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FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sacramento
STREET ADDRESS: 720 9th Street
MAILING ADDRESS: 720 9th Street
CITY AND ZIP CODE: Sacramento, 95814
BRANCH NAME: Gordon D. Schaber Sacramento County Courthouse

PLAINTIFF/PETITIONER: Kyle Rodriguez
DEFENDANT/RESPONDENT: River City Bank

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER:
34-2021-00296612

(Check one): [x] **UNLIMITED CASE** (Amount demanded exceeded $25,000) [ ] **LIMITED CASE** (Amount demanded was $25,000 or less)

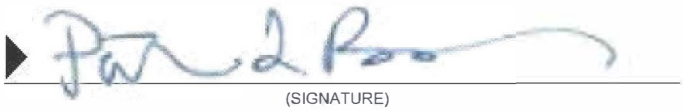
TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: September 2, 2021

2. A copy of the judgment, decree, or order is attached to this notice.

Date: September 3, 2021

Patricia L. Bonheyo
(TYPE OR PRINT NAME [x] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)



(SIGNATURE)

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Judicial Council of California
CIV-130 [New January 1, 2010]

PLAINTIFF/PETITIONER: Kyle Rodriguez DEFENDANT/RESPONDENT: River City Bank	CASE NUMBER: 34-2021-00296612

PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF ENTRY OF JUDGMENT OR ORDER

(NOTE: You cannot serve the* Notice of Entry of Judgment or Order *if you are a party in the action. The person who served the notice must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

SEE ATTACHED PROOF OF SERVICE

2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelope with the United States Postal Service.
   b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
3. The *Notice of Entry of Judgment or Order* was mailed:
   a. on *(date):*
   b. from *(city and state):* SEE ATTACHED PROOF OF SERVICE
4. The envelope was addressed and mailed as follows:
   a. Name of person served:
      Street address:
      City:
      State and zip code:
   c. Name of person served:
      Street address:
      City:
      State and zip code:

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   b. Name of person served:
      Street address:
      City:
      State and zip code:
   d. Name of person served:
      Street address:
      City:
      State and zip code:

   ☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*
5. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

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(TYPE OR PRINT NAME OF DECLARANT) (SIGNATURE OF DECLARANT)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 09/02/2021 TIME: 09:00:00 AM DEPT: 54

JUDICIAL OFFICER PRESIDING: Christopher Krueger
CLERK: G. Toda
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: N. Alvi, T. Elder

CASE NO: **34-2021-00296612-CU-BC-GDS** CASE INIT.DATE: 03/16/2021
CASE TITLE: **Rodriguez vs. River City Bank**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Ari Michaelson, for Rodriguez, Kyle (Plaintiff) Remotely
Patricia Bonheyo, for River City Bank (Defendant) Remotely

Nature of Proceeding: Hearing on Demurrer to the First Amended Complaint

TENTATIVE RULING

Defendant River City Bank's ("Bank") demurrer to the First Amended Complaint ("1AC") is ruled upon as follows.

***** If oral argument is requested, the parties must at the time oral argument is requested notify the clerk and opposing counsel of the specific causes of action that will be addressed at the hearing. Counsel are also reminded that pursuant to local rules, only limited oral argument is permitted on law and motion matters. *****

Factual Background

This putative class action commenced on 3/16/2021 arises from a data breach involving "Private Financial Information" ("PFI") consisting of customer names, addresses, dates of birth, social security numbers and account information. The 1AC asserts that an employee of Bank downloaded customer data to a personal storage drive and then sent the information to a third party, thereby exceeding his/her authorized access to the data which was otherwise limited to "legitimate bank purposes." (1AC, ¶1.) According to the 1AC, Bank discovered the breach on 9/29/2020 but did not provide a Notice of Data Breach until 11/19/2020, leaving Bank customers "at considerable risk of identity theft and fraud" and "causing [them] to expend time, money and resources addressing their damaged security interests and even their reputations." (1AC, ¶2.) It is further allege that "class members now must take steps to monitor their personal and business accounts, networks, computer profiles, and remote financial relations/associations to prevent or respond to identity or other theft," prompting them to here seek "injunctive and monetary relief to remedy the harm caused by [Bank's] failure to safeguard its customers' [PFI]." (*Id.*)

