IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BARNES & NOBLE PIN PAD LITIGATION	))))	No. 12-cv-08617 Judge Andrea R. Wood

ORDER

Defendant's motion to dismiss the Second Amended Consolidated Class Action Complaint [136] is granted. Plaintiffs' action is dismissed with prejudice. The Clerk is directed to enter Judgment in favor of Defendant. See accompanying Statement for details. Civil case terminated.

STATEMENT

Plaintiffs Ray Clutts, Heather Dieffenbach, Jonathan Honor, and Susan Winstead filed this putative class action against Defendant Barnes & Noble, Inc. ("Barnes & Noble") in the wake of a data breach during which hackers obtained personal identifying information ("PII") belonging to Barnes & Noble customers. Plaintiffs purchased products with their credit or debit cards at affected stores during the time period in which this data breach occurred. This Court previously dismissed Plaintiffs' Consolidated Class Action Complaint ("Original Complaint") for lack of Article III standing and their First Amended Consolidated Class Action Complaint ("Amended Complaint") for failure to state a claim. Now before the Court is Plaintiffs' Second Amended Consolidated Class Action Complaint ("SAC"), which Barnes & Noble has again moved to dismiss for failure to state a claim (Dkt. No. 136). As discussed further below, the Court grants Barnes & Noble's motion and dismisses the SAC. Furthermore, as the Court concludes that providing Plaintiffs with another attempt to amend their complaint would be futile, the Court this time dismisses the action with prejudice.

I. Background

In September 2012, unsolicited individuals, known as "skimmers," tampered with PIN pad terminals in 63 Barnes & Noble stores located in nine states. (SAC ¶¶ 2, 50, Dkt. No. 132.) Barnes & Noble uses these PIN pad terminals to process its customers' credit and debit card payments in its retail stores. (*Id.* ¶ 20.) Six weeks after discovering this potential security breach, Barnes & Noble announced to the public that the skimmers had potentially stolen customer credit and debit information from the affected locations. (*Id.* ¶ 50.) Plaintiffs were customers of Barnes & Noble at retail stores affected by the data breach during the time period when the breach occurred.[1] (*Id.* ¶¶ 12–17.)

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[1] The Court presented a more detailed version of the facts concerning Plaintiffs' claims in its previous decision. *See In re Barnes & Noble Pin Pad Litigation*, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013). The Court presumes the reader's familiarity with those background facts.

Plaintiffs filed their Original Complaint on March 25, 2013. (Dkt. No. 39.) The Original Complaint pleaded five causes of action: (1) breach of implied contract; (2) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.*; (3) invasion of privacy; (4) violation California Civil Code §§ 1798.80 *et seq.* ("Section 1798"); and (5) violation of California's Unfair Competition Act ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.* Plaintiffs sought damages for, among other things, unauthorized disclosure of their PII, loss of privacy, expenses incurred attempting to mitigate the increased risk of identity theft or fraud, time lost mitigating the increased risk of identity theft or fraud, an increased risk of identity theft, deprivation of the value of Plaintiffs' PII, and anxiety and emotional distress. (*Id.* at ¶¶ 10–14.)

Barnes & Noble moved to dismiss the Original Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. No. 43.) The Court granted the motion, finding that Plaintiffs had failed to establish Article III standing. (9/3/2013 Order of Dismissal at 10, Dkt. No. 57.) Plaintiffs subsequently filed their Amended Complaint. (Dkt. No. 58.) The Amended Complaint charged the same five causes of action as the Original Complaint and alleged virtually identical facts. The Court also dismissed the Amended Complaint, this time finding that Plaintiffs had established standing but nonetheless failed to plead a viable claim. (Dkt. No. 130.)

Plaintiffs then filed the SAC. Now the operative complaint, the SAC makes no mention of Plaintiff Honor. Plaintiffs also have filed a notice of voluntary dismissal with respect to Plaintiff Clutts. (Dkt. No. 138.) The SAC also drops the invasion of privacy claim against Barnes & Noble with respect to Plaintiffs Dieffenbach and Winstead, and adds factual allegations regarding Dieffenbach's and Winstead's injuries. In particular, the SAC alleges that, as a result of Barnes & Noble's conduct, Dieffenbach's bank account was put on hold, she could not use her debit card until a new one was delivered, she had to spend time with police and bank employees, she had to use minutes from her cell phone plan to speak with bank employees, she lost the value of her PII, and she suffered emotional distress. (*Id.* ¶ 13.) The SAC further alleges that, as a result of Barnes & Noble's conduct, Winstead lost the value of her PII, could not use her credit card until a new one was delivered, and had to renew her credit monitoring service to protect against any further fraud. (*Id.* ¶¶ 14, 15, 17.)

II. Discussion

When ruling on a Rule 12(b)(6) motion to dismiss, the Court must determine whether the plaintiff's complaint states a plausible claim for relief. *Olson v. Champaign Cnty., Ill.*, 784 F.3d 1093, 1099 (7th Cir. 2015); *see also* Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss, a plaintiff must do more than provide "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, a complaint survives a motion to dismiss only when it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

In its prior decision, the Court dismissed the breach of contract, ICFA, invasion of privacy, and UCL claims in Plaintiffs' Amended Complaint because Plaintiffs failed to show that they had any redressable injuries. Plaintiffs' Section 1798 claim in the Amended Complaint was predicated on the theory that that Barnes & Noble provided untimely notice of the security breach; the Court dismissed that claim for failure to plead causation between the alleged violation and any alleged injuries. The SAC seemingly no longer relies on a theory of untimely notice but now claims that Barnes & Noble did not maintain reasonable security measures.[2] (SAC ¶¶ 114–126, Dkt. No. 132.) Barnes & Noble argues that the changes made in the SAC still fail to address any of the Court's concerns and that, consequently, the SAC should be dismissed. The Court agrees.

