

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE ANTHEM, INC. DATA BREACH  
LITIGATION

Case No. 15-MD-02617-LHK

**ORDER GRANTING IN PART AND  
DENYING IN PART ANTHEM  
DEFENDANTS’ MOTION TO DISMISS  
AND ORDER GRANTING IN PART  
AND DENYING IN PART NON-  
ANTHEM DEFENDANTS’ MOTION TO  
DISMISS**

Re: Dkt. No. 410, 413

Plaintiffs<sup>1</sup> bring this putative class action against Anthem, Inc., 28 Anthem affiliates,<sup>2</sup> Blue

<sup>1</sup> All named Plaintiffs are identified in paragraphs 12 through 108 of the Consolidated Amended Complaint. *See* ECF No. 334-6 (“CAC”) ¶¶ 12–108.

<sup>2</sup> The Anthem affiliates are: Blue Cross and Blue Shield of Georgia; Blue Cross Blue Shield Healthcare Plan of Georgia; Anthem Blue Cross and Blue Shield of Indiana; Anthem Blue Cross of California; Anthem Blue Cross Life and Health Insurance Company; Anthem Blue Cross and Blue Shield of Colorado and Anthem Blue Cross and Blue Shield of Nevada; Anthem Blue Cross and Blue Shield of Connecticut; Anthem Blue Cross and Blue Shield of Kentucky; Anthem Blue Cross and Blue Shield of Maine; Anthem Blue Cross and Blue Shield of Missouri; Anthem Blue Cross and Blue Shield of Missouri (RightChoice Managed Care, Inc. & Healthy Alliance Life Insurance Company); Anthem Blue Cross and Blue Shield of New Hampshire; Empire Blue Cross and Blue Shield; Anthem Blue Cross and Blue Shield of Ohio; Anthem Blue Cross and Blue Shield of Virginia (Anthem Health Plans of Virginia & HMO HealthKeepers); Anthem Blue Cross and Blue Shield of Wisconsin (Blue Cross Blue Shield of Wisconsin & CompCare Health Services

1 Cross Blue Shield Association, and 17 non-Anthem Blue Cross Blue Shield Companies.<sup>3</sup> The  
 2 Court shall refer to Anthem, Inc. and the Anthem affiliates as the “Anthem Defendants,” and shall  
 3 refer to Blue Cross Blue Shield Association and the non-Anthem Blue Cross Blue Shield  
 4 Companies as the “Non-Anthem Defendants.” The Court shall refer to the Anthem and Non-  
 5 Anthem Defendants collectively as “Defendants.”

6 Before the Court are separate motions to dismiss Plaintiffs’ consolidated amended  
 7 complaint (“CAC”) filed by the Anthem and Non-Anthem Defendants. *See* ECF No. 334-6  
 8 (“CAC”); ECF No. 410 (“Anthem Mot.”); ECF No. 413 (“Non-Anthem Mot.”). Having  
 9 considered the parties’ submissions, the relevant law, and the record in this case, the Court hereby  
 10 GRANTS in part and DENIES in part the Anthem Defendants’ motion to dismiss and GRANTS in  
 11 part and DENIES in part the Non-Anthem Defendants’ motion to dismiss.

## 12 I. BACKGROUND

### 13 A. Factual Background

14 Defendant Anthem, Inc. (“Anthem”) is one of the largest health benefits and health  
 15 insurance companies in the United States. CAC ¶ 109. Anthem serves its members through  
 16 various Blue Cross Blue Shield (“BCBS”) licensee affiliates and other non-BCBS affiliates. *Id.* ¶  
 17 155. Anthem also cooperates with the Blue Cross Blue Shield Association (“BCBSA”) and  
 18 several independent BCBS licensees via the BlueCard program. *Id.* ¶ 156. “Under the BlueCard  
 19 program, members of one BCBS licensee may access another BCBS licensee’s provider networks  
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21 Insurance Corporation); Amerigroup Services; HealthLink; Unicare Life & Health Insurance  
 22 Company; CareMore Health Plan; the Anthem Companies; the Anthem Companies of California;  
 23 Amerigroup Corporation; and the Amerigroup Kansas, Inc.

24 <sup>3</sup> The non-Anthem BCBS Companies are: Blue Cross and Blue Shield of Alabama; Blue Cross  
 25 Blue Shield of Arizona; Arkansas Blue Cross and Blue Shield; Blue Shield of California; Blue  
 26 Cross and Blue Shield of Illinois; Blue Cross and Blue Shield of Florida; CareFirst BlueCross  
 27 BlueShield; Blue Cross and Blue Shield of Massachusetts; Blue Cross and Blue Shield of  
 28 Michigan; Blue Cross and Blue Shield of Minnesota; Horizon Blue Cross and Blue Shield of New  
 Jersey; Blue Cross and Blue Shield of North Carolina; Highmark Blue Shield; Highmark Blue  
 Cross Blue Shield West Virginia; BlueCross BlueShield of Tennessee; Blue Cross and Blue Shield  
 of Texas; and Blue Cross and Blue Shield of Vermont.

1 and discounts when the members are out of state.” *Id.*

2 In order to provide certain member services, the Anthem and Non-Anthem Defendants  
3 “collect, receive, and access their customers’ and members’ extensive individually identifiable  
4 health record information.” *Id.* ¶ 157. “These records include personal information (such as  
5 names, dates of birth, Social Security numbers, health care ID numbers, home addresses, email  
6 addresses, and employment information, including income data) and individually-identifiable  
7 health information (pertaining to the individual claims process, medical history, diagnosis codes,  
8 payment and billing records, test records, dates of service, and all other health information that an  
9 insurance company has or needs to have to process claims).” *Id.* The Court shall refer to  
10 members’ personal and health information as Personal Identification Information, or “PII.”

11 Anthem maintains a common computer database which contains the PII of current and  
12 former members of Anthem, Anthem’s affiliates, BCBSA, and independent BCBS licensees. *Id.* ¶  
13 158. In total, Anthem’s database contains the PII of approximately 80 million individuals. *Id.* ¶  
14 204. According to Plaintiffs, both the Anthem and Non-Anthem Defendants promised their  
15 members that their PII would be protected. Blue Cross of California, for instance, mailed the  
16 following privacy notice to its members:

17 We keep your oral, written and electronic [PII] safe using physical, electronic,  
18 and procedural means. These safeguards follow federal and state laws. Some of  
19 the ways we keep your [PII] safe include securing offices that hold [PII],  
20 password-protecting computers, and locking storage areas and filing cabinets. We  
21 require our employees to protect [PII] through written policies and procedures. . .  
22 . Also, where required by law, our affiliates and nonaffiliates must protect the  
23 privacy of data we share in the normal course of business. They are not allowed to  
24 give [PII] to others without your written OK, except as allowed by law and  
25 outlined in this notice.

26 *Id.* ¶ 163 (emphasis removed). In February 2015, Anthem announced to the public that  
27 “cyberattackers had breached the Anthem Database, and [had] accessed [the PII of] individuals in  
28 the Anthem Database.” *Id.* ¶ 203. This was not the first time that Anthem had experienced  
29 problems with data security. In late 2009, approximately 600,000 customers of Wellpoint

1 (Anthem’s former trade name) “had their personal information and protected healthcare  
2 information compromised due to a data breach.” *Id.* ¶ 194. In addition, in 2013, the U.S.  
3 Department of Health and Human Services fined Anthem \$1.7 million for various HIPAA  
4 violations related to data security. *Id.* ¶ 195. Finally, in 2014, the federal government informed  
5 Anthem and other healthcare companies of the possibility of future cyberattacks, and advised these  
6 companies to take appropriate measures, such as data encryption and enhanced password  
7 protection. *Id.* ¶¶ 200–01.

8 Plaintiffs allege that Defendants did not sufficiently heed these warnings, which allowed  
9 cyberattackers to extract massive amounts of data from Anthem’s database between December  
10 2014 and January 2015. *Id.* ¶ 226. After Anthem discovered the extent of this data breach, it  
11 proceeded to implement various containment measures. *Id.* ¶ 232. The cyberattacks ceased by  
12 January 31, 2015. *Id.* In addition, after learning of the cyberattacks, Anthem proceeded to retain  
13 Mandiant, a cybersecurity company, “to assist in assessing and responding to the Anthem Data  
14 Breach and to assist in developing security protocols for Anthem.” *Id.* ¶ 207. Mandiant’s work  
15 culminated in the production of an Intrusion Investigation Report (“Mandiant Report”), which  
16 Mandiant provided to Anthem in July 2015. *Id.*

17 According to Plaintiffs, the Mandiant Report found that “Anthem and [its] Affiliates  
18 [had] failed to take reasonable measures to secure the [PII] in their possession.” *Id.* ¶ 236.  
19 Likewise, Plaintiffs allege that “Anthem and Anthem Affiliates [] lacked reasonable encryption  
20 policies.” *Id.* ¶ 237. Additionally, “BCBSA and non-Anthem BCBS allowed the [PII] that their  
21 current and former customers and members had entrusted with them to be placed into the Anthem  
22 Database even though there were multiple public indications and warnings that the Anthem and  
23 Anthem Affiliates’ computer systems and data security practices were inadequate.” *Id.* ¶ 243.  
24 Plaintiffs further aver that although Anthem publicly disclosed the data breach in February 2015,  
25 many affected customers were not personally informed until March 2015, if at all. *Id.* ¶ 250.  
26 Finally, Plaintiffs contend that Anthem still has not disclosed whether it has made any changes to

1 its security practices to prevent a future cyberattack.

2 **B. Procedural History**

3 A number of lawsuits were filed against the Anthem and Non-Anthem Defendants in the  
4 wake of the Anthem data breach. In general, these lawsuits bring putative class action claims  
5 alleging (1) failure to adequately protect Anthem’s data systems, (2) failure to disclose to  
6 customers that Anthem did not have adequate security practices, and (3) failure to timely notify  
7 customers of the data breach.

8 In spring 2015, Plaintiffs in several lawsuits moved to centralize pretrial proceedings in a  
9 single judicial district. *See* 28 U.S.C. § 1407(a) (“When civil actions involving one or more  
10 common questions of fact are pending in different districts, such actions may be transferred to any  
11 district for coordinated or consolidated pretrial proceedings.”). On June 12, 2015, the Judicial  
12 Panel on Multidistrict Litigation (“JPML”) issued a transfer order selecting the undersigned judge  
13 as the transferee court for “coordinated or consolidated pretrial proceedings” in the multidistrict  
14 litigation (“MDL”) arising out of the Anthem data breach. *See* ECF No. 1 at 1–3.<sup>4</sup>

15 On September 10, 2015, the Court held a hearing to appoint Lead Plaintiffs’ counsel.  
16 Following this hearing, the Court issued an order appointing Co-Lead Plaintiffs’ counsel and  
17 requesting that counsel file a single consolidated amended complaint by October 19, 2015. ECF  
18 No. 284 at 2. On October 19, 2015, Plaintiffs filed their consolidated amended complaint, which  
19 organized Plaintiffs’ causes of action into thirteen different counts, with claims pursuant to various  
20 state and federal laws asserted under each count. The complaint’s prayer for relief included  
21 requests for class certification, injunctive relief, and damages.

22 On this final form of relief, Plaintiffs seek damages arising from four separate economic  
23 losses. First, Plaintiffs allege that they “paid Anthem money for services that should have  
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25 <sup>4</sup> As of February 14, 2016, after remand or dismissal of 9 cases, this MDL is comprised of 114  
26 active individual cases. ECF No. 451-1 at 4. An additional case is pending conditional transfer to  
27 this MDL.

1 included protecting their [PII] from unauthorized disclosure”; Plaintiffs refer to these losses as  
 2 “Benefit of the Bargain” losses. ECF No. 424 at 3. Second, Plaintiffs seek recovery for “the theft  
 3 of Plaintiffs’ [PII],” which Plaintiffs refer to as the “Loss of Value of PII.” *Id.* Third, Plaintiffs  
 4 allege that many class members “incurred out-of-pocket losses, including delayed tax returns, and  
 5 the time and costs of credit monitoring.” Plaintiffs refer to these losses as “Out of Pocket” costs.  
 6 *Id.* Finally, Plaintiffs allege that all class members “are at significant risk of imminent identity  
 7 theft . . . as a result of the exfiltration of their [PII],” which Plaintiffs refer to as the “Imminent  
 8 Risk of Further Costs.” *Id.*

9 At the October 25, 2015 case management conference, the Court determined that the  
 10 Anthem Defendants and Non-Anthem Defendants would file separate motions to dismiss. Both  
 11 motions would be “limited to a combined total of 10 claims, with 5 claims selected by Plaintiffs, 3  
 12 claims selected by the Anthem Defendants, and 2 claims selected by the [Non-Anthem  
 13 Defendants].” ECF No. 326 at 2–3. At the November 10, 2015 case management conference, the  
 14 parties informed the Court of the 10 claims that would be addressed in Defendants’ motions to  
 15 dismiss. ECF No. 366 at 2.

16 On November 23, 2015, the Anthem Defendants and Non-Anthem Defendants filed their  
 17 respective motions to dismiss. ECF No. 410 (“Anthem Mot.”); ECF No. 413 (“Non-Anthem  
 18 Mot.”). Plaintiffs filed their oppositions on December 21, 2015, and the Anthem Defendants and  
 19 Non-Anthem Defendants filed their replies on January 19, 2016. ECF No. 424 (“Anthem  
 20 Opp’n”); ECF No. 425 (“Non-Anthem Opp’n”); ECF No. 432 (“Anthem Reply”); ECF No. 433  
 21 (“Non-Anthem Reply”).

## 22 **II. LEGAL STANDARD**

### 23 **A. Motion to Dismiss**

24 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an  
 25 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
 26 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the

1 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
 2 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a  
 3 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
 4 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For  
 5 purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the  
 6 complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving  
 7 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

8 Nonetheless, the Court is not required to “assume the truth of legal conclusions merely  
 9 because they are cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064  
 10 (9th Cir. 2011) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere  
 11 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to  
 12 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); accord *Iqbal*, 556 U.S. at 678.  
 13 Furthermore, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which establish  
 14 that he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.  
 15 1997) (quoting *Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995)).

16 For purposes of motions to dismiss, as with virtually all motions touching upon substantive  
 17 legal matters, the general rule “is that the MDL transferee court is generally bound by the same  
 18 substantive legal standards, if not always the same interpretation of them, as would have applied in  
 19 the transferor court.” *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 699 (9th Cir. 2011).

## 20 **B. Leave to Amend**

21 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely  
 22 granted when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate  
 23 decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d  
 24 1122, 1127 (9th Cir. 2000) (en banc) (ellipses omitted). Generally, leave to amend shall be denied  
 25 only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be  
 26 futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512



1 F.3d 522, 532 (9th Cir. 2008).

2 **III. DISCUSSION**

3 **A. Standing**

4 Before addressing any of the specific claims at issue, the Court turns first to the three  
 5 arguments that the Non-Anthem Defendants have raised regarding standing. First, “not one of the  
 6 98 named plaintiffs in the CAC alleges that he or she was insured by or had *any* connection with .  
 7 . . . Blue Cross and Blue Shield of Arizona, Inc., BlueCross BlueShield of Tennessee, Inc., and  
 8 Highmark West Virginia, Inc.” Non-Anthem Mot. at 2 (emphasis added). Thus, the Non-Anthem  
 9 Defendants request that these three Non-Anthem Defendants be dismissed from this action in its  
 10 entirety.

11 Second, the consolidated amended complaint fails “to allege any facts regarding ten Non-  
 12 Anthem Defendants with respect to” the selected claims at issue in the instant motions to dismiss.  
 13 Non-Anthem Mot. at 1 (emphasis removed).<sup>5</sup> Accordingly, the Non-Anthem Defendants request  
 14 that the selected “claims . . . be dismissed as to those ten Non-Anthem Defendants.” Non-Anthem  
 15 Reply at 3.

16 Third, the consolidated amended complaint fails to allege any specific facts as to Plaintiffs’  
 17 Indiana negligence, Kentucky Consumer Protection Act, New Jersey breach of contract, New  
 18 York unjust enrichment, New York General Business Law § 349, and California Unfair  
 19 Competition Law claims against 16 of the 17 Non-Anthem Defendants. Specifically, the  
 20 consolidated amended complaint identifies a New Jersey Plaintiff—Elizabeth Ames—who was  
 21 enrolled in a plan managed by Non-Anthem Defendant Horizon Blue Cross Blue Shield of New  
 22 Jersey. *See* CAC ¶ 146; Non-Anthem Mot. at 3. Plaintiffs have thus properly asserted a New

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 25 <sup>5</sup> These ten Non-Anthem Defendants are: Blue Cross and Blue Shield of Alabama; Blue Cross and  
 26 Blue Shield of Arizona, Inc.; CareFirst of Maryland, Inc.; Blue Cross and Blue Shield of  
 27 Michigan; Blue Cross and Blue Shield of North Carolina, Inc.; Highmark Health Services;  
 28 Highmark West Virginia, Inc.; BlueCross BlueShield of Tennessee, Inc.; Blue Cross and Blue  
 Shield of Vermont; and Blue Cross and Blue Shield of Illinois. Non-Anthem Mot. at 1.



1 Jersey breach of contract claim against Horizon Blue Cross Blue Shield of New Jersey, but have  
2 not alleged any specific facts as to the remaining 16 Non-Anthem Defendants. The Non-Anthem  
3 Defendants therefore request dismissal of those Non-Anthem Defendants who have not had any  
4 specific facts alleged against them as to Plaintiffs’ Indiana negligence, Kentucky Consumer  
5 Protection Act, New Jersey breach of contract, New York unjust enrichment, New York General  
6 Business Law § 349, and California Unfair Competition Law claims.

7 All three of these arguments implicate the same thorny legal question: when, in the context  
8 of a nationwide consumer class action, should a federal court address issues of standing? Indeed,  
9 “[a]lthough standing is a ‘threshold issue’ usually considered at the outset of the case,” two U.S.  
10 Supreme Court decisions—*Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v.*  
11 *Fibreboard Corp.*, 527 U.S. 815 (1999)—“make clear that there are situations in which a court  
12 may defer that issue to later in the case.” *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp.  
13 3d 1154, 1160 (D. Minn. 2014). As the *In re Target* court summarized, both *Amchem* and *Ortiz*  
14 involved “global settlements of [consumer] class actions” where the district court “was  
15 simultaneously presented with class certification issues and Article III issues.” *Id.* at 1159–60. In  
16 both *Amchem* and *Ortiz*, the U.S. Supreme Court determined that the district court could defer  
17 standing questions until after class certification. In the instant case, Plaintiffs request that the  
18 Court adopt the same approach.

19 Neither *Amchem* nor *Windsor*, however, created a blanket exception for standing in the  
20 consumer class action context. Rather, the U.S. Supreme Court “in both cases stated that class  
21 certification questions could be addressed first [because] they were ‘logically antecedent’ to the  
22 standing questions.” *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1071 (N.D. Cal. 2015) (quoting  
23 *Ortiz*, 527 U.S. at 831; *Amchem*, 521 U.S. at 612). The scope and applicability of this “logically  
24 antecedent” exception has, in the aftermath of *Amchem* and *Windsor*, confounded both courts and  
25 commentators alike. *See, e.g., In re Target*, 66 F. Supp. 3d at 1160 (“Although some courts [have]  
26 interpreted [*Amchem* and *Windsor*] to require deferral of the Article III standing determination

1 until after class certification, [others courts have] found more persuasive the decisions that  
 2 interpreted the Supreme Court precedent to allow consideration of the named plaintiff’s Article III  
 3 standing at an earlier stage, thus requiring a named plaintiff to establish standing for each claim set  
 4 forth in a class action when the issue is presented prior to class certification.”) (internal quotation  
 5 marks omitted); Linda S. Mullenix, *Standing and Other Dispositive Motions After Amchem and*  
 6 *Ortiz: The Problem of “Logically Antecedent” Inquiries*, 2004 Mich. St. L. Rev. 703. Even  
 7 district courts within the Northern District of California have split ways on when (and how)  
 8 *Amchem* and *Ortiz* should apply in the consumer class action context. *See generally In re Carrier*  
 9 *IQ*, 78 F. Supp. 3d at 1068–75 (reviewing cases that have considered standing before and after  
 10 class certification).

11 On this particular question, the Court finds instructive the reasoning in *In re Carrier IQ*.  
 12 In *In re Carrier IQ*, the district court undertook a comprehensive analysis of U.S. Supreme Court  
 13 and Ninth Circuit precedent, decisions from various federal district courts, and pertinent legal  
 14 scholarship. *See id.* After surveying these sources in detail, the *In re Carrier IQ* court concluded  
 15 “that it ha[d] the discretion to defer questions of standing until after class certification”—which it  
 16 could decide to exercise on a case by case (or even an issue by issue) basis. *Id.* at 1074. In  
 17 exercising this discretion, the *In re Carrier IQ* court noted that a district court might consider  
 18 factors such as the cost and burden of discovery, “the breadth of the proposed class and the  
 19 number of state law claims asserted on behalf of the class,” and whether a named plaintiff’s “claim  
 20 is typical of those individuals whose claims arise under the laws of . . . other states.” *Id.* at 1072–  
 21 75. Following *In re Carrier IQ*, the Court finds that it has discretion to decide in the instant action  
 22 when to consider issues of standing, and shall exercise this discretion as follows.

### 23 **1. All Claims as to Three Non-Anthem Defendants**

24 As to Blue Cross and Blue Shield of Arizona, Inc., BlueCross BlueShield of Tennessee,  
 25 Inc., and Highmark West Virginia, Inc., “not one of the 98 named plaintiffs in the CAC alleges  
 26 that he or she was insured by or had *any* connection with” these entities. Non-Anthem Mot. at 2.

1 The Non-Anthem Defendants request that these three entities be dismissed from this action in its  
2 entirety. The Court finds the Non-Anthem Defendants' contentions well taken, for the reasons  
3 stated below.

4 First, each of the factors described in *In re Carrier IQ* weigh in favor of the Court  
5 addressing standing questions at the outset of this litigation, rather than deferring such questions  
6 until class certification. As to the cost and burden of discovery, for instance, the Court observes  
7 that the parties must litigate the selected claims "through two motions to dismiss, through class  
8 cert[ification], [and] through summary judgment." ECF No. 359 at 60. The parties expect  
9 discovery to be expensive and time-consuming. As this action moves forward, Plaintiffs may not  
10 be able to find a single class member who can assert any claim with specific factual allegations  
11 against Blue Cross and Blue Shield of Arizona, Inc., BlueCross BlueShield of Tennessee, Inc., and  
12 Highmark West Virginia, Inc. Under such circumstances, it would make little sense to require  
13 these three Non-Anthem Defendants to be subject to extensive discovery and motions practice.

14 In addition, there are nearly 80 million potential class members, with each class member  
15 asserting a variety of state and federal law claims. Deferring questions of standing until class  
16 certification would only make the Court's class certification decision all the more unwieldy, and  
17 would not be in the interest of promoting efficient litigation. *See In re Carrier IQ*, 78 F. Supp. 3d  
18 at 1074–75 ("Moreover, given the breadth of the proposed class and the number of state law  
19 claims asserted on behalf of the class, there is a meaningful risk that the requirements of class  
20 certification under Rule 23 may not be met or, if they are, subclasses may have to be created  
21 which would engender delay.").