The 1AC purports to assert seven separate causes of action against Bank in this order: Negligence,

Negligence *Per Se*, Bailment, Breach of Implied Contract, Violation of the Unfair Competition Law, Violation of the Customer Records Act, and Violation of the California Consumer Privacy Act. Bank now demurs to all causes of action except the fourth for Breach of Implied Contract on the grounds summarized below. Plaintiff opposes, at least in part.

Analysis

Negligence. Bank first asserts that this negligence cause of action is barred by the Economic Loss Rule ("ELR") which holds that purely economic losses are not recoverable in the absence of personal injury or property damage and serves to limit liability in commercial activities which go awry due to negligence or inadvertence, preventing contract and tort law from dissolving into one another. More specifically, Bank maintains that while the 1AC alleges the breach of two related duties (*i.e.*, duty to protect plaintiff's personal information and duty to promptly notify him of the data breach), there is no allegation of plaintiff suffering either personal injury or property damage as a result of the 2020 data breach which means the negligence claim is barred by the ELR unless plaintiff had a "special relationship" with Bank. Bank further contends that no California court has found the existence of a "special relationship" between a bank and its customers with respect to the latter's personal financial information and to the contrary, California decisional law typically holds that banks owe limited duties to their customers and are not fiduciaries.

In opposition, plaintiff insists the 1AC alleges in Paragraphs 32 and 33 that he and the putative class members suffered non-economic harm in the form of "loss of time, enlarged future risk of identity theft, [and] loss of privacy." Relying largely on the factors discussed in *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799 [*i.e.*, degree to which transaction was intended to affect plaintiff, foreseeability of harm to plaintiff, the degree of certainty that plaintiff suffered injury, closeness of connection between defendant's conduct and injury, moral blame attached to defendant's conduct, and policy of preventing future harm], the opposition also asserts that there was a "special relationship" between plaintiff and Bank but even if the Court disagrees, Bank owed a duty of care to plaintiff by virtue of California's Customer Records Act and Consumer Privacy Act.

One of the cases on which Bank relies for its challenge to this negligence claim is *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, where the California Supreme Court considered the ELR and stated in pertinent part:

We begin with a brief background on the economic loss rule. Economic loss consists of " ' " 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits -- without any claim of personal injury or damages to other property. ...' " ' [Citation.]" [Citation.] Simply stated, the economic loss rule provides: " ' "[W]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." ' This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." [Citation.] The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. [Citation.] Quite simply, the economic loss rule "prevent[s] the law of contract and the law of tort from dissolving one into the other." [Citation.]

In *Jimenez v. Superior Court, supra*, 29 Cal.4th 473, we set forth the rationale for the economic loss rule: " 'The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the

responsibility a manufacturer must undertake in distributing his products.' [Citation.] We concluded that the nature of this responsibility meant that a manufacturer could appropriately be held liable for physical injuries (including both personal injury and damage to property other than the product itself), regardless of the terms of any warranty. [Citation.] But the manufacturer could not be held liable for 'the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.' [Citation.]" [Citation.]
(*Robinson Helicopter*, at 988-989 (underline added for emphasis).)

In light of the foregoing, this Court is not persuaded that the ELR on which Bank's demurrer is explicitly premised actually applies to the facts alleged in the 1AC. First, plaintiff's claim against Bank does not appear to arise from any "sale of goods for commercial purposes where economic expectations are protected by commercial and contract law." Second, plaintiff's negligence claim does not appear to be for either "purely economic loss due to disappointed expectations" with respect to some defective product sold by Bank but even if it were, this negligence claim seems to assert that plaintiff (and the putative class members) suffered "harm above and beyond a broken contractual promise." Instead, Paragraphs 32 and 33 contain the following allegations which must be accepted as true for purposes of this demurrer:

