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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

|                                      |                         |
|--------------------------------------|-------------------------|
| JOEL RUIZ, on behalf of himself and) | Case No. 07-5739 SC     |
| all others similarly situated, )     |                         |
|                                      | ORDER GRANTING IN       |
| Plaintiffs, )                        | PART AND DENYING IN     |
|                                      | PART DEFENDANT'S        |
| v. )                                 | MOTION FOR JUDGMENT     |
|                                      | <u>ON THE PLEADINGS</u> |
| GAP, INC., and DOES 1-9 inclusive, ) |                         |
|                                      |                         |
| Defendants. )                        |                         |
| _____ )                              |                         |

**I. INTRODUCTION**

This matter comes before the Court on Defendant Gap, Inc.'s Motion for Judgment on the Pleadings ("Motion").<sup>1</sup> Docket No. 8. Plaintiff Joel Ruiz filed an Opposition and Gap submitted a Reply. Docket Nos. 18, 23. For the reasons stated herein, the Defendant's Motion is GRANTED IN PART and DENIED IN PART. All dismissals are with prejudice as none of the dismissed claims is curable by amendment.

Various other motions have also been submitted, including a motion to strike Ruiz's class allegations, Gap's request for judicial notice, and a motion to dismiss Gap's counterclaim. The motion to strike the class allegations merely reargues Gap's

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<sup>1</sup> Gap's Motion also devotes itself to demonstrating that Ruiz has failed to state a claim. Thus, the Motion is treated as both a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim. Moran v. Peralta Comm. College Dist., 825 F. Supp. 891, 893 (N.D. Cal. 1993).

1 standing arguments and makes premature arguments regarding class  
2 certification. Neither argument is persuasive or appropriate and  
3 the motion is DENIED.

4 Gap's request for judicial notice is also DENIED. Federal  
5 Rule of Evidence 201 permits courts to take judicial notice of  
6 facts that are "not subject to reasonable dispute." Gap seeks  
7 judicial notice for two sets of materials: a study from an  
8 internet site on identity theft, and a list, also from an internet  
9 site, of data breach incidents reported in California in the last  
10 two years. Neither of these documents contain information which  
11 is "generally known within the territorial jurisdiction of the  
12 trial court" or "capable of accurate and ready determination."  
13 Fed. R. Evid. 201. In short, these materials are not remotely  
14 akin to the type of facts which may be appropriately judicially  
15 noticed.

16 Finally, Ruiz has moved to dismiss Gap's counterclaim. Gap's  
17 counterclaim seeks a declaratory judgment "that its actions were  
18 in compliance with federal and state laws, and that Mr. Ruiz and  
19 the putative class he purports to represent are not entitled to  
20 any relief." Counterclaim, Docket No. 3, ¶ 15. Gap's  
21 counterclaim raises no new issues of law or fact and is completely  
22 superfluous to Ruiz's lawsuit. Ruiz's motion to dismiss the  
23 counterclaim is GRANTED.

24  
25 **II. BACKGROUND**

26 The following facts are taken from Plaintiff's Complaint,  
27 unless otherwise noted. Ruiz, a citizen of Texas, applied online  
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1 for a position with one of Gap's stores in late 2006. Gap is a  
2 clothing store based in San Francisco. As part of the  
3 application, Ruiz was required to provide personal information,  
4 including his social security number. On September 28, 2007, Gap  
5 disclosed that two laptop computers were stolen from a vendor with  
6 whom Gap had contracted for recruiting purposes. The laptops  
7 contained the personal information, including social security  
8 numbers, of approximately 800,000 Gap job applicants. The  
9 information was not encrypted and was therefore easily accessible.  
10 In response to these thefts, Gap notified the applicants whose  
11 personal information was on the computers and offered to provide  
12 these applicants, including Plaintiff, with twelve months of  
13 credit monitoring and fraud assistance without charge.<sup>2</sup> Gap also  
14 is providing \$50,000 worth of identity theft insurance. Opp'n at  
15 3.

16 In reaction to the theft of the laptops, Ruiz filed the  
17 present class action, asserting the following causes of action:  
18 (1) negligence; (2) bailment; (3) violation of California Business  
19 and Professions Code § 17200 et seq.; (4) violation of the  
20 California Constitutional right to privacy; and (5) violation of  
21 California Civil Code § 1798.85.<sup>3</sup> Plaintiff seeks damages and  
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23 <sup>2</sup> As a condition of receiving the credit monitoring, the  
24 applicants were apparently required to waive their right to a jury  
25 trial should the credit monitoring service prove inadequate.  
26 Compl., Docket No. 1, ¶ 38.