22 Furthermore, as the parties acknowledge, there are subtle but significant differences in the  
23 various state and federal law claims at issue. Plaintiffs might, for instance, be able to move  
24 forward with a breach of contract claim under California law but not a breach of contract claim  
25 under the law of a different state. Under such circumstances, grouping all Non-Anthem  
26 Defendants together—particularly those who have had no specific factual allegations asserted

1 against them—makes little sense. *See id.* at 1072 (holding that deferring issues of standing until  
2 after class certification may be appropriate where a claim brought by an individual with standing  
3 “is typical of those individuals whose claims arise under the laws of the other states.”).

4 In addition to the specific *In re IQ Carrier* factors discussed above, Plaintiffs acknowledge  
5 that “named Plaintiffs from a particular state do not bring their individual state law claims against  
6 Non-Anthem Defendants with whom they did not have a relationship.” Non-Anthem Opp’n at 5;  
7 *see also Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001), *recognized as abrogated on other*  
8 *grounds by Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014) (“In order to assert claims on  
9 behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of  
10 sustaining some direct injury as a result of the challenged statute or official conduct.”). Thus,  
11 under Plaintiffs’ own theory of the case, there is little reason to keep certain Non-Anthem  
12 Defendants in this action when no specific factual allegations have been asserted against them  
13 with respect to any of the claims in the consolidated amended complaint.

14 As a final point, in this particular instance, case law appears to tilt in the Non-Anthem  
15 Defendants’ favor. In *In re Carrier IQ*, for instance, the district court addressed standing prior to  
16 class certification and “require[d] the [p]laintiffs to present a named class member who possesses  
17 individual standing to assert each state law’s claims against Defendants.” 78 F. Supp. 3d at 1074.  
18 As in the instant case, the *In re Carrier IQ* court cited both “the expense and burden of nationwide  
19 discovery” and “the breadth of the proposed class” in reaching this determination. *Id.* Likewise,  
20 in *Pardini v. Unilever United States, Inc.*, 961 F. Supp. 2d 1048, 1061 (N.D. Cal. 2013), the  
21 district court observed that “there is only one named plaintiff and she has not alleged that she  
22 purchased [defendant’s product] outside of California.” Thus, “[p]laintiff does not have standing  
23 to assert a claim under the consumer protection laws of the other states named in the Complaint.”  
24 *Id.*; *accord Harris v. CVS Pharmacy, Inc.*, 2015 WL 4694047, \*4 (C.D. Cal. Aug. 6, 2015)  
25 (finding that, “[a]s the party advocating for the application of Rhode Island law, [p]laintiff must  
26 make at least [a] *prima facie* showing that the RIDTPA applies to him such that he would have

1 standing to bring that claim.”).

2 Plaintiffs’ attempt to distinguish this line of cases by relying on *In re Target* is unavailing.  
3 Although the *In re Target* court did defer issues of standing until after class certification, the  
4 district court reasoned that, “[a]s Target undoubtedly knows, there are consumers in Delaware,  
5 Maine, Rhode Island, Wyoming, and the District of Columbia whose personal financial  
6 information was stolen in the 2013 breach.” 66 F. Supp. 3d at 1160. Accordingly, even though no  
7 named plaintiffs hailed from these specific jurisdictions at the time Target filed its motion to  
8 dismiss, residents from these jurisdictions were almost certainly affected by the data breach and  
9 could almost certainly be identified at some later point in the litigation.

10 This same principle does not apply with equal force in the instant case. Here, unlike in *In*  
11 *re Target*, Plaintiffs do not bring their claims against a single nationwide entity. Instead, Plaintiffs  
12 have brought suit against Anthem, 28 Anthem affiliates, and 17 Non-Anthem Defendants. The  
13 Non-Anthem Defendants do not dispute that the Anthem data breach affected upwards of 80  
14 million individuals, and that these individuals have standing to bring their claims against at least  
15 *some* Defendants. The Non-Anthem Defendants, however, contest whether three specific Non-  
16 Anthem Defendants should remain in this action when not a single named Plaintiff has been able  
17 to assert any specific factual allegations against these three Non-Anthem Defendants. Unless and  
18 until Plaintiffs demonstrate otherwise, the Court finds that there is little use in keeping these three  
19 Non-Anthem Defendants in this action.

20 Accordingly, the Court DISMISSES Blue Cross and Blue Shield of Arizona, Inc.,  
21 BlueCross BlueShield of Tennessee, Inc., and Highmark West Virginia, Inc. from this action in its  
22 entirety. Plaintiffs, however, shall have leave to amend. It is possible that Plaintiffs may be able  
23 to assert specific factual allegations against the three Non-Anthem Defendants listed above by, for  
24 instance, adding a new named Plaintiff. *See Lopez*, 203 F.3d at 1127 (holding that “a district court  
25 should grant leave to amend . . . unless it determines that the pleading could not possibly be cured  
26 by the allegation of other facts.”). The Court therefore GRANTS with leave to amend the Non-

1 Anthem Defendants' motion to dismiss Blue Cross and Blue Shield of Arizona, Inc., BlueCross  
2 BlueShield of Tennessee, Inc., and Highmark West Virginia, Inc. from this action in its entirety.

3 **2. All Selected Claims as to Ten Non-Anthem Defendants**

4 For substantially the same reasons, the Court also GRANTS with leave to amend the Non-  
5 Anthem Defendants' motion to dismiss the ten selected claims at issue in the instant motion to  
6 dismiss against Blue Cross and Blue Shield of Alabama; Blue Cross and Blue Shield of Arizona,  
7 Inc.; CareFirst of Maryland, Inc.; Blue Cross and Blue Shield of Michigan; Blue Cross and Blue  
8 Shield of North Carolina, Inc.; Highmark Health Services; Highmark West Virginia, Inc.;  
9 BlueCross BlueShield of Tennessee, Inc.; Blue Cross and Blue Shield of Vermont; and Blue Cross  
10 and Blue Shield of Illinois.

11 As noted above, the consolidated amended complaint fails to allege any specific facts  
12 regarding these ten Non-Anthem Defendants with respect to the selected claims at issue in the  
13 instant motions to dismiss. Non-Anthem Mot. at 1. Requiring these particular Non-Anthem  
14 Defendants to undergo extensive discovery and motions practice in this action is both costly and  
15 unnecessary. Moreover, dismissing these ten Non-Anthem Defendants from the ten selected  
16 claims at issue does not altogether absolve these Defendants from liability. By requiring the  
17 parties to focus on a set of selected claims, the Court sought to narrow the issues presented in  
18 order to move forward with this MDL in a timely and cost-effective manner. The Court's decision  
19 to adopt such a streamlined approach, however, does not result in dismissal of the many  
20 remaining, non-selected claims against these ten Non-Anthem Defendants asserted in the  
21 consolidated amended complaint.

22 **3. Selected Claims as to Most Non-Anthem Defendants**

23 Finally, the Non-Anthem Defendants request that the Court dismiss Plaintiffs' Indiana  
24 negligence, Kentucky Consumer Protection Act, New Jersey breach of contract, California Unfair  
25 Competition Law ("UCL"), New York unjust enrichment, and New York General Business Law  
26 ("GBL") § 349 claims against all Non-Anthem Defendants about whom the consolidated amended



1 complaint makes no factual allegations.

2 As an initial matter, this argument is moot with respect to Plaintiffs' Indiana negligence  
3 and Kentucky Consumer Protection Act claims. As discussed in greater detail below, Plaintiffs  
4 can not maintain these claims as a matter of law. These claims will therefore be dismissed with  
5 prejudice.

6 That leaves the Court with the following four claims: New Jersey breach of contract,  
7 California Unfair Competition Law ("UCL"), New York unjust enrichment, and New York  
8 General Business Law ("GBL") § 349. Although the Non-Anthem Defendants acknowledge that  
9 Plaintiffs have properly brought these claims against at least *one* Anthem or Non-Anthem  
10 Defendant, the Non-Anthem Defendants contend that there is little point in keeping *all* Non-  
11 Anthem Defendants in this litigation with respect to these particular claims. The Court agrees.

12 Consistent with its reasoning throughout this section, the Court finds that it would be  
13 improvident to require all 17 non-Anthem Blue Cross Blue Shield Defendants to answer for a  
14 claim when Plaintiffs assert factual allegations against only a handful of these 17 Defendants. The  
15 breadth and complexity of this action make streamlining this litigation all the more important.  
16 Thus, the Court GRANTS the Non-Anthem Defendants' motion to dismiss Plaintiffs' Indiana  
17 negligence, Kentucky Consumer Protection Act, New Jersey breach of contract, California Unfair  
18 Competition Law ("UCL"), New York unjust enrichment, and New York General Business Law  
19 ("GBL") § 349 claims against all Non-Anthem Defendants about whom the consolidated amended  
20 complaint makes no factual allegations. As above, Plaintiffs shall have leave to amend.<sup>6</sup>

21 **B. Indiana Negligence (against Anthem and Non-Anthem Defendants)**

22 "The elements of a negligence claim under Indiana law are: (1) a duty owed to plaintiff by  
23 defendant, (2) breach of duty by allowing conduct to fall below the applicable standard of care,  
24

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25 <sup>6</sup> In the same vein, Plaintiffs must specifically and accurately identify the health plan of each  
26 named Plaintiff. For example, although the consolidated amended complaint alleges that  
27 California Plaintiff Michael Bronzo was enrolled in a "Blue Cross Blue Shield of California health  
28 plan," Non-Anthem Defendants allege that no such entity exists. Non-Anthem Mot. at 10 n.2.



1 and (3) a compensable injury proximately caused by defendant’s breach of duty.” *Pisciotta v. Old*  
2 *Nat’l Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007) (internal quotation marks omitted). Here,  
3 Plaintiffs allege that the Anthem and Non-Anthem Defendants “violated the duty of care owed  
4 Indiana Plaintiffs and Class Members by collecting and storing their [PII] without adequate data  
5 security.” Anthem Opp’n at 3.

6 Defendants contend that Plaintiffs’ negligence claim fails for three reasons. First,  
7 Defendants assert “that Indiana law does not allow a cause of action in tort against a database  
8 owner for failing to protect adequately personal information.” Anthem Mot. at 2. Second,  
9 Defendants argue that the economic loss doctrine bars recovery for Defendants’ alleged  
10 negligence. *Id.* at 3. Third, Defendants contend that the allegations in the consolidated amended  
11 complaint fail to establish proximate causation. Non-Anthem Mot. at 8.

12 As to whether Indiana law provides Plaintiffs a private cause of action, the parties  
13 acknowledge that no Indiana court has yet ruled on this question. The Court therefore looks to the  
14 law of the Seventh Circuit, of which Indiana is a part. On this point, the Court finds instructive  
15 the Seventh Circuit’s decision in *Pisciotta v. Old National Bancorp*. In *Pisciotta*, Old National  
16 Bancorp (“ONB”) maintained a website containing the personal information of potential  
17 customers. In 2005, ONB learned that its website had been hacked, and ONB subsequently  
18 informed affected potential customers of this breach. Upon receiving this information, Luciano  
19 Pisciotta (“Pisciotta”) and Daniel Mills (“Mills”) proceeded to file a putative class action  
20 complaint against ONB. As in the instant case, the *Pisciotta* complaint asserted a negligence  
21 claim under Indiana law. The District Court for the Southern District of Indiana determined that  
22 Pisciotta and Mills could not bring such a claim as a matter of law, and granted ONB’s motion for  
23 judgment on the pleadings. 499 F.3d at 632–33 (reciting procedural history). The Seventh Circuit  
24 upheld the district court’s decision on appeal.

25 In reaching this conclusion, the Seventh Circuit first observed that “[n]either the parties’  
26 efforts nor our own have identified any Indiana precedent addressing” whether “Indiana would

1 consider that the harm caused by identity information exposure, coupled with the attendant costs  
2 to guard against identity theft, constitutes an existing *compensable injury and consequent damages*  
3 required to state a claim for negligence.” *Id.* at 635. Accordingly, “[w]ithout state authority to  
4 guide us, ‘[w]hen given a choice between an interpretation of [state] law which reasonably  
5 restricts liability, and one which greatly expands liability, we should’—as a general matter—  
6 “choose the narrower and more reasonable path (at least until the [state] Supreme Court tells us  
7 differently).” *Id.* at 635–36 (quoting *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412 (7th Cir.  
8 1994) (en banc)) (alterations in original).

9 With this general canon of interpretation in mind, the Seventh Circuit further observed that  
10 “the Indiana authority most closely addressed to the issue”—a series of statutes enacted by the  
11 Indiana legislature in 2006—weighed against finding that Pisciotta and Mills could assert a private  
12 right of action against ONB. *Id.* at 636–37. The statutory provisions “applicable to private  
13 entities storing personal information require only that a database owner disclose a security breach  
14 to potentially affected consumers; they do not require the database owner to take any other  
15 affirmative act in the wake of a breach.” *Id.* at 637. Moreover, “[i]f the database owner fails to  
16 comply with the only affirmative duty imposed by the statute—the duty to disclose—the statute  
17 provides for enforcement *only* by the Attorney General of Indiana. It creates no private right of  
18 action against the database owner.” *Id.* Thus, disclosure to those affected is the only duty  
19 imposed upon the database owners by Indiana’s data breach statutes, and these statutes only allow  
20 for enforcement by the Indiana Attorney General.

21 The Seventh Circuit went on to reject the view “that the statute is evidence that the Indiana  
22 legislature believes that an individual has suffered a compensable injury at the moment his  
23 personal information is exposed because of a security breach.” *Id.* Indeed, “given the novelty of  
24 the legal questions posed by information exposure and theft, it is unlikely that the legislature  
25 intended to sanction the development of common law tort remedies that would apply to the same  
26 factual circumstances addressed by the statute.” *Id.*

1 The Court finds *Pisciotta* persuasive for the following reasons. First, this Court, as an  
2 MDL court, “must apply the law of the transferor forum, that is, the law of the state in which the  
3 action was filed.” *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 903 (E.D. La. 2007); *see*  
4 *also In re Korean Air*, 642 F.3d at 699 (“[T]he MDL transferee court is generally bound by the  
5 same substantive legal standards . . . as would have applied in the transferor court.”). This legal  
6 principle means that, for a negligence claim brought under the laws of Indiana, the MDL court  
7 should—as a general matter—follow the lead of the Seventh Circuit.

8 Second, although *Pisciotta* was decided in 2007, the parties have identified no subsequent  
9 cases—state or federal—that have discussed Indiana’s data breach statutes. The Court has found  
10 none in its own research. Thus, *Pisciotta* continues to serve as the final word on how courts  
11 should interpret Indiana’s data breach statutes and, critically, whether individuals may maintain a  
12 private cause of action for negligence. 499 F.3d at 637 (“Had the Indiana legislature intended that  
13 a cause of action should be available against a database owner for failing to protect adequately  
14 personal information, we believe that it would have made some more definite statement of that  
15 intent.”).

16 Third, the *Pisciotta* decision is consistent with the negligence law of other jurisdictions. In  
17 *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1054 (E.D. Mo. 2009), for instance,  
18 plaintiff alleged “that defendant was negligent in its failure to properly secure its computerized  
19 database system[,] thereby rendering the system vulnerable to a security breach and, further, was  
20 negligent in its failure to timely disclose the alleged breach.” In rejecting plaintiff’s claim, the  
21 *Amburgy* court “note[d] that the Missouri legislature [had] recently enacted a data breach  
22 notification law.” *Id.* at 1055. That law, like Indiana’s statutes, holds that the state “Attorney  
23 General [is] to have exclusive authority in bringing claims against data handlers for a violation of  
24 the notice requirements.” *Id.* The Missouri statute did not provide a private cause of action, and  
25 the *Amburgy* court declined to create a cause of action “where one does not exist.” *Id.*

26 Similarly, in *Willingham v. Global Payments, Inc.*, 2013 WL 440702, \*17 n.19 (N.D. Ga.

1 Feb. 5, 2013), plaintiffs sought to assert a common law negligence claim against defendant. In  
2 arguing that defendant owed plaintiffs such a duty, plaintiffs cited data breach statutes from  
3 Kansas and California. *Id.* After carefully reviewing these statutes, the *Willingham* court  
4 concluded that the statutes “do not give [p]laintiffs a [private] cause of action for negligence.” *Id.*  
5 As the district court explained, these statutes contain a notice provision which requires companies  
6 to provide notice to affected customers of a data breach. Like the statutes at issue in *Pisciotta* and  
7 *Amburgy*, however, these statutes do not contain a private enforcement mechanism.

8 Third, and finally, Plaintiffs’ attempts to distinguish *Pisciotta* are unavailing. Plaintiffs,  
9 for instance, point to the fact that the Indiana legislature amended Indiana’s data breach statutes in  
10 2009. The statutes now require database owners to “maintain reasonable procedures . . . to protect  
11 and safeguard from unlawful use or disclosure any personal information,” a provision that did not  
12 exist at the time *Pisciotta* was decided. Anthem Opp’n at 4. The amendments also exempt some  
13 “database owners with security policies under HIPAA from some . . . [statutory] requirements.”  
14 Anthem Mot. at 2 n.3. None of these amendments, however, address whether individual plaintiffs  
15 may maintain a private cause of action in negligence. Indiana’s data breach statutes continue to  
16 provide a single enforcement mechanism: an action brought by the state Attorney General. Ind.  
17 Code. Ann. § 24-4.9-4-2. The Court thus fails to see how the 2009 amendments give support to  
18 Plaintiffs’ attempts to maintain a private cause of action. *Pisciotta* was decided in 2007. The  
19 Indiana legislature, presumably aware of the *Pisciotta* decision, declined to provide plaintiffs a  
20 private cause of action when given the opportunity to amend the state’s data breach statutes in  
21 2009.

22 Plaintiffs also contend that Indiana courts “frequently borrow from statutes that do not  
23 contain a private right of action to impose common law duties.” Anthem Opp’n at 4. Plaintiffs  
24 cite *Kho v. Pennington*, 875 N.E.2d 208, 212 (Ind. 2007), where the Indiana Supreme Court  
25 recognized a private right of action for statutory negligence “arising from the violation of the  
26 identity confidentiality provision in Indiana Code § 34-18-8-7(a)(1).”

1           There are two key flaws with Plaintiffs’ reliance on *Kho*. First, the fact that Indiana courts  
 2 have recognized claims for statutory negligence in *some* cases does not suggest that this Court  
 3 should recognize a private cause of action in the instant case. This point is all the more  
 4 pronounced where, as here, the District Court for the Southern District of Indiana and the Seventh  
 5 Circuit—two federal courts that are significantly more familiar with Indiana law than this Court—  
 6 declined to recognize a private cause of action under nearly identical circumstances in *Pisciotta*.  
 7 *Cf. Butner v. United States*, 440 U.S. 48, 58 (1979) (“The federal judges who deal regularly with  
 8 questions of state law in their respective districts and circuits are in a better position than we to  
 9 determine how local courts would dispose of comparable issues.”).

10           Second—and relatedly—all of the decisions cited in *Kho* are Indiana Supreme Court or  
 11 Indiana Court of Appeals decisions. None are federal court decisions, much less decisions by a  
 12 federal court sitting in a different state. This result is, in the Court’s view, consistent with the  
 13 view of the Seventh Circuit, that “[w]hen [a federal court is] given a choice between an  
 14 interpretation of [state] law which reasonably restricts liability, and one which greatly expands  
 15 liability, [the federal court] should choose the narrower and more reasonable path.” *Todd*, 21 F.3d  
 16 at 1412. In light of these circumstances, Plaintiffs can not pursue their Indiana negligence claim  
 17 against Defendants.

18           Because Plaintiffs can not pursue such a claim as a matter of law, the Court need not  
 19 address Defendants’ arguments concerning the economic loss doctrine and proximate causation.  
 20 Accordingly, Defendants’ motions to dismiss Plaintiffs’ Indiana negligence claim is GRANTED.

21           Moreover, the Court finds that amendment would be futile. Case law and statutory  
 22 authority indicates that, in Indiana, data breach actions must be brought by the Indiana Attorney  
 23 General. Plaintiffs have identified no relevant authority that would allow private individuals to  
 24 bring an Indiana data breach action under a common law negligence theory. In the absence of  
 25 supporting authority for Plaintiffs’ position, the Court finds that leave to amend would be futile,  
 26 and therefore denies leave to amend. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)

1 (“Futility of amendment can, by itself, justify the denial of a motion for leave to amend.”).

2 Therefore, Plaintiffs’ Indiana negligence claim is DISMISSED with prejudice.

3 **C. California Breach of Contract (against Anthem Defendants)**

4 The consolidated amended complaint asserts against the Anthem Defendants a breach of  
 5 contract claim under California law. Specifically, Plaintiffs allege that “Anthem and Anthem  
 6 Affiliates did not satisfy their promises and obligations to Plaintiffs and Statewide Class Members  
 7 under the contracts in that they did not take reasonable measures to keep Plaintiffs’ and Statewide  
 8 Class Members’ [PII] secure and confidential and did not comply with the applicable laws,  
 9 regulations, and industry standards.” CAC ¶ 305. In moving to dismiss Plaintiffs’ claim, the  
 10 Anthem Defendants contend that “(a) the CAC fails to identify the contractual provisions that  
 11 allegedly were breached, (b) the CAC fails to allege facts showing any breach caused Plaintiffs to  
 12 suffer damages that are cognizable under California law, and (c) certain Plaintiffs’ claims are  
 13 preempted by ERISA.” Anthem Mot. at 4.<sup>7</sup>

14 As to whether the consolidated amended complaint identifies the contractual provisions  
 15 that were breached, the Court observes that, “[u]nder California law, to state a claim for breach of  
 16 contract a plaintiff must plead the contract, plaintiffs’ performance (or excuse for  
 17 nonperformance), defendant’s breach, and damage to plaintiff therefrom.” *Low v. LinkedIn Corp.*,  
 18 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012) (internal quotation marks omitted). With respect to  
 19 this first requirement—the need to plead the contract—a plaintiff must, in actions involving breach  
 20 of a written contract, “allege the specific provisions in the contract creating the obligation the  
 21 defendant is said to have breached.” *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1117 (N.D.  
 22 Cal. 2011); *see also Frances T. v. Vill. Green Owners Ass’n*, 723 P.2d 573, 586 (Cal. 1986)

23  
 24  
 25 <sup>7</sup> The Anthem Defendants also allege that three California Plaintiffs (Joseph Blanchard, Lillian  
 26 Brisko, and Alvin Lawson) do not have a contractual relationship with an Anthem Defendant.  
 27 Anthem Mot. at 4. Plaintiffs concede this point, and acknowledge that these three Plaintiffs “do  
 28 not bring [California] breach of contract claims against [the] Anthem Affiliates with whom they  
 had no relationship.” Anthem Opp’n at 6–7 n.6.



1 (“Plaintiff’s allegation that defendants breached that contract . . . must fail because she does not  
 2 allege that any provision in any of the writings imposed such an obligation on defendant.”);  
 3 *Murphy v. Hartford Accident & Indem. Co.*, 2 Cal. Rptr. 325, 328 (Ct. App. 1960) (“In order for  
 4 an action to be based upon an instrument in writing, the writing must express the obligation sued  
 5 upon.”).