32. As a direct and proximate result of Defendants' wrongful actions and inaction and the resulting data breach, Plaintiff and the Class members have been placed at an imminent, immediate, and continuing increased risk of harm from identity theft and identity fraud, requiring them to take the time which they otherwise would have dedicated to other life demands such as work and effort to mitigate the actual and potential impact of the Data Breach on their lives including, inter alia, by placing "freezes" and "alerts" with credit reporting agencies, contacting their financial institutions, closing or modifying financial accounts, closely reviewing and monitoring their credit reports and accounts for unauthorized activity, changing the information used to verify their identity to information not subject to this data breach, and filing police reports. This time has been lost forever and cannot be recaptured. In all manners of life in this country, time has constantly been recognized as compensable. In addition, Plaintiff and the other Class Members were subjected to continued and continuing risk of incurring unjustified expenses proximately resulting from the data breach including but not limited to purchasing extended credit monitoring and/or other remedial services to help minimize the risk of their PFI being maliciously exposed and exploited, as well as expenses associated with unauthorized transactions resulting from malicious exposure and exploitation of their PFI.

33. Defendants' wrongful actions and inaction directly and proximately caused the exfiltration, theft, and dissemination to an unknown third party of Plaintiff's and the other Class Members' Personal Financial Information, causing them to suffer, and to continue to suffer, economic damages and other actual harm for which they are entitled to compensation, including:
(a) theft of their Personal Information and financial information;
(b) costs for credit monitoring services;
(c) unauthorized charges on their debit and credit card accounts; the imminent and certainly impending injury flowing from potential fraud and identity theft posed by their credit/debit card and Personal Information being placed in the hands of criminals...;
(d) the untimely and inadequate notification of the data breach;
(e) the improper disclosure of their customer data;
(f) loss of privacy;
(g) ascertainable losses in the form of out-of-pocket expenses and the value of their time reasonably incurred to remedy or mitigate the effects of the data breach;
(h) ascertainable losses in the form of deprivation of the value of their Personal Information, for which there is a well-established national and international market; ascertainable losses in the form of the loss of cash back or other benefits as a result of their inability to use certain accounts and cards affected by the data breach;

(i) loss of use of, and access to, their account funds and costs associated with the inability to obtain money from their accounts or being limited in the amount of money they were permitted to obtain from their accounts, including missed payments on bills and loans, late charges and fees, and adverse effects on their credit including adverse credit notations; and
(j) the loss of productivity and value of their time spent to address, attempt to ameliorate, mitigate, and deal with the actual and future consequences of the data breach, including finding fraudulent charges, cancelling and reissuing cards, purchasing credit monitoring and identity theft protection services, imposition of withdrawal and purchase limits on compromised accounts, changing the information used to verify their identity to information not subject to this data breach, and the stress, nuisance, and annoyance of dealing with all such issues resulting from the data breach.
(Underline added for emphasis.)

Given that *Robinson Helicopter* states that "economic loss" consists of "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits," it is self-evident that the harm currently alleged in the 1AC is not limited to economic losses which might otherwise be barred by the ELR and thus, Bank's demurrer to the negligence cause of action based on the ELR must be OVERRULED. As a consequence, this Court need not consider here whether or not a "special relationship" existed between plaintiff and Bank but it is worth noting that the balance of the factors discussed in *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799 would certainly seem to support the finding a "special relationship" did exist.

Negligence *Per Se*. Bank demurs on several grounds including but not limited to negligence *per se* not constituting an independent cause of action but rather merely being an evidentiary presumption which arises in certain circumstances a where a statutory violation is shown. The Court agrees and coupled with the opposition's failure to address Bank's contention, the demurrer to the negligence *per se* claim shall be SUSTAINED without leave to amend.

Bailment. Bank asserts here that in an action for breach of bailment contract, the plaintiff-bailor must prove the agreement is a bailment contract, the subject property was deposited with the defendant-bailee, the plaintiff demanded return of the subject property, and the defendant thereafter failed to return the subject property but that in the case at bar, plaintiff's personal financial information is not a tangible piece of personal property which was "deposited" with Bank or which Bank is alleged to have unlawfully failed to return to plaintiff or was otherwise retained by Bank to the exclusion of plaintiff.