27 <sup>3</sup> California Civil Code § 1798.85 prohibits a company from  
28 "[r]equiring an individual to use his or her social security number  
to access an Internet Web site, unless a password or unique  
personal identification number or other authentication device is  
also required to access the Internet Web site."

1 injunctive relief.

2  
3 **III. LEGAL STANDARD**

4 A Federal Rule of Civil Procedure 12(c) motion for "judgment  
5 on the pleadings is properly granted when, taking all the  
6 allegations in the non-moving party's pleadings as true, the  
7 moving party is entitled to judgment as a matter of law." Fajardo  
8 v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999).

9 A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss  
10 tests the sufficiency of the complaint. Dismissal pursuant to  
11 Rule 12(b)(6) is appropriate if the plaintiff is unable to  
12 articulate "enough facts to state a claim to relief that is  
13 plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S.  
14 Ct. 1955, 1974 (2007). For purposes of such a motion, the  
15 complaint is construed in the light most favorable to the  
16 plaintiff and all properly pleaded factual allegations are taken  
17 as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Everest  
18 & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th  
19 Cir. 1994). All reasonable inferences are to be drawn in favor of  
20 the plaintiff. Id. Unreasonable inferences or conclusory legal  
21 allegations cast in the form of factual allegations, however, are  
22 insufficient to defeat a motion to dismiss. W. Mining Council v.  
23 Watt, 643 F.2d 618, 624 (9th Cir. 1981).

24  
25 **IV. DISCUSSION**

26 **A. Standing**

27 The only harm Ruiz alleges in his Complaint is that, as a  
28

1 result of the laptop thefts, he is now "at an increased risk of  
2 identity theft." Compl. ¶¶ 56, 63. Ruiz does not allege that his  
3 identity has been stolen. Id. "It goes without saying that those  
4 who seek to invoke the jurisdiction of the federal courts must  
5 satisfy the threshold requirement imposed by Article III of the  
6 Constitution by alleging an actual case or controversy." City of  
7 Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). "[T]he core  
8 component of standing is an essential and unchanging part of the  
9 case-or-controversy requirement of Article III." Lujan v.  
10 Defenders of Wildlife, 504 U.S. 555, 560 (1992). "[T]he  
11 irreducible constitutional minimum of standing contains three  
12 elements." Id. "First, the plaintiff must have suffered an  
13 'injury in fact' - an invasion of a legally protected interest  
14 which is (a) concrete and particularized . . . and (b) actual or  
15 imminent, not conjectural or hypothetical." Id. (internal  
16 citations and quotation marks omitted). "Second, there must be a  
17 causal connection between the injury and the conduct complained of  
18 . . . ." Id. "Third, it must be likely, as opposed to merely  
19 speculative, that the injury will be redressed by a favorable  
20 decision." Id. (internal quotation marks omitted).

21 The dispute in the present case centers on the first element.  
22 The Ninth Circuit has addressed the issue of when the risk of a  
23 future harm may give rise to an injury in fact. In Hartman v.  
24 Summers, 120 F.3d 157, 160 (9th Cir. 1997), the court stated that  
25 to "confer standing, the threat of future injury must be credible  
26 rather than remote or hypothetical." Id. Thus, a plaintiff "must  
27 show a very significant possibility that the future harm will

1 ensue." Id.

2 The injury that underlies all of Plaintiff's claims - the  
3 fact that Plaintiff faces an increased risk that his identity may  
4 be stolen at some time in the future - seems, at first blush,  
5 conjectural or hypothetical, rather than actual or imminent.  
6 Nonetheless, the Court must presume "that general allegations  
7 embrace those specific facts that are necessary to support the  
8 claim." Lujan, 504 U.S. at 561 (internal quotation marks  
9 omitted). Although Ruiz has asserted that the risk of identity  
10 theft he and other putative class members face is now "increased,"  
11 there is nothing else from which the Court can determine whether  
12 this risk is actual, imminent, credible, or any of the other  
13 adjectives courts have used in defining what types of risk of  
14 future harm may confer standing.