6 The Court finds that the consolidated amended complaint fails to satisfy this requirement,  
 7 based on a review of (1) the language in the consolidated amended complaint, (2) the language on  
 8 Anthem’s public websites and in various privacy notices, (3) the exhibits submitted in connection  
 9 with the consolidated amended complaint, and (4) relevant state and federal law. The Court  
 10 addresses these four areas in detail below.

### 11 **1. Language in Consolidated Amended Complaint**

12 First, with respect to the language in the consolidated amended complaint, Plaintiffs allege  
 13 that class members “who purchased individual insurance plans from Anthem Affiliates or who  
 14 received health insurance . . . under a contract between an employer . . . and Anthem or Anthem  
 15 Affiliates had valid, binding, and enforceable express, third party beneficiary, or implied contracts  
 16 with Anthem and Anthem Affiliates.” CAC ¶ 303.

17 However, under the section of the consolidated amended complaint titled “Breach of  
 18 Contract,” *id.* ¶¶ 302–311, Plaintiffs do not refer to any contractual language or any contractual  
 19 provisions that the Anthem Defendants allegedly breached. Instead, Plaintiffs state—without  
 20 reference to an underlying contract or other documents—that class members provided “Anthem  
 21 and/or Anthem Affiliates with their [PII].” *Id.* ¶ 303(a). In exchange, the Anthem Defendants  
 22 promised “to protect [class members’ PII] in compliance with federal and state laws and  
 23 regulations, including HIPAA, and industry standards.” *Id.* In the very next paragraph, Plaintiffs  
 24 state that “[t]he terms of Plaintiffs’ and Statewide Class Members’ contracts with Anthem and  
 25 Anthem Affiliates that concern the protection of Plaintiffs’ [PII] [are] set forth above.” *Id.* ¶ 304.  
 26 However, this paragraph does not refer specifically to any other part of the consolidated amended



1 complaint. The remaining paragraphs in this section do no better. One paragraph addresses  
2 Plaintiffs’ implied contract theory, *id.* ¶ 303(c), another paragraph alleges that Plaintiffs “fully  
3 performed their obligations under their contracts,” *id.* ¶ 307, and several paragraphs address the  
4 damages that Plaintiffs seek, *id.* ¶¶ 308–310. Considered together, none of these paragraphs  
5 identify a specific contractual provision that the Anthem Defendants breached.

6 These stray allegations mirror the facts in *Young v. Facebook*, where plaintiff stated in the  
7 complaint that “Facebook did not perform in accordance with the terms of [the] agreement in their  
8 Statement of Rights and Responsibilities contract by arbitrarily and impulsively handling  
9 [plaintiff’s] member account.” *Young*, 790 F. Supp. 2d at 1117 (internal quotation marks omitted).  
10 However, as the district court pointed out, plaintiff’s “complaint [did] not allege any provision of  
11 the contract prohibiting Facebook from terminating an account in the manner alleged.” *Id.*  
12 Because plaintiff had failed to identify a relevant contractual provision that was breached, the  
13 *Young* court granted Facebook’s motion to dismiss plaintiff’s California breach of contract claim.  
14 *Id.* (finding that plaintiff had failed to “allege the specific provisions in the contract creating the  
15 obligation the defendant is said to have breached.”). As in *Young*, Plaintiffs’ conclusory  
16 statements in the “Breach of Contract” section of the consolidated amended complaint are  
17 insufficient to survive a motion to dismiss.

## 18 2. Language on Public Websites and in Privacy Notices

19 Plaintiffs, however, contend that the paragraphs discussed above constitute “only . . . the  
20 summary language [of Plaintiffs’] breach of contract count.” Anthem Opp’n at 5. Instead,  
21 Plaintiffs note, “specific promises . . . regarding data security” are located in paragraphs 161  
22 through 170. *Id.* at 5–6. These paragraphs include language from the public websites of the  
23 Anthem Defendants and from statements made by the Anthem Defendants in various privacy  
24 notices. The website for every Anthem BCBS affiliate, for instance, states:

25 **[PII] (including Social Security Number) Privacy Protection Policy**  
26 **[Name of Anthem BCBS Affiliate] maintains policies that protect the**  
27 **confidentiality of [PII], including Social Security numbers, obtained from its**

1 **members and associates in the course of its regular business functions.** [Name  
2 of Anthem BCBS Affiliate] is committed to protecting information about its  
customers and associates, especially the confidential nature of their [PII].

3 CAC ¶ 166 (second and fourth alterations in original). Likewise, Blue Cross of California mailed  
4 the following privacy notice to customers:

5 **We keep your oral, written and electronic [PII] safe using physical,**  
6 **electronic, and procedural means. These safeguards follow federal and state**  
7 **laws.** Some of the ways we keep your [PII] safe include securing offices that hold  
[PII], **password-protecting computers,** and locking storage areas and filing  
8 cabinets. We require our employees to protect [PII] through written policies and  
9 procedures. **These policies limit access to [PII] to only those employees who**  
10 **need the data to do their job.** Employees are also required to wear ID badges to  
help keep people who do not belong out of areas where sensitive data is kept.  
11 **Also, where required by law, our affiliates and nonaffiliates must protect the**  
12 **privacy of data we share in the normal course of business.** They are not  
allowed to give [PII] to others without your written OK, except as allowed by law  
and outlined in this notice.

13 *Id.* ¶ 163. Although this language is more specific than the conclusory paragraphs discussed  
14 above, this language still does not give rise to a viable California breach of contract claim.

15 First, the consolidated amended complaint provides no information on when the language  
16 at issue was posted onto the Anthem Defendants’ websites and when the various privacy notices  
17 were sent to class members. Clearly, such notices would be of little assistance to Plaintiffs’ claim  
if Plaintiffs received these notices *after* the data breach at issue.

18 More importantly, the consolidated amended complaint makes no attempt to connect the  
19 language in paragraphs 161 through 170 with the terms of Plaintiffs’ alleged contracts. At no  
20 point in paragraphs 161 through 170 do Plaintiffs allege that the privacy notices or public website  
21 statements were part of or were incorporated by reference into Plaintiffs’ contracts with the  
22 Anthem Defendants. In fact, the word “contract” does not appear at all in paragraphs 161 through  
23 170. By this same token, under the section of the consolidated amended complaint titled “Breach  
24 of Contract,” *id.* ¶¶ 302–311, Plaintiffs do not at any point refer to the privacy notices or public  
25 websites discussed in paragraphs 161 through 170.

26 Plaintiffs can not bring a breach of contract claim based on language from documents that

1 might have been issued after the alleged breach and based on language from documents that might  
 2 not even have been part of the alleged contract. In reaching this conclusion, the Court returns to  
 3 the legal principle discussed above: that, “[i]n an action for breach of a written contract, a plaintiff  
 4 must allege the specific provisions in the contract creating the obligation the defendant is said to  
 5 have breached.” *Young*, 790 F. Supp. 2d at 1117; *see also Miron v. Herbalife Int’l, Inc.*, 11 F.  
 6 App’x 927, 929 (9th Cir. 2001) (“The district court’s dismissal of the Miron’s breach of contract  
 7 claims was proper because the Miron’s failed to allege any provision of the contract which supports  
 8 their claim.”). Plaintiffs have failed to identify any such contractual provision because Plaintiffs  
 9 have made no effort to connect the language in paragraphs 161 through 170 with the terms in  
 10 Plaintiffs’ contracts with the Anthem Defendants. On this basis alone, the Court finds that  
 11 dismissal of Plaintiffs’ California breach of contract claim is warranted. Below, the Court  
 12 addresses additional bases upon which Plaintiffs’ California breach of contract claim is unavailing.

### 13 3. Exhibits Submitted in Connection With Consolidated Amended Complaint

14 Plaintiffs have failed to submit any relevant exhibits, such as a copy of the contract  
 15 between an Anthem Defendant and a California Plaintiff, which might counsel against dismissal.  
 16 Although Plaintiffs are not required to submit such exhibits, these exhibits would certainly provide  
 17 clarity on the scope and nature of the Anthem Defendants’ obligations. Thus, in *Young*, plaintiff  
 18 included a copy of Facebook’s Statement of Rights and Responsibility with the complaint. 790 F.  
 19 Supp. 2d at 1118. Likewise, in *Zepeda v. PayPal, Inc.*, 777 F. Supp. 2d 1215, 1220 (N.D. Cal.  
 20 2011), plaintiff included Paypal’s user agreement as an exhibit to accompany the complaint. In  
 21 *Woods v. Google Inc.*, 2011 WL 3501403, \*3–\*4 (N.D. Cal. Aug. 10, 2011), plaintiff also filed a  
 22 copy of Google’s advertising contract with the complaint. In all of these cases—*Young*, *Zepeda*,  
 23 and *Woods*—the district court, after reviewing the allegations made in the complaint and the terms  
 24 of the pertinent agreement, determined that the plaintiff could not maintain a cause of action for  
 25 breach of contract under California law. Here, on the other hand, there is nothing for the Court to  
 26 review as Plaintiffs have submitted no contracts or other materials for the Court to examine.

1 In fact, the only possibly relevant exhibits filed were submitted by the Anthem Defendants,  
2 not Plaintiffs. The Anthem Defendants, for instance, filed a copy of the Summary Plan  
3 Description under which Plaintiffs Daniel and Kelly Tharp allegedly received coverage. *See* ECF  
4 No. 411 at 1–2. This Plan Description includes a five page “Privacy Notice.” *See* ECF No. 411-4  
5 at 58–62. This Privacy Notice provides a list of specific circumstances where Anthem or an  
6 Anthem affiliate might disclose a member’s personal health information. *Id.* The Notice further  
7 provides that “[o]ther than as stated above, the Health Plan will not disclose your health  
8 information other than with your written authorization.” *Id.* at 61. Moreover, “[t]he Health Plan  
9 is required by law to maintain the privacy of your health information and to provide you with this  
10 Notice of the Plan’s legal duties and privacy practices with respect to your health information. If  
11 you participate in an insured plan option, you will receive a notice directly from the Insurer.” *Id.*  
12 at 62. This final statement in the Summary Plan Description could plausibly be taken to  
13 incorporate by reference future privacy notices sent to class members.

14 However, the problem with relying on this Summary Plan Description is that Plaintiffs  
15 have, in the consolidated amended complaint, stated that such documents do not represent the  
16 contract between class members and the Anthem Defendants. *See* CAC ¶ 303(b) (“With respect to  
17 contracts between employers and Anthem and/or Anthem Affiliates, the applicable contract is the  
18 services agreement between the employer and Anthem and/or Anthem Affiliates, not the employer  
19 benefits plan document.”). Plaintiffs repeat this assertion in opposing the Anthem Defendants’  
20 motion to dismiss. *See* Anthem Opp’n at 25 (describing Summary Plan Description documents as  
21 “non-enforceable”). Given Plaintiffs’ position, the Court can not rely upon the Summary Plan  
22 Description to save Plaintiffs’ breach of contract of claim from dismissal.

#### 23 **4. Incorporation of Applicable State and Federal Law**

24 As a final point, Plaintiffs state that, “[u]nder California law, Defendants’ contracts  
25 necessarily incorporate applicable laws even absent specific promises.” Anthem Opp’n at 7  
26 (citing *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 297 (Cal. 2008)). This contention alone,

1 however, does not save Plaintiffs' breach of contract claim.

2 First, the consolidated amended complaint provides little guidance as to which "applicable  
3 laws" were incorporated into the contract. Instead, the consolidated amended complaint merely  
4 alleges that the Anthem Defendants were required to comply with "federal and state laws and  
5 regulations, including HIPAA, and industry standards." CAC ¶ 303(a). In other words, outside of  
6 a single passing reference to HIPAA, Plaintiffs have provided little detail on what other laws,  
7 regulations, or standards the Anthem Defendants might have violated. As other district courts  
8 have noted, "plaintiffs must . . . do something more to allege a breach of contract claim than  
9 merely point to allegations of a statutory violation." *Wiebe v. NDEX West, LLC*, 2010 WL  
10 2035992, \*3 (C.D. Cal. May 17, 2010) (quoting *Berger v. Home Depot U.S.A., Inc.*, 476 F. Supp.  
11 2d 1174, 1177 (C.D. Cal. 2007)). The consolidated amended complaint fails to meet this  
12 requirement.

13 Second, Plaintiffs' breach of contract claim reaches beyond mere violation of "applicable  
14 laws." Plaintiffs, for instance, also allege that the Anthem Defendants' actions ran afoul of certain  
15 "industry standards." CAC ¶ 303(a). Thus, simply stating that Defendants' contracts incorporate  
16 applicable laws does not accurately reflect the nature of Plaintiffs' breach of contract claim.

17 In sum, after examining the consolidated amended complaint, the exhibits (or lack thereof)  
18 filed in connection with the consolidated amended complaint, and relevant case law and statutory  
19 authority, the Court finds that Plaintiffs have failed to identify the specific contractual provisions  
20 that were breached, as Plaintiffs must do in order to bring a breach of written contract claim under  
21 California law.

## 22 **5. Breach of Implied Contract**

23 In addition to Plaintiffs' breach of express contract claim, Plaintiffs also state that "[b]y  
24 demanding and accepting Plaintiffs' and Statewide Class Members' [PII], Anthem and Anthem  
25 Affiliates entered into implied contracts with Plaintiffs and Statewide Class Members." CAC ¶  
26 303(c). The consolidated amended complaint does not delve into additional detail on the terms

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1 and scope of this alleged implied contract. In moving to dismiss Plaintiffs’ California breach of  
2 contract claim, the Anthem Defendants contend that “[t]he CAC fails to allege any facts showing  
3 that [any] implied contracts existed beyond vague, conclusory allegations.” Anthem Mot. at 6.  
4 Relying upon both federal and state case law, the Anthem Defendants argue that Plaintiffs’  
5 implied contract theory is not well taken. *Id.*

6 Plaintiffs declined to respond to these arguments in Plaintiffs’ opposition. *See* Anthem  
7 Opp’n at 6 n.7 (“The fact that Plaintiffs have pled theories of contract formation *in the alternative*  
8 is no reason to dismiss Plaintiffs’ breach of contract claims. This Court need not resolve now the  
9 merits of any challenge to these alternative theories of contract formation.”) (citation omitted). In  
10 light of Plaintiffs’ position, the Court finds Plaintiffs’ implied contract theory unavailing. If  
11 Plaintiffs intend to pursue an implied contract theory in lieu of an express contract claim, Plaintiffs  
12 must elaborate upon the nature and scope of the implied contract in the pleadings and must  
13 respond to any specific arguments made by the Anthem Defendants.

14 **6. Conclusion**

15 The consolidated amended complaint fails to identify the contractual provisions that were  
16 breached. In addition, Plaintiffs’ opposition fails to respond to the Anthem Defendants’  
17 arguments concerning Plaintiffs’ implied contract theory. Accordingly, the Court finds that  
18 Plaintiffs can not maintain a breach of contract claim under California law. The Anthem  
19 Defendants’ motion to dismiss Plaintiffs’ California breach of contract claim is therefore  
20 GRANTED. Pursuant to this decision, the Court need not address the Anthem Defendants’  
21 arguments regarding contract damages and ERISA preemption.

22 However, Plaintiffs shall have leave to amend because the Court finds that amendment  
23 would not be futile. Plaintiffs may, for instance, be able to allege sufficient facts to show that the  
24 privacy notices were incorporated by reference into Plaintiffs’ contracts with the Anthem  
25 Defendants. Alternatively, Plaintiffs may be able to more specifically explain the scope and  
26 nature of their implied contracts with the Anthem Defendants. Plaintiffs’ California breach of



1 contract claim is therefore DISMISSED with leave to amend.

2 **D. New Jersey Breach of Contract (against Non-Anthem Defendants)**

3 Plaintiffs' have also asserted against the Non-Anthem Defendants a breach of contract  
4 claim under New Jersey law. Specifically, Plaintiffs allege that the Non-Anthem Defendants "did  
5 not satisfy their promises and obligations to Plaintiffs . . . [because] they failed to ensure that  
6 Plaintiffs' and Statewide Class Members' [PII] would be secured as required by the contracts.  
7 Instead, Plaintiffs' and Statewide Class Members' [PII] was stored in the inadequately-secured  
8 Anthem Database and accessed and exfiltrated in the Anthem Data Breach." CAC ¶ 316. In  
9 response, the Non-Anthem Defendants contend that the CAC "fails to identify the contractual  
10 provisions that allegedly were breached." Non-Anthem Mot. at 4.

11 As the Non-Anthem Defendants acknowledge, this arguments essentially repeat the  
12 Anthem Defendants' arguments concerning Plaintiffs' California breach of contract claim. *Id.* at  
13 4–6. As with Plaintiffs' California breach of contract claim, the Court finds that the consolidated  
14 amended complaint fails to identify the relevant contractual provisions that were breached.

15 Indeed, as with California breach of contract claims, parties seeking "[t]o prevail on a  
16 breach of contract claim under New Jersey law" must "identify the specific contract or provision  
17 that was allegedly breached." *CIBC Inc. v. Grande Vill, LLC*, 2015 WL 5723135, \*5 (D.N.J.  
18 Sept. 29, 2015); *see also Skypala v. Mortg. Elec. Registration Sys., Inc.*, 655 F. Supp. 2d 451, 460  
19 (D.N.J. 2009) (same). The consolidated amended complaint fails to meet this requirement—no  
20 New Jersey contracts are attached, no specific provisions are referred to, and no contractual  
21 language is discussed.

22 Moreover, although the Non-Anthem Defendants filed a copy of the policy provided to  
23 purchasers of the Horizon Blue Cross Blue Shield of New Jersey health plan, *see* ECF Nos. 414-1  
24 & 414-2, which includes a section regarding privacy practices, Plaintiffs dispute that this exhibit  
25 constitutes a true and accurate copy of the policy agreement between Plaintiffs and the Non-  
26 Anthem Defendants, *see* Non-Anthem Opp'n at 8.



1 Accordingly, consistent with the Court’s determination as to Plaintiffs’ California breach  
 2 of contract claim, the Non-Anthem Defendants’ motion to dismiss Plaintiffs’ New Jersey breach  
 3 of contract claim is GRANTED, and Plaintiffs’ New Jersey breach of contract claim is thus  
 4 DISMISSED with leave to amend.

5 **E. New York Unjust Enrichment (against Anthem and Non-Anthem Defendants)**

6 Plaintiffs assert an unjust enrichment claim under New York law against the Anthem and  
 7 Non-Anthem Defendants. *See, e.g.*, CAC ¶¶ 350–58. Specifically, Plaintiffs argue that  
 8 Defendants “should not be permitted to retain the money belonging to Plaintiffs and Class  
 9 Members because Defendant[s] failed to implement (or adequately implement) the data security  
 10 and security practices and procedures that Plaintiffs and Class Members paid for.” *Id.* ¶ 355.  
 11 Defendants contend that this claim “should be dismissed because” such claims can not be brought  
 12 “where there exists an enforceable express contract.” Anthem Mot. at 11. According to  
 13 Defendants, Plaintiffs must, pursuant to New York law, bring their claim against Defendants as a  
 14 breach of contract claim, and not as an unjust enrichment claim. *See, e.g., Goldman v. Metro. Life*  
 15 *Ins. Co.*, 841 N.E.2d 742, 746–47 (N.Y. 2005) (“Given that the disputed terms and conditions fall  
 16 entirely within the insurance contract, there is no valid claim for unjust enrichment.”).

17 As the parties acknowledge, the viability of Plaintiffs’ New York unjust enrichment claim  
 18 depends largely upon the viability of Plaintiffs’ breach of contract claims. *See* Anthem Mot. at 11;  
 19 Anthem Opp’n at 11. As Plaintiffs point out, parties are barred from bringing unjust enrichment  
 20 claims in New York where “there is a ‘valid written agreement, the existence of which is  
 21 undisputed, and the scope of *which clearly covers the dispute between the parties.*’” Anthem  
 22 Opp’n at 11 (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y.  
 23 1987)). Here, there is significant uncertainty over the nature and scope of Plaintiffs’ contracts  
 24 with Defendants, as Plaintiffs have failed to identify the specific contractual provisions that were  
 25 breached. Based on this reason, the Court dismissed Plaintiffs’ California and New Jersey breach  
 26 of contract claims.

1 Because Plaintiffs' New York unjust enrichment claim depends upon Plaintiffs' breach of  
 2 contract claims, the Court DISMISSES Plaintiffs' New York unjust enrichment claim. However,  
 3 consistent with the Court's ruling regarding Plaintiffs' breach of contract claims, Plaintiffs shall  
 4 have leave to amend their New York unjust enrichment claim.

5 **F. California Unfair Competition Law (against Anthem and Non-Anthem Defendants)**

6 California's Unfair Competition Law ("UCL") provides a cause of action for business  
 7 practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Cal. Bus & Prof. Code § 17200, *et*  
 8 *seq.* "The UCL's coverage is sweeping, and its standard for wrongful business conduct  
 9 intentionally broad." *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1204 (N.D. Cal. 2014) (internal  
 10 quotation marks omitted). "Although the UCL targets a wide range of misconduct, its remedies  
 11 are limited because UCL actions are equitable in nature." *Pom Wonderful LLC v. Welch Foods,*  
 12 *Inc.*, 2009 WL 5184422, \*2 (C.D. Cal. Dec. 21, 2009). "Remedies for private individuals bringing  
 13 suit under the UCL are limited to restitution and injunctive relief." *Id.*

14 Each prong of the UCL provides a separate and distinct theory of liability, *Lozano v. AT&T*  
 15 *Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007), and Plaintiffs assert that Defendants'  
 16 conduct was unlawful, unfair, and fraudulent, *see* CAC ¶¶ 366. Before addressing whether  
 17 Plaintiffs have sufficiently pleaded liability under these three prongs, however, the Court must  
 18 first determine whether Plaintiffs have standing to bring suit. In order to establish standing under  
 19 the UCL, "a plaintiff must make a twofold showing: he or she must demonstrate injury in fact and  
 20 a loss of money or property caused by unfair competition." *Susilo v. Wells Fargo Bank, N.A.*, 796  
 21 F. Supp. 2d 1177, 1195–96 (C.D. Cal. 2011) (internal quotation marks omitted). The California  
 22 Supreme Court has referred to these elements as the "economic injury" and "caus[ation]"  
 23 requirement. *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 885 (Cal. 2011).

24 **1. Standing**

25 **a. Economic Injury**

26 As to whether Plaintiffs have demonstrated "injury in fact" and "a loss of money or

1 property caused by unfair competition,” *Susilo*, 796 F. Supp. 2d at 1195–96, the California  
 2 Supreme Court has stated that “[t]here are innumerable ways in which economic injury from  
 3 unfair competition may be shown,” *Kwikset*, 246 P.3d at 885. A plaintiff may, for instance,

4 (1) surrender in a transaction more, or acquire in a transaction less, than he or she  
 5 otherwise would have; (2) have a present or future property interest diminished;  
 6 (3) be deprived of money or property to which he or she has a cognizable claim;  
 7 or (4) be required to enter into a transaction, costing money or property, that  
 8 would otherwise have been unnecessary

9 *Id.* at 885–86. Here, Plaintiffs seek recovery under the UCL for three types of economic injury:  
 10 “Loss of Benefit of the Bargain,” “Out of Pocket Costs,” and “Imminent Risk of Further Costs.”<sup>8</sup>

11 Plaintiffs’ request for “Loss of Benefit of the Bargain” mirrors the California Supreme Court’s  
 12 determination in *Kwikset* that a plaintiff who has “surrender[ed] in a transaction more, or  
 13 acquire[d] in a transaction less, than he or she otherwise would have” may bring a UCL claim.

