to protect the confidentiality of the CMI that Gilead obtained from Plaintiffs' healthcare providers, Compl. ¶ 76-78, 82, that Gilead

breached this duty, *id.* ¶¶ 79, 83, and that this breach was the proximate cause of Plaintiffs' damages including embarrassment, humiliation, frustration, anxiety, emotional distress, and fear, and putting them at increased risk for losing employment, housing, access to healthcare, and even violence and other trauma, *id.* ¶¶ 80, 85-87. Plaintiffs have thus sufficiently alleged an actionable tort of negligence under California law. *See United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 594 (1970).

1. California Law Applies to Plaintiffs' Negligence Claims

Gilead claims, without any legal support, that the law of Plaintiffs' home states governs their negligence claims. (Dem. at 19, 19 n.7, 21.) As an initial matter, choice-of-law is a fact intensive inquiry that is better considered after discovery. *See, e.g., Fehrenbach v. Hewlett Packard Co.*, 2017 WL 11422106, at *6 (S.D. Cal. Jan. 5, 2017) ("Such a detailed choice-of-law analysis should occur during the class certification stage, after discovery."). Second, once a plaintiff makes a threshold showing that there are sufficient contacts with California such that California law can constitutionally be applied, the burden shifts to the other side to demonstrate "that foreign law, rather than California law, should apply to class claims." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). Defendant's conclusory footnote does not meet its burden.

In any event, under the "governmental interest analysis" applied by California courts to choice-of-law questions, California law clearly applies. *See Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95, 107-108 (2006) (citing *Reich v. Purcell*, 63 Cal. 2d 551 (1967) (Traynor, J.)). California has a well-established public policy to protect consumers' private information, and a clear and undisputed interest in ensuring that businesses based in California abide by such a policy, by making them liable to plaintiffs under the conditions established by California common law. *See, e.g., In re Adobe Systems, Inc. Privacy Litigation*, 66 F. Supp. 3d at 1228 (finding that the legislative intent of various privacy statutes "collectively reflect California's public policy of protecting customer data"). Further, as in *Hurtado v. Superior Court*, 11 Cal. 3d 574, 580-581 (1974), a full analysis would show any conflict between the various states' tort liability laws to be a "false conflict" where any putative liability limits under Alabama, Indiana, and Missouri law are "primarily local" interests that "protect its residents from the imposition of these excessive financial burdens," *id.* at 581. "Since it is the plaintiffs and not the defendants who are [residents of other states] in this case, [these other states have] no interest in applying [their] limitation of damages—[Alabama, Indiana, and Missouri have] no defendant residents to protect and [have] no

interest in denying full recovery to [their] residents injured by [defendants from other states]." *Id.; see also Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005-07 (9th Cir. 2001) ("It is pure fancy to believe that Hawaii would wish to restrict its residents from recovery that others could obtain in California solely because it had not enacted a statute like California's to complement its common law action for the same offense.").

2. Plaintiffs' Alleged Harms Including Embarrassment, Humiliation, Frustration, Anxiety, Emotional Distress, Fear, as well as Increased Risk of Loss of Employment, Loss Housing, Loss Access to Healthcare, and Violence and Other Trauma Are Sufficient Harms Under California Tort Law

First, Plaintiffs allege physical harms such as anxiety, stress, and increased risk of loss of housing, health care and employment. These harms are cognizable as physical harms under California tort law. *See Hensley v. San Diego Gas & Electric Co.*, 7 Cal. App. 5th 1337, 1351 (2017).

Second, as Defendant concedes, "physical injury is not a prerequisite for recovering damages for *serious* emotional distress." *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1079 (1992) (emphasis in original). Plaintiffs' allegations, taken by themselves are legally sufficient to constitute such "serious emotional distress." *See, e.g., Lorenzo v. United States*, No. 09-1803, 2010 WL 11508278, at *4 (S.D. Cal. Oct. 21, 2010) (public release of video of border patrol officer shooting an individual sufficiently alleged "serious emotional distress" to officer); *Gonzalez v. Compass Vision, Inc*., No. 07-1951, 2008 WL 11337934, *5 (S.D. Cal. July 24, 2008) (allegations that plaintiffs suffered "including insomnia, depression, humiliation, severe apprehension, anxiety, and even hospitalization due to stress" after disclosure of negligently conducted drug tests sufficient to withstand motion to dismiss).