The Court agrees and since the opposition did not address the demurrer to the bailment cause of action, the demurrer to it will also be SUSTAINED without leave to amend.

Customer Records Act ("CRA"). According to Bank, a plaintiff pursuing a claim under the CRA (Civil Code §1798.80 *et seq*.) must plead s/he was injured by the alleged violation but in the case at bar, plaintiff does not allege he suffered any injury as a result of Bank's purportedly delay in providing notice of the data breach; instead, the 1AC merely asserts plaintiff was damaged as a result of the disclosure of his personal information (see 1AC, ¶96 ["Plaintiff and the other Class Members suffered damages, including, but not limited to, loss of and invasion of privacy, loss of property, loss of money, loss of control of their personal and financial nonpublic information, fear and apprehension of fraud and loss of control over their personal and financial information, the burden of taking actions to protect themselves from fraud or potential fraud."]) but no harm or damage is explicitly attributed to Bank's alleged delay in giving notice of the data breach. More specifically, although the CRA cause of action alleges in Paragraph 95 that Bank violated Civil Code §1798.82(a) and/or (b) by failing to provide prompt notice of the data breach, there is no allegation that plaintiff suffered any injury as a result of Bank's delay from 9/29/2020 (data breach discovered) until 11/19/2020 (date of notice of breach given) such as a third party using his personal information during this limited window of time.

In opposition, plaintiff argues his CRA cause of action does allege injury "as a result of the delay" in Bank's notice of the data breach or at least includes "sufficient allegations to raise a plausible inference of injury resulting from the delay. (Oppos., p.8:17-18.) According to the opposition, the 1AC alleges Bank failed to provide prompt notice of the data breach which was discovered on 9/29/2020 and at which time the affected customers not only "did not know they were at increased risk of theft and fraud and should take action to monitor their financial accounts for suspicious activity" (1AC, ¶¶25, 32, 89-97) but also that "as a result of Defendant's wrongful actions and inaction,...includ[ing] the failure to promptly notify customers, [they] have been placed at an increased risk of identify [*sic*] theft and fraud and would have to spend time placing freezes and alerts with credit reporting agencies, contacting their financial institutions, and taking other actions to minimize the risk" (1AC, ¶32). (Oppos., p.8:18-p.9:5.)

The Court shall SUSTAIN Bank's demurrer to the CRA claim as well. Initially, it should be noted that under current California law, all statutory causes of action must be pleaded with particularity, showing every fact essential to the existence of liability under the relevant statute(s). (See, *Covenant Care, Inc. v. Superior Court (Inclan)* (2004) 32 Cal.4th 771, 790 (citing *Lopez v. Southern Cal. Rapid Trans. Dist.* (1985) 40 Cal.3d 780, 795) (emphasis added).) In short, the burden is on the plaintiff to plead all facts necessary to establish each element of the statutory claim being advanced. Plaintiff's CRA claim in the case at bar explicitly alleges in Paragraph 95 that Bank's failure to provide prompt notice of the data breach constituted a violation of Civil Code §1798.82(a) and/or (b), while the following paragraph states in its entirety:

96. As a direct and proximate result of Defendants' failure to implement and maintain reasonable security procedures and practices to protect Plaintiff's and Class members' personal and financial information, a breach of [Bank's] security system occurred, of which Plaintiff and the other Class Members were not timely notified, and upon which Plaintiff and the other Class Members suffered damages, including, but not limited to, loss of and invasion of privacy, loss of property, loss of money, loss of control of their personal and financial nonpublic information, fear and apprehension of fraud and loss of control over their personal and financial information, the burden of taking actions to protect themselves from fraud or potential fraud.