14 246 P.3d at 885; *see also* CAC ¶ 309 (“As a result of Anthem and Anthem Affiliates’ failure to  
 15 implement the security measures required by the contracts, Plaintiffs and Statewide Class  
 16 Members did not receive the full benefit of their bargain, and instead received health insurance  
 17 and/or related health care services that were less valuable than what they paid for.”).

18 Moreover, more recent case law within the data breach context confirms that benefit of the  
 19 bargain damages represent economic injury for purposes of the UCL. *See In re Adobe Sys., Inc.*  
 20 *Privacy Litig.*, 66 F. Supp. 3d 1197, 1224 (N.D. Cal. 2014) (finding standing under the UCL  
 21 because “[f]our of the six [p]laintiffs allege they personally spent more on Adobe products than  
 22 they would had they known Adobe was not providing the reasonable security Adobe represented it  
 23 was providing.”); *In re LinkedIn User Privacy Litig.*, 2014 WL 1323713, \*4 (N.D. Cal. Mar. 28,  
 24 2014) (finding that benefit of the bargain losses are “sufficient to confer . . . statutory standing  
 25 under the UCL.”). Taken together, *Kwikset*, *In re Adobe*, and *In re LinkedIn* demonstrate that

26 <sup>8</sup> The consolidated amended complaint also alleges economic injury in the form of the “Loss of  
 27 Value of PII.” Plaintiffs, however, concede “that the loss of Value of PII” does not “constitute[]  
 28 economic injury for purposes of the UCL.” Anthem Opp’n at 14 n.16.

1 benefit of the bargain losses, as alleged in the consolidated amended complaint, constitute  
2 economic injury cognizable under the UCL.

3 Incidentally, the fact that Plaintiffs have sufficiently pleaded benefit of the bargain losses  
4 also establishes that Plaintiffs may seek restitution under the UCL. “[I]n the context of the UCL,  
5 ‘restitution’ is limited to the return of property or funds in which the plaintiff has an ownership  
6 interest (or is claiming through someone with an ownership interest).” *Madrid v. Perot Sys.*  
7 *Corp.*, 30 Cal. Rptr. 3d 210, 219 (Ct. App. 2005). “Under the UCL, an individual may recover  
8 profits unfairly obtained to the extent that these profits represent monies given to the defendant or  
9 benefits in which the plaintiff has an ownership interest.” *Pom Wonderful*, 2009 WL 5184422, \*2  
10 (internal quotation marks omitted). In requesting benefit of the bargain damages, Plaintiffs allege  
11 (1) that Defendants promised to undertake reasonable data security measures in accordance with  
12 the law, (2) that some portion of Plaintiffs’ plan premiums went towards data security, and (3) that  
13 Defendants failed to undertake the promised data security measures. Plaintiffs therefore  
14 “overpa[id]” for their health insurance. CAC ¶ 309. In other words, Defendants profited from  
15 their lax security measures. Because Plaintiffs seek to “recover profits unfairly obtained,” *Pom*  
16 *Wonderful*, 2009 WL 5184422, \*2, Plaintiffs have sufficiently established that they may seek  
17 restitution in the instant action.

18 Defendants’ reliance on *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*  
19 (*“Sony I”*), 903 F. Supp. 2d 942 (S.D. Cal. 2012), to challenge this conclusion is misplaced. In  
20 *Sony I*, defendants provided users with access to the Playstation Network (“PSN”) free of charge.  
21 903 F. Supp. 2d at 966. Because the *Sony I* plaintiffs “received the PSN services free of cost,” the  
22 district court concluded that “[p]laintiffs have not alleged ‘lost money or profits,’” as required to  
23 seek restitution under the UCL. *Id.* In contrast, in the instant action, Plaintiffs did pay Defendants  
24 for their health benefits. Moreover, Plaintiffs understood that some portion of this payment would  
25 be directed “to protect Plaintiffs’ and Statewide Class Members’ [PII] in compliance with federal  
26 and state laws and regulations.” CAC ¶ 303(a). Based on these allegations, Plaintiffs have

1 established that Defendants received money in exchange for protecting Plaintiffs' data and that  
2 Plaintiffs now seek recovery of this money.

3 Because Plaintiffs have established economic injury and restitution under the UCL by  
4 pleading benefit of the bargain losses, the Court need not address whether "Out of Pocket Costs"  
5 and "Imminent Risk of Further Costs" constitute economic injury under the UCL. The Court  
6 recognizes, however, that the case law on these questions is still developing. On the one hand,  
7 some district courts have held that such costs are not actionable under the UCL. *See, e.g., Sony I*,  
8 903 F. Supp. 2d at 966 ("Plaintiffs' allegations that the heightened risk of identity theft, time and  
9 money spent on mitigation of that risk, and property value in one's information, do not suffice as  
10 injury under the UCL."); *Ruiz v. Gap, Inc.*, 2009 WL 250481, \*4 (N.D. Cal. Feb. 3, 2009) ("[I]t is  
11 far from clear that the time and expenditure associated with monitoring one's credit is the kind of  
12 loss of money or property necessary for standing to assert a claim under section 17200.").

13 Several other district courts, however, have found otherwise. *See, e.g., Corona v. Sony*  
14 *Pictures Entm't, Inc.*, 2015 WL 3916744, \*5 (C.D. Cal. June 15, 2015) ("[T]he Court finds that  
15 [p]laintiffs adequately allege a cognizable injury by way of costs relating to credit monitoring,  
16 identity theft protection, and penalties."); *Witriol v. LexisNexis Grp.*, 2006 WL 4725713, \*6 (N.D.  
17 Cal. Feb. 10, 2006) ("Plaintiff has expressly alleged that[] he and the Class Members have  
18 incurred costs associated with monitoring and repairing credit impaired by the unauthorized  
19 release of private information. Thus, plaintiff has sufficiently alleged that he has suffered actual  
20 injury and sustained monetary loss as a result of [d]efendants' actions.") (internal quotation marks  
21 omitted).

22 Although *Kwikset* does contain language that appears to weigh in Plaintiffs' favor, *see,*  
23 *e.g.*, 246 P.3d at 885–86 (economic injury includes instances where an individual is "required to  
24 enter into a transaction, costing money or property, that would otherwise have been unnecessary"),  
25 because Plaintiffs have already established economic injury under the UCL by pleading "Benefit  
26 of the Bargain" losses, the Court need not resolve whether "Out of Pocket Costs" and "Imminent

1 Risk of Further Costs” constitute economic injury under the UCL.

2 **b. Causation**

3 “Generally, to prove that a data breach caused identity theft, the pleadings must include  
4 allegations of a nexus between the two instances beyond allegations of time and sequence.”  
5 *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1326 (11th Cir. 2012). “[P]urely temporal connections are  
6 often insufficient to establish causation.” *Stollenwerk v. Tri-West Health Care All.*, 254 F. App’x  
7 664, 668 (9th Cir. 2009). Instead, the “pleadings must indicate a logical connection between the  
8 two incidents.” *Resnick*, 693 F.3d at 1327.

9 Here, the consolidated amended complaint sufficiently establishes a logical connection  
10 between the Anthem data breach and the harm suffered by Plaintiffs. Every Plaintiff was at one  
11 point enrolled in a health plan administered by a Defendant. *See* CAC ¶¶ 12–108. As a condition  
12 of this enrollment, each Plaintiff provided his or her PII to a Defendant, which was thereafter  
13 inputted into Anthem’s database. Defendants do not contest that each Plaintiff had his or her PII  
14 stolen as a result of the Anthem data breach. Finally, many Plaintiffs allege that third parties used  
15 Plaintiffs’ PII in the wake of the data breach. *See, e.g., id.* ¶ 21 (“[T]he Tharps received a  
16 confirmatory letter from the IRS informing them that someone may have attempted to impersonate  
17 them by using their names and Social Security numbers to file a 2014 federal tax return.”). These  
18 allegations—that each Plaintiff was enrolled in a health plan administered by a Defendant, that  
19 each Plaintiff had his or her PII stolen, and that specific aspects of Plaintiff’s PII were used for  
20 illicit financial gain after the breach—establish the requisite logical and temporal connection  
21 necessary to demonstrate causation.

22 Defendants’ contentions to the contrary lack merit. Defendants argue that Plaintiffs “rel[y]  
23 . . . on tenuous temporal relationships that fail to connect the cyberattack and the alleged injuries,  
24 rather than stating sufficient facts to show economic injury caused by the unfair business  
25 practice.” Anthem Mot. at 16 (internal quotation marks and alteration omitted). As the Court has  
26 pointed out, however, Plaintiffs do more than simply allege a temporal relationship between their



1 economic injury and the data breach at issue. Rather, Plaintiffs state that (1) they were enrolled in  
2 a particular health plan administered by a Defendant, (2) that they provided their PII to Anthem,  
3 (3) that their PII was compromised as a result of the data breach, and (4) that their PII was used for  
4 illicit financial gain. Taken together, these allegations “plausibly link Plaintiffs’ purported injuries  
5 to the Anthem cyberattack.” *Id.* at 9.

6 On this particular point, the Court also observes that Defendants have argued that “[s]cores  
7 of other cyber intrusions and data thefts have compromised the personal information of tens of  
8 millions of individuals.” *Id.* at 9 n.7. In support of this argument, Defendants point to recent data  
9 breaches at eBay, Target, Home Depot, Neiman Marcus, and various other entities. *Id.* This  
10 contention fails for multiple reasons. First, Defendants’ argument relies upon facts taken from a  
11 *Forbes* magazine article—an article not cited or referred to in the consolidated amended  
12 complaint. Defendants’ argument thus represents little more than an end around the rule that, on a  
13 motion to dismiss, the Court may generally “consider only the contents of the complaint.” *Cooper*  
14 *v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997).

15 Second, and more importantly, under Defendants’ theory, a company affected by a data  
16 breach could simply contest causation by pointing to the fact that data breaches occur all the time,  
17 against various private and public entities. This would, in turn, create a perverse incentive for  
18 companies: so long as enough data breaches take place, individual companies will never be found  
19 liable. No part of the UCL, the relevant authority addressing causation, or the specific facts of this  
20 case support such a legal theory.

21 As a final matter, Defendants focus on the allegations of Plaintiff Joseph Blanchard  
22 (“Blanchard”). Blanchard alleges that he “spent over 60 hours addressing credit fraud, monitoring  
23 his accounts, and addressing issues arising from the Anthem data breach.” CAC ¶ 22. However,  
24 according to Defendants, Blanchard never received notice that his PII had been “compromised in  
25 the Anthem cyberattack.” Non-Anthem Mot. at 11. “Rather, the CAC alleges that Plaintiff  
26 Blanchard’s wife—who is not a named Plaintiff—received notice that *her* [PII] may have been



1 compromised.” *Id.*

2 As with Defendants’ other arguments concerning causation, the Court finds this argument  
 3 unavailing. The consolidated amended complaint states that Blanchard “was enrolled in a Blue  
 4 Cross Blue Shield of Texas health plan,” and that he provided his PII to Blue Cross Blue Shield of  
 5 Texas as a condition of his enrollment. CAC ¶ 22. The consolidated amended complaint further  
 6 states that Blanchard and his wife were enrolled in the same health plan. Thus, the only apparent  
 7 difference between the two is that Blanchard’s wife received notice of the data breach, but  
 8 Blanchard did not. This difference in circumstances, however, does not excuse the Non-Anthem  
 9 Defendants from liability. Again, Plaintiffs allege that *every* individual enrolled in a health plan  
 10 administered by an Anthem or Non-Anthem Defendant was affected by the data breach. *Id.* ¶¶ 1,  
 11 3. That means that Blanchard, after reviewing the notice sent to his wife, could have reasonably  
 12 concluded that his PII had also been compromised.

13 Additional allegations in the consolidated amended complaint lend further support to  
 14 Blanchard’s decision to take action. According to Blanchard, “[f]ollowing announcement of the  
 15 Anthem breach, at least 10 credit cards or credit accounts were opened or attempted to be opened  
 16 in Mr. Blanchard’s name and using his [PII].” *Id.* ¶ 22. Although Blanchard spent significant  
 17 time contesting the new charges on his accounts, Blanchard’s credit score nonetheless dropped by  
 18 approximately 130 points. These events suggest that Blanchard’s data was not only compromised,  
 19 but also that Blanchard suffered significant financial harm as a result of the Anthem data breach.

20 To summarize, the Court finds that Plaintiffs have sufficiently demonstrated both a logical  
 21 and temporal relationship necessary to establish causation. Defendants’ attempts to direct the  
 22 Court to the facts (1) that many other data breaches occurred during the relevant time period and  
 23 (2) that a named Plaintiff did not receive notice from an Anthem or Non-Anthem Defendant do not  
 24 negate this finding. Thus, by demonstrating both causation and economic loss, Plaintiffs have  
 25 sufficiently established standing under the UCL.

26 **2. Unlawful**

1 “The unlawful prong of the UCL prohibits anything that can properly be called a business  
2 practice and that at the same time is forbidden by law.” *In re Adobe*, 66 F. Supp. 3d at 1225  
3 (internal quotation marks omitted). “Generally, violation of almost any law may serve as a basis  
4 for a UCL claim.” *Antman v. Uber Technologies, Inc.*, 2015 WL 6123054, \*6 (N.D. Cal. Oct. 19,  
5 2015) (internal quotation marks omitted). However, a UCL claim “must identify the particular  
6 section of the statute that was violated, and must describe with reasonable particularity the facts  
7 supporting the violation.” *Baba v. Hewlett-Packard Co.*, 2010 WL 2486353, \*6 (N.D. Cal. June  
8 16, 2010) (internal quotation marks omitted).

9 Plaintiffs allege that, with respect to the UCL’s unlawful prong, Defendants’ actions  
10 violated the Federal Trade Commission Act, HIPAA, the Gramm-Leach-Bliley Act, California’s  
11 Confidentiality of Medical Information Act, California’s unfair insurance practices statutes,  
12 California’s Insurance Information and Privacy Protection Act, and California’s data breach  
13 statute. CAC ¶ 366(b). In support of this contention, the consolidated amended complaint  
14 identifies specific provisions of HIPAA, *id.* ¶¶ 177–81, the Gramm-Leach-Bliley Act, *id.* ¶ 182,  
15 the Federal Trade Commission Act, *id.* ¶ 183, and California’s data breach statute, *id.* ¶ 366(b),  
16 that were allegedly violated. Such references directly rebut Defendants’ claim that the  
17 consolidated amended complaint “references . . . statutes only generally, and does not specify how  
18 . . . Defendants supposedly violated them.” Anthem Mot. at 17. Instead, a review of the  
19 complaint demonstrates that Plaintiffs’ allegations “identify the particular section of the statute  
20 that was violated,” and other allegations in the consolidated amended complaint “describe with  
21 reasonable particularity the facts supporting the violation.” *Baba*, 2010 WL 2486353, \*6.  
22 Accordingly, the Court finds that Plaintiffs’ claim survives under the UCL’s unlawful prong.

### 23 3. Unfair

24 “The ‘unfair’ prong of the UCL creates a cause of action for a business practice that is  
25 unfair even if not proscribed by some other law.” *In re Adobe*, 66 F. Supp. 3d at 1225. “The UCL  
26 does not define the term ‘unfair.’ . . . [And] the proper definition of ‘unfair’ conduct against

1 consumers ‘is currently in flux’ among California courts.” *Id.*

2 Some California appellate courts apply a balancing approach, which requires courts to  
 3 “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”  
 4 *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012) (internal quotation marks  
 5 omitted). Other California appellate courts have held that “unfairness must be tethered to some  
 6 legislatively declared policy or proof of some actual or threatened impact on competition.”  
 7 *Lozano*, 504 F.3d at 735. Finally, at least one California appellate court has adopted and applied  
 8 the three-part test set forth in § 5 of the Federal Trade Commission Act: “(1) the consumer injury  
 9 must be substantial; (2) the injury must not be outweighed by any countervailing benefits to  
 10 consumers or competition; and (3) it must be an injury that consumers themselves could not  
 11 reasonably have avoided.” *Camacho v. Auto. Club of Southern California*, 48 Cal. Rptr. 3d 770,  
 12 777 (Ct. App. 2006). The Court shall refer to these tests as the “balancing test,” the “tethering  
 13 test,” and the “FTC test,” respectively.

14 In challenging whether Plaintiffs have sufficiently pleaded a UCL claim under the unfair  
 15 prong, Defendants argue that the consolidated amended complaint “does not allege facts that  
 16 support the conclusion that Defendants’ failure to prevent the cyberattack resulted from *immoral,*  
 17 *unethical, oppressive, or unscrupulous* conduct on Defendants’ part.” Anthem Mot. at 18.  
 18 Defendants’ singular focus on whether their actions were immoral, unethical, oppressive, or  
 19 unscrupulous, however, is misplaced.

20 None of the three tests for unfairness require plaintiffs to plead that defendants acted in an  
 21 immoral, unethical, oppressive, or unscrupulous manner. With respect to the balancing test, for  
 22 instance, the California Courts of Appeal have stated that “an unfair business practice occurs when  
 23 it offends an established public policy *or* when the practice is immoral, unethical, oppressive,  
 24 unscrupulous or substantially injurious to consumers.” *Bardin v. Daimlerchrysler Corp.*, 39 Cal.  
 25 Rptr. 3d 634, 638 (Ct. App. 2006) (internal quotation marks omitted) (emphasis added). In other  
 26 words, parties may proceed with a UCL claim under the balancing test by either alleging immoral,

1 unethical, oppressive, unscrupulous, or substantially injurious conduct by Defendants *or* by  
 2 demonstrating that Defendants’ conduct violated an established public policy. Similarly, with  
 3 respect to the tethering test, parties need not show immoral, unethical, oppressive, unscrupulous,  
 4 or substantially injurious conduct in order to move forward with a UCL claim. The tethering test  
 5 only requires parties to show “that the public policy which is a predicate to a consumer unfair  
 6 competition action under the ‘unfair’ prong of the UCL [is] tethered to specific constitutional,  
 7 statutory, or regulatory provisions.” *In re Adobe*, 66 F. Supp. 3d at 1226. Finally, the FTC test  
 8 also does not require parties to show immoral, unethical, oppressive, unscrupulous, or  
 9 substantially injurious conduct by Defendants.

10 In any event, the Court finds dismissal of Plaintiffs’ UCL claim under the unfair prong  
 11 unwarranted. In *In re Adobe*, this Court observed that various California statutes—including  
 12 several statutes upon which Plaintiffs rely here—reflect “California’s public policy of protecting  
 13 customer data.” *Id.* at 1227 (internal quotation marks omitted). Based on the allegations in the  
 14 consolidated amended complaint, Defendants’ actions violated this public policy. Whether  
 15 Defendants’ public policy violation is outweighed by the utility of their conduct under the  
 16 balancing test is a question to be resolved at a later stage in this litigation. Thus, based on the  
 17 balancing test alone, the Court DENIES Defendants’ motion to dismiss Plaintiffs’ UCL claim  
 18 under the unfair prong.

#### 19 4. Fraudulent

20 “To state a claim under the ‘fraud’ prong of [the UCL], a plaintiff must allege facts  
 21 showing that members of the public are likely to be deceived by the alleged fraudulent business  
 22 practice.” *Antman*, 2015 WL 6123054, \*6. Claims stated under the fraud prong of the UCL are  
 23 subject to the particularity requirements of Federal Rule of Civil Procedure 9(b). *Kearns v. Ford*  
 24 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Under this Rule, “[i]n alleging fraud or mistake,  
 25 a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ.  
 26 P. 9(b). Plaintiffs must include “an account of the time, place, and specific content of the false

1 representations” at issue. *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal  
2 quotation marks omitted).

3 The gravamen of Plaintiffs’ fraud claim is that Defendants promised to carry out  
4 reasonable security measures, but ultimately failed to carry through with this promise. *See*  
5 *generally* CAC ¶¶ 2–6. At first blush, these allegations appear sufficient to state a claim under the  
6 fraud prong of the UCL: Defendants represented to Plaintiffs that they would do one thing, but  
7 ended up doing another. In general, such allegations constitute a misrepresentation in the most  
8 classic sense. *See Northstar Fin. Advisors Inc. v. Schwab Invs.*, 2015 WL 5785549, \*16 (N.D.  
9 Cal. Oct. 5, 2015) (“[Defendant] represented . . . to shareholders that [defendant] would do one  
10 thing, but ended up doing another. That is a misrepresentation in the most classic sense.”).

11 However, Plaintiffs’ fraud claim suffers from one notable flaw: as with Plaintiffs’ breach  
12 of contract claims, Plaintiffs have not “include[d] an account of the *time* . . . of the false  
13 representations” at issue. *Swartz*, 476 F.3d at 764 (emphasis added). Instead, Plaintiffs once  
14 again direct the Court to review statements made by Defendants in various privacy notices and on  
15 Defendants’ public websites. *See* Anthem Opp’n at 17 (citing CAC ¶¶ 161–76). As the Court has  
16 explained, the consolidated amended complaint does not specify when these privacy notices were  
17 received or when certain statements were made on Defendants’ websites. In fact, for several of  
18 the statements at issue, the only date identified in the consolidated amended complaint is October  
19 19, 2015, the last day that Plaintiffs visited Defendants’ websites. That date postdates the Anthem  
20 data breach and does not establish that Plaintiffs relied upon or were deceived by promises that  
21 Defendants made to Plaintiffs prior to the data breach.

22 Consistent with the Court’s reasoning with respect to Plaintiffs’ breach of contract claims,  
23 it is possible that Plaintiffs may amend the complaint to state with particularity the time that the  
24 specific misrepresentations occurred. Accordingly, the Court finds that Plaintiffs have not stated a  
25 fraud claim under the UCL, but that Plaintiffs may be able to do so after amendment. Thus,  
26 Plaintiffs’ fraud claim under the UCL is DISMISSED with leave to amend. Plaintiffs, however,

1 have sufficiently established standing under the UCL and have sufficiently stated a UCL claim to  
 2 survive dismissal under the unlawful and unfair prongs. Defendants’ motion to dismiss Plaintiffs’  
 3 UCL claim is therefore GRANTED in part and DENIED in part.

4 **G. New York General Business Law § 349 (against Anthem and Non-Anthem  
 5 Defendants)**

6 New York General Business Law (“GBL”) § 349 prohibits “[d]eceptive acts or practices in  
 7 the conduct of any business, trade or commerce or in the furnishing of any service.” N.Y. Gen.  
 8 Bus. § 349(a). To successfully assert a claim under this section, “a plaintiff must allege that a  
 9 defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that  
 10 (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.” *Orlander v.*  
 11 *Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015). In moving to dismiss Plaintiffs’ GBL § 349 claim,  
 12 Defendants contend, with respect to (1), that Plaintiffs’ claim is based on a private contract  
 13 dispute, and is therefore not the result of consumer-oriented conduct. Anthem Mot. at 19–20.  
 14 Defendants also argue, with respect to (3), that Plaintiffs have failed to demonstrate actual harm  
 15 and causation. The Court addresses these contentions in turn.

