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Heartland Payment Systems, Inc. (“Heartland”) respectfully submits this reply memorandum in further support of its motion to dismiss the Master Complaint in its entirety.

Plaintiffs’ Opposition does not cure the Master Complaint’s inherent deficiencies:

- In regard to *Iqbal*, Plaintiffs’ core allegations either are legal conclusions recast as “facts” or suggest innocent conduct just as plausibly as unlawful conduct. *See Point I infra*.
- Plaintiffs’ negligence claim is just as deficient under New Jersey law as it is under Texas law, making any choice-of-law issue irrelevant. *See Point II infra*.
- The misrepresentation claims fail for a myriad of reasons, including Plaintiffs’ failure to plead actionable false or misleading statements, justifiable reliance, or that Plaintiffs were the intended recipients of the statements in question. *See Point III infra*.
- Plaintiffs’ consumer protection claims are legally deficient regardless of whether New Jersey or their home states provide the governing consumer protection statute, making that choice-of-law issue irrelevant as well. *See Point IV infra*.
- And because Plaintiffs are neither donee nor creditor beneficiaries of Heartland’s contracts with third parties, and in any event are not intended beneficiaries of those contracts, Plaintiffs’ contract claims fail as well. *See Point V infra*.

In short, the Master Complaint should be dismissed.

ARGUMENT

I. THE MASTER COMPLAINT FAILS TO SATISFY *IQBAL*

Under *Iqbal*, “recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” and plaintiffs cannot survive a motion to dismiss merely by claiming that the legal elements of the claim exist. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Plaintiffs’ allegations also must establish a plausible claim of entitlement to relief based on “more than the mere possibility of misconduct.” *Id.* at 1950. The Master Complaint fails to meet these standards because Plaintiffs’ supporting allegations either are legal conclusions improperly recast as “facts” or point just as plausibly to Heartland’s having acted properly as to its having done anything inappropriate.

Plaintiffs center their claims on the legal conclusion that Heartland “failed to take adequate measures to prevent the breach from occurring.” Opp. at 8. Plaintiffs offer five

purported “factual allegations” to support this conclusion, *see id.* at 9, which fall into two categories: (1) statements made or actions taken by the card brands regarding Heartland after the Intrusion; and (2) statements made by Heartland *after* the Intrusion about security measures it was taking. Neither category, however, meets Plaintiffs’ burden under *Iqbal*.

Under *Iqbal*, a review of the allegations in the first category shows that they consist of no more than legal conclusions. For example, Visa’s delisting of Heartland months after the Intrusion is nothing more than a recitation by another party adverse to Heartland of the same legal conclusion that Plaintiffs advance here: namely, that Heartland failed to take the legally required actions to secure its system. Plaintiffs must plead actual *facts* regarding the security measures that Heartland was required but failed to take. Plaintiffs cannot substitute, in lieu of such facts, an interested third party’s own legal conclusion. If taken as true, such a third-party conclusion merely recites a legal element of one or more of Plaintiffs’ claims. To the extent Plaintiffs rely upon events such as Visa’s delisting determination to satisfy *Iqbal*, it is incumbent on Plaintiffs to allege the *facts underlying the determination* that plausibly suggest Visa was correct in reaching its conclusion. No such facts appear, however, in the Master Complaint.

The allegations in the second category fail as well because they address the wrong time. That Heartland took steps *after* the Intrusion to improve its system’s security in no way shows that the system’s security was legally deficient prior to the Intrusion. Moreover, under Federal Rule of Evidence 407, these allegations would be entirely inadmissible if offered to prove such a legal deficiency, and therefore may not be considered in determining whether the Master Complaint satisfies *Iqbal* even if they were probative.¹

¹ See *Pugh v. Tribune Co.*, 521 F.3d 686, 695 (7th Cir. 2008) (finding that implementation of subsequent remedial measure could not go toward establishing control deficiency element of claim because such evidence was inadmissible under Rule 407); *Ortiz-Rosario v. Toys R Us Puerto Rico, Inc.*, 585 F. Supp. 2d 216, 226 (D.P.R. 2007) (“[I]f the evidence is not admissible at trial, it is also not admissible for pretrial motion purposes.”).