Although it does allege a variety of harm, this paragraph remains unnecessarily vague and uncertain inasmuch as it fails to clarify that any of the damages enumerated are actually the direct and proximate result of Bank's delay in giving notice of the data breach rather than merely a result of the data breach itself. The first part of Paragraph 96 by its own terms asserts that the damages alleged are "a direct and proximate result of [Bank's] failure to implement and maintain reasonable security procedures and practices to protect Plaintiff's and Class members' personal and financial information, a breach of [Bank's] security system occurred..." Not only does this opening allegation indicate that the damages identified are actually a result of the data breach itself but the remainder of Paragraph 96 does not unambiguously attribute any of the enumerated damages solely to Bank's alleged delay in giving notice rather than the data breach itself. Additionally, most of the harm specifically described at the end of Paragraph 96 cannot be reasonably or rationally attributed to any alleged delay in notice of the data breach including plaintiff's claimed "loss of and invasion of privacy," "loss of control of...personal and financial nonpublic information," "fear and apprehension of fraud and loss of control...personal and financial information," and "the burden of taking actions to protect...from fraud or potential fraud." In the end, because the CRA cause of action does not in its current form clearly and unambiguously allege damages which are proximately related to any delay in Bank's notice of the data breach as distinguished from the breach itself, this cause of action is subject to demurrer and the Court need not address the parties' other contentions relating to this CRA cause of action.

California Consumer Privacy Act ("CCPA"). Bank first contends this cause of action under the CCPA at Civil Code §1798.100 *et seq.* fails because there is no allegation that plaintiff's personal information was "subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's

violation of the duty to implement and maintain reasonable security procedures and practices," but rather only the latter element of "exfiltration, theft or disclosure." Bank next asserts that to recover statutory damages under the CCPA, plaintiff must plead that he gave the defendant business 30 days' written notice of the alleged violation and where, as here, the business cures the alleged violation and provides written notice of same, §1798.150(b) provides that no action may be maintained against the business. Finally, Bank insists plaintiff has failed to allege with the requisite factual particularity how Bank's security measures were unreasonable but has instead asserted in purely conclusory terms that Bank's security measures were inadequate because "they did not properly restrict access," even though the 1AC's opening paragraph admits that the employee who downloaded customer data was authorized to access the data but exceeded this authorization in this instance.

Plaintiff opposes, arguing that "unauthorized access" is not required for liability under the CCPA and that Bank's improper focus on "unauthorized access" not only renders §1798.150(a)(1)'s other terms of "theft" and "disclosure" superfluous but also ignores the fact the CCPA is a remedial statute which should be broadly construed in favor of consumers. Relying on a decision by the federal District Court for the Southern District of California, the opposition contends that an allegation of "unauthorized disclosure" is sufficient to state a claim for violation of the CCPA. Plaintiff also maintains that he is entitled to statutory damages under the CCPA because Bank did not cure the violation or the resulting harm to customers but merely took steps to end the data breach by implementing new security measures to prevent IT employees from moving customer data without approval of a senior manager.

Bank's demurrer to the CCPA cause of action will also be SUSTAINED. As explained above, California law presently mandates that all statutory causes of action such as those under the CCPA be pleaded with particularity, showing every fact essential to the existence of liability under the relevant statute(s). Here, Civil Code §1798.150(a)(1) provides in pertinent part:

Any consumer whose nonencrypted and nonredacted personal information, as defined in subparagraph (A) of paragraph (1) of subdivision (d) of Section 1798.81.5, is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information may institute a civil action for any of the following:
(A) To recover damages in an amount not less than one hundred dollars ($100) and not greater than seven hundred and fifty ($750) per consumer per incident or actual damages, whichever is greater.
(B) ...
(Underline added for emphasis.)

Also relevant here is the following excerpt from a recent California Supreme Court decision:

In interpreting a statute, our primary goal is to determine and give effect to the underlying purpose of the law. [Citation.] "Our first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." (*Ibid*.) " 'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' " [Citation.] In other words, we are not free to "give the words an effect different from the plain and direct import of the terms used."
(*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 (underline added for emphasis).)