15 At this stage of the proceedings, the Court cannot conclude  
16 that Ruiz lacks standing. Nonetheless, Ruiz must be mindful that  
17 the elements of standing "are not mere pleading requirements but  
18 rather an indispensable part of the plaintiff's case . . . ."  
19 Lujan, 504 U.S. at 561. Should it become apparent that Ruiz's  
20 alleged injury is in fact too speculative or hypothetical, the  
21 Court will conclude, as it must, that Ruiz lacks standing.

22 **B. Ruiz's Claims**

23 **1. Negligence**

24 "An action in negligence requires a showing that the  
25 defendant owed the plaintiff a legal duty, that the defendant  
26 breached the duty, and that the breach was a proximate or legal  
27 cause of injuries suffered by the plaintiff." Ann M. v. Pac.

1 Plaza Shopping Ctr., 6 Cal. 4th 666, 673 (1993). The only element  
2 at issue is whether Ruiz has suffered an injury. As discussed in  
3 the discussion on standing, the Court finds that Ruiz has alleged  
4 an injury in fact. His negligence claim, therefore, survives  
5 Gap's Motion. The Court notes, however, that it is far from clear  
6 what damages, if any, Ruiz will be able to recover if he  
7 eventually prevails on his negligence claim.

## 8 2. Bailment

9 Courts have suggested various, mostly similar definitions of  
10 bailment. The Ninth Circuit, relying on California law, has  
11 defined bailment as "the deposit of personal property with  
12 another, usually for a particular purpose." United States v.  
13 Alcaraz-Garcia, 79 F.3d 769, 774 n.11 (9th Cir. 1996); see also  
14 Whitcombe v. Stevedoring Servs. of Am., 2 F.3d 312, 317 (9th Cir.  
15 1993) (stating "California law generally defines a bailment as the  
16 delivery of a thing in trust for a purpose upon an implied or  
17 express contract") (internal citation omitted); Earhart v. Callan,  
18 221 F.2d 160, 163 (9th Cir. 1955) (defining a bailment as "the  
19 relationship arising when personal property is delivered to  
20 another for some particular purpose upon an express or implied  
21 contract to redeliver the goods when the purpose has been  
22 fulfilled or to otherwise deal with the goods according to the  
23 bailor's directions").

24 Ruiz's claim for bailment fails for several reasons. First,  
25 as Ruiz freely admits, the laptops were stolen from Gap. Ruiz  
26 does not allege that Gap was in any way involved with this theft.  
27 Rather, he alleges that Gap failed to maintain adequate security  
28

1 procedures to protect against this type of theft. Compl. ¶ 8.  
2 Thus, there are no allegations of conversion or any other action  
3 by Gap that would indicate that Gap sought to unlawfully retain  
4 possession of Ruiz's social security number.

5 Second, the Court is hard pressed to conceive of how Ruiz's  
6 social security number could be construed to be personal property  
7 so that Ruiz somehow "delivered" this property to Gap and then  
8 expected it be returned. If such a legal theory for bailment  
9 exists, Ruiz has failed to present it to the Court in his  
10 Opposition papers and the Court, on its own, has found nothing to  
11 support it.

12 Finally, because the only allegation against Gap regarding  
13 the theft of the laptops was that Gap was negligent, Ruiz's claim  
14 for bailment is duplicative of his claim for negligence. Damages  
15 under bailment are typically related to the reasonable value of  
16 the property that was not returned. See Weisberg v. Loughridge,  
17 253 Cal. App. 2d 416, 428 (Ct. App. 1967) (stating "[o]ne who is  
18 in possession of personal property as a bailee and thereafter  
19 converts it by excluding therefrom the person rightfully entitled  
20 to possession without the consent of the owner is liable for its  
21 reasonable value"). Any damages Ruiz might be able to recover  
22 under this unorthodox claim for bailment would be recoverable  
23 under his negligence claim. For the reasons stated above, the  
24 Court GRANTS Gap's Motion for Judgment on the Pleadings for Ruiz's  
25 claim for bailment.