In short, because they have alleged only *that*, but not *how*, Heartland failed to lawfully secure its computer system against the Intrusion, Plaintiffs have failed to meet their *Iqbal* burden.² Indeed, Judge Thompson in the District of New Jersey reached this same conclusion in dismissing a securities fraud complaint against Heartland that incorporated many of the same allegations Plaintiffs rely on here. Upon evaluating those allegations, Judge Thompson concluded that they failed to meet not only the heightened pleading standards of the Private Securities Litigation Reform Act, but also Rule 8 in light of *Iqbal*. Judge Thompson's ruling emphasized that, viewing the complaint as a whole, "[i]t is equally plausible that Heartland did place a high emphasis on security but that the Company's security systems were nonetheless overcome." *In re Heartland Payment Sys., Inc. Sec. Litig.*, Civ. No. 3:09-cv-01043 (D.N.J. Dec. 7, 2009), slip. op. at 8 (Ex. A hereto). The Master Complaint fails for the same reason.

II. THE NEGLIGENCE COUNT MUST BE DISMISSED

Plaintiffs' negligence claim asks this federal court sitting in diversity to postulate a New Jersey common-law duty requiring handlers of payment card data to safeguard that data for the benefit of payment card issuers. Yet Plaintiffs point to no case either in New Jersey or anywhere else declaring that such a duty exists. Plaintiffs also fail to address *Merrick Bank*, which addressed this very question, found that no such duty exists, and dismissed negligence claims essentially identical to the claim asserted here. *See Cumis Ins. Soc'y, Inc. v. Merrick Bank Corp.*, No. 07-374, 2008 WL 4277877, at *11-12 (D. Ariz. Sept. 18, 2008).

Plaintiffs are in error to suggest that resolving the duty question requires discovery. *See Opp.* at 16-17. The issue presented here is not whether the defendant breached an existing common-law duty, but rather as a threshold matter, whether the common-law duty even exists.

² *See Coleman v. Sentinel Transp., LLC*, No. H-09-1510, 2009 WL 3834438, at *6 (S.D. Tex. Nov. 16, 2009) (Rosenthal, J.) (dismissing complaint premised on allegations of corporate relationship to wrongdoer because a

Whether a common-law duty exists is “a matter of law properly decided by the court,” *see Wang v. Allstate Ins. Co.*, 592 A.2d 527, 534 (N.J. 1991), and can be resolved, contrary to Plaintiffs’ contentions, prior to discovery.³ Indeed, in *Wang*, which Plaintiffs rely on to suggest Heartland’s motion is premature, *see Opp.* at 17, the court expressly noted the record was “sparse” and discovery had not been taken, yet proceeded to resolve the duty question. *See* 592 A.2d at 534.⁴

A. New Jersey Law Does Not Impose the Common-Law Duty That Is the Basis For Plaintiffs’ Negligence Claim

There is no New Jersey decision holding that a handler of payment card data owes payment card issuers a common-law duty of care to safeguard such data. Where, as here, there is an “absence of explicit guidance from the state courts” on an issue of state law, the Court’s task under *Erie* is to “attempt to predict state law, not to create or modify it.” *See Rx.Com Inc. v. Hartford Fire Ins. Co.*, 364 F. Supp. 2d 609, 613 (S.D. Tex. 2005) (Rosenthal, J.) (internal quotation omitted); *see also Mem’l Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GMBH*, 524 F.3d 676, 678 (5th Cir. 2008) (federal court is not empowered to create “a previously nonexistent state law cause of action”). Plaintiffs’ negligence claim can survive a motion to dismiss, then, only if this Court predicts that New Jersey would recognize the duty claimed by Plaintiffs.

New Jersey courts place “great stock on whether a party owes a duty to another before

“barebones assertion” of corporate relationship did not provide defendants with fair notice of plaintiff’s claims).

³ *See Piscitelli v. Classic Residence by Hyatt*, 973 A.2d 948, 966-68 (N.J. Super. Ct. App. Div. 2009) (affirming dismissal of complaint, reasoning employer owed no duty to verify employee’s identity so as to protect unrelated third party from identity theft); *Taylor ex rel. Taylor v. Cutler*, 703 A.2d 294, 300 (N.J. Super. Ct. App. Div. 1997) (affirming dismissal of complaint, holding negligent motorist owed no duty to child of injured party who was not conceived at time of accident), *aff’d*, 724 A.2d 793 (N.J. 1999).