As discussed above, the SAC alleges that Dieffenbach's injuries consist of the facts that her bank account was put on hold, she could not use her debit card until a new one was delivered, she had to spend time with police and bank employees sorting out her financial affairs, she had to use minutes from her cell phone plan to speak with bank employees, she lost the value of her PII, and she suffered emotional distress. Plaintiffs allege that Winstead also lost use of her credit card until a new one was delivered, she lost the value of her PII, and she had to renew her credit monitoring service to protect against any further fraud.

The Court previously ruled that in order to state a claim based upon breach of contract, the ICFA, or the UCL, Plaintiffs had to allege economic or out-of-pocket damages caused by the data breach. The Court applies this ruling to Plaintiffs' Section 1798 claim as well; though California law is silent on the issue, the kinds of injury that will ground a Section 1798 claim are coextensive with those that will ground a claim under the UCL. *See Neumann v. Borg-Warner Morse Tec LLC*, 168 F. Supp. 3d 1116, 1124 (N.D. Ill. 2016) (stating that, in the absence of governing state law, a federal district court sitting in diversity may consult *inter alia* "other relevant state precedents" to determine how the highest court would decide the issue (citing *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007)).

In light of this, Plaintiffs' alleged injuries to the value of their PII, their time spent with bank and police employees, and any emotional distress they might have suffered are not injuries sufficient to state a claim. In a similar vein, Plaintiffs' temporary inability to use their bank accounts is also insufficient to state a claim—the temporary inability to use a bank account is not a monetary injury in itself, and Plaintiffs have not set forth any allegations about how they suffered monetary injury due to the inconvenience of not being able to access their accounts.

As for Dieffenbach's allegations that she lost cell phone minutes in speaking to bank employees, that cost is *de minimis* and too attenuated to Barnes & Noble's conduct to qualify as a redressable injury. *McGrady v. Chrysler Motors Corp.*, 360 N.E.2d 818, 821 (Ill. App. Ct. 1977) ("[M]ere inconvenience, without more, is not a proper element of [contract] damages." (internal citations omitted)); *Cooney v. Chicago Pub. Sch.*, 943 N.E.2d 23, 31 (Ill. App. Ct.

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[2] The SAC adds no factual allegations explaining how Barnes & Noble's alleged failure to provide "clear, conspicuous, and timely notice" to Plaintiffs about the security breach caused or exacerbated any injury to Plaintiffs. Thus, insofar as Plaintiffs' Section 1798 claim is still predicated on untimely notice of the security breach, it remains dismissed.

2010) (holding that aggravation and incidental costs in preventing future fraud do not constitute injury under ICFA); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) ("[H]eightened risk of identity theft, time and money spent on mitigation of that risk, and property value in one's information, do not suffice as injury under the UCL . . . .").

Finally, with respect to Winstead's purchase of credit monitoring, the Court previously ruled that because Plaintiffs only alleged that the services were renewed "in part" due to the security breach, Plaintiffs failed to plausibly allege that the purchase was attributable to the breach. Although the SAC now states that the security breach was "***a*** decisive factor" in Winstead's decision to renew her credit monitoring (SAC ¶ 17, Dkt. No. 132), that change in phrasing does not save Winstead's claim. The SAC still alleges that the security breach only played a part in Winstead's decision to renew her credit monitoring service, and thus this alleged injury is still insufficient to state a claim under breach of contract. Indeed, even if Winstead's decision was made solely on the basis of the security breach, it still would not be redressable as it is not an actual injury. *Moyer v. Michaels Stores, Inc.*, 2014 WL 3511500, at *7 (N.D. Ill. July 14, 2014) (dismissing breach of contract claim because under Illinois contract law purchase of credit monitoring service does not constitute actual injury); *Cooney*, 943 N.E.2d at 31 (holding that costs of credit monitoring are not a redressable injury under ICFA); *In re Sony*, 903 F. Supp. 2d at 966 (stating that money spent on attempts to mitigate risk of future fraud are not recoverable under the UCL).

Thus, the Court grants Barnes & Noble's motion to dismiss the SAC. Furthermore, the dismissal is with prejudice, as the Court concludes any further opportunity for amendment would be futile. *Tribble v. Evangelides*, 670 F.3d 753, 761 (7th Cir. 2012) ("District courts have broad discretion to deny leave to amend . . . where the amendment would be futile."). Even with the benefit of the Court's prior ruling, Plaintiffs primarily rested on the same theories of injury that had been rejected in the prior ruling. Moreover, the additional putative injuries that Plaintiffs added to the SAC failed for very similar reasons. The Court thus concludes that Plaintiffs do not have any other injuries that can ground their claims for relief. If Plaintiffs did have injuries that could ground their claims for relief, they have been given ample opportunity to bring those to the Court's attention.

ENTERED:

Dated: June 13, 2017

Andrea R. Wood
United States District Judge