Based on this precedent, this Court must first look to the actual words the Legislature put into §1798.150(a)(1) and construe them according to plain meaning. As the opening sentence of §1798.150(a)(1) explicitly states that "Any consumer whose...personal information...is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices...may institute a civil action" (underline added for emphasis), it is self-evident that there are (at least) two prerequisites to a claim

under this statute: (1) "unauthorized access" to the "personal information" and (2) either "exfiltration, theft, or disclosure" of that "personal information." No reasonable person applying the well-established, primary rule of statutory construction (*i.e.*, the "plain meaning" rule described by the Supreme Court in *Goodman*) could, as the opposition suggests, construe §1798.150(a)(1) as authorizing a claim where just one of these first two elements is pleaded. This would certainly explain why no California appellate court has spoken on this issue and why this Court rejects plaintiff's reliance on the non-binding decision by the Southern District of California for the proposition contends that an "unauthorized disclosure" alone is enough to plead a claim for violation of the CCPA. Finally, nothing in this Court's interpretation of the plain language utilized in §1798.150(a)(1) could be reasonably construed as somehow rendering "superfluous" the second element of "exfiltration, theft, or disclosure" of personal information.

Additionally, Bank correctly points out that §1798.150(b) bars an action for either individual or class-wide statutory damages where (1) a consumer provides a business with written notice of the specific provisions of the CCPA are alleged to have been violated and (2) the business within 30 days not only "actually cures the noticed violation" but also "provides the consumer an express written statement that the violations have been cured and that no further violations shall occur." In the case at bar, plaintiff admits in Paragraph 104 that in response to the written notice he provided, Bank responded by advising plaintiff "it had implemented several new security procedures and practices, including but not limited to the restriction of access to online storage...sites..., thus blocking anyone from the IT department from moving PFI from [Bank's] customers via an online storage site absent approval by senior management..." This admission by plaintiff would appear to preclude this CCPA claim against Bank pursuant to the above-cited provision of §1798.150(b) but in an obvious attempt to circumvent this statutory bar, Paragraph 104 proceeds to make the following additional allegations:

[H]owever, although [Bank's] remedial efforts appear to underscore [Bank's] deficient and unreasonable security policies and practices that were in place at the time of the breach, and even if [Bank's] remedial efforts may prevent future similar data breaches, they did nothing whatsoever to alleviate or cure the defects or damaging effects of the breach as they have impacted, and continue to impact, Plaintiff and other Class Members, whose PFI is and continues to be unlawfully in the possession of a third party and at continued risk of malicious exposure and exploitation. Indeed, by the plain terms of §1798.150(b), the mere implementation of appropriate security measures following a breach does not constitute a cure with respect to that breach. Accordingly, [Bank] did not, and has not, cured the noticed violation pursuant to §1798.150(b).
(Underline added for emphasis.)

As will now be shown, these additional allegations are legally inadequate and fail to provide plaintiff with a means by which to escape statutory bar erected by §1798.150(b). With respect to plaintiff's suggestion that §1798.150(b) expressly provides that "the mere implementation of appropriate security measures following a breach does not constitute a cure with respect to that breach," there is little doubt this allegation is based upon the recently amended but not yet operative provision of §1798.150(b), which states in pertinent part:

The implementation and maintenance of reasonable security procedures and practices pursuant to Section 1798.81.5 following a breach does not constitute a cure with respect to that breach.

Since the version of §1798.150(b) containing this new law language will not be operative until 1/1/2023, plaintiff's reference to it is of no legal consequence and cannot at this time provide a means by which to evade the otherwise unqualified statutory bar found in the presently operative version of §1798.150(b).

Similarly, while Paragraph 104 alleges that Bank's remedial "did nothing whatsoever to alleviate or cure the...damaging effects of the [data] breach...," the opposition has offered no authority which is binding on this Court to support plaintiff's claim that Bank is under the current version of §1798.150(b) obligated to

"cure the damaging effects of the breach" in order to escape liability here. Instead, the opposition relies primarily on a decision by the Ninth Circuit which did not even involve any provision of the CCPA but instead related only to a completely different statutory enactment, the Rosenthal Fair Debt Collection Practices Act. This Court, however, is not bound by this Ninth Circuit but even if it were, it is not dispositive of the issue presented by the case at bar since it does not address the application or interpretation of §1798.150(b). The opposition does also cite, albeit without any discussion, two California appellate decisions at Page 15:11-13, neither decision considered any provision of the CCPA but rather appear to have dealt only with the Safe Drinking Water and Toxic Enforcement Act of 1986 found in the Health & Safety Code and the Brown Act found in the Government Code.

