IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

JONATHAN TORRES, individually and on behalf of all others similarly situated, Plaintiff, v. THE WENDY'S COMPANY, Defendant.	)	**CASE NO. 6:16-cv-210-PGB-DAB** **DISPOSITIVE MOTION**

THE WENDY'S COMPANY'S MOTION TO DISMISS PLAINTIFF'S CLASS ACTION COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), The Wendy's Company ("Wendy's")[1] hereby moves to dismiss Plaintiff's Class Action Complaint ("Complaint") with prejudice.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiff alleges that Wendy's was the victim of a data breach perpetrated by unknown criminal hackers. Plaintiff seeks to shift liability for the breach from the hackers to Wendy's based on the idea that "Wendy's could have prevented the data breach." Compl. ¶ 4. But this assertion, like the rest of Plaintiff's Complaint, is based on nothing more than speculation and

[1] The Complaint improperly names The Wendy's Company as a defendant. The Wendy's Company is the parent company of Wendy's International, LLC, which operates Wendy's restaurants and is the proper defendant for Plaintiff's claims.

innuendo. Plaintiff admits that "very few details" about the alleged breach have been released (Compl. ¶ 3), but has no problem claiming that Wendy's was negligent in failing to prevent it. Plaintiff likewise alleges no facts regarding Wendy's actual security practices, but does not hesitate to claim they were inadequate. And Plaintiff hangs all his claims on the thin reed that because he used his debit card at a Wendy's and later incurred two unauthorized transactions on the card, his information must have been compromised in the alleged data breach.

Speculation and innuendo are not sufficient to state a plausible claim for relief. Nor are they sufficient to carry Plaintiff's burden of establishing Article III standing. Notably absent from the Complaint is any allegation of a concrete injury traceable to Wendy's that would establish Plaintiff's standing. Plaintiff struggles mightily to try and identify a concrete injury that gives him standing to sue. But all of his allegations fall short. For example, Plaintiff's claim of unauthorized charges on his debit card does not give rise to standing because Plaintiff does not allege that these charges remained unreimbursed after he reported them to his credit union. Moreover, the charges are not fairly traceable to Wendy's – particularly given Plaintiff's own allegations about the prevalence of identity theft, fraud, and other retail data breaches.

Plaintiff's other allegations of supposed injury suffer from the same problems. The hypothetical possibility of future harm does not give rise to standing. Nor does a theoretical claim that Plaintiff's personally identifiable information ("PII") or payment card data ("PCD") somehow lost value as a result of the alleged breach or that the food he purchased from Wendy's was overpriced because it did not come with protection from a third-party data breach. Plaintiff's lack of standing requires dismissal of the Complaint.

In addition to Plaintiff's fatal failure to establish standing, Plaintiff also fails to state a single cognizable claim against Wendy's:

- Plaintiff's negligence claim fails because he does not allege a duty of care that exists under Florida law. Furthermore, Plaintiff's allegations of harm are too remote and conclusory to establish the essential negligence element of actual loss or damage proximately caused by the alleged breach.

- Plaintiff's implied contract claim fails because Plaintiff does not allege a meeting of the minds with respect to the terms he unilaterally attempts to impose upon Wendy's. Plaintiff also fails to allege cognizable damages.

- Plaintiff's claim for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") fails because Plaintiff does not have standing to sue under the statute and does not allege a deceptive or unfair practice by Wendy's.

Plaintiff's Complaint should be dismissed in its entirety.

II. SUMMARY OF COMPLAINT ALLEGATIONS[2]

Wendy's is the world's third-largest quick-service hamburger company, with franchise and company restaurants in the U.S. and around the world. Compl. ¶ 7. On January 27, 2016, Wendy's announced publicly that it was investigating unusual activity involving payment cards at some of its restaurants. *Id.* ¶ 3.[3] Plaintiff filed this putative class action just 12 days later, asserting claims arising out of an alleged Wendy's data breach and seeking certification of nationwide and Florida putative classes.

[2] Wendy's summarizes the allegations in the Complaint because they must be taken as true for purposes of this Motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Wendy's does not, however, concede the veracity of the Complaint's allegations.

[3] *See also Wendy's Probes Reports of Credit Card Breach*, Krebs on Security (Jan. 27, 2016), *available at* http://krebsonsecurity.com/2016/01/wendys-probes-reports-of-credit-card-breach/.

Plaintiff makes only sparse allegations of a data breach affecting the Wendy's restaurant where he used his payment card. Plaintiff alleges that unidentified hackers utilized malware to access Wendy's computer systems and speculates that the malware was "more than likely" identical to malware that "hackers used in last year's data breach at many other retail establishments." *Id.* ¶¶ 2-4. Plaintiff alleges, upon information and belief, that the alleged data breach involved not only his PCD, but also other PII, (*id.* ¶¶ 25-27). But this allegation is nothing more than rank speculation given what Plaintiff admits are the "very few details" publicly available about the alleged breach. *Id.* ¶ 3. In fact, Plaintiff sums it up best when he admits that he lacks "a cogent picture of how the Data Breach occurred and its full effects on consumers' PII and PCD information." *Id.* ¶ 24.