16 **1. Consumer-Oriented Conduct**

17 “To provide the basis for a Section 349 claim, a disputed private transaction must have  
 18 ‘ramifications for the public at large,’ or be harmful to the general public interest.” *M & T Mortg.*  
 19 *Corp. v. White*, 736 F. Supp. 2d 538, 571 (E.D.N.Y. 2010). “The conduct need not be repetitive or  
 20 recurring but defendant’s acts or practices must have a broad impact on consumers at large;  
 21 private contract disputes *unique to the parties* would not fall within the ambit of the statute.” *Id.*  
 22 (internal quotation marks omitted) (emphasis added). Similarly, the New York Court of Appeals  
 23 held, in *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d  
 24 741, 744 (N.Y. 1995), that “[p]rivate contract disputes, unique to the parties . . . would not fall  
 25 within the ambit of [GBL § 349].” *See also id.* (finding that single shot transactions are not  
 26 covered by section 349). In general, New York courts have held that the consumer-oriented



1 requirement should be “construed liberally.” *New York v. Feldman*, 210 F. Supp. 2d 294, 301  
 2 (S.D.N.Y. 2002).

3 In interpreting this requirement, courts have found consumer-oriented conduct where  
 4 banks operated a standard savings account policy for customers, *Oswego*, 647 N.E.2d at 745, and  
 5 where a mortgage company offered a standard lending policy to prospective borrowers, *M & T*  
 6 *Mortg. Corp.*, 736 F. Supp. 2d at 571. On the other hand, courts have determined that the  
 7 consumer-oriented requirement was not met where an insurance company denied an individual’s  
 8 claim for coverage, *Daniels v. Provident Life & Cas. Ins. Co.*, 2001 WL 877329, \*8 (W.D.N.Y.  
 9 July 25, 2001), and where a party failed to fulfill a specific provision in an advertising contract,  
 10 *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494, 498 (S.D.N.Y. 2011).

11 Plaintiffs’ claims satisfy the GBL’s consumer-oriented requirement. The instant case does  
 12 not involve a unique, single shot dispute over the nature or scope of an individual’s insurance  
 13 coverage. Instead, Plaintiffs seek to bring a putative class action on behalf of approximately 80  
 14 million individuals who were affected by the Anthem data breach. The purpose of bringing this  
 15 litigation as a putative class action is to ensure that consumers who might not have the resources to  
 16 serve as named Plaintiffs can nonetheless recover for Defendants’ alleged misconduct. Moreover,  
 17 Plaintiffs aver that the instant breach is but the latest in a series of data security incidents.  
 18 Notably, Anthem’s database was also breached in 2009. In 2013, the Office of the Inspector  
 19 General found Anthem’s information systems deficient in several respects. *See* CAC ¶¶ 193–98.  
 20 Anthem’s continued non-compliance with data security practices would therefore not only affect  
 21 the named Plaintiffs, but also “a broad group of individuals”—all 80 million individuals whose PII  
 22 is stored on Anthem’s database. *See Feldman*, 210 F. Supp. 2d at 301. Accordingly, Plaintiffs  
 23 have sufficiently alleged that Defendants’ conduct was consumer-oriented in nature.

## 24 **2. Actual Harm**

25 Parties seeking damages under the GBL must provide “proof that a material deceptive act  
 26 or practice caused actual, although not necessarily pecuniary, harm.” *Small v. Lorillard Tobacco*

United States District Court  
Northern District of California

1 *Co., Inc.*, 720 N.E.2d 892, 897 (N.Y. 1999) (internal quotation marks and emphasis omitted). As  
 2 with Plaintiffs’ UCL claim, Plaintiffs allege the following forms of harm under the GBL: “Out of  
 3 Pocket Costs,” “Imminent Risk of Further Costs,” and “Loss of Benefit of the Bargain.” Plaintiffs  
 4 also allege harm in the form of “Loss of Value of PII.” Anthem Opp’n at 18.<sup>9</sup>

5 **a. “Out of Pocket Costs” and “Imminent Risk of Further Costs”**

6 As to “Out of Pocket Costs” and “Imminent Risk of Further Costs,” the Court finds  
 7 instructive the Southern District of New York’s decision in *Shafran v. Harley-Davidson, Inc.*,  
 8 2008 WL 763177 (S.D.N.Y. Mar. 20, 2008). In *Shafran*, plaintiff brought suit against defendants  
 9 “seeking monetary damages and injunctive relief for himself and on behalf of a putative class of  
 10 60,000 . . . who were informed by [defendants] that a laptop computer containing members’  
 11 personal information had been lost.” *Id.* at \*1. As in the instant case, plaintiff in *Shafran* asserted  
 12 a claim under GBL § 349. In reviewing defendants’ motion to dismiss, the district court  
 13 summarized the question before it as follows: “whether, under New York law, the time and money  
 14 that could be spent to guard against identity theft constitutes an existing compensable injury.” *Id.*  
 15 at \*2. The *Shafran* court observed that “New York courts have not addressed the issue,” but that  
 16 several other courts had considered and rejected such claims. *Id.* Consistent with these decisions,  
 17 the *Shafran* court determined that plaintiff’s claim for credit monitoring damages failed as a matter  
 18 of law. *Id.* at \*3.

19 Several district courts within the Second Circuit have relied upon *Shafran* to find that “Out  
 20 of Pocket Costs” and “Imminent Risk of Further Costs” do not represent injuries cognizable under  
 21 GBL § 349. *See, e.g., Hammond v. The Bank of New York Mellon Corp.*, 2010 WL 2643307, \*13  
 22 (S.D.N.Y. June 25, 2010) (citing *Shafran* and concluding that “[p]laintiffs cannot establish that  
 23 [d]efendant engaged in consumer-oriented fraud or other misconduct which caused actual  
 24 damages within the meaning of the laws of their respective states.”); *Willey v. J.P. Morgan Chase*,

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25  
 26 <sup>9</sup> Plaintiffs did not seek recovery for this form of injury with respect to their UCL claim.

1 N.A., 2009 WL 1938987, \*10 (S.D.N.Y. July 7, 2009) (“Willey’s claims for expenses related to  
2 credit monitoring, anxiety, emotional distress, and loss of privacy all arise due to the probability  
3 that his data might have been misused. Because this does not rise to the level of actual damages,  
4 the state law claims fail to allege actual damages and must be dismissed.”).

5 Tellingly, Plaintiffs have not cited any cases interpreting GBL § 349 that have found to the  
6 contrary. Instead, Plaintiffs rely upon the First Circuit’s decision in *Anderson v. Hannaford Bros.*  
7 *Co.*, 659 F.3d 151 (1st Cir. 2011). Plaintiffs’ reliance on this case is misplaced. In *Anderson*, the  
8 First Circuit was charged with interpreting and applying Maine tort and contract law. *Id.* at 162–  
9 67. The *Anderson* court did not interpret, apply, or consider whether “Out of Pocket Costs” and  
10 “Imminent Risk of Further Costs” were recoverable under GBL § 349. Thus, rather than rely  
11 upon *Anderson*—which did not address the state statutory provision at issue here—the Court shall,  
12 in the instant case, follow the lead of *Shafran, Hammond, and Willey* and find that “Out of Pocket  
13 Costs” and “Imminent Risk of Further Costs” are not cognizable injuries under GBL § 349.

14 **b. “Loss of Value of PII”**

15 As to the “Loss of Value of PII,” the Court observes that no New York state courts have  
16 yet ruled on this question. Nor has the Second Circuit or any federal district court in the Second  
17 Circuit provided guidance on whether such losses constitute cognizable injury under GBL § 349.  
18 Instead, Defendants rely entirely upon the Southern District of California’s decision in *In re Sony*  
19 *Gaming Networks & Consumer Data Security Breach Litigation (“Sony II”)*, 996 F. Supp. 2d 942,  
20 1004–05 (S.D. Cal. 2014). In *Sony II*, the district court held that “a loss of privacy and/or a loss in  
21 value of [one’s] Personal Information” does not constitute injury under GBL § 349. In reaching  
22 this decision, the *Sony II* court relied solely upon the three Southern District of New York  
23 decisions discussed above (*Shafran, Hammond, and Willey*), as well as the Seventh Circuit’s  
24 decision in *Pisciotta*.

25 The Court finds *Sony II* inapposite. First, *Shafran, Hammond, and Willey* did not address  
26 whether “Loss of Value of PII” represented a cognizable injury under GBL § 349. Instead, the

1 *Shafran, Hammond, and Willey* courts examined whether “Out of Pocket Costs” and “Imminent  
2 Risk of Further Costs” represented a cognizable injury under GBL § 349. *See, e.g., Shafran*, 2008  
3 WL 763177, \*2 (“Thus, the question before the Court is whether, under New York law, the time  
4 and money that could be spent to guard against identity theft constitutes an existing compensable  
5 injury.”); *Hammond*, 2010 WL 2643307, \*13 (focusing on whether plaintiffs could recover for  
6 costs of credit monitoring); *Willey*, 2009 WL 1938987, \*10 (same). Although these concepts are  
7 somewhat similar to one another, they are not the same. Indeed, as this Court explained in *In re*  
8 *Adobe*, the “[i]ncreased risk of harm” to an individual’s personal information that arises after a  
9 data breach and the money that an individual spends to mitigate a data breach are two different  
10 injuries. *See, e.g., 66 F. Supp. 3d at 1217* (“[T]he Court finds that Plaintiffs have plausibly alleged  
11 that the substantial risk of harm [p]laintiffs face following the 2013 data breach constitutes a  
12 cognizable injury-in-fact. The costs [certain] [p]laintiffs . . . incurred to mitigate this risk of harm  
13 constitute an *additional cognizable injury.*”) (emphasis added).

14 In addition, in *Pisciotta*—the only other decision cited by the *Sony II* court—plaintiffs did  
15 not bring a GBL § 349 claim. Instead, plaintiffs asserted an Indiana negligence claim, and the  
16 *Pisciotta* court examined whether plaintiffs could proceed under Indiana law with a “cause of  
17 action in tort against a database owner for failing to” adequately protect personal information.  
18 Anthem Mot. at 2. Given the fact that *Pisciotta* interpreted a different cause of action from a  
19 different state, the Court declines to rely upon *Pisciotta* to find that “Loss of Value of PII” is not a  
20 cognizable injury under GBL § 349.

21 To summarize, none of the cases cited in *Sony II* addressed whether “Loss of Value of PII”  
22 constitutes a cognizable injury under GBL § 349. Under such circumstances, the Court need not  
23 follow *Sony II*. Instead, the Court finds more persuasive a set of more recent decisions, all  
24 published after *Sony II*, where courts have recognized that “Loss of Value of PII” does represent a  
25 cognizable economic harm.

26 In *In re Adobe*, for instance, this Court rejected defendant’s argument that an “increased

1 risk [of future harm]’ is not a cognizable injury for Article III standing purposes.” 66 F. Supp. 3d  
2 at 1211. In reaching this conclusion, this Court held that “the risk that [p]laintiffs’ personal data  
3 will be misused by the hackers who breached Adobe’s network is immediate and very real.” *Id.* at  
4 1214. According to plaintiffs in *In re Adobe*, “hackers deliberately targeted Adobe’s servers and  
5 spent several weeks collecting names, usernames, passwords, email addresses, phone numbers,  
6 mailing addresses, and credit card numbers and expiration dates.” *Id.* After the Adobe data  
7 breach, hackers misused plaintiffs’ personal information to decrypt credit card accounts and “to  
8 discover vulnerabilities in Adobe’s products.” *Id.* at 1215–16. Under these facts, this Court  
9 concluded that “[p]laintiffs’ allegations of a concrete and imminent threat of future harm suffice to  
10 establish Article III injury-in-fact at the pleadings stage under both” prevailing Ninth Circuit and  
11 U.S. Supreme Court precedent. *Id.* at 1216; *see also Corona*, 2015 WL 3916744, \*3 (determining  
12 that plaintiffs had sufficiently established injury under Article III by alleging “that the[ir] PII was  
13 stolen and posted on file-sharing websites for identity thieves to download.”).

14 Here, too, Plaintiffs allege that cyberattackers extracted Plaintiffs’ PII from the Anthem  
15 database over an extended time period, from December 2014 to January 2015. Plaintiffs further  
16 allege that these cyberattackers misused Plaintiffs’ personal information. A false tax return, for  
17 instance, was allegedly filed on behalf of New York Plaintiff Juan Carlos Cerro. CAC ¶ 87.  
18 Thus, under the reasoning set forth in *In re Adobe*, Plaintiffs’ “Loss of Value of PII” would  
19 represent a cognizable injury under Article III.

20 Likewise, in *In re Facebook Privacy Litigation*, 572 F. App’x 494, 494 (9th Cir. 2014),  
21 plaintiffs contended that “they were harmed both by the dissemination of their personal  
22 information and by losing the sales value of that information.” The Ninth Circuit concluded that,  
23 “[i]n the absence of any applicable contravening state law,” such “allegations [were] sufficient to  
24 show the element of damages for [plaintiffs’] breach of contract and fraud claims,” and that “the  
25 district court erred in dismissing these state law claims.” *Id.*

26 Most recently, in *Svenson v. Google, Inc.*, 2015 WL 1503429, \*5 (N.D. Cal. Apr. 1, 2015),

1 the district court, following *In re Facebook*, concluded that plaintiff’s “allegations of diminution  
2 in value of her personal information are sufficient to show contract damages for pleading  
3 purposes.”

4 The Court acknowledges that the *In re Adobe*, *Corona*, *In re Facebook*, and *Svenson*  
5 decisions are not perfectly analogous to the claim that is currently before the Court. Both *In re*  
6 *Adobe* and *Corona*, for instance, addressed the loss in value of an individual’s PII in the standing  
7 context, and both *In re Facebook* and *Svenson* addressed the loss in value of an individual’s PII in  
8 the context of a common law breach of contract claim. However, the consistent theme running  
9 through these decisions—all of which were, again, published after *Sony II*—is that “Loss of Value  
10 of PII” represents a cognizable form of economic injury. Absent any state law or Second Circuit  
11 precedent that holds to the contrary, the Court finds that it would be appropriate to apply this  
12 general principle to Plaintiffs’ GBL § 349 claim. Accordingly, the Court finds that “Loss of Value  
13 of PII” constitutes a cognizable injury under GBL § 349.

14 **c. “Loss of Benefit of the Bargain”**

15 Finally, the Court turns to consider harm in the form of “Loss of Benefit of the Bargain.”  
16 On this point, the case law tips in Plaintiffs’ favor. In *Orlander v. Staples, Inc.*, 802 F.3d 289, 301  
17 (2d Cir. 2015), the Second Circuit determined that plaintiff had “sufficiently alleged an injury  
18 stemming from [a] misleading practice” by pleading that “he would not have purchased [a set of  
19 services] had he known that [d]efendant intended to decline to provide him any [such] services”  
20 during the first of year of his contract. The reasoning in *Orlander* directly governs Plaintiffs’  
21 claim here for “Benefit of the Bargain” losses: Plaintiffs allege that, “[h]ad Defendants disclosed  
22 to Affected Individuals that their computer systems and data security practices were inadequate to  
23 safeguard Affected Individuals’ highly sensitive [PII], Affected Individuals would not have  
24 entrusted their [PII] to Defendants and would not have enrolled in their insurance or health care  
25 plans.” CAC ¶ 249.

26 In challenging this finding, Defendants rely upon an earlier Second Circuit decision,



1 *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009). Anthem Mot. at 20. Defendants’  
 2 reliance on *Spagnola* is not well taken. In fact, in *Orlander*, the Second Circuit discussed and  
 3 distinguished *Spagnola*. Specifically, the Second Circuit observed that, in *Spagnola*, although  
 4 plaintiffs alleged “damages in the amount of the purchase price of their contracts,” plaintiffs  
 5 “failed to allege that defendants had denied them the services for which they contracted.” 802  
 6 F.3d at 302. In *Orlander*, however, “[p]laintiff . . . alleged both [1] a monetary loss stemming  
 7 from the deceptive practice and [2] the [d]efendant’s failure to deliver contracted-for services.”  
 8 *Id.* Similarly, in the instant case, Plaintiffs have alleged both (1) a monetary loss stemming from a  
 9 deceptive practice—“overpayment[] to Defendants for health insurance or health care services  
 10 purchased,” CAC ¶ 267(h)—and (2) Defendants’ failure to deliver to Plaintiffs certain services—  
 11 “reasonable and adequate security measures to protect Affected Individuals’ [PII],” *id.*

12 In sum, although “Out of Pocket Costs” and “Fear of Imminent Further Costs” are not  
 13 cognizable injuries under GBL § 349, “Loss of Value of PII” and “Loss of Benefit of the Bargain”  
 14 are cognizable injuries under GBL § 349. Accordingly, Plaintiffs have sufficiently pleaded injury  
 15 under GBL § 349.

### 16 3. Causation

17 Last, “[t]o properly allege causation, a plaintiff must state in his complaint that he has seen  
 18 the misleading statements of which he complains before he came into possession of the products  
 19 he purchased.” *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 480  
 20 (S.D.N.Y. 2014). Unlike the UCL, “an action under § 349 is not subject to the pleading-with-  
 21 particularity requirements of Rule 9(b), but need only meet the bare-bones notice-pleading  
 22 requirements of Rule 8(a).” *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508, 511 (2d  
 23 Cir. 2005) (citation omitted); *see also id.* (“[B]ecause § 349 extends well beyond common-law  
 24 fraud to cover a broad range of deceptive practices, . . . a private action under § 349 does not  
 25 require proof of the same essential elements (such as reliance) as common-law fraud.”).

26 As the Court has explained, Plaintiffs aver that Defendants made various representations

1 that Plaintiffs' PII would be protected. These representations came in the form of statements made  
 2 on Defendants' websites and statements made in Defendants' privacy notices. The Court finds  
 3 that Plaintiffs have sufficiently alleged causation under GBL § 349 based on GBL § 349's  
 4 pleading requirements and case law interpreting GBL § 349.

5 First, as the Court has pointed out, GBL § 349 is not subject to the more demanding  
 6 pleading requirements of Federal Rule of Civil Procedure 9(b). Thus, the New York Court of  
 7 Appeals has held that Plaintiffs bringing claims under GBL § 349 must simply raise a reasonable  
 8 inference of causation rather than demonstrating reliance. *See, e.g., Stutman v. Chem. Bank*, 731  
 9 N.E.2d 608, 612 (N.Y. 2000) ("Reliance and causation are twin concepts, but they are not  
 10 identical."); *see also id.* at 612–13 (elaborating upon differences between reliance and causation).

11 Several recent federal district court decisions from the Eastern and Southern Districts of  
 12 New York help illustrate the difference between causation and reliance. In *Dash v. Seagate*  
 13 *Technology (U.S.) Holdings, Inc.*, 27 F. Supp. 3d 357 (E.D.N.Y. 2014), for instance, the district  
 14 court *denied* dismissal of plaintiff's deceptive practices claim under GBL § 349, but *granted*  
 15 dismissal on plaintiff's common law fraud claim. Although plaintiff did not specify when plaintiff  
 16 saw the misrepresentations at issue, "[t]he reasonable inference to be drawn from [plaintiff's]  
 17 allegations is that [plaintiff] saw the misleading statements and, as a result of such, purchased the  
 18 [product] at issue." *Id.* at 361. Accordingly, the *Dash* court found causation "sufficiently pled"  
 19 for purposes of GBL § 349. *Id.* However, after reciting the applicable pleading requirements  
 20 under Rule 9(b), the *Dash* court determined that, under these same facts, plaintiffs' "concluso[ry]  
 21 alleg[ations]" were insufficient to state a claim for common law fraud. *Id.* at 362–63.

22 Consistent with *Dash*, plaintiff in *Goldemberg v. Johnson & Johnson* "describe[d] in  
 23 particular [detail] the allegedly misleading advertising and other statements." 8 F. Supp. 3d at  
 24 480. Plaintiff "then allege[d] that '[defendant]'s false, misleading, and deceptive  
 25 misrepresentations and omissions . . . deceived and misled [plaintiff]." *Id.* Although plaintiff did  
 26 not specify when defendant made the "false, misleading, and deceptive misrepresentations" at

1 issue, the district court concluded that “[t]he reasonable inference to be drawn from these  
2 allegations . . . is that [plaintiff] saw the [misrepresentations] described previously in the  
3 Complaint, and was thus deceived into purchasing the products in question.” *Id.*

4 Finally, in *Belfiore v. Proctor & Gamble Co.*, 94 F. Supp. 3d 440, 446 (E.D.N.Y. 2015),  
5 the pleadings also failed to specify when plaintiff viewed the misrepresentation at issue. The  
6 district court, however, found this detail “not decisive” for purposes of plaintiff’s GBL § 349  
7 claim. *Id.* Consistent with *Goldemberg* and *Dash*, the district court stated that the reasonable  
8 inference to be drawn was that plaintiff first viewed the misrepresentation, and then went on to  
9 purchase the product at issue. *Id.*

10 In sum, after reviewing the allegations in the consolidated amended complaint, the  
11 different pleading requirements between GBL § 349 and Federal Rule of Civil Procedure 9(b), and  
12 case law addressing GBL § 349, the Court finds that Plaintiffs have sufficiently alleged causation  
13 for purposes of their GBL § 349 claim.

#### 14 **4. ERISA Preemption**

15 As a final matter, the consolidated amended complaint includes four named New York  
16 Plaintiffs, all of whom assert a GBL § 349 claim on behalf of themselves and a putative statewide  
17 class. CAC ¶¶ 85–88. Defendants contend that New York Plaintiff Matthew Gates’ (“Gates”) GBL § 349  
18 claim is preempted by ERISA. *See Anthem Mot.* at 22. Defendants, however, do not  
19 assert ERISA preemption against New York Plaintiffs Barbara Gold, Marne Onderdonk, and Juan  
20 Carlos Cerro. Thus, because Plaintiffs have demonstrated all of the required elements to plead a  
21 GBL § 349 claim, Plaintiffs’ GBL § 349 claim survives whether or not Gates’ claim is preempted.  
22 Defendants’ motion to dismiss Plaintiffs’ GBL § 349 claim is therefore DENIED.