For these reasons, plaintiff has failed to adequately plead a valid claim against Bank for violation of the CCPA, thereby obviating the need to consider the remaining arguments advanced by the parties.

Unfair Competition. Bank demurs to this statutory cause of action, which is premised on Bank's allegedly inadequate security measures and failure to timely disclose the data breach, on the grounds that plaintiff cites no specific statute to support his claim that Bank's security measures were inadequate and the statutes which he does generally reference in this cause of action are "inapplicable" to Bank and/or an unfair competition claim. For instance, plaintiff explicitly cites Civil Code §1798.82 in Paragraph 84 but this statutory provision contains no requirements relating to security measures and while one provision of the CRA (*i.e.*, §1798.81.5) does require businesses to "implement reasonable security procedures and practices to protect personal information," §1798.81.5(e)(2) expressly states that this requirement does not apply to "financial institution[s]" like Bank which are subject to California's Financial Information Privacy Act. Likewise, to the extent this cause of action relies on an alleged violation of the CCPA, it is improper since §1798.150(c) explicitly states, "Nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law." Moreover, plaintiff has failed to set forth specific facts showing how or why Bank's security procedures were inadequate but he instead relies on impermissible conclusory allegations. Finally, to the extent this unfair competition claim is premised on Bank's alleged failure to provide timely notice of the data breach, it still fails because the 1AC does not allege plaintiff suffered any injury which was actually attributable to delayed notice, separate and apart from the data breach itself.

The opposition insists this cause of action is sufficiently pleaded because the 1AC alleges plaintiff suffered harm from Bank's "delayed notice [of the data breach in] violation of §1789.82 [*sic*]" and this violation of the CRA is a proper basis for liability under the unfair competition law. Plaintiff adds that this cause of action may also be predicated on Bank's violation of the CCPA and that Bank's reliance on §1798.150(c) is misplaced inasmuch plaintiff is "not relying on the CCPA to create a private right of action under the [unfair competition law, which] already has a private right of action. Finally, the opposition contends this unfair competition claim may be based on plaintiff's negligence cause of action.

Since this Court has already determined that plaintiff's preceding statutory claims under both the CRA and CCPA are for the reasons cited above not adequately pleaded, the only real question left to be resolved is whether this unfair competition cause of action may be properly based on the 1AC's common law negligence cause of action. The threshold issue with plaintiff's reliance on the 1AC's first cause of action for general negligence is that his unfair competition cause of action is not clearly premised, even in part, on the negligence claim and this is even more problematic given that California law requires statutory causes of action like those under Business & Professions Code §17200 *et seq.* be pled with particularity, showing every fact essential to the existence of liability under the relevant statute(s). While Paragraph 83 does in pertinent part allege that Bank "engaged in unlawful acts...by negligently storing Plaintiff's and the other Class Members' PFI...in violation of California's Financial Information Privacy Act, California Financial Code §§4050 *et seq.*," this allegation makes no express or implicit reference to the 1AC's first cause of action for common law negligence (which itself contains no reference either generally to California's Financial Information Privacy Act or more specifically to any particular statutory

provision found at Financial Code §4050 *et seq.*, nor is there any explicit reference to an alleged violation of either the CRA or the CCPA). Accordingly, in this Court's view, plaintiff's unfair competition cause of action cannot be fairly read as being predicated, even in part, on the first cause of action for common law negligence.