Plaintiff's specific allegations are few – on January 3, 2016, he visited a Wendy's restaurant and used his debit card. *Id.* ¶ 6. At some point thereafter, he learned that his debit card number had been used to make two fraudulent purchases – one at a Sport's Authority and one at a Best Buy. *Id.* Plaintiff does not provide any basis for linking these fraudulent purchases to the data breach he alleges. Plaintiff also does not allege that he was actually required to pay these alleged fraudulent charges after reporting them to his credit union. *Id.*

III. STANDARD OF REVIEW

Wendy's moves to dismiss the Complaint for lack of subject-matter jurisdiction under Rule 12(b)(1). Plaintiff bears the burden of proving that subject-matter jurisdiction exists. *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1273 (11th Cir. 2000). That burden includes pleading sufficient factual information to support a finding of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Wendy's also moves to dismiss under Rule 12(b)(6) for failure to state a claim. This Court should dismiss Plaintiff's claims if Plaintiff fails to plead sufficient allegations "to raise [his] right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Claims have "facial plausibility" only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

IV. ARGUMENT AND AUTHORITIES

A. Plaintiff Lacks Article III Standing.

Article III standing is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006). "A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action." *Warth*, 422 U.S. at 499 (internal quotation marks and citation omitted).

Not just any financial loss or injury will suffice to confer standing. Rather, to satisfy Article III, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA, et al.*, 133 S. Ct 1138, 1147 (2013) (*quoting Monsanto Co. v. Geertson Seed Farms*, 561 U.S.

139 (2010)). Plaintiff's allegations fall far short of satisfying these requirements. Plaintiff's failure to establish standing requires dismissal of his Complaint.[4]

1. Plaintiff does not allege an actual or imminent injury.

a. Plaintiff does not allege an actual monetary loss.

Plaintiff attempts to satisfy the requirement of an actual injury by alleging that two unauthorized charges were made using his debit card number. Compl. ¶ 6. Plaintiff acknowledges that he reported those charges to his credit union and does not allege that the credit union failed to reimburse them. *Id.* Without an allegation of an actual out-of-pocket loss to Plaintiff, the charges are insufficient to confer standing.

Courts have consistently held that a data breach plaintiff cannot establish standing simply by alleging a fraudulent charge. Rather it is necessary to plead that the fraudulent charge *went unreimbursed* – i.e., that Plaintiff experienced an out-of-pocket loss. As one court has explained, "in order to have suffered an actual injury, plaintiff must have had an unreimbursed charge on [his] credit card." *Whalen v. Michael Stores Inc.*, No. 14-cv-7006, 2015 WL 9462108, at *3 (E.D.N.Y. Dec. 28, 2015) (quoting *In re Barnes & Noble Pin Pad Litig.*, 12-CV-8617, 2013 WL 4759588, at *6 (N.D. Ill. Sept. 3, 2013)) (internal quotations

[4] Plaintiff's decision to cast his claims in the form of a putative class action does not relieve him of the burden of proving his own standing. Named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth*, 422 U.S. at 502. "[If] none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of [herself] or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

omitted); *see also Burton v. MAPCO Express, Inc.*, 47 F. Supp. 3d 1279, 1285 (N.D. Ala. 2014) ("If he cannot plausibly allege and ultimately prove actual damages (for example, an allegation that the charges on his account were not forgiven, and he had to pay for the charges), then the Court must dismiss his negligence claim for lack of subject matter jurisdiction because he cannot plead an Article III case or controversy."); *Clark v. Experian Info. Solutions, Inc.*, 2006 WL 2224049, at *3 (N.D. Ill. Aug. 2, 2006) ("Plaintiffs suffered no actual injury . . . if Plaintiffs were reimbursed for all unauthorized withdrawals and bank fees and, thus, suffered no out-of-pocket losses.").

The allegations in Plaintiff's Complaint are in sharp contrast to those present in the few outlier data breach cases where courts have found standing. For example, in *In re Target Corporation Data Security Breach Litigation*, the court found standing where the plaintiffs identified specific, unreimbursed charges, as well as additional charges or harm connected to the unauthorized charges. *See* 66 F. Supp. 3d 1154, 1159 (D. Minn. 2014) (plaintiffs alleged multiple, specific instances in which they incurred "unlawful charges, restricted or blocked access to bank accounts, inability to pay other bills, and late payment charges or new card fees."); *see also In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 527 (N.D. Ill. 2011) (plaintiff alleged monetary loss stemming from unauthorized bank account withdrawals or fees and charges associated with withdrawals). Even these courts have acknowledged, however, that standing would be lacking if the costs and fees at issue had been reimbursed. *Id.*

Plaintiff here has not alleged such an actual monetary loss. Rather, he alleges only that fraudulent charges were made, not that those charges remain unreimbursed or that he suffered additional unreimbursed costs in connection with the alleged fraudulent charges. *See* Compl.

¶ 6; *see also* ¶ 38 (alleging that damage has occurred "whether or not such charges are ultimately reimbursed").[5] Plaintiff's allegations of fraudulent charges are thus not sufficient to establish standing.

b. Costs voluntarily incurred to prevent speculative future harm cannot confer Article III standing.