As alleged, Plaintiffs "have suffered and will continue to suffer 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 as a result of the disclosure of their HIV-related information." (Compl. ¶ 48.) HIV is a highly stigmatized medical condition as it is often associated with behavior that is unacceptable, or even illegal, in some communities. Coming out or being outed as living with HIV often has devastating social consequences including ostracization, alienation, and exclusion from shared housing, employment, families, and other communities, all of which directly and proximately can and do result in serious physical and emotional injuries. (*Id.* ¶¶ 20-25.) Gilead is well aware of the physical

and emotional harms individuals whose HIV status is publicly disclosed are subject to, as evidenced by numerous reports and other programs sponsored directly by Gilead with the aims of reducing stigma associated with HIV.[11]

Finally, as Defendant's reliance on the Judicial Council of California Civil Jury Instructions implicitly concedes, the determination of whether a harm meets the standard of a "serious emotional distress," Dem. at 21 n.8, is a factual question that must be addressed by the fact-finder through the development of a sufficient record. It should not be adjudicated on a demurrer.

3. Plaintiffs Sufficiently Alleged Duties of Care Regarding Plaintiffs' CMI under the CMIA and Cal. Health & Safety Code § 120980(a) to Sustain the Negligence Per Se Claim

In its demurrer, Defendant only disputes whether a claim made under the auspices of "negligence per se," where the defendant is alleged to have breached a statutory duty, provides an independent cause of action from a simple negligence claim, or merely provides "an evidentiary presumption that affects the standard of care in a cause of action for negligence." *Millard v. Biosources, Inc.*, 156 Cal. App. 4th 1338, 1353 n.2 (2007). In the case at hand, Defendant's argument only serves to spread confusion. *See County of Sonoma v. Superior Court*, 190 Cal. App. 4th 1312, 1326 n.11 (2010) ("It is the 'gravamen of plaintiff's cause of action' that matters, 'regardless of the title attached to the cause of action or the remedy sought.'") (quoting *Hensler v. City of Glendale*, 8 Cal. 4th 1, 26 (1994)).

Plaintiffs have alleged that Gilead owed (and violated) a common law duty of care under California law to protect the Plaintiffs' CMI from disclosure, Compl. ¶ 77, that Gilead owed (and violated) a statutory duty of care under the CMIA (Cal. Civ. Code § 56.101) to do the same, Compl. ¶ 82, and that Gilead owed (and violated) a statutory duty of care under Cal. Health & Safety Code

[11] *See, e.g.*, "The State of HIV Stigma Study," https://stories.gilead.com/articles/glaad-and-gilead-release-inaugural-us-survey-on-hiv-stigma (July 26, 2020); Gilead HIV, https://www.gileadhiv.com (retrieved Nov. 10, 2020) ("People living with HIV and those at-risk for HIV often experience stigma, which marginalizes them, and pushes them to the edges of society, creating a barrier to HIV prevention, testing and treatment. Stigma can take many forms: the language we use, unfair and unjust treatment, prejudice and discrimination, rejection and avoidance, or violence."); Gilead COMPASS Initiative, https://www.gileadcompass.com (retrieved Nov. 10, 2020).

§ 120980(a) to do the same, *id.* ¶ 82.[12] Defendant has not disputed that any of these duties exist. Notably, Gilead has only disputed the "simple negligence" claim on the basis of cognizable injury, as discussed above, and has not otherwise contested the sufficiency of Plaintiffs' allegations regarding its duty or alleged breach of that duty under the common law of California.

Plaintiffs have sufficiently alleged that Gilead had a duty of care under § 56.101(a) in the creation, maintenance, preservation, and any other disposition of Plaintiffs' medical information and breached that duty by recklessly printing their medical information on an envelope and sending it through the postal system to Plaintiffs' workplaces and homes. *See supra* Part IV.A.

Further, Plaintiffs have sufficiently alleged that Gilead has a duty under § 120980(a) not to "negligently disclose[] results of an HIV test, as defined in subdivision (c) of Section 120775, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply." Defendant recklessly printed **HIV Prevention Team** on an envelope clearly addressing Plaintiffs by name. (Compl. ¶ 7.) This association directly implicates a knowledge of HIV status (positive or negative) and testing to determine that status in order to take appropriate measures to prevent transmission. *See John B. v. Superior Court*, 38 Cal. 4th 1177, 1218 (2006) (Moreno, J., dissenting) (discussing that disclosure of HIV status implicates same concern as tests under §§ 120975, 120980). Because the **HIV Prevention Team** return address directly implied a HIV status and therefore a HIV test and linked that status to the Plaintiffs, Defendant violated the duty imposed by section 120980(a)'s prohibition on disclosing test results.