⁴ Plaintiffs suggest that a choice-of-law dispute exists that precludes dismissal of their negligence claim, *Opp.* at 14, but there in fact is no such dispute, because Plaintiffs’ negligence claim fails under both Texas and New Jersey law on the duty element. *See Br.* at 10-14. Indeed, Plaintiffs effectively concede that the claim fails under Texas law, as they declined to address Texas law in their Opposition. Thus, while Heartland continues to believe that Texas law governs the negligence claim, the Court need not decide this issue in order to grant Heartland’s motion.

any considerations of liability may flow.” *See Brunson v. Affinity Fed. Credit Union*, 972 A.2d 1112, 1124-25 (N.J. 2009). Under New Jersey law, a defendant generally owes no duty of care to avoid causing purely economic injuries to third parties unless the parties in question had a “special relationship,” *see Wang*, 592 A.2d at 533-35 (absent any allegation of special relationship, there is no common-law duty on part of insurance carriers or agents to advise insureds regarding possible need for higher policy limits when renewing policy), or the defendant’s conduct either caused or at least threatened physical harm to persons or property of the particular plaintiffs in question or an “identifiable class” to which they belonged, *see People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985).⁵

Plaintiffs’ duty argument therefore rests entirely on New Jersey cases that had nothing to do with payment card data or other confidential information, but that instead involved a plaintiff who either suffered or was threatened with a physical injury to person or property (and not just a purely economic loss) or shared a special relationship with the defendant (or both). For example, in *Carvalho v. Toll Bros. & Developers*, 675 A.2d 209, 213-15 (N.J. 1996), *see Opp.* at 18, an engineer had a special relationship with, and thus had a duty of care to, workers at a construction

⁵ To be clear, Heartland did not rely on *People Express* to argue that the economic loss doctrine bars Plaintiffs’ claims under New Jersey law. Rather, as explained in Heartland’s moving papers, *see Br.* at 15 n.16, and as discussed more fully herein, while purely economic losses may be recoverable under New Jersey law where they result from the defendant’s breach of a duty of care owed to the plaintiff, Plaintiffs have not met the *People Express* standard for establishing that Heartland owed them a duty of care.

Plaintiffs cannot contend the rule of *People Express* applies even where the defendant’s conduct involved no actual or threatened physical injury. Such a reading cannot be squared with *Wang*, which was decided six years later, involved no threat of physical injury, and never even cited *People Express*, much less followed its holding. That reading also ignores the only two New Jersey cases ever to follow *People Express* in permitting the recovery of purely economic losses in negligence. These cases, like *People Express* itself, involved plaintiffs who suffered economic losses by reason of threatened physical injuries to their property. *See Complaint of Nautilus Motor Tanker Co., Ltd.*, 900 F. Supp. 697, 705 (D.N.J. 1995) (holding under *People Express* that a berth operator could recover business interruption losses it incurred when the operator of a vessel caused a fuel spill as it was approaching the berth); *Bahrle v. Exxon Corp.*, 652 A.2d 178, 194 (N.J. Super. Ct. App. Div. 1995) (holding under *People Express* that a gas station had a duty of care to its neighboring residents to protect them against loss resulting from fuel discharges because they “comprised a foreseeable class potentially harmed by any negligent discharge from the gas station”).

site, in circumstances where the engineer knew of but failed to warn the workers about a dangerous condition that threatened them with physical injury. Similarly, in *J.S. v. R.T.H.*, 693 A.2d 1191, 1193-94 (N.J. Super. Ct. App. Div. 1997), *see* Opp. at 17, a spouse had a special relationship with, and thus had a duty of care to, children of an acquaintance and neighbor to protect them from her husband's foreseeable sexual abuse. There is no relationship at all (and certainly no "special" one) between a payment card handler and a payment card issuer, and there is nothing comparable between Plaintiffs' alleged economic losses here and the physical injuries that the engineer's co-workers in *Carvalho* or the children in *J.S.* either suffered or were threatened with.⁶ Accordingly, nothing in these cases would cause one to predict that New Jersey law recognizes the duty of care upon which Plaintiffs' negligence claim is founded.⁷