Although Plaintiff alleges that he is at risk of future identity theft and fraud, he stops short of alleging he has personally incurred any costs to protect against those risks. *See, e.g.*, Compl. ¶¶ 38, 41, 42(f). For this reason alone, the specter of costs incurred to protect against future harm do not support standing here.[6] Moreover, even if Plaintiff's Complaint could be read to allege such losses (and it cannot), any resources Plaintiff chooses to expend to protect against a speculative possibility of future harm do not confer standing.

In *Clapper*, the Supreme Court rejected the notion that a plaintiff can create standing by taking "costly and burdensome measures to protect" against potential future harm. *Clapper*, 133 S. Ct. at 1151 (rejecting Second Circuit's holding that "plaintiffs have established that they suffered *present* injuries in fact . . . stemming from a reasonable fear of *future* harmful

[5] Any such claim would not be plausible on the facts alleged. Plaintiff alleges that his debit card number was fraudulently used at two stores and that his credit union was informed that the transactions were fraudulent. Compl. ¶ 6. The card brands that sponsor payment cards, including debit cards, have zero-liability policies for fraudulent charges. *See e.g.*, https://www.visa.com/chip/personal/security/zero-liability.jsp; https://www.mastercard.us/en-us/consumers/find-card-products/debit-cards/standard.html; https://www.mastercard.us/en-us/about-mastercard/what-we-do/terms-of-use/zero-liability-terms-conditions.html. Further, federal law limits consumer liability where, as here, the financial institution is informed that the charge is fraudulent. 12 C.F.R. § 1005.6.

[6] In addition, allegations of future harm cannot confer Article III standing. *See* Section IV(A)(1)(e), *infra*.

government conduct."). After *Clapper*, it is clear that alleged losses, no matter how reasonable, are not "fairly traceable" to a defendant's actions if willingly incurred to protect against a possibility of future harm. *Id.* at 1152-53. Plaintiff "cannot manufacture standing merely by inflicting harm on [himself] based on [his] fears of hypothetical future harm that is not certainly impending." *Id.* at 1151. "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.*

Following the Supreme Court's guidance in *Clapper*, courts have held that mitigation costs cannot satisfy the requirement of fair traceability. *See, e.g., In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 961 (D. Nev. June 1, 2015) ("[C]osts incurred to prevent future harm is not enough to confer standing . . . 'even when such efforts are sensible'"); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 658 (S.D. Ohio 2014) (Plaintiffs "cannot create standing by choosing to make expenditures in order to mitigate a purely speculative harm"); *accord Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011); *In re SuperValu, Inc. Customer Data Sec. Breach Litig.*, 14-MD-2586, 2016 WL 81792, *7 (D. Minn. Jan. 7, 2016); *Whalen*, 2015 WL 9462108, at *3; *Green v. eBay Inc.*, No. 14-1688, 2015 WL 2066531, at *5 (E.D. La. May 4, 2015); *Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 876 n.9 (N.D. Ill. 2014); *In re Science Apps. Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014); *Brit Ins. Holdings N.V. v. Krantz*, No. 1:11 CV 948, 2012 WL 28342, at *9 (N.D. Ohio Jan. 5, 2012); *Giordano v. Wachovia Sec., LLC*, No. 06–476, 2006 WL 2177036, at *4 (D.N.J. July 31, 2006). In sum, there is no factual basis in the Complaint for concluding

that Plaintiff has incurred any losses protecting against the risk of potential (and speculative) future harm. And even if he has, such losses cannot be used to create standing.

c. Alleged deprivation of value of PII and PCD is not injury-in-fact.

Plaintiff alleges "ascertainable losses in the form of deprivation of the value of [his] PII and PCD. . . ." Compl. ¶ 42(g). But Plaintiff has not alleged how his PII or PCD became less valuable as a result of the alleged data breach, and other courts have found such conclusory allegations of harm insufficient to establish standing. *See Whalen*, 2015 WL 9462108, at *4 (no standing when plaintiff did not allege "how her cancelled credit card information lost value"); *Galaria*, 998 F. Supp. 2d at 660 (no standing when plaintiffs "failed to allege any facts explaining how their PII became less valuable to them (or lost all value) by the data breach"). Having "failed to allege any facts explaining how [his PII or PCD] became less valuable as a result of the" alleged data breach, Plaintiff has not established standing. *In re SuperValu*, 2016 WL 81792, at *7 (citing *In re Zappos.com*, 108 F. Supp. 3d. at 949; *In re SAIC*, 45 F. Supp. 3d at 30; *Green*, 2015 WL 2066531, at *5 n.59).

d. Plaintiff's allegation of overpayment does not support standing.

Plaintiff also attempts to establish injury by claiming that a portion of the price he paid for Wendy's food was attributed to payment card security measures that were not implemented. Compl. ¶ 42(h). This conclusory allegation – utterly devoid of any factual support – is insufficient to confer standing. Indeed, other courts have rejected this same argument, explaining that the plaintiff "failed to allege that [the company] charges a different price for credit card payments and cash payments or that [the company] uses any customer payments for its security services." *Whalen*, 2015 WL 9462108, at *4; *see also Barnes & Noble*, 2013

WL 4759588, at *5. In other words, when a plaintiff fails to allege that "the value of the goods or services [he] purchased was diminished as a result of the data breach," he cannot establish standing on this basis. *In re SuperValu*, 2016 WL 81792, at *8 (collecting cases showing that courts "consistently [have] rejected" this theory of standing).