23 Additionally, the Court denies without prejudice Defendants’ motion to dismiss Gates’  
24 GBL § 349 claim as preempted by ERISA. As the Ninth Circuit has observed, “[t]here are two  
25 strands of ERISA preemption: (1) ‘express’ preemption under ERISA § 514(a), 29 U.S.C. §  
26 1144(a); and (2) preemption due to a ‘conflict’ with ERISA’s exclusive remedial scheme set forth

1 in [ERISA § 502(a),] 29 U.S.C. § 1132(a).” *Fossen v. Blue Cross and Blue Shield of Mont., Inc.*,  
 2 660 F.3d 1102, 1107 (9th Cir. 2011). “Under § 514(a), ERISA broadly preempts any and all State  
 3 laws insofar as they may now or hereafter *relate to* any covered employee benefit plan.” *Id.* at  
 4 1108 (internal quotation marks and alteration omitted) (emphasis added). “A [state] law ‘relates  
 5 to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or  
 6 reference to such a plan.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983). “[T]he words  
 7 ‘relate to,’” however, “cannot be taken too literally.” *Roach v. Mail Handlers Benefit Plan*, 298  
 8 F.3d 847, 849 (9th Cir. 2002). “If ‘relate to’ were taken to extend to the furthest stretch of its  
 9 indeterminacy, then for all practical purposes pre-emption would never run its course, for ‘really,  
 10 universally, relations stop nowhere.’” *N.Y. State Conf. of Blue Cross & Blue Shield Plans v.*  
 11 *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (alteration omitted). Instead, “relates to” must be  
 12 “read in the context of the presumption that in fields of traditional state regulation the historic  
 13 police powers of the States are not to be superseded by a Federal Act unless that was the clear and  
 14 manifest purpose of Congress.” *Roach*, 298 F.3d at 850 (internal quotation marks and alteration  
 15 omitted).

16 Under ERISA § 502(a), a civil enforcement action may be brought:

17 (1) by a participant or beneficiary— . . . (B) to recover benefits due to him under  
 18 the terms of his plan, to enforce his rights under the terms of the plan, or to clarify  
 19 his rights to future benefits under the terms of the plan.

20 29 U.S.C. § 1132(a). Pursuant to this provision, a “state-law cause of action that duplicates,  
 21 supplements, or supplants the ERISA civil enforcement remedy” is preempted because it  
 22 “conflicts with the clear congressional intent to make the ERISA remedy exclusive.” *Aetna*  
 23 *Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

24 The primary points of disagreement between the parties is whether, for purposes of both  
 25 conflict and express preemption, (1) Defendants’ promises to protect Plaintiffs’ PII represents a  
 26 “benefit” under Plaintiffs’ health plans, as defined by ERISA, and (2) whether state laws that  
 27 implicate Plaintiffs’ data security “relate to” or conflict with ERISA.

1           There is insufficient information at this time to make a determination on either question.  
2           As noted above, Plaintiffs have failed to produce a copy of their insurance contracts with  
3           Defendants and have failed to identify which contractual provisions Defendants allegedly  
4           breached. In addition, although Defendants have submitted a copy of Gates' Summary Plan  
5           Description, *see* ECF No. 412-1, Plaintiffs contend that Gates' contract and the Summary Plan  
6           Description are different documents. Anthem Opp'n at 25. Defendants' obligations to protect  
7           Gates' data, Plaintiffs argue, were memorialized in Gates' contract, and "[t]here is no preemption  
8           when plaintiffs sue to enforce the terms of some contract other than the ERISA plan." *Id.* As a  
9           final point, neither party has provided briefing on whether Congress necessarily intended for  
10          ERISA to preempt state consumer protection laws such as New York's GBL § 349.

11          Given the disputed contentions made by the parties and the fact that the parties have not  
12          produced a copy of Gates' contract, the Court can not decide whether Gates' GBL § 349 claim is  
13          preempted by ERISA. In reaching this conclusion, the Court finds instructive statements made by  
14          U.S. Department of Labor ("DOL") staff at the 2010 Joint Committee of Employee Benefits  
15          Technical Session, hosted by the American Bar Association. Specifically, DOL staff were asked  
16          the following:

17                 In an era of enhanced privacy protections, some participants have complained that  
18                 personally identifiable information (PII) releases have occurred under State  
19                 privacy laws . . .

20                 Does the DOL agree that State privacy laws regarding PII releases are not  
21                 applicable to plan administration communications from authorized third party  
22                 service providers?

23          *Questions and Proposed Answers for the Department of Labor Staff for the 2010 Joint Committee*  
24          *of Employee Benefits Technical Section at 20–21 (May 5, 2010), available at*  
25          <http://tinyurl.com/jhp2hcp>. DOL staff declined to provide a definitive "answer [to] this question  
26          due to insufficient information." *Id.* at 21. After citing and discussing ERISA § 514(a) and the  
27          applicable legal standards behind this section, DOL "staff note[d] that without specific statutory

1 language and a description of how the statute relates to [a specific] ERISA-covered employee  
 2 benefit plan, [DOL] staff [could not] determine whether a particular state privacy statute is  
 3 preempted by ERISA.” *Id.* In sum, when confronted with a general inquiry as to whether state  
 4 privacy laws were preempted by ERISA, DOL staff declined to provide a sweeping response, and  
 5 instead requested additional information on the specific laws at issue.

6 The Court’s decision to deny without prejudice is in line with DOL’s position. Without  
 7 specific information on the contours of Gates’ health plan and the statutory purpose behind GBL §  
 8 349, the Court can not decide whether Gates’ GBL § 349 claim is subject to ERISA preemption.  
 9 Accordingly, the Court DENIES without prejudice Defendants’ motion to dismiss Gates GBL §  
 10 349 claim as preempted by ERISA.

11 **H. Kentucky Consumer Protection Act (against Anthem and Non-Anthem Defendants)**

12 Plaintiffs allege that the Anthem and Non-Anthem Defendants “engaged in deceptive,  
 13 unfair, and unlawful trade acts or practices in the conduct of trade or commerce,” in violation of  
 14 the Kentucky Consumer Protection Act (“KCPA”), Ky. Rev. Stat. § 367.170, *et seq.* CAC ¶ 425.  
 15 Defendants contend that Plaintiffs’ KCPA claim fails “because the Act cannot be used to bring a  
 16 class action.” Anthem Mot. at 12. Moreover, Defendants assert that Plaintiffs do not have  
 17 standing to bring a KCPA claim. *Id.* at 12–13.

18 With respect to the viability of class certification, the Court turns first to the Kentucky  
 19 Circuit Court’s decision in *Arnold v. Microsoft Corporation*, 2000 WL 36114007 (Ky. Cir. Ct.  
 20 July 21, 2000). In *Arnold*, plaintiffs brought suit against Microsoft under the KCPA and under  
 21 Kentucky’s version of the Sherman Antitrust Act. *Id.* at \*1. Plaintiffs sought damages and class  
 22 certification. *Id.* In granting Microsoft’s motion to dismiss, the Kentucky Circuit Court  
 23 concluded that “[t]he Court does not believe that KRS 367.170 [the KCPA] is the correct statute to  
 24 bring a claim based on monopolistic practices.” *Id.* at \*6. Moreover, “[t]he Court also does not  
 25 believe that KRS 367.170 was meant to be a vehicle for Class Action suits and declines to open  
 26 such a sweepingly vague statute for use as a blunt instrument in a Class Action suit.” *Id.*; *see also*



1 *id.* at \*8 (“Based on venue requirements and other language[,] . . . this Court . . . feels that KRS  
2 367.170 was never meant to encompass class action litigants.”). The Kentucky Court of Appeals  
3 affirmed the Circuit Court’s judgment. *Arnold v. Microsoft Corp.*, 2001 WL 1835377, \*7–\*8 (Ky.  
4 Ct. App. Nov. 21, 2001).

5 A number of federal courts—including several in the MDL context—have relied upon  
6 *Arnold* to find that plaintiffs can not bring a class action claim under the KCPA. In *In re*  
7 *Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 84 (D. Mass. 2005),  
8 for instance, the district court relied upon *Arnold* to find that, “[u]nder the laws of . . . Kentucky .  
9 . . . there is no right to bring a class action to enforce the consumer protection statutes.” *Id.* Thus,  
10 the court concluded that “[c]onsumers in [Kentucky] may be excluded out of hand” in an MDL  
11 brought against 42 pharmaceutical manufacturers. *Id.* Likewise, in *In re Grand Theft Auto Video*  
12 *Game Consumer Litigation (No. II)*, 251 F.R.D. 139, 160 (S.D.N.Y. 2008), the district court,  
13 citing *Arnold*, held that “Kentucky[’s] consumer-fraud provision does not permit [a] class-action  
14 suit.” *Id.* Finally, in *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012), the  
15 Ninth Circuit vacated the district court’s decision to certify a nationwide class. In reaching this  
16 decision, the Ninth Circuit determined that nationwide class certification was inappropriate  
17 because of differences amongst various state consumer protection laws. *See id.* at 590–92. In  
18 dissent, Judge Dorothy Nelson disagreed with the majority’s conclusion “that material differences  
19 exist between California law and that of the 43 jurisdictions in which class members reside.” *Id.*  
20 at 597 (Nelson, J., dissenting). As Judge Nelson observed, “I find only one potentially material  
21 difference: Louisiana, Georgia, Mississippi, Kentucky, Virginia and Alabama prohibit class  
22 actions that allege unfair trade practices under state law.” *Id.* at 597–98; *see also id.* at 598 (citing  
23 *Arnold*). Thus, even though Judge Nelson disagreed with the majority’s determination, she  
24 nonetheless acknowledged that consumer protection laws in some states—including Kentucky—  
25 bar private plaintiffs from bringing class action claims.

26 More recently, in *In re Target*, the District of Minnesota district court dismissed plaintiffs’

1 KCPA claim upon finding that “[t]he consumer-protection statutes in eight states—Alabama,  
2 Georgia, Kentucky, Louisiana, Mississippi, Montana, South Carolina, and Tennessee—prohibit  
3 class-action treatment of claims under those statutes.” 66 F. Supp. 3d at 1163. The *In re Target*  
4 court did not cite *Arnold*; instead, the *In re Target* court cited *Davenport v. Charter*  
5 *Communications, LLC*, 35 F. Supp. 3d 1040 (E.D. Mo. 2014). 66 F. Supp. 3d at 1165. As  
6 Plaintiffs note, the *Davenport* court was not presented with a KCPA claim. Anthem Opp’n at 12.  
7 Instead, the *Davenport* court was presented with a claim under Ky. Rev. Stat. § 337.385, a statute  
8 governing unpaid overtime. *See Davenport*, 35 F. Supp. 3d at 1051. The Court therefore finds the  
9 *In re Target* decision to be less instructive than the decisions in *In re Pharmaceutical* and *In re*  
10 *Grand Theft Auto*. Nonetheless, the common theme running through all of these cases is that,  
11 consistent with *Arnold*, courts have found that plaintiffs can not pursue a class action claim under  
12 the KCPA.

13 Plaintiffs have not cited any case law that would compel a different conclusion. Instead,  
14 Plaintiffs argue only that the KCPA “does not contain an express class action ban,” and that some  
15 “courts have certified class actions under the KCPA, both before and after *Arnold*.” Anthem  
16 Opp’n at 12. In support of this latter point, Plaintiffs rely upon two Western District of Kentucky  
17 decisions: *Brummett v. Skyline Corporation*, 1984 WL 262559 (W.D. Ky. Apr. 11, 1984), and  
18 *Clark v. BellSouth Telecommunications, Inc.*, 461 F. Supp. 2d 541 (W.D. Ky. 2006).

19 As Plaintiffs acknowledge, *Brummett* was decided sixteen years prior to *Arnold*. This fact  
20 alone renders Plaintiffs’ reliance on *Brummett* unavailing. As the Sixth Circuit, of which  
21 Kentucky is a part, has noted, “[t]he function of [a federal court] is to apply the law of the state  
22 which governs the suit, not to take a position regarding the advisability or fairness of the rule  
23 applied.” *San Francisco Real Estate Inv’rs v. J.A. Jones Real Estate Constr. Co.*, 703 F.2d 976,  
24 977 n.2 (6th Cir. 1983); *see also In re Korean Air*, 642 F.3d at 699 (“[T]he MDL transferee court  
25 is generally bound by the same substantive legal standards . . . as would have applied in the  
26 transferor court.”). Here, the federal district court for the Western District of Kentucky predicted

1 that the KCPA would be interpreted one way in *Brummett*, and then the Kentucky Circuit Court  
 2 concluded in *Arnold* that the KCPA should be interpreted in a different way. Under such  
 3 circumstances, *Arnold*—not *Brummett*—is more persuasive. See *Goranson v. Kloeb*, 308 F.2d  
 4 655, 656–57 (6th Cir. 1962) (“We should not attempt to make new law for the state in conflict  
 5 with its existing decisions.”).

6 In addition, the *Brummett* plaintiffs sought class certification on a number of different  
 7 claims. See *Brummett*, 1984 WL 262559, \*1 (asserting claims under the KCPA, the Kentucky  
 8 Uniform Commercial Code, the Kentucky Mobile Home Sales Act, Kentucky common law, and  
 9 various federal laws). The parties did not assert and the district court did not conduct a separate  
 10 analysis of plaintiffs’ KCPA claim. Thus, in light of this procedural posture and intervening state  
 11 authority in *Arnold*, the Court finds *Brummett* insufficient to allow Plaintiffs to proceed with their  
 12 KCPA class action claim in the instant case.

13 Plaintiffs’ reliance on *Clark v. BellSouth Telecommunications* is likewise unavailing. As  
 14 in *Brummett*, plaintiffs in *Clark* asserted a number of claims under state and federal law. With  
 15 respect to plaintiffs’ KCPA claim, the *Clark* court found the parties’ briefing incomplete. 461 F.  
 16 Supp. 2d at 549. Consequently, the district court stated that it would “set a schedule for additional  
 17 briefing on” plaintiffs’ KCPA claim. *Id.* Following this discussion of the KCPA claim, the *Clark*  
 18 court reviewed plaintiffs’ motion for class certification, and found class certification appropriate.  
 19 The district court, however, described its certification decision as being “provision[al]” in nature,  
 20 *id.* at 550, a description which would comport with the court’s decision to order additional briefing  
 21 on the KCPA claim. Under these circumstances, the Court is not persuaded by Plaintiffs’  
 22 argument that the *Clark* court “certified [a] class action[] under the KCPA . . . after *Arnold*.”  
 23 Anthem Opp’n at 12.

24 Outside of *Brummett* and *Clark*, Plaintiffs have not identified any cases where courts have  
 25 allowed parties to proceed with a class action claim under the KCPA. The Court has found none  
 26 in its own research. Instead, *Arnold* remains the most pertinent state authority on this issue, and

1 several courts have relied upon *Arnold* to hold that parties can not, as a matter of law, bring a  
 2 KCPA claim as a class action. *See In re Pharm.*, 230 F.R.D. at 84; *In re Grand Theft Auto*, 251  
 3 F.R.D. at 160. Consistent with the reasoning of *Arnold* and of these courts, the Court finds that  
 4 Plaintiffs can not maintain a putative class action claim under the KCPA. In addition, because  
 5 Plaintiffs can not pursue such a claim as a matter of law, the Court need not address Defendants’  
 6 arguments regarding standing. Accordingly, Defendants’ motions to dismiss Plaintiffs’ KCPA  
 7 claim is GRANTED.

8 Furthermore, in the absence of any authority for the position that a KCPA claim may be  
 9 brought as a class action, the Court finds that leave to amend would be futile, and thus denies  
 10 Plaintiffs leave to amend. *See Bonin*, 59 F.3d at 845 (“Futility of amendment can, by itself, justify  
 11 the denial of a motion for leave to amend.”). Plaintiffs’ KCPA claim is therefore dismissed with  
 12 prejudice.

13 **I. Kentucky Data Breach Act (against Anthem Defendants)**

14 In opposing the instant motions to dismiss, Plaintiffs have moved to withdraw their cause  
 15 of action against the Anthem Defendants for violation of Kentucky’s Data Breach Act. Anthem  
 16 Opp’n at 11 n.13. Accordingly, the Anthem Defendants’ motion to dismiss Plaintiffs’ Kentucky  
 17 data breach claim is GRANTED, and Plaintiffs’ Kentucky data breach claim is DISMISSED with  
 18 prejudice.

19 **J. Georgia Insurance Information and Privacy Protection Act (against Anthem Defendants)**

20 The Georgia Insurance Information and Privacy Protection Act (“IIPA”) states that “[a]n  
 21 insurance institution, agent, or insurance-support organization shall not *disclose* any personal or  
 22 privileged information about an individual collected or received in connection with an insurance  
 23 transaction unless the *disclosure*” falls under a list of specifically enumerated exceptions. Ga.  
 24 Code. Ann. § 33-39-14 (emphasis added). In the consolidated amended complaint, Plaintiffs  
 25 allege that “Defendants Anthem and Anthem Affiliates disclosed individually-identifiable [PII]  
 26

1 regarding members of the Georgia Class that was collected or received in connection with an  
2 insurance transaction without their authorization, in violation of” the IIPA. CAC ¶ 801.

3 In response, the Anthem Defendants contend that Plaintiffs’ PII was never “disclosed.”  
4 *See, e.g.*, Anthem Reply at 12. Rather, Plaintiffs’ PII was “stole[n]” by “a third-party  
5 cyberattacker.” *Id.* The IIPA, the Anthem Defendants argue, protects only against disclosure, and  
6 not against theft. In addition, the Anthem Defendants contend that Plaintiffs have failed to allege  
7 any actual damages. *See id.* at 13.

8 As to the scope of the IIPA’s disclosure requirement, the Court notes that neither party has  
9 identified a case—state or federal—interpreting Ga. Code. Ann. § 33-39-14. The Court has found  
10 none in its own research. Thus, this action presents an issue of first impression: whether the IIPA,  
11 which proscribes the unlawful disclosure of personal information, also applies to the theft of one’s  
12 personal information.

13 In interpreting the IIPA, the Court must examine statutory rules of construction as applied  
14 by courts in Georgia. *See In re Korean Air*, 642 F.3d at 699 (“[T]he MDL transferee court is  
15 generally bound by the same substantive legal standards . . . as would have applied in the  
16 transferor court.”). On this particular point, the Georgia Supreme Court has stated that, “[w]e  
17 begin our analysis of the statute by recognizing that fundamental rules of statutory construction  
18 require us to construe a statute according to its terms, to give words their plain and ordinary  
19 meaning, and to look diligently for the intention of the General Assembly.” *Atlanta Indep. Sch.*  
20 *Sys. v. Atlanta Neighborhood Charter Sch., Inc.*, 748 S.E.2d 884, 886 (Ga. 2013). “Where the  
21 plain language of a statute is clear and susceptible of only one reasonable construction, we must  
22 construe the statute according to its terms.” Thus, following the Georgia Supreme Court, the  
23 Court shall begin by reviewing the IIPA’s text, before examining other pertinent canons of  
24 statutory interpretation.

### 25 **1. Statutory Text**

26 As an initial point, the Court observes that the Georgia Code does not define the term

1 “disclose” or “disclosure” in the IIPA. *See* Ga. Code. Ann. § 33-39-3 (providing list of  
2 definitions). Where a statute does not define a key term, the Court must “look to the ordinary  
3 meaning of that word.” *Jackson v. State*, 709 S.E.2d 44, 46 (Ga. Ct. App. 2011). With respect to  
4 the ordinary meaning analysis, courts generally begin by examining dictionary definitions of the  
5 term at issue. *Id.*; *see also* Jacob Scott, *Codified Canons and the Common Law of Interpretation*,  
6 98 Geo. L.J. 341, 357 (2010) (finding use of dictionary definitions to be the most commonly used  
7 textual canon).

8 Black’s Law Dictionary defines “disclosure” as “[t]he act or process of making known  
9 something that was previously unknown; a revelation of facts.” Black’s Law Dictionary 531 (9th  
10 ed. 2009). Black’s Law Dictionary also defines “act” as “[s]omething done or performed, esp.  
11 voluntarily.” *Id.* at 27. The Oxford English Dictionary defines “disclose” as “[t]o uncover and  
12 expose to view (anything material); to remove a covering from; to reveal, allow to be seen.”  
13 Oxford English Dictionary Online (3d ed. 2013), *available at* [tinyurl.com/jlynyc8](http://tinyurl.com/jlynyc8). Taken  
14 together, these definitions suggest that, in order to “disclose” something, the information holder  
15 must commit some affirmative, voluntary act.

16 An analysis of the structure of the IIPA lends further support to this conclusion. As noted  
17 above, the IIPA states that “[a]n insurance institution, agent, or insurance-support organization  
18 shall not disclose any personal or privileged information . . . unless the disclosure” falls under a  
19 set of 18 exceptions. These exceptions allow the insurance institution, agent, or insurance-support  
20 organization to disclose an individual’s personal information “[t]o a medical-care institution or  
21 medical professional,” Ga. Code Ann. § 33-39-14(4), “[t]o an insurance regulatory authority,” Ga.  
22 Code Ann. § 33-39-14(5), and “[t]o a law enforcement or other governmental authority,” Ga.  
23 Code Ann. § 33-39-14(6), among other entities. Indeed, for each of these 18 exceptions, the  
24 insurance institution, agent, or insurance-support organization must affirmatively provide an  
25 individual’s personal information to a third party. Thus, under the dictionary definition of  
26 “disclosure” and under the structure of the IIPA, it is unlikely that the Georgia Legislature



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1 intended for “disclosure” to encompass instances of third party cyberhacking and data breach.

2 **2. Additional Considerations**

3 In addition to the IIPA’s text and structure, several other considerations lend support to this  
4 more narrow reading of the IIPA’s scope. Indeed, in predicting how the Georgia Supreme Court  
5 would rule on this issue, the Court believes that the Georgia Supreme Court would review how the  
6 terms “disclose” or “disclosure” have been defined in other statutes and how these terms have  
7 been interpreted by other courts.

8 On this particular point, the Federal Privacy Act defines “disclosure” to “mean[] providing  
9 personal review of a record, or a copy thereof, to someone other than the data subject or the data  
10 subject’s authorized representative.” 5 C.F.R. § 297.102. Courts have restricted this definition to  
11 situations where information holders have willfully provided data to an unauthorized third party.  
12 In *Walia v. Chertoff*, 2008 WL 5246014, \*6 (E.D.N.Y. Dec. 17, 2008), for instance, plaintiff’s  
13 medical and legal records were allegedly placed in an unlocked credenza located in the office of  
14 plaintiff’s supervisor. Other employees, including those not authorized to review plaintiff’s  
15 medical and legal records, had access to this office. *Id.* Upon learning these facts, plaintiff  
16 brought suit against his employer. The *Walia* court rejected plaintiff’s Federal Privacy Act claim  
17 and held that plaintiff’s claim rested “on the accessibility of [plaintiff’s] medical and legal records  
18 to individuals in the office.” *Id.* at \*11. Mere accessibility, however, is insufficient to constitute  
19 “willful or intentional disclosure by the agency, a required element of a [Federal Privacy Act]  
20 claim.” *Id.* Here, as in *Walia*, Plaintiffs’ IIPA claim pivots around the idea of access and  
21 accessibility, not willful and active disclosure. *See e.g.*, Anthem Opp’n at 21 (“[A]s Plaintiffs  
22 contend . . . unauthorized *access* resulted from Anthem’s actions.”) (emphasis added). Thus, at  
23 least as understood in the context of the Federal Privacy Act, Plaintiffs have failed to sufficiently  
24 allege that the Anthem Defendants “disclosed” Plaintiffs’ PII to cyberattackers during the data  
25 breach.