The second and more dispositive issue here is whether an unfair competition cause of action can be properly predicated upon a general negligence cause of action. The opposition cites *Mehta v. Robinhood Financial, LLC* (N.D. Cal 2021) and *Corona v. Sony Pictures Entertainment Inc.* (C.D. Cal 2015) for the proposition an unfair competition claim may be founded upon a negligence claim but Bank relies upon *Stearns v. Select Comfort Retail Corp.* (N.D. Cal 2010) and *Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965 for the opposite proposition. Because there is an apparent conflict between federal district courts (and even within the Northern District itself) and because none of the cited federal district court rulings constitutes binding precedent in this jurisdiction, this Court will look to published California appellate authorities to resolve the question of whether unfair competition cause of action can be properly predicated upon a general negligence cause of action. In *Klein*, the First District Court of Appeal stated in pertinent part:

An unlawful business practice or act is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. [Citation.] Virtually any law can serve as the predicate for a section 17200 action. [Citation.]

It is Klein's theory that liability imposed under the doctrines of "strict products liability and... breach of the implied warranty of fitness" will support an independent action under the "unlawful" prong of section 17200. While these doctrines do provide for civil liability upon proof of their elements they do not, by themselves, describe acts or practices that are illegal or otherwise forbidden by law. And Klein has not presented any argument or evidence to back up his claim that [defendant] Earth Elements broke any law by unwittingly distributing contaminated pet food. In our view the unintentional distribution of a defective product is beyond the scope and policy of the "unlawful" prong of section 17200.
(*Klein,* at 969 (underline added for emphasis).)

Although the First District's analysis was explicitly limited to strict liability and breach of the implied warranty of fitness, this Court finds that it is equally applicable to a common law claim of negligence inasmuch as a defendant may face liability if the elements of negligence are ultimately proven, the law of negligence does not by itself "describe acts or practices that are illegal or otherwise forbidden by law." Consequently, as the parties have offered no other binding authority addressing the specific issue presented here, this Court finds that plaintiff's unfair competition cause of action cannot properly be supported by the opening cause of action for general negligence and for this reason as well, the demurrer to the unfair competition cause of action will be SUSTAINED as well.

Disposition

For the reasons explained above, Bank's demurrer to plaintiff's 1AC is SUSTAINED except as to the first cause of action for negligence only.

Since this is the first challenge to the complaint, leave to amend is GRANTED except as to the second and third causes of action for Negligence *Per Se* and Bailment since the opposition failed not only to address Bank's demurrers to these causes of action but also to demonstrate how these causes of action might in good faith be amended to plead a valid claim against Bank.

Where leave to amend is granted, plaintiff may file and serve a Second Amended Complaint no later than 9/17/2021. **Although not required by court rule or statute, plaintiff is directed to present a copy of this order when the amended complaint is presented for filing.**

Bank to respond within 30 days if the amended complaint is personally served, 35 days if served by mail.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken this matter under submission, the Court now rules as follows. The tentative ruling is affirmed with the modification that the Second Amended Complaint may be served by October 1, 2021.

PROOF OF SERVICE

CASE NAME: *Kyle Rodriguez v. River City Bank*
CASE NUMBER: 34-2021-00296612
DATE OF SERVICE: September 3, 2021

DESCRIPTION OF DOCUMENTS SERVED:

NOTICE OF ENTRY OF JUDGMENT OR ORDER

SERVED ON THE FOLLOWING:

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Polina Brandler
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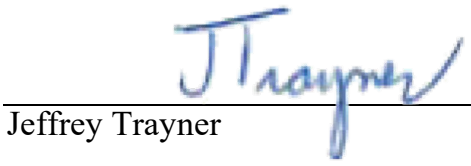
Attorneys for Plaintiff

I am over the age of 18 years and not a party to or interested in the above-named case. I am an employee of Goodman Neuman Hamilton LLP, and my business address is One Post Street, Suite 2100, San Francisco, CA 94104. On the date stated above, I served a true copy of the document(s) described above, by:

ELECTRONIC TRANSMISSION ONLY. Only by electronic submission of the document(s) to the person(s) at the email address(es) listed, pursuant to the parties' agreement to electronic service in this action and Code of Civil Procedure sections 1010.6(a)(4) and (5) and 1010.6(e). Prior to the service hereof, the appropriate electronic service address for counsel being served was confirmed by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission of the document(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the date stated above.



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