The same result should follow here. Plaintiff does not allege that customers purchasing Wendy's products with payment cards paid a higher price for those products (nor could he). He likewise does not allege that Wendy's allocates a portion of its customer payments to security measures or that the supposed security shortcomings he alleges in any way diminished the value of the food he purchased from Wendy's. Accordingly, Plaintiff's overpayment theory does not establish standing.

e. Future harm is insufficient to confer Article III standing.

Plaintiff alleges that he has been injured because he may incur future harm – specifically, that he is at "risk of harm from identity theft and identity fraud" and has an "imminent and impending injury flowing from potential fraud and identity theft." Compl. ¶¶ 41, 42(b). Plaintiff's "allegations of future harm are too remote to establish an injury-in-fact for Article III purposes." *Whalen*, 2015 WL 9462108, at *4. Allegations of future harm cannot establish Article III standing, unless the threatened injury is "*certainly* impending" or "there is a substantial risk that the harm will occur." *Clapper*, 133 S. Ct. at 1147, 1150 n. 5 (emphasis in original); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). The allegations must be more than mere "allegations of possible future injury." *Clapper*, 133 S. Ct. at 1147.

In *Clapper*, the Supreme Court held that plaintiffs lacked standing where their injury was "highly speculative" and contingent on a "highly attenuated chain of possibilities." *Id.* at 1148. *Clapper* confirmed what numerous courts had previously articulated: there is no standing where injuries are speculative and hypothetical. *Whalen*, 2015 WL 9462108, at *5. This is particularly true when, as here, the potential future injury hinges on the unknown (and unknowable) future actions of third parties. *See Clapper*, 133 S. Ct. at 1150, 1150 n.5.

Plaintiff's alleged harm here is highly speculative because it depends on a daisy chain of future events. As one court has found, future harm flowing from a data breach is inherently speculative because it depends on "whether the hacker (1) read, copied, and understood [Plaintiff's] personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of [Plaintiffs] by making unauthorized transactions in [Plaintiffs'] names." *In re SuperValu*, 2016 WL 81792, at *5 (citing *Reilly*, 664 F.3d at 42). Based on this same reasoning, the vast majority of courts have held that the potential for future identify theft or fraud does not confer standing. *See e.g.*, *Reilly*, 664 F.3d at 43; *Whalen*, 2015 WL 9462108, at *5; *In re Zappos.com*, 108 F. Supp. 3d. at 957-58; *Green v. eBay, Inc.*, 2015 WL 2066531, at *3 n.33; *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 364-68 (M.D. Pa. 2015); *Galaria*, 998 F. Supp. 2d at 654-56; *Trustwave Holdings*, 27 F. Supp. 3d at 876-77; *Lewart v. P.F. Chang's China Bistroc, Inc.*, No. 14-4787, 2014 WL 7005097, at *3 (N.D. Ill. Dec. 10, 2014).

Plaintiff cannot establish a certainly impending harm when there is no way of knowing when, if ever, Plaintiff will actually suffer a harm from the increased risk of identity theft. *See Whalen*, 2015 WL 9462108, at *5 (allegation that any "fraudulent use of cards might not be

apparent for years" belied claim that injury was "certainly impending"). *Id.* ¶ 37. Plaintiff's allegations of hypothetical possible future injuries thus do not establish standing.[7]

2. Plaintiff does not allege any injuries fairly traceable to Wendy's.

Even assuming that any of Plaintiff's allegations give rise to an injury-in-fact, Plaintiff still cannot establish standing because none of the alleged "harms" is fairly traceable to Wendy's conduct. Plaintiff premises his claims on the implication that unauthorized charges on Plaintiff's debit card must have been the result of the alleged data breach. But there is no factual support for Plaintiff's *ipse dixit.* As one court has held, an unauthorized charge following a data breach "is not indicative of data misuse that is fairly traceable" to the alleged data breach in the Complaint. *In re SuperValu*, 2016 WL 81792, at * 5. That is because, "given the unfortunate frequency of credit card fraud," some credit card fraud is expected. *Id.* Thus, Plaintiff's allegations do not confer standing because they give no indication that the fraudulent charges on his account were "in any way related to the security breach." *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *6.

Plaintiff does not allege any injury fairly traceable to the alleged data breach. Accordingly, Plaintiff has not established standing, and his Complaint should be dismissed.[8]

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[7] Only once has any Florida federal court denied a motion to dismiss brought by the victim of a third-party criminal data breach. In *Burrows v. Purchasing Power, LLC*, No. 1:12-cv-22800-UU, 2012 WL 9391827 (S.D. Fla. Oct. 18, 2012), the court held that plaintiff had suffered a concrete harm in the form of identity theft when a hacker, using information unquestionably obtained from the data breach, filed an unauthorized tax return on his behalf. The situation here is far different.