D. Plaintiffs Pleaded Sufficient Damages to Sustain a Breach of Contract Claim

Plaintiffs have also properly alleged their breach of contract claims. California has long recognized that nominal damages are sufficient to bring a contract claim. Cal. Civ. Code § 3360 (1872) ("When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."); *see also Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (1959). Courts interpreting California law have specifically found that privacy violations in contravention of user agreements were such cases. *In re Google Referrer Header Privacy Litig.*, No. 10-04809,

[12] Gilead does not dispute that Plaintiffs have sufficiently alleged that Gilead owes and breached its duty under the common law of California to protect the disclosure of Plaintiffs' confidential CMI, only that Plaintiffs have failed to state a claim for a violation of a statutory duty under either the CMIA or section 120980(a). Thus, even under Gilead's logic of collapsing the negligence claims into a single claim, the only legal issue in dispute is the scope of Gilead's duties in light of the common law, the CMIA, and section 120980(a), not whether they exist at all. The fact that Plaintiffs have otherwise pleaded a sufficient negligent action must then be assumed.

2020 WL 3035796 (N.D. Cal. June 5, 2020), *motion to certify appeal denied*, 2020 WL 5545155 (N.D. Cal. Sept. 16, 2020) (sharing search history in contravention of terms of service is an alleged breach of contract that "suffices to demonstrate injury in fact at the pleading stage").[13][14]

Notwithstanding the claim's survival on nominal damages, Plaintiffs have alleged actual damages in the form of lost benefit of the bargain. These damages "flow directly and necessarily from a breach of contract, or … are a natural result of a breach" and, for the purposes of pleading, they are understood as general damages. *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* 34 Cal. 4th 960, 968 (2004) (citing Cal. Civ. Code. § 3300). As general damages, these allegations represent evidentiary matters to be established through discovery and not a basis for dismissal at the pleading stage. *See Colvig v. RKO General, Inc.*, 232 Cal. App. 2d 56, 68–69 (1965); *see also Armstrong v. Adams*, 102 Cal. App. 677, 682 (1929).

E. Plaintiffs' Unjust Enrichment Claims Are Appropriately Pleaded

Plaintiffs also argue that they are entitled to damages under a theory of unjust enrichment. California law recognizes that unjust enrichment claims will survive a demurrer when pleaded alongside contractual claims where benefits incident to a contract are alleged. *See Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000-01 (2015); *see also Bruton v. Gerber Prod. Co.*, 703 Fed. Appx. 468, 470 (9th Cir. 2017) ("The California Supreme Court has clarified California law and allowed independent claims for unjust enrichment to proceed."). To the extent that the Court determines that there is a contract regarding Plaintiffs' provision of CMI in exchange for drug discounts and a promise to maintain the confidentiality of the information, Plaintiffs agree that the matter should be adjudicated on the basis of the contract and the related UCL claims. However, to the extent that Gilead's various and conflicting arguments that dispute an agreement between Plaintiffs and Gilead regarding the stewardship of Plaintiffs' CMI puts the nature and scope of that agreement into question for factual resolution, that raises a set of factual questions

[13] Gilead's legal support here is dubious. In *In re Google Assistant Privacy Litigation*, 457 F. Supp. 3d 797, 834 (N.D. Cal. 2020), the court notes that "Plaintiffs are entitled to seek compensatory damages or perhaps nominal damages for [the invasion of privacy]," but dismissed the claims because plaintiffs failed to plead that their information had been shared as has been alleged here, *id.* at 833. *In re LinkedIn User Privacy Litigation*, 932 F. Supp. 2d 1089 (N.D. Cal. 2013), addresses Article III standing in federal courts and does not address section 3360 injuries.

[14] Courts in Alabama, Indiana, and Missouri also recognize that a contractual breach itself alleges sufficient nominal damages to bring an action. *Knox Kershaw, Inc. v. Kershaw*, 552 So.2d 126 (Ala. 1989); *Wagner v. Wagner*, 94 N.E.3d 366, 3 (Ind. Ct. App. 2017); *Dierkes v. Blue Cross and Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. 1999).

and Plaintiffs' unjust enrichment claim should survive for resolution at a later date on a more complete record.

F. Plaintiffs' Invasion of Privacy Claims Are Properly Pleaded

To state a claim for an invasion of privacy under California law, Plaintiffs must allege "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 214 (1998), *as modified on denial of reh'g* (July 29, 1998). Plaintiffs here have established all four elements. They have alleged that Gilead has publicly disclosed through the publication on the envelopes Plaintiffs' participation in a HIV pharmaceutical program. This information is CMI that is not of legitimate public concern, and its disclosure is offensive and objectively unreasonable due to the stigma that being affiliated with HIV treatment has for the Plaintiffs.