26 In addition, in *Galaria v. Nationwide Mutual Insurance Co.*, 998 F. Supp. 2d 646, 650

1 (S.D. Ohio 2014), plaintiffs provided Nationwide Mutual Insurance (“Nationwide”) their PII “in  
2 the course of purchasing or seeking to purchase insurance products.” In November 2012,  
3 plaintiffs “received a letter from [Nationwide] indicating that on October 23, 2012, thieves hacked  
4 into a portion of [Nationwide’s] computer network and that their PII was stolen and disseminated  
5 as part of the theft.” *Id.* In response, plaintiffs brought suit against Nationwide alleging, *inter*  
6 *alia*, common law invasion of privacy. *Id.* at 661.

7 The district court granted Nationwide’s motion to dismiss. In reaching this decision, the  
8 district court observed that the common law tort of invasion of privacy requires publicity of a  
9 private fact. Publicity, in turn, “means that [a] matter is made public, by communicating it to the  
10 public at large, or to so many persons that the matter must be regarded as substantially certain to  
11 become one of public knowledge.” *Id.* Plaintiffs had failed to satisfy this publicity requirement  
12 because “there is no allegation in the Complaint that [Nationwide] *disclosed* Named Plaintiffs’  
13 private affairs.” *Id.* at 662 (emphasis added). Moreover, “[t]here are no factual allegations in the  
14 Complaint to make plausible the allegation that [Nationwide] disseminated Named Plaintiffs’ PII.”  
15 *Id.* Rather, “the Complaint alleges the PII was *stolen* from [Nationwide], not that [Nationwide]  
16 disseminated it to anyone.” *Id.* In sum, when presented with a substantially similar set of facts,  
17 the *Galaria* court clearly understood “disclosure” as requiring a party to commit some voluntary,  
18 affirmative act. The *Galaria* court, moreover, drew a distinction between when information is  
19 “disclosed” and when information is “stolen.” Thus, although the questions presented in *Galaria*  
20 were somewhat different than the questions presented in the instant case, this Court nevertheless  
21 finds the *Galaria* court’s understanding of “disclosure” informative.

22 The D.C. District Court’s decision in *In re Science Applications International Corp.*  
23 *(SAIC) Backup Tape Data Theft Litigation*, 45 F. Supp. 3d 14 (D.D.C. 2014), is similarly  
24 illuminating. In *In re SAIC*, as in *Galaria*, “[p]laintiffs . . . allege[d] that they ha[d] been injured  
25 because their privacy [had been] invaded by [a] data breach.” *Id.* at 28. In deciding to dismiss  
26 plaintiffs’ invasion of privacy claim, the district court held that “[f]or a person’s privacy to be

1 invaded, their personal information must, at a minimum, *be disclosed to* a third party.” *Id.*  
 2 (emphasis added). The *In re SAIC* court proceeded to refer to a number of different sources  
 3 discussing disclosure. The district court, for instance, cited a decision by the Eastern District of  
 4 Wisconsin, which defined disclosure as “the placing into the view of another information which  
 5 was previously unknown.” *Id.* (quoting *Schmidt v. Dep’t of Veteran Affairs*, 218 F.R.D. 619, 630  
 6 (E.D. Wis. 2003)). The district court also cited a decision by the District of South Carolina, which  
 7 defined disclosure as “the imparting of information which . . . was previously unknown to the  
 8 person to whom it was imparted.” *Id.* (quoting *Harper v. United States*, 423 F. Supp. 192, 197  
 9 (D.S.C. 1976)). These definitions all conform to the Court’s understanding of what disclosure  
 10 should mean in the context of the IIPA: an active, voluntary decision by the information holder to  
 11 provide data to an unauthorized third party.

12 In opposing the Anthem Defendants’ motion to dismiss, Plaintiffs rely upon a statement in  
 13 *Shames-Yeakel v. Citizens Financial Bank*, 677 F. Supp. 2d 994, 1008 (N.D. Ill. 2009).  
 14 Specifically, in discussing the viability of an Indiana common law negligence claim, the *Shames-*  
 15 *Yeakel* court stated that “[i]f th[e] duty not to disclose customer information is to have any weight  
 16 in the age of online banking, then banks must certainly employ sufficient security measures to  
 17 protect their customers’ online accounts.” *Id.* Although this statement does appear to weigh in  
 18 Plaintiffs’ favor, Plaintiffs’ reliance on *Shames-Yeakel* is ultimately inapposite.

19 First, as discussed above, private plaintiffs can not, under *Pisciotta*, bring a cause of action  
 20 in Indiana for negligence for injuries arising out of a data breach. The Northern District of  
 21 Illinois’ decision in *Shames-Yeakel* is therefore, at the very least, in tension with the Seventh  
 22 Circuit’s decision in *Pisciotta*. Tellingly, in discussing the negligence claim in *Shames-Yeakel*,  
 23 the district court did not refer to *Pisciotta*. The district court also acknowledged that “this court  
 24 could not find an Indiana case addressing the matter” of whether a bank has a “duty to sufficiently  
 25 secure its online banking system.” *Id.* Thus, by allowing plaintiffs in *Shames-Yeakel* to move  
 26 forward with their Indiana negligence claim, the *Shames-Yeakel* court appeared to overlook both

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1 the specific and general precedent of its circuit court of appeals, the Seventh Circuit, that federal  
2 courts, sitting in diversity, should refrain from creating new causes of action under state law. *See,*  
3 *e.g., Pisciotta*, 499 F.3d at 637 (“Had the Indiana legislature intended that a cause of action should  
4 be available against a database owner for failing to protect adequately personal information, we  
5 believe that it would have made some more definite statement of that intent.”); *Insolia v. Philip*  
6 *Morris, Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) (“When confronted with a state law question that  
7 could go either way, the federal courts usually choose the narrower interpretation that restricts  
8 liability.”).

9 Second, with respect to the specific statement quoted by Plaintiffs—that a bank’s duty not  
10 to disclose must include a duty to protect customers’ personal information—the *Shames-Yeakel*  
11 court did not discuss, refer to, or cite any supporting authority. In the nearly six and a half years  
12 since the *Shames-Yeakel* decision, no federal or state court has cited *Shames-Yeakel* for this  
13 proposition. In light of these circumstances, and in light of the fact that *Shames-Yeakel* appears to  
14 be in tension with prevailing Seventh Circuit precedent, the Court finds Plaintiffs’ reliance on  
15 *Shames-Yeakel* not well taken.

16 To conclude, Plaintiffs have failed to persuade the Court that a broader construction of the  
17 IIPA is warranted. Under the facts alleged in the consolidated amended complaint, the Anthem  
18 Defendants did not “disclose” Plaintiffs data, as required under the IIPA. Pursuant to the Court’s  
19 finding, the Court need not address the Anthem Defendants’ arguments regarding whether  
20 Plaintiffs have sufficiently alleged damages for purposes of the IIPA. The Anthem Defendants’  
21 motion to dismiss Plaintiffs’ IIPA claim is GRANTED.

22 Plaintiffs, however, shall have leave to amend because the Court finds that amendment  
23 would not be futile. Plaintiffs may be able to allege facts to demonstrate that the Anthem  
24 Defendants disclosed Plaintiffs’ PII to a third party. *See Lopez*, 203 F.3d at 1127 (holding that “a  
25 district court should grant leave to amend . . . unless it determines that the pleading could not  
26 possibly be cured by the allegation of other facts.”). Plaintiffs’ IIPA claim is therefore

1 DISMISSED with leave to amend.

2 **K. Federal Law Third Party Beneficiary (against Non-Anthem Defendants)**

3 Finally, Plaintiffs assert a third party beneficiary claim for breach of contract under federal  
 4 law against the Non-Anthem Defendants. CAC ¶ 331–42. Specifically, Plaintiffs assert that Blue  
 5 Cross Blue Shield Association (“BCBSA”) “had a valid, binding, and enforceable express contract  
 6 with OPM [the Office of Personnel Management] to provide insurance and other benefits to those  
 7 Plaintiffs who received health insurance and related benefits under the Federal BCBSA Plan.” *Id.*  
 8 ¶ 332. Under this contract (hereinafter referred to as the “Federal BCBSA contract”), BCBSA  
 9 “promised to take reasonable measures to protect the security and confidentiality of Federal  
 10 Employee Plaintiffs’ [PII].” *Id.* ¶ 333. Plaintiffs allege that the Federal Employee Plaintiffs were  
 11 “intended third-party beneficiaries of the data security provisions in the contract between BCBSA  
 12 . . . and OPM, and are entitled to directly enforce its terms.” *Id.* ¶ 339.

13 The Non-Anthem Defendants contend that Plaintiffs’ third party beneficiary claim fails  
 14 because OPM is the *only* party that can seek relief under the Federal BCBSA contract. Plaintiffs  
 15 can not, in other words, pursue a private cause of action against BCBSA. The Non-Anthem  
 16 Defendants also argue that “the Federal Employee Plaintiffs’ state law claims are preempted.”  
 17 Non-Anthem Mot. at 19.

18 Given that adjudication of the instant claim involves a nuanced understanding of federal  
 19 law, administrative regulations, and various rules governing contract interpretation, the Court first  
 20 provides an overview of the background and statutory framework behind the Federal BCBSA  
 21 contract. The Court shall then address the Non-Anthem Defendants’ arguments in turn.

22 **1. Background**

23 The Federal Employee Health Benefits Act (“FEHBA”), enacted in 1959, “established a  
 24 comprehensive program to provide federal employees and retirees with subsidized health care  
 25 benefits.” *Hayes v. Prudential Ins. Co. of Am.*, 819 F.2d 921, 922 (9th Cir. 1987). “Under the  
 26 Act, the United States does not act as an insurer, but, through the Office of Personnel Management

1 (OPM), contracts with various private carriers to develop health care plans with varying coverages  
2 and costs.” *Id.* “After OPM negotiates changes with the carriers[,] all federal enrollees are  
3 permitted to switch enrollment from one plan to another, regardless of their state of health, during  
4 a period called ‘open season.’” *Id.*

5 “Among the plans offered to federal employees is the Blue Cross Blue Shield Service  
6 Benefit Plan,” which is governed by the Federal BCBSA contract (known internally as 2013  
7 Contract No. CS 1039). CAC ¶ 172.<sup>10</sup> The Federal BCBSA contract provides that “[a]ny  
8 inconsistency in this contract shall be resolved by giving precedent in the following descending  
9 order: the Act,<sup>11</sup> the regulations in part 890, title 5, Code of Federal Regulations, the regulations in  
10 chapters 1 and 16, title 48, Code of Federal Regulations, and this contract.” Fed. BCBSA Contract  
11 § 1.3. The Federal BCBSA contract also states that “[t]he Carrier [BCBSA] shall provide the  
12 benefits as described in the agreed upon” Statement of Benefits, which are attached as an  
13 addendum to the contract. *Id.* § 2.2(a).

14 The framework under which the Federal BCBSA contract operates is notable in three  
15 important respects. First, Plaintiffs assert, and the Non-Anthem Defendants do not dispute, that  
16 the Federal Employee Plaintiffs are intended third party beneficiaries of the Federal BCBSA  
17 contract. *See* CAC ¶ 339; Non-Anthem Mot. at 14; Non-Anthem Opp’n at 14; *see also Catholic*  
18 *Diocese of Biloxi Supplemental Med. Reimbursement Plan and Catholic Diocese of Biloxi v. Blue*

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<sup>10</sup> Plaintiffs refer to Contract No. CS 1039 in the consolidated amended complaint, and the Non-  
Anthem Defendants have submitted a copy of this contract, the 2014 and 2015 amendments to the  
contract, and the contract’s 2014 and 2015 Statement of Benefits. *See* ECF No. 416-1 (“Fed.  
BCBSA Contract”); ECF No. 416-2 (“2014 Amendments”); ECF No. 416-3 (“2015  
Amendments”); ECF No. 416-4 (“2014 Statement of Benefits”); ECF No. 416-5 (“2015 Statement  
of Benefits”). Unlike the Summary Plan Descriptions described above, Plaintiffs do not dispute  
that these documents are true and accurate copies of their contract with BCBSA and the  
accompanying statement of benefits. Non-Anthem Opp’n at 13 n.9. Accordingly, the Court takes  
judicial notice of these documents. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
1141 n.5 (9th Cir. 2003) (stating that court “may consider documents on which the complaint  
necessarily relies and whose authenticity is not contested.”) (internal quotation marks and ellipses  
omitted).

<sup>11</sup> The Federal BCBSA contract defines “Act” to mean “FEHBA.” Fed. BCBSA Contract § 1.1.



1 *Cross, Blue Shield of Tex.*, 960 F. Supp. 1145, 1146 (S.D. Miss. 1997) (“The federal employee  
2 does not enter into a separate contract with the carrier, but rather is a third-party beneficiary of the  
3 OPM-carrier contract.”). As a result of this arrangement, “[a]ll *health benefits claims* [under the  
4 Federal BCBSA contract] must be submitted initially to the carrier of the covered individual’s  
5 health benefits plan.” 5 C.F.R. § 890.105(a)(1) (emphasis added). “If the carrier denies a [health  
6 benefits] claim (or a portion of a claim), the covered individual may ask the carrier to reconsider  
7 its denial.” *Id.* “If the carrier affirms its denial or fails to respond . . . , the covered individual  
8 may ask OPM to review the claim.” *Id.* Notably, “[a] covered individual must exhaust both the  
9 carrier and OPM review processes specified in this section before seeking judicial review of [a]  
10 denied claim.” *Id.* The administrative apparatus designed to handle health benefits claims is, in  
11 short, fairly comprehensive.

12         Second, the Federal BCBSA contract and various administrative regulations vest OPM  
13 with general management authority over the contract. As discussed, individuals filing health  
14 benefits claims must, prior to going to federal court, present their claims in an administrative  
15 proceeding before OPM. Outside of handling such health benefits claims, OPM “shall” also  
16 “notify [BCBSA] of [various] deficiencies” which relate to BCBSA’s “financial resources,  
17 facilities, providers, staff and other necessary resources to meet [BCBSA’s] obligations under this  
18 contract.” Fed. BCBSA Contract § 1.12(a). Relatedly, BCBSA must “notify” OPM “of any  
19 Significant Event within ten (10) working days after [BCBSA] becomes aware of it.” *Id.* § 1.10;  
20 *see also id.* (providing list of Significant Events). If BCBSA does not address a Significant Event  
21 in a satisfactory manner, OPM may suspend new enrollments, advise enrollees of the asserted  
22 deficiencies and provide enrollees an opportunity to transfer to another plan, withhold payment,  
23 and refuse to renew the contract. *Id.* On a more general level, federal law provides that OPM  
24 “may prescribe reasonable minimum standards for health benefits plans,” 5 U.S.C. § 8902(e), and  
25 “may prescribe regulations necessary to carry out” FEHBA, 5 U.S.C. § 8913(a).

26         Third, and finally, the Federal BCBSA contract includes several provisions that address

1 data privacy. Section 1.30(a) states that BCBSA must “at a minimum, comply with equivalent  
2 privacy and security policies as are required of a ‘covered entity’ under the HIPAA Privacy and  
3 Security regulations.” *Id.* § 1.30(a). The Federal BCBSA contract was specifically amended in  
4 2014 so that BCBSA could be required to go beyond compliance with the minimum privacy  
5 standards required under federal law. Section 1.30(d), for instance, now states that an OPM  
6 representative “may recommend that the Carrier adopt a best practice drawn from NIST Special  
7 Publication 800-53 (or its current equivalent).” 2014 Amendments § 1.30(d). This document—  
8 NIST Special Publication 800-53—“provides a catalog of security and privacy controls for federal  
9 information systems and organizations and a process for selecting controls to protect  
10 organizational operations.” National Institute of Standards and Technology, *NIST Special  
11 Publication 800-53 (Revision 4): Security and Privacy Controls for Federal Information Systems  
12 and Organizations*, <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r4.pdf>  
13 (last updated Jan. 22, 2015). Notably, many of the practices listed in NIST Special Publication  
14 800-53 are recommendations that go above and beyond current requirements under federal law. A  
15 third section of the Federal BCBSA contract, § 1.6(b), states that BCBSA “shall . . . hold all  
16 medical records, and information relating thereto, of Federal subscribers confidential.” Fed.  
17 BCBSA Contract § 1.6(b). Neither the Federal BCBSA contract nor federal law specifies who  
18 may seek a remedy for breach of these data privacy obligations.

## 19 **2. Enforcement of Federal BCBSA Contract**

### 20 **a. “Health Benefits Claim”**

21 The Non-Anthem Defendants first contend that Plaintiffs’ third party beneficiary claims  
22 constitute health benefits claims. Thus, pursuant to the Federal BCBSA contract, Plaintiffs must  
23 exhaust the administrative apparatus described above before bringing their claims into federal  
24 court. The Court finds this contention unavailing.

25 The administrative apparatus to which Non-Anthem Defendants refer applies to “health  
26 benefits claims.” Federal regulations define “claim” to mean a “request for (i) payment of a

1 health-related bill; or (ii) provision of a health-related service or supply.” 5 C.F.R. § 890.101.  
 2 The Federal BCBSA contract, in turn, defines “[b]enefits” as “[c]overed services or payment for  
 3 covered services set forth in [the Statement of Benefits], to which Members are entitled to the  
 4 extent provided by this contract.” Fed. BCBSA Contract § 1.1. The Statement of Benefits  
 5 accompanying the Federal BCBSA contract does not define “benefit.” *See* 2015 Statement of  
 6 Benefits at 145 (providing list of definitions). However, the Statement of Benefits does list the  
 7 following as “Benefits”: “Preventative care,” “Allergy care,” and “Prescription drug benefits.” *Id.*  
 8 at 32. In short, “benefits”—at least as understood in the context of the Federal BCBSA contract  
 9 and the Statement of Benefits—appears to refer only to the provision of medical-related coverage.  
 10 Tellingly, neither patient privacy nor data security is listed as a “benefit” in the Statement of  
 11 Benefits. Indeed, there is but one reference to patient privacy in the Statement of Benefits,  
 12 confined to a single sentence in the 160 page document: “We [BCBSA] will keep your medical  
 13 and claims information confidential.” *Id.* at 14. There is, in sum, little to suggest that “health  
 14 benefits claims” were meant to encompass claims regarding data privacy.

15 In further support of this conclusion, the Court observes that, in *Roach v. Mail Handlers*  
 16 *Benefits Plan*, the Ninth Circuit construed “benefits” under FEHBA narrowly. Specifically, the  
 17 Ninth Circuit noted that, in interpreting the scope of FEHBA, several “courts have created a divide  
 18 between claims based on a denial of benefits, which are preempted, and claims based on medical  
 19 malpractice, which are not.” *Roach*, 298 F.3d at 850. Upon examining these decisions, the Ninth  
 20 Circuit determined that such a “division protects the federal interest in uniformity of FEHBA plan  
 21 interpretation” while also “preserv[ing] the traditional state interest in the quality of medical care.”  
 22 *Id.* In sum, the Ninth Circuit distinguished “denial of benefit claims,” which “are preempted by . .  
 23 . FEHBA,” from “malpractice claims,” which “are not” preempted by FEHBA. *Id.* Under this  
 24 narrow construction, claims related to one’s data privacy—which do not concern health benefits or  
 25 payment for health benefits—would seem to fall outside the purview of a “denial of benefit”  
 26 claim.

1 To summarize, the Federal BCBSA contract, the Statement of Benefits, and Ninth Circuit  
2 precedent all counsel in favor of finding that Plaintiffs here have not asserted a claim that should  
3 have first gone through an established administrative review apparatus.

4 The Non-Anthem Defendants have not cited any authority to support their arguments to the  
5 contrary. Instead, the Non-Anthem Defendants point to the allegations in the consolidated  
6 amended complaint, which state that “[a]s a result of BCBSA, Anthem BCBS Affiliates, and non-  
7 Anthem BCBS’s failure to implement the security measures required by the Federal BCBSA  
8 contract, OPM did not receive the full *benefit* of its bargain.” CAC ¶ 340 (emphasis added). This  
9 argument lacks merit. In seeking benefit of the bargain damages, Plaintiffs state that they received  
10 “services that were less valuable than what OPM bargained for.” *Id.* This understanding of  
11 “benefit” differs significantly from the term of art referenced in FEHBA and employed in the  
12 Federal BCBSA contract. Accordingly, the Court finds that Plaintiffs’ third party beneficiary  
13 claim is not a “health benefits claim.”

14 **b. Exclusive Enforcement Authority**

15 In the alternative, the Non-Anthem Defendants argue that even “[i]f the Federal Employee  
16 Plaintiffs are suing for something other than benefits, their claims are no less barred because  
17 FEHBA’s scheme gives OPM exclusive authority over all aspects of the contractual relationship,  
18 not just over benefits.” Non-Anthem Mot. at 17. The gist of this contention is that “FEHBA  
19 leaves no room for” Plaintiffs to seek a remedy as a third party beneficiary. *Bridges v. Blue Cross  
20 and Blue Shield Ass’n*, 935 F. Supp. 37, 41 (D.D.C. 1996). Instead, “the broad enforcement and  
21 oversight powers of the OPM established in the statute indicate that the exclusive remedy for an  
22 action cognizable under . . . FEHBA” lies with OPM. *Id.*

23 The Court disagrees with this argument. As an initial matter, the Court notes that, “[w]hen  
24 interpreting contracts under federal law, courts look to general common law on contracts.”  
25 *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 932 (11th Cir. 2013). “One  
26 such general principle is that only a party to a contract or an intended third-party beneficiary may

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1 sue to enforce the terms of a contract or obtain an appropriate remedy for breach.” *GECCMC*  
 2 *2005-C1 Plummer St. Office Ltd. P’ship v. JPMorgan Chase Bank, Nat’l Ass’n*, 671 F.3d 1027,  
 3 1033 (9th Cir. 2012). “This [rule] distinguishes intended beneficiaries to a contract whose rights  
 4 are judicially enforceable from incidental beneficiaries whose rights are not judicially  
 5 enforceable.” *Id.* In the instant case, Plaintiffs assert—and, more importantly, Defendants do not  
 6 challenge—the fact that Plaintiffs are intended third party beneficiaries under the Federal BCBSA  
 7 contract. *See, e.g.*, CAC ¶ 339 (“Federal Employee Plaintiffs and Class Members are intended  
 8 third-party beneficiaries of the data security provisions in the contract between BCBSA . . . and  
 9 OPM, and are entitled to directly enforce its terms.”). Thus, at least for purposes of the instant  
 10 motions to dismiss, Plaintiffs have cleared the first hurdle by demonstrating intended third party  
 11 beneficiary status.

12 Assuming that Plaintiffs are intended third party beneficiaries of the Federal BCBSA  
 13 contract, it is—as a general matter—“no objection to an action by the third party that the  
 14 contracting party (here the government) could also sue upon the contract for the same breach.”  
 15 *Shell v. Schmidt*, 272 P.2d 82, 89 (Cal. Ct. App. 1954); *see also Malone v. Crescent City M & T*  
 16 *Co.*, 18 P. 858, 860 (Cal. 1888) (“[I]t is no objection to the maintenance of a suit by him for whose  
 17 benefit the promise is made that an action might be brought also against the one to whom the  
 18 promise was made.”); *id.* (citing supporting case law from New York, Kansas, Wisconsin, and  
 19 Alabama). To emphasize: as a matter of general contract law, both an intended third party  
 20 beneficiary and a party to the contract may sue for breach. *See generally Zigas v. Superior Court*,  
 21 174 Cal. Rptr. 806, 811 (Ct. App. 1981) (reaffirming holding in *Shell*).