[8] Plaintiff lumps a number of conduct-based allegations – like theft of personal and financial information, untimely notification of the data breach, improper disclosure of private information, loss of privacy, and deprivation of rights under FDUTPA – into a list of supposed

B. Plaintiff Fails to State A Claim as A Matter of Law.[9]

1. Plaintiff fails to plead a valid negligence claim.

To state a claim for negligence under Florida law, Plaintiff must plead that: (1) Wendy's owed Plaintiff a duty; (2) Wendy's breached that duty; and (3) the breach proximately caused Plaintiff to incur actual loss or damage. *See Mengle v. Goldsmith*, No. 2:09-cv-46-FtM-SPC, 2011 WL 1058852, at *5 (M.D. Fla. Mar. 21, 2011). Plaintiff's negligence claim fails because Florida law does not recognize the duties Plaintiff alleges, and without a duty flowing from Wendy's to Plaintiff, there can be no negligence. Likewise, Plaintiff fails to allege any actual loss or damage he incurred as a result of the alleged breach.

a. Wendy's Does Not Owe Plaintiff a Common Law Duty.

Under Florida law, "the existence of a duty is a minimum threshold legal requirement that opens the courthouse doors . . . , and is ultimately a question of law for the court rather than a jury." *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1339 (11th Cir. 2012). Plaintiff contends that, as a result of a third-party criminal intrusion, Wendy's breached several common law duties owed to Plaintiff. But Plaintiff has not identified a single cognizable duty that Wendy's owed him, and thus Plaintiff's negligence claim should be dismissed.

injuries. But Plaintiff does not tether any of these allegations to a concrete, actual or imminent injury incurred by Plaintiff. As such they are not sufficient to confer standing.

[9] Plaintiff is a Florida resident who alleges that his information was compromised at a Wendy's restaurant located in Florida. Accordingly, Wendy's analyzes Plaintiff's claims here under Florida law. Wendy's does not concede – and in fact contests – that Florida law would apply to the claims of any members of the putative class with different factual circumstances.

i. There is no common law duty to safeguard a customer's PII from an unforeseeable third-party criminal intrusion.

Plaintiff claims that Wendy's had a common law duty "to exercise reasonable care to secure and safeguard [PII] and to utilize commercially reasonable methods to do so." Compl. ¶ 66. But no Florida court has ever held that a merchant owes customers a common law duty to safeguard their information against criminal attack. Moreover, courts applying other states' laws have held that no such duty exists. *See Willingham v. Global Payments, Inc.*, No. 1:12-cv-01157-RWS, 2013 WL 440702 (N.D. Ga. Feb. 5, 2013) (payment card processor has no duty to protect consumers from third-party criminal hackers); *Worix v. MedAssets, Inc.*, 869 F. Supp.2d 893, 897 (N.D. Ill. 2012) (no common law duty to safeguard sensitive information); *Citizens Bank of Pa. v. Reimbursement Techs., Inc.*, No. 12-1169, 2014 WL 2738220, at *2 (E.D. Pa. June 17, 2014) (no common law duty "to properly secure and to protect consumers' personal banking information and other information" or "to implement procedures and practices to prevent and/or have in place appropriate data privacy and security safeguards to prevent disclosure to unauthorized third parties."). Plaintiff has provided the Court with no reason to create a new-found duty under Florida law.[10]

[10] The Florida legislature is well aware of the issues presented by data breaches. In fact, in 2014, it amended the Florida Information Protection Act of 2014, Fla. Stat. Ann. § 501.171 – the State's data breach notification statute – to enhance and clarify the requirements imposed on a data breach victim. The legislature could have created a private right of action under that statute or imposed other opportunities for private plaintiffs to recover for purported harm arising out of a data breach. The legislature, however, chose not to do so. Its inaction, when considered alongside Florida's longstanding principal that it will not recognize a new-found duty where a statute governs, *see Parsons v. Harbor Specialty Ins. Co.*, 839 So. 2d 742, 743 (Fla. 4th DCA 2003), further warrants dismissal of Plaintiff's negligence claim.

Plaintiff's invocation of duty here also flies in the face of the well-established body of Florida law holding that, as a general rule, there is no legal duty to anticipate criminal acts of third parties or to control the conduct of those third parties unless the criminal acts are reasonably foreseeable. *See Patterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985). For a criminal act to be reasonably foreseeable, a plaintiff must prove that the defendant "had actual or constructive knowledge of prior *similar* acts committed" on the *same* premises. *Id.* at 1214 (emphasis added). Plaintiff does not allege that Wendy's experienced prior data breaches, nor has he alleged Wendy's had reason to know that this particular criminal intrusion would occur. Indeed, all that Plaintiff alleges is that data breaches have become prevalent among other retailers. *See* Compl. ¶ 13. If this Court were to hold that the mere prevalence and possibility of crime is sufficient to create a duty to protect others against similar crime, then it would fundamentally rewrite Florida tort law, eviscerating the long line of cases holding that there is no duty to "take precautions against a sudden attack" when there is "no reason to anticipate" its occurrence. *Patterson*, 472 So.2d at 1214-15.

ii. <u>There is no common law duty to notify customers of a data breach.</u>

Plaintiff contends that "Wendy's breached its duty to notify" Plaintiff of the breach by "waiting many months after learning of the breach" and by failing to "provide sufficient information" about the breach. Compl. ¶ 68.[11] There is no Florida case establishing a common

[11] There is no factual allegation in the Complaint as to when Wendy's learned of the alleged data breach, making Plaintiff's allegation of delayed notification nothing more than rank speculation. Moreover, the media statement on which Plaintiff bases his claim forecloses this assertion as it demonstrates that Wendy's promptly notified its customers of alleged suspicious activity – even before a data breach was confirmed. Compl. ¶ 3.

law duty to notify. Moreover, outside Florida, courts have held that merchants do not owe customers a common law duty to provide notice of a data breach. *See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108, 124 (D. Me. 2009) (no common law duty to "advise customers of the theft of their data once it occurred. . . ."); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1055 (E.D. Mo. 2009) (no negligence claim for failure to provide adequate and timely notice of a data breach).