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1                   **3.    Violations of California Business and Professions**  
2                   **Code § 17200 et seq.**

3                   "California's unfair competition statute prohibits any unfair  
4 competition, which means 'any unlawful, unfair or fraudulent  
5 business act or practice.'" In re Pomona Valley Med. Group, 476  
6 F.3d 665, 674 (9th Cir. 2007) (citing Cal. Bus. & Prof. Code §  
7 17200, et seq.). Ruiz alleges that Gap's conduct was unfair and  
8 unlawful under § 17200. "[T]o pursue either an individual or a  
9 representative claim under the California unfair competition law,  
10 Business and Professions Code section 17200 et seq.," a plaintiff  
11 "must have suffered an 'injury in fact' and 'lost money or  
12 property as a result of such unfair competition.'" Hall v. Time  
13 Inc., 158 Cal. App. 4th 847, 849 (Ct. App. 2008). Ruiz has lost  
14 neither money nor property. His attempt to allege that the theft  
15 of the laptops somehow constitutes a loss of property because his  
16 personal information was contained on the laptop is unavailing.  
17 Nor has Ruiz presented any authority to support the contention  
18 that unauthorized release of personal information constitutes a  
19 loss of property. Without any such authority, the Court is  
20 constrained to find that Ruiz has not alleged any loss of property  
21 and therefore has not stated a valid claim under § 17200.

22                   Gap's Motion is GRANTED with respect to Ruiz's § 17200 claim  
23 for unfair business practices.

24                   **4.    Violation of the California Constitutional Right to**  
25                   **Privacy**

26                   A "plaintiff alleging an invasion of privacy in violation of  
27 the state constitutional right to privacy must establish each of  
28

1 the following: (1) a legally protected privacy interest; (2) a  
2 reasonable expectation of privacy, and (3) conduct by defendant  
3 constituting a serious invasion of privacy." Hill v. Nat'l  
4 Collegiate Athletic Assn., 7 Cal. 4th 1, 26 (1994). Only the  
5 third factor is at issue in this case. "Actionable invasions of  
6 privacy must be sufficiently serious in their nature, scope, and  
7 actual or potential impact to constitute an egregious breach of  
8 the social norms underlying the privacy right." Id. at 37. The  
9 factual allegations in Ruiz's Complaint do not approach this  
10 standard. The Court has found that Ruiz has standing to pursue  
11 several of his claims because of the alleged increased risk of  
12 identity theft. This increased risk and the manner in which it  
13 was allegedly created, however, do not constitute an egregious  
14 breach and therefore are not violations of the California  
15 Constitutional right to privacy. Gap's Motion is GRANTED with  
16 respect to this claim.

17 **5. Violation of California Civil Code § 1798.85**

18 California Civil Code § 1798.85 states, in part, "a person or  
19 entity may not . . . [r]equire an individual to use his or her  
20 social security number to access an Internet Web site, unless a  
21 password or unique personal identification number or other  
22 authentication device is also required to access the Internet Web  
23 site." Ruiz has alleged that he was required to enter his social  
24 security number, without a password or other authentication  
25 device, in order to enter and use Gap's online application  
26  
27  
28

1 process.<sup>4</sup>

2 Gap, without any authority, asserts that § 1798.85 does not  
3 create a private right of action. As Gap has filed the motion for  
4 judgment on the pleadings, it is Gap's burden to demonstrate that  
5 it is entitled to judgment as a matter of law. The Court declines  
6 to shoulder Gap's burden at this stage and embark on an expedition  
7 in search of authority supporting Gap's contention. Gap's motion  
8 for judgment on the pleadings of this claim is DENIED.

9

10 **V. CONCLUSION**

11 For the reasons stated above, the Court GRANTS IN PART AND  
12 DENIES IN PART Gap's Motion for Judgment on the Pleadings. The  
13 Motion is GRANTED with respect to Ruiz's second, third, and fourth  
14 claims and DENIED with respect to Ruiz's first and fifth claims.  
15 Gap's Request for Judicial Notice is DENIED. Gap's Motion to  
16 Strike Class Allegations is DENIED. Ruiz's Motion to Dismiss  
17 Gap's Counterclaim is GRANTED.

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19

20 IT IS SO ORDERED.

21

22 Dated: March 24, 2008



23

UNITED STATES DISTRICT JUDGE

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25 <sup>4</sup> Although the Court presumes "that general allegations  
26 embrace those specific facts that are necessary to support the  
27 claim," Lujan, 504 U.S. at 561 (internal quotation marks omitted),  
if further evidence reveals that Ruiz's social security number was  
28 necessary only to submit his application, and was not required to  
access any website, then this claim will also fail.

28