22 The Restatement of Contracts is in accord with this conclusion. Section 145, which  
 23 addresses “Beneficiaries Under Promises to the United States,” states that:

24 A promisor bound to the United States . . . by contract to . . . render a service to  
 25 some or all of the members of the public, is subject to no duty under the contract  
 26 to such members to give compensation for the injurious consequences of  
 performing or attempting to perform it, or of failing to do so, *unless*, . . . an

1 intention is manifested in the contract, as interpreted in the light of the  
2 circumstances surrounding its formation.

3 Restatement (First) of Contracts § 145 (emphasis added). In other words, under the Restatement,  
4 promisors such as BCBSA have duties to the Federal Employee Plaintiffs because these Plaintiffs  
5 are intended third party beneficiaries.

6 In addition, the U.S. Supreme Court’s decision in *Astra USA, Inc. v. Santa Clara County,*  
7 *California*, 563 U.S. 110 (2011), is not inconsistent with this conclusion. In *Astra*, the U.S.  
8 Supreme Court determined that plaintiffs did not have standing to sue as third party beneficiaries  
9 where plaintiffs merely sought to enforce certain statutory obligations memorialized in a federal  
10 contract. *See, e.g., id.* at 118 (“The absence of a private right to enforce the statutory ceiling price  
11 obligations would be rendered meaningless if 340B entities could overcome that obstacle by suing  
12 to enforce the contract’s ceiling price obligations instead. The statutory and contractual  
13 obligations, in short, are one and the same.”). The *Astra* Court emphasized that “[t]he form  
14 agreements, composed by HHS, contain no negotiable terms.” *Id.*

15 On the other hand, as the Court has noted, the Federal BCBSA contract here was  
16 specifically amended in 2014 such that BCBSA could be held to privacy standards above and  
17 beyond the standards required under federal law. *See* 2014 Amendments § 1.3(d). In addition, in  
18 direct contrast to the contract in *Astra*, where the agreement contained “no negotiable terms,” the  
19 2014 Amendments include three full paragraphs that allow BCBSA to negotiate with OPM over  
20 which best practices BCBSA should implement. *See id.* § 1.3(d)(2) (“In a written response to such  
21 a recommendation, [BCBSA] shall (i) agree to adopt the recommendation, (ii) explain that it is  
22 already in compliance with the recommendation, or (iii) explain why maintaining its current  
23 practice . . . is equally, if not more, appropriate for its business purposes than the recommended  
24 best practice.”). As a final point, the consolidated amended complaint alleges that BCBSA  
25 breached the contract by failing to comply with various laws, regulations, and—most  
26 importantly—“industry standards for data security.” CAC ¶ 335. Thus, Plaintiffs’ claim clearly  
27 reaches beyond the mere statutory violations that were at issue in *Astra*.



1 In sum, under general principles of contract law, as reflected in the Restatement, U.S.  
2 Supreme Court precedent, and relevant state court case law, the mere fact that OPM could also  
3 bring suit against BCBSA does not bar Plaintiffs from bringing suit as a third party beneficiary.

4 The Non-Anthem Defendants, however, contend that the Federal BCBSA contract does not  
5 comport with these general contract law principles. Rather, the Non-Anthem Defendants contend  
6 that the Federal BCBSA contract is unique because it is governed by FEHBA, which gives  
7 exclusive enforcement authority to OPM. In support of this contention, the Non-Anthem  
8 Defendants point to both the structure of the Federal BCBSA contract and case law interpreting  
9 FEHBA.

10 The Court is not persuaded by either of these points. With respect to the structure of the  
11 Federal BCBSA contract, the Court has already noted that the Federal BCBSA contract provides  
12 an extensive administrative review process for “health benefits claims,” but that Plaintiffs’ claims  
13 are not “health benefits claims.” The Court also observes that, under § 1.10 of the Federal  
14 BCBSA contract, BCBSA must notify OPM within ten days if BCBSA becomes aware of the  
15 occurrence of a “Significant Event.” Fed. BCBSA Contract § 1.10(a). BCBSA and OPM must  
16 then work together to address the Significant Event. *Id.* § 1.10(b). The Federal BCBSA contract  
17 provides a list of 13 Significant Events. None of these Significant Events mention or relate to data  
18 security. Thus, under a plausible reading of this section, BCBSA might not even have been  
19 required to notify OPM of the Anthem data breach, and OPM would not necessarily have needed  
20 to take corrective action.

21 Taken together, the extensive administrative review process and the “Significant Event”  
22 provisions appear to delineate some of the contours of OPM’s authority. On a conceptual level, it  
23 might be helpful to consider OPM, the BCBSA, and Plaintiffs as being three separate but related  
24 actors. Here, OPM contracts with BCBSA, and Plaintiffs serve as an intended third party  
25 beneficiary. The instant contract, however, is unique in two ways. First, if Plaintiffs have a health  
26 benefits claim, Plaintiffs must go to OPM first. Second, if BCBSA experiences a Significant

1 Event, such as the “[d]isposal of major assets” or a loss of more than 15% of its membership, *id.* §  
2 1.10(b)(1) & § 1.10(b)(2), then BCBSA must go to OPM. The contract is silent as to all  
3 remaining matters, including matters of data security. Given this contractual structure, the Court  
4 finds that it would be equally (if not more) plausible to find that general contract law principles  
5 govern matters where the Federal BCBSA contract is silent, rather than the Non-Anthem  
6 Defendants’ exclusive enforcement theory.

7 The Court also finds unavailing the Non-Anthem Defendants’ reliance on *Miscellaneous*  
8 *Service Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981), and *Bridges v. Blue Cross*  
9 *and Blue Shield Association*, 935 F. Supp. 37 (D.D.C. 1996). *Miscellaneous Service Workers*  
10 addressed OPM’s exclusive enforcement authority under the Service Contract Act, an altogether  
11 different act than FEHBA. 661 F.2d at 777. Given the complicated interplay here between  
12 specific contractual provisions, specific federal laws, and specific federal regulations, the Court  
13 declines to rely on a case interpreting a different contractual provision in the context of a different  
14 federal law.

15 *Bridges* appears to be more on point. In *Bridges*, plaintiffs “allege[d] that BCBSA’s  
16 licensee entities, with BCBSA’s knowledge and approval, secretly negotiated discounts on the  
17 cost of services of member facilities and physicians, and then failed to apply those discounts to the  
18 enrollees’ coinsurance payments.” 935 F. Supp. at 39 (internal quotation marks omitted).  
19 Plaintiffs thereafter brought suit against BCBSA and OPM, with plaintiffs asserting violations of  
20 breach of contract and the Racketeer Influenced and Corrupt Organizations Act (“RICO”). *Id.* at  
21 40. Plaintiffs did not bring a third party beneficiary claim. With respect to plaintiffs’ breach of  
22 contract claim, the *Bridges* court observed that plaintiffs had “failed to exhaust . . . [the]  
23 administrative remedies under . . . FEHBA before filing suit against the carrier.” *Id.* at 44. With  
24 respect to plaintiffs’ RICO claims, the *Bridges* court stated that “nothing in . . . FEHBA, nor in its  
25 implementing language or legislative history, indicates that the legislature had any intent to allow  
26 a civil RICO action to spring out of a violation of . . . FEHBA.” *Id.* at 42. The district court also

1 noted that plaintiffs had failed to exhaust plaintiffs' breach of contract and RICO claims through  
2 the administrative review process. Finally, the district court observed that plaintiffs had failed "to  
3 allege injury resulting from BCBSA's investment of racketeering income into its business," a  
4 substantive pleading requirement specific to RICO. *Id.* at 43; *see also* 18 U.S.C. § 1962(a)  
5 (specifying RICO pleading requirements).

6 The Court finds *Bridges* distinguishable for three reasons. First, the *Bridges* court did not  
7 rely only on an "exclusive enforcement" theory. Instead, the district court determined that  
8 plaintiffs had also failed to sufficiently allege a RICO violation as a substantive matter.

9 Second, the Court believes the RICO claim in *Bridges* is at least somewhat analogous to a  
10 "health benefits claim." Indeed, the *only* way that plaintiffs in *Bridges* could have been  
11 overcharged for a coinsurance payment is if plaintiffs actually decided to exercise their health  
12 benefits. In the Statement of Benefits, for instance, the "Benefits Description" section provides a  
13 statement of what benefits are covered, followed by a discussion of the coinsurance payment that  
14 the insured must incur in exchange for a particular benefit. *See, e.g.*, 2014 Statement of Benefits  
15 at 37–118. On the other hand, the Statement of Benefits includes but a single sentence on data  
16 privacy, and a class member's data privacy could have been compromised even if that class  
17 member did not decide to exercise any health benefits.

18 Similarly, under the "Disputed Claims Process" section of the Statement of Benefits, an  
19 insured can readily dispute a coinsurance payment by including "copies of documents that support  
20 your claim, such as . . . bills . . . and explanation of benefits (EOB) forms." *Id.* at 130. There is no  
21 clear parallel provision for recovery for a personal data breach.

22 Third, and finally, it is not clear that the Court should follow *Bridges*. *Bridges* was  
23 decided by the D.C. District Court in 1996. Since that time, more recent federal court precedent  
24 has appeared to take a more narrow understanding of OPM's enforcement authority. As this Court  
25 has noted, for instance, the Ninth Circuit allowed plaintiff in *Roach*, who was covered by a  
26 FEHBA plan, to proceed with a state medical malpractice claim against her health insurance

1 carrier after finding that such a claim fell outside of OPM’s purview. 298 F.3d at 850–51. In  
 2 reaching this decision, the Ninth Circuit relied upon supporting decisions from the Third, Fifth,  
 3 and Tenth Circuits. *Id.*

4 To conclude, neither the structure of the Federal BCBSA contract nor the case law cited by  
 5 the Non-Anthem Defendants compels the Court to find, as a matter of law, that OPM has  
 6 exclusive enforcement authority over the Anthem data breach as it applies to the Federal  
 7 Employee Plaintiffs. Instead, under general principles of contract law and after a careful review of  
 8 the interaction between relevant laws, regulations, and contractual provisions, the Court finds that  
 9 Plaintiffs may proceed with their third party beneficiary claim. The Non-Anthem Defendants’  
 10 motion to dismiss Plaintiffs’ third party beneficiary claim is therefore DENIED.

### 11 **3. Preemption of State Law Claims**

12 In addition to arguments concerning OPM’s enforcement of the Federal BCBSA contract,  
 13 the Non-Anthem Defendants contend that the Federal Employee Plaintiffs’ state law claims are  
 14 preempted. This contention applies to two Plaintiffs in particular: Stella Williams (“Williams”), a  
 15 resident of Indiana, and Alvin Lawson (“Lawson”), a resident of California.<sup>12</sup>

16 The Court need not address whether Williams’ Indiana state law claims are preempted.  
 17 Only one of the ten causes of action selected by the parties is based on Indiana law—the Indiana  
 18 negligence claim. As the Court has already determined, Plaintiffs can not proceed with this claim  
 19 as a matter of law.

20 With respect to Lawson, two of the ten causes of action selected by the parties are based on  
 21 California law—the California breach of contract claim and the California UCL claim. The Court  
 22 finds Lawson’s California breach of contract claim preempted, for two reasons. First, Plaintiffs do  
 23 not contest that this claim is preempted. *See, e.g.*, Non-Anthem Opp’n at 15 (contesting Lawson’s  
 24

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25 <sup>12</sup> The remaining Federal Employee Plaintiffs are residents of Connecticut and Nevada. The  
 26 instant motions to dismiss do not address claims brought under Connecticut and Nevada law.  
 27 Non-Anthem Opp’n at 15 n.10; Non-Anthem Mot. at 19.

1 California UCL claim and Williams’ Indiana negligence claim, but making no mention of  
 2 Lawson’s California breach of contract claim). Second, the Federal BCBSA contract expressly  
 3 provides that “United States law will apply to resolve any claim of breach of this contract.” Fed.  
 4 BCBSA Contract § 5.62; CAC ¶ 332 (“Under the . . . Federal BCBSA Contract, federal law  
 5 applies to breach of contract claims.”).

6 On the other hand, whether or not Lawson’s UCL claim is preempted is a more difficult  
 7 question. The U.S. Supreme Court “has identified three types of preemption: express preemption,  
 8 field preemption, and implied conflict preemption.” *Deweese v. Nat’l R.R. Passenger Corp.*  
 9 (*Amtrak*), 590 F.3d 239, 245 (3d Cir. 2009). Express preemption “exists when Congress includes  
 10 in a statute explicit language stating an intent to preempt conflicting state law.” *Id.* Field  
 11 preemption “occurs when a state law impinges upon a field reserved for federal regulation.” *Id.*  
 12 (internal quotation marks omitted). Finally, implied conflict preemption exists “when compliance  
 13 with both federal and state regulations is a physical impossibility, or when a state law stands as an  
 14 obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”  
 15 *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1141 (9th Cir. 2015) (internal quotation  
 16 marks omitted). Here, the Non-Anthem Defendants contend that Lawson’s UCL claim is subject  
 17 to both express and implied conflict preemption.<sup>13</sup> The Court addresses these contentions in turn.

#### 18 **a. Express Preemption**

19 On the issue of express preemption, FEHBA contains the following express preemption  
 20 provision:

21 The terms of any contract under this chapter which *relate to* the nature, provision,  
 22 or extent of coverage or benefits (including payments with respect to benefits)  
 23 shall supersede and preempt any State or local law, or any regulation issued

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24 <sup>13</sup> The Non-Anthem Defendants also assert that “the Federal Employee Plaintiffs’ state law claims  
 25 are displaced by federal common law.” Non-Anthem Reply at 9. Consistent with the approach  
 26 taken by other federal courts, the Court addresses this displacement theory in its conflict  
 27 preemption discussion. See *Helfrich v. Blue Cross and Blue Shield Ass’n*, 804 F.3d 1090, 1097  
 (10th Cir. 2015) (“On the other hand, no conflict, no displacement.”).

1 thereunder, which relates to health insurance or plans.

2 5 U.S.C. § 8902(m)(1) (emphasis added). Because this preemption provision mirrors ERISA’s  
3 express preemption provision, *see* ERISA § 514, 29 U.S.C. § 1144(a), the Ninth Circuit has  
4 referred to U.S. Supreme Court decisions interpreting ERISA’s “relate to” requirement in  
5 examining cases brought under FEHBA. *Botsford v. Blue Cross and Blue Shield of Mont., Inc.*,  
6 314 F.3d 390, 393–94 (9th Cir. 2002). Specifically, the Ninth Circuit has stated that FEHBA’s  
7 “relate to” requirement must, as with ERISA’s “relate to” requirement, not “be taken too literally.”  
8 *Roach*, 298 F.3d at 849. “If relate to were taken to extend to the furthest stretch of its  
9 indeterminacy, then for all practical purposes pre-emption would never run its course, for really,  
10 universally, relations stop nowhere.” *Id.* at 849–50 (internal quotation marks omitted).

11 With this principle in mind, the Ninth Circuit has “held that FEHBA preempts disputes  
12 over a “‘denial of benefits’ and ‘the nature or extent of coverage for benefits.’” *Botsford*, 314 F.3d  
13 at 395. Indeed, “[t]he application of different state standards would disrupt the nationally uniform  
14 administration of *benefits* which FEHBA provides.” *Id.* (emphasis added). To further underscore  
15 this point, the Ninth Circuit has characterized “[a] dispute over benefits” as “precisely the kind of  
16 dispute that FEHBA preempts.” *Id.* Thus, in *Botsford*, the Ninth Circuit determined that a dispute  
17 over the amount of reimbursement of a particular claim constituted a dispute over benefits.  
18 Accordingly, plaintiff in *Botsford* could not pursue such a claim under Montana’s Unfair Trade  
19 Practices Act.

20 In like manner, the Tenth Circuit recently observed that a number of federal courts have  
21 concluded that “FEHBA preempts state laws limiting subrogation and reimbursement.” *Helfrich*,  
22 804 F.3d at 1107. Such state laws directly implicate how an insured’s benefits are processed and  
23 how much an insured can receive after filing a health benefits claim. Thus, consistent with the  
24 decisions of these other federal courts, the *Helfrich* court determined that FEHBA preempted a  
25 “Kansas insurance regulation prohibiting subrogation and reimbursement clauses in insurance  
26 contracts.” *Id.* at 1092.



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1 In contrast, as noted above, the Ninth Circuit has determined that state medical malpractice  
2 claims are not necessarily preempted by FEHBA. *Roach*, 298 F.3d at 850. In reaching this  
3 decision, the Ninth Circuit relied upon supporting case law from a number of other federal circuit  
4 courts, *see id.* (citing decisions from the Third, Fifth, and Tenth Circuits), and determined that  
5 state medical malpractice laws did not jeopardize “the federal interest in uniformity of FEHBA  
6 plan interpretation,” *id.*

7 After carefully reviewing these decisions, the Court concludes that Lawson’s UCL claim  
8 does not represent a claim for benefits. The understanding of “benefits,” as elucidated in *Roach*,  
9 *Helfrich*, and *Botsford*, is that benefits pertain to an individual’s medical coverage and payments  
10 related to such medical coverage. Benefits do not, however, pertain to claims related to data  
11 privacy. Accordingly, the Court finds that Lawson’s UCL claim is not expressly preempted under  
12 FEHBA’s express preemption provision, 5 U.S.C. § 8902(m)(1).

13 **b. Conflict Preemption**

14 Turning to the issue of conflict preemption, the Court notes that conflict preemption  
15 applies when compliance with federal and state law is physically impossible (hereinafter referred  
16 to as “impossibility preemption”) or where the state law is an obstacle to the purposes and  
17 objectives of the federal law (hereinafter referred to as “obstacle preemption”). “Courts will find  
18 impossibility preemption where it is impossible for a private party to comply with both state and  
19 federal requirements.” *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 584 (6th Cir. 2013) (internal  
20 quotation marks omitted). Lawson’s UCL claim is not subject to impossibility preemption. It  
21 would not be “impossible” for BCBSA to comply with both federal and state law. All BCBSA  
22 must do is take affirmative and reasonable measures to protect Plaintiffs’ PII. According to  
23 Plaintiffs, Defendants’ collective failure to take such steps resulted in the approximately 120  
24 individual complaints filed against them.

25 Lawson’s UCL claim is also not subject to obstacle preemption. The Non-Anthem  
26 Defendants’ primary argument in this regard is that “the state law claims interfere with OPM’s

1 exclusive authority to police FEHBA carriers.” Non-Anthem Reply at 9. According to the Non-  
2 Anthem Defendants, the Federal BCBSA contract implicates uniquely federal interests, which thus  
3 preempts parties from asserting state law claims. *Id.* at 10. These arguments largely repeat the  
4 Non-Anthem Defendants’ contentions concerning Plaintiffs’ third party beneficiary claims. As  
5 with those claims, the Court finds that OPM’s exclusive authority does not apply to claims over an  
6 individual’s data privacy.

7 A review of the Congressional purpose behind FEHBA lends additional support to this  
8 finding. A report from the House of Representatives, for instance, “expressed fear that the  
9 imposition of state-law requirements on FEHBA contracts would result in . . . a lack of uniformity  
10 of *benefits* for enrollees in the same plan.” *Helfrich*, 804 F.3d at 1106 (quoting H.R. Rep. No. 95-  
11 282 at 4 (1977)) (alteration omitted) (emphasis added). Additional reports from the House and  
12 Senate further confirm the importance of FEHBA in the administration of benefits and medical  
13 coverage. *See id.* at 1106–07 (citing additional reports). In other words, health benefits—rather  
14 than promises concerning data privacy—represent the unique federal interests protected by  
15 FEHBA. Accordingly, because data privacy is not a “benefit” under FEHBA and is not, therefore,  
16 a uniquely federal interest, Lawson’s UCL claim is not obstacle preempted.

17 In sum, the Court need not address whether Williams’ Indiana negligence claim is  
18 preempted because Plaintiffs can not proceed with this claim as a matter of law. In addition, the  
19 Court finds that, as Plaintiffs concede, Lawson’s California breach of contract claim is preempted.  
20 Lawson’s California breach of contract claim is therefore DISMISSED with prejudice. Finally,  
21 the Court finds that Lawson’s UCL claim is not preempted. Therefore, the Non-Anthem  
22 Defendants’ motion to dismiss Lawson’s UCL claim is DENIED.

#### 23 **IV. CONCLUSION**

24 To conclude:

- 25 1. The Court GRANTS with leave to amend the Non-Anthem Defendants’ motion to  
26 dismiss Blue Cross and Blue Shield of Alabama; Blue Cross and Blue Shield of

1 Arizona, Inc.; CareFirst of Maryland, Inc.; Blue Cross and Blue Shield of Michigan;  
2 Blue Cross and Blue Shield of North Carolina, Inc.; Highmark Health Services;  
3 Highmark West Virginia, Inc.; BlueCross BlueShield of Tennessee, Inc.; Blue Cross  
4 and Blue Shield of Vermont; and Blue Cross and Blue Shield of Illinois, with respect  
5 to the selected claims at issue in the instant motions to dismiss.

6 2. The Court GRANTS with leave to amend the Non-Anthem Defendants' motion to  
7 dismiss Blue Cross and Blue Shield of Arizona, Inc.; BlueCross BlueShield of  
8 Tennessee, Inc.; and Highmark West Virginia, Inc. from this action in its entirety.

9 3. The Court GRANTS with leave to amend the Non-Anthem Defendants' motion to  
10 dismiss all Non-Anthem Defendants against whom no specific factual allegations were  
11 made with respect to Plaintiffs' New Jersey breach of contract, New York unjust  
12 enrichment, New York General Business Law § 349, and California Unfair  
13 Competition Law claims.

14 4. The Court GRANTS with leave to amend Defendants' motions to dismiss Plaintiffs'  
15 California breach of contract, New Jersey breach of contract, New York unjust  
16 enrichment, and Georgia Information and Privacy Protection Act claims. In addition,  
17 the Court GRANTS with leave to amend Defendants' motion to dismiss Plaintiffs'  
18 fraud claim under California's Unfair Competition Law.

19 5. The Court GRANTS with prejudice Defendants' motions to dismiss Plaintiffs' Indiana  
20 negligence, Kentucky Consumer Protection Act, Kentucky Data Breach Act, and  
21 Plaintiff Lawson's California breach of contract claim.

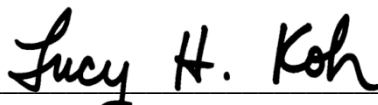
22 6. The Anthem and Non-Anthem Defendants' motions to dismiss are otherwise DENIED.

23 Should Plaintiffs elect to file an amended complaint curing the deficiencies identified  
24 herein, Plaintiffs shall do so within 30 days of the date of this Order. Failure to meet the 30 day  
25 deadline to file an amended complaint or failure to cure the deficiencies identified in this Order  
26 will result in a dismissal with prejudice. Plaintiffs may not add new causes of actions or parties

1 without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure  
2 15.

3 **IT IS SO ORDERED.**

4 Dated: February 14, 2016



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6 LUCY H. KOH  
United States District Judge

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