Florida's data breach notification statute underscores the lack of a duty here. By statute, Florida has outlined a procedure for providing notice of a data breach. *See* Fla. Stat. Ann. § 501.171. There is no private right of action under that statute, and no Florida court has ever held that the statute gives rise to a common law duty. *See id.* at § 501.171(10) ("NO PRIVATE RIGHT OF ACTION.-This section does not establish a private cause of action."). If this court were to become the first in Florida to hold that there is a duty to notify, that decision would run afoul of the principle that a plaintiff cannot use the common law to advance a statute that is not enforceable by private right of action. *See McClelland v. Medtronic, Inc.*, 944 F. Supp.2d 1193, 1200 (M.D. Fla. 2013) ("'[N]o private right of action exists under the [statute]. Plaintiffs cannot make an end run around this rule by recasting violations of the [statute] as violations of state common law.'") (quoting *In re Medtronic, Inc., Sprint Fidelis Leads Prod. Liab. Litig.*, 623 F.3d 1200, 1204 (8th Cir. 2010)). Plaintiff's failure to identify a duty requires dismissal of his negligence claim.

b. Plaintiff's alleged injuries are too remote and conclusory to sustain a claim of negligence.

Wendy's has set forth in Section IV(A) the reasons why Plaintiff's allegations of harm are not sufficient to establish constitutional standing. The allegations of harm are also

insufficient to satisfy the essential negligence element of actual loss or damage proximately caused by the alleged breach.

i. Plaintiff's PII does not possess extrinsic value.

Plaintiff alleges he has been injured by the "deprivation of value" of his PII and PCD. Compl. ¶ 42(g). As set forth more fully in Section A(1)(c), the diminution in value of Plaintiff's PII or PCD is not a cognizable injury at law. *See Galaria*, 998 F. Supp. 2d at 660. That is because for allegations of harm to rise to the level of actual injury, Plaintiff must plead that "[he] has the ability to sell his own information and a defendant sold the information." *Barnes & Noble*, 2013 WL 4759588, at *5. Plaintiff does not allege that he has any ability to sell his own PII or PCD. As such, any theoretical diminution in the value of his PII or PCD does not cause him actual injury. Plaintiff likewise does not allege that Wendy's sold his PII or PCD. In fact, he pleads the opposite, specifically alleging that "hackers scoured Wendy's networks to find a way to access PCD," and, if that data was sold at all, it was the hacker(s) who sold it. Compl. ¶ 25.

ii. Speculative harm cannot sustain a claim for negligence.

Speculative allegations that Plaintiff will suffer future harm as a result of the data breach are insufficient to establish an actual injury proximately caused by the data breach. Yet this is all Plaintiff proffers to support his negligence claim. In general terms, Plaintiff alleges that he will suffer "imminent and certainly impending injury flowing from ***potential*** fraud and identity theft." Compl. ¶ 42(b) (emphasis added). "Potential" fraud is not "an existing compensable injury and consequent damages" as is "required to state a claim for negligence." *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007) (dismissing negligence claim

because "the harm caused by identity information exposure, coupled with the attendant costs to guard against identify theft" is insufficient to state a claim for negligence)*; see also Krottner v. Starbucks Corp.*, 406 F. App'x 129, 130 (9th Cir. 2010) (pre-*Clapper* decision holding that while plaintiffs had standing, they did not allege injury required for their negligence claims). "[A]ppreciable, non-speculative, present harm is an essential element of a negligence cause of action." *In re Sony Gaming Network & Customer Data Security Breach Litig.*, 903 F. Supp. 2d 942, 962 (S.D. Cal. 2012).

iii. Plaintiff's allegation of fraudulent charges is far too conclusory to state a claim for negligence.

Without any basis for it, Plaintiff blames Wendy's for two fraudulent purchases made on his debit card at some point in January 2016. *See* Compl. ¶ 6. Plaintiff does not allege that these charges have gone unreimbursed, meaning that there is no basis for concluding that Plaintiff incurred any out-of-pocket costs as a result of the charges. *See e.g.*, *Whalen*, 2015 WL 9462108, at *3. Thus, these allegations do not establish a concrete injury.[12]

Moreover, the only allegation linking Plaintiff's fraudulent transactions to the alleged Wendy's data breach is Plaintiff's claim that "the person or persons [who made the charges]. . . stole his debit card from Wendy's." *Id.* It is difficult to square this claim with Plaintiff's