Gilead disputes that Plaintiffs allege sufficient publicity to sustain this claim. (Dem. at 24.) This is despite Plaintiffs' specific and plausible allegations that many people saw the **HIV Prevention Team** letter including mail processors, mail carriers, family, friends, roommates, co-workers, landlords, neighbors, and complete strangers. (Compl. ¶ 10.) This disclosure, taken both as to individual Plaintiffs and the putative Class as a whole, alleges sufficient publicity to sustain an invasion of privacy tort under California law. *See, e.g.*, *Kinsey v. Macur*, 107 Cal. App. 3d 265, 270 (finding information disclosed to "twenty (people) at most" and a "small select group of people" sufficiently public as opposed to disclosure to single individual); *Catsouras v. Department of California Highway Patrol*, 181 Cal. App. 4th 856, 904 (2010) (Aronson, J., concurring) (email to non-enumerated persons); *Doe v. John F Kennedy Univ.*, No. 13-01137, 2013 WL 4565061, *11 (N.D. Cal. Aug. 27, 2013) (disclosure to classroom of peers).

G. Missouri Doe and the Putative Missouri Class of Plaintiffs Have Sufficiently Pleaded Violations of Missouri's Statutory Privacy Protections

1. Plaintiff Missouri Doe's Statutory Claim Under Mo. Rev. Stat. § 191.656 is supported by the law and facts

Defendant breached its statutory duty to protect Missouri Doe and Missouri Class Members' personal information. Gilead's duty is found in Mo. Rev. Stat. § 191.656, which forbids the unauthorized dissemination of information and records "concerning an individual's HIV infection status or the results of any individual's HIV testing." Section 191.656 reads in relevant part:

> ***All*** information and records containing ***any*** information held or maintained by any person, or by any agency, department, or political subdivision of the state, ***concerning*** an individual's HIV infection status ***or*** the results of any individual's HIV testing shall be strictly confidential and shall not be disclosed. . .

Mo. Rev. Stat. § 191.656 (emphasis added). As a result of the breach, Plaintiffs are suffering the distress and anxiety caused by loss of control over sensitive and private information. By its plain language, the statute is concerned with protecting two discrete categories of information: (1) "results of an individual's HIV testing;" and (2) "any" information "concerning" an individual's "HIV infection status." It is the second category that is at issue here, and it is far broader than the first going beyond positive or negative test results to encompass "any information" "concerning" HIV infection status. *See Brownstein v. Rhomberg–Haglin & Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992) ("A basic principle of statutory interpretation is that words and phrases are to be considered in their plain and ordinary meaning.").

As discussed above, **HIV Prevention Team** in bold letters in a return address from a pharmaceutical company on the same envelope addressed to the patient creates an indisputable link between the patient's name and some HIV infection status. Under the plain meaning of the statute and contrary to Defendant's interpolations, it is not necessary that the violator improperly disclose some specific status, whether the person receiving it has a positive or negative status or is merely anxious about an as yet undetermined infection status. That range of concerns is precisely what the plain language covers for, among other things, the public policy interest in protecting people from both the stigma of having HIV and the stigma of being someone who might conceivably have HIV. Plaintiffs have thus sufficiently alleged that Gilead violated Mo. Stat. Rev. § 191.656 when it publicly linked the Plaintiffs with the **HIV Prevention Team** thereby disclosing information "concerning" their "HIV infection status."

2. Plaintiffs Have Adequately Pleaded a Claim Under Missouri Doe's Missouri Merchandise Practices Act. Mo. Stat. §§ 407.010 *et seq.* (MMPA)

Again repeating its argument under the California UCL, Defendant argues that Missouri Doe did not pay for privacy safeguards and therefore cannot state a claim under the MMPA. (Dem. at 26.) However, Missouri Doe and Missouri Class Members did "pay" for the privacy safeguards by providing Gilead access to and use of their valuable, confidential, and legally protected personal data. (*See supra* Parts IV.B.1 and IV.D.) Missouri Doe and Missouri Class Members suffered an ascertainable loss under the MMPA when Defendant failed to protect their confidential information.

Similar to California courts and as conceded by Gilead, 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." *Thompson v. Allergan USA, Inc*., 993 F. Supp. 2d 1007, 1012 (E.D. Mo. 2014). (Dem. at 26.) As already noted, Plaintiffs entered into these agreements and shared their CMI with Gilead on the basis of the promise that "[p]atient confidentiality is of primary importance to [Gilead]. All patient information will remain confidential." Gilead did not uphold its end of the agreement. For the same reasons more fully articulated above with regards to benefit-of-the-bargain losses under the California UCL claim, Plaintiffs have therefore adequately pleaded economic loss sufficient under Missouri law. *See Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016) ("A plaintiff adequately pleads this element of an MMPA claim if he alleges an ascertainable loss under the benefit-of-the-bargain rule, which compares the actual value of the item to the value of the item if it had been as represented at the time of the transaction.").

V. CONCLUSION

Wherefore Plaintiffs respectfully request the Court deny Defendant Gilead's Demurrer.

Respectfully submitted,

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