[12] Costs Plaintiff does not even allege he incurred do not constitute an actual injury proximately caused by Wendy's conduct. Accordingly, allegations of the possible need to protect against future fraud, without more, do not support Plaintiff's negligence claim. Even if Plaintiff had voluntarily elected to incur such expenses, after *Clapper*, it is clear that alleged losses, no matter how reasonable, are not "fairly traceable" to a defendant's actions if willingly incurred to protect against a possibility of future harm. *Id.* at 1152-53.

other allegations, which make plain that there are many different ways a fraudster could have come into possession of Plaintiff's PCD that have nothing whatsoever to do with Wendy's. *See id.* at ¶ 13 (alleging data breaches are common and that "PII data is highly coveted and a frequent target of hackers"); *id.* at ¶ 14 (asserting broad impact of Target data breach); *id.* at ¶ 31 (alleging that "as many as 10 million American have their identities stolen each year"). There is no way, except by supposition, that Plaintiff can conclude that the purported fraudulent transactions resulted from the alleged Wendy's data breach. And mere supposition is not sufficient to state a plausible claim for relief. *See Iqbal*, 556 U.S. at 678.

2. Plaintiff fails to state a cognizable claim for breach of implied contract.

Plaintiff alleges that he entered into an implied contract with Wendy's "pursuant to which Wendy's agreed to safeguard and protect" Plaintiff's PII and PCD "and to timely notify" Plaintiff if his "data had been breached and compromised." *See* Compl. ¶ 59. The Complaint is utterly devoid of any factual allegations demonstrating a meeting of the minds as to these supposed terms. Likewise, the Complaint fails to establish that Plaintiff incurred any actionable injuries as a result of the alleged data breach. Plaintiff's conclusory allegations do not state a claim for breach of implied contract under *Twomby* or *Iqbal*, and Count I of the Complaint should be dismissed.

a. Plaintiff fails to allege a meeting of the minds.

A contract implied in fact occurs when the parties' assent can be inferred from the parties' course of dealing or performance. *See Rabon v. Inn of Lake City, Inc.*, 693 So.2d 1126, 1131 (Fla. 1st DCA 1997). It "requires the same elements as an express contract – . . . a mutual intent to contract – and differs only in the parties' method of expressing mutual

consent." *Jenks v. Bynum Trans., Inc.*, 104 So.3d 1217, 1224 (Fla. 1st DCA 2012); *see also Hercules Inc. v. U.S.*, 516 U.S. 417, 423-24 (1996) ("An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'"). In data breach cases, courts have rejected implied contract claims, finding no meeting of the minds as to the additional terms proposed by the plaintiffs. *See, e.g.*, *Krottner.*, 406 F. App'x. at 131 (affirming dismissal of implied contract claim because allegations failed to demonstrate a meeting of the minds of any specific offer to encrypt or otherwise safeguard plaintiffs' personal data); *Frezza v. Google Inc.*, No. 12-cv-00237-RMW, 2012 WL 5877587, at *4 (N.D. Cal. Nov. 20, 2012) (dismissing implied contract claim based on finding that "even if an implied contract does indeed exist, plaintiffs must sufficiently plead that Google agreed to and then breached a specific obligation"); *see also In re Zappos.com*, 108 F. Supp. 3d. at 955.

The same result should follow here. There is no factual allegation that Wendy's ever agreed to the proposed terms Plaintiff seeks to impose. Indeed, the Complaint describes the agreement between Wendy's and Plaintiff simply as follows: "Wendy's solicited and invited Plaintiff and Class members to eat at its restaurants and make purchases using their credit or debit cards. Plaintiff and Class members accepted Wendy's offers and used their credit and debit cards to make purchases at Wendy's restaurants during the period of the Data Breach." Compl. ¶ 59. This is the only meeting of the minds Plaintiff alleges. And it does not support Plaintiff's attempt to engraft any additional obligations on Wendy's.

b. Plaintiff fails to allege cognizable damages.

Even if Plaintiff could establish injury for purposes of standing under Article III, his implied contract claim still should be dismissed for failure to plead the requisite damages. A breach of contract claim requires a party to show that *damages resulted from* the breach. *Rollins, Inc. v. Butland*, 951 So.2d 860, 876 (Fla. 2d DCA 2006); *Pisciotta*, 499 F.3d at 632, 639 (loss of PII without direct harm is not a compensable harm); *Moyer v. Michaels Stores, Inc.*, No. 14 C. 561, 2014 WL 3511500, at *7 (N.D. Ill. July 14, 2014) (dismissing implied contract claim for lack of direct harm); *Holmes v. Countrywide Fin. Corp.*, No. 5:08-cv-00205-R, 2012 WL 2873892, at *13 (W.D. Ky. July 12, 2012) (dismissing contract claims in data security case because "[defendant's] actions did not cause any direct financial harm to [plaintiffs]"). Plaintiff's failure to allege direct financial harm or widespread misuse of PII stands in stark contrast to the rare cases permitting implied contract theories to proceed. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1326 (11th Cir. 2012) (plaintiffs alleged they became victims of identity theft for the first time after the laptops containing their sensitive information was stolen; the sensitive information taken from the stolen laptops, was used to open a bank account, change an address at the Post Office, and open an E*Trade account); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 531 n.6 (N.D. Ill. 2011) (plaintiffs alleged "that criminals have misused their financial information and caused Plaintiffs to lose money from unauthorized withdrawals and/or related bank fees"); *see also In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1158 (D. Minn. 2014) (plaintiffs alleged unauthorized charges, lost access to bank accounts, late fees, card-replacement fees, and credit monitoring costs); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 154 (1st Cir. 2011) (plaintiffs alleged

that over 1,800 unauthorized charges occurred as a result of the breach). Having failed to establish its requisite elements, Count I of the Complaint should be dismissed.

3. Plaintiff fails to plead a valid claim under FDUTPA.

Plaintiff also alleges that Wendy's has violated FDUTPA. "A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." Fla. Stat. Ann. § 501.204(1); *Virgilio v. Ryland Grp., Inc*., 680 F.3d 1329, 1338 n.25 (11th Cir. 2012); *Siever v. BWGaskets, Inc*., 669 F. Supp. 2d 1286, 1292 (M.D. Fla. 2009). Plaintiff does not allege these elements, and his FDUTPA claim should be dismissed.[13]

a. Plaintiff lacks standing to pursue claims under FDUTPA because he has not alleged the requisite actual damages.

As detailed in Section B(1), the Plaintiff lacks Article III standing, and all claims, including the statutory claim, should be dismissed. *See, e.g.*, *Prohais v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1339 (S.D. Fla. 2007) (speculative future damages insufficient to confer standing under FDUTPA). Plaintiff's failure to allege cognizable damages or injury-in-fact also means that Plaintiff has not demonstrated the specific statutory standing required to bring the FDUTPA claim. *See* Fla. Stat. Ann. § 501.211 (plaintiff must plead actual injury).

[13] Plaintiff's request for injunctive relief under FDUTPA fails for all the same reasons as the underlying claim. Compl. ¶ 94. But, in addition, Plaintiff has overlooked the fact that injunctive relief "is limited to prospective relief." *Ala. v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1133 (11th Cir. 2005). And, as detailed in section IV(A)(1)(e), *supra*, Plaintiff has not pled any "imminent" future harm that he will suffer as a result of the alleged Wendy's data breach, and thus is not entitled to relief related to potential future harm. *Id.*

b. Plaintiff does not plead that Wendy's committed any deceptive or unfair practice.

To state a claim under FDUTPA, Plaintiff must plead that Wendy's committed "[u]nfair methods of competition, unconscionable acts or practices, [or] unfair or deceptive acts or practices." Fla. Stat. Ann. § 501.204(1). Plaintiff falls far short of carrying this burden.

First, only rote, conclusory allegations support Plaintiff's assertion that "Wendy's engaged in unfair and deceptive trade practices by holding itself out as providing as [sic] secure online environment and by actively promoting trust online with consumers. . . ." Compl. ¶ 83. To support such a claim, Plaintiff would need to premise his claim on some assertion that Wendy's misrepresented its cyber security practices. But Plaintiff does not allege any public representation at all concerning Wendy's security practices – much less a misrepresentation. Accordingly, his FDUTPA claim fails. *See Michaels Stores*, 830 F. Supp. 2d at 525 (no deceptive practice given plaintiffs' failure to identify a deceptive communication by defendant). Plaintiff's failure to allege a representation also means that Plaintiff fails to allege a representation by which "an objective reasonable person would have been deceived." *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1283 (11th Cir. 2011). This too is required to state a FDUTPA claim.

Second, Plaintiff's half-hearted assertion that Wendy's engaged in unfair competition by "failing to appropriately safeguard their products, service, and customer information" (*see* Compl. ¶ 91) also falls short. As a preliminary matter, Plaintiff does not allege how the alleged failure to safeguard injured competition – nor does Plaintiff allege how any such injury flowed through to consumers. And even if Plaintiff had alleged an injury to competition (which he

has not), a competitor – not a consumer – must raise such a claim. *See F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).[14]

Third, to the extent Plaintiff asserts that the very act of failing to secure customer data violated FDUTPA, Plaintiff has not suffered an ascertainable loss as FDUTPA requires. *See Himes v. Brown & Co. Secs. Corp.*, 518 So.2d 937, 938 (Fla. 3d DCA 1987). This failure stems from the fact that "personal data does not have an apparent monetary value that fluctuates like the price of goods or services. . . ." *Burrows*, 2012 WL 9391827, at *3. Plaintiff cannot premise his FDUTPA claim on the disclosure of PII because he has not alleged a monetary loss resulting from the supposed diminution in value of his PII. *Id.* at *5.

Fourth, there is no case holding that the alleged failure to promptly disclose a data breach gives rise to FDUTPA liability. This is particularly so when Florida law imposes no obligation to disclose (other than the data breach notification law, which is not at issue here), and Wendy's did in fact make a timely disclosure. *See* Section B(2).

V. CONCLUSION

For the reasons set forth above, the Court should grant Wendy's Motion and dismiss Plaintiff's claims with prejudice.

Dated: April 4, 2016.

[SIGNATURES ON FOLLOWING PAGE]

[14] *Sperry & Hutchinson* involves an enforcement action brought under the FTC Act. FDUTPA, as a "baby FTC Act," is to be read with "due consideration and great weight" to the FTC and federal courts' interpretations of the FTC Act. *See* Fla. Stat. Ann. § 501.204(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record that are registered with the Court's CM/ECF system.

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