In the absence of apposite legal precedent, Plaintiffs focus on the alleged foreseeability of the Intrusion, suggesting that Heartland must have known of the risk of a criminal breach of its computer system, and thus owed a duty to issuing banks to safeguard against such an attack. However, even if a sophisticated criminal cyber attack overcoming Heartland's security system were in fact foreseeable, the "ability to foresee injury to a potential plaintiff does not in itself establish the existence of a duty." *See Carvalho*, 675 A.2d at 212 (internal quotation omitted); *see also People Express*, 495 A.2d at 116 (in determining whether a party may recover in

⁶ Equally inapposite are Plaintiffs' citations to *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (*see* Opp. at 18) (where a landowner had a special relationship with, and hence may have had a duty of care to, workers and their spouses to take reasonable steps to protect them against physical injuries from asbestos exposure) and *Bahrle*, 652 A.2d at 194 (*see* Opp. at 18) (*see* discussion in note 5 *supra*).

⁷ Plaintiffs also cite the premises liability doctrine to support their claim that Heartland had a common-law duty to take reasonable care to protect them against the criminal acts of the perpetrator of the Intrusion. *See* Opp. at 22. However, in the context of premises liability, New Jersey courts merely recognize that "owners and landlords have a duty to protect patrons and tenants from foreseeable criminal acts of third parties occurring on their premises." *See Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1021 (N.J. 1997). Plainly, Plaintiffs were not patrons of and did not visit any premises of Heartland. In any event, Plaintiffs allege only consequential economic losses, not injury to person or property. *See id.* at 1027 (relying on Restatement (Second) of Torts, § 314A, which states that a possessor of land who holds it open to the public is under a duty to protect them against "unreasonable risk of physical harm") (emphasis added).

negligence for economic loss, foreseeability alone does not suffice).⁸ Rather, additional elements are whether one party has superior knowledge of the risk in question, and also the parties' relative abilities to guard against that risk. In particular, New Jersey law does not recognize a common-law duty where the class of persons the duty would benefit has the ability to protect itself against the risk.⁹ Here, then, Plaintiffs cannot establish the duty they claim simply by observing that the criminal intrusion and its success against Heartland's security system were foreseeable. To so hold would create "boundless liability" for purely economic losses in these circumstances, which is disfavored. *See People Express*, 495 A.2d at 116. Rather, Plaintiffs must further establish that payment card issuers have so limited an ability to protect themselves against the risk of payment card data being stolen from third parties that the common law should do so.¹⁰

Plaintiffs have not, and cannot, establish that payment card issuers are in no position to protect themselves against the risk of stolen payment card data. As set forth in Heartland's moving papers, *see* Br. at 16-17, but nowhere contested by Plaintiffs, the very same card brand regulations that bind Plaintiffs, and that Plaintiffs claim were violated by Heartland, expressly contemplate that issuers will maintain their own significant fraud monitoring programs to protect themselves against payment card data being stolen from third parties. Moreover, those same

⁸ Thus, even if the rule of *People Express* applied where there is no threat of physical injury (which it does not, *see* note 5 *supra*), the rule would be inapplicable here in any event, given the *People Express* court's holding that a class of plaintiffs is "identifiable" not merely if it is "foreseeable," but only if the myriad of other relevant factors (including "the type of economic expectations disrupted") also support the duty's existence. 495 A.2d at 116.

⁹ *See, e.g., Piscitelli*, 973 A.2d at 967 (finding that employer owed plaintiff no duty to detect theft of her identity by employee, emphasizing that she was in position to protect against risk herself and other remedies existed in the field); *Cross v. County of Essex*, 2007 WL 208531, at *2 (N.J. Super. Ct. App. Div. Jan. 29, 2007) (in determining whether a duty exists, "[a] related question is whether plaintiff lacked the ability or opportunity to avoid the harm.").

¹⁰ Given the unwillingness of the New Jersey courts to step in and create a common-law duty to protect parties against risks they are perfectly capable of addressing on their own, it is hardly surprising that none of the New Jersey cases cited by Plaintiffs in support of the duty of care on which their negligence claim is founded involved circumstances where, as here, the beneficiaries of the claimed duty are sophisticated commercial actors who already are contractually protected against the very risk that would be the subject of the claimed duty.

regulations include detailed mechanisms for payment card issuers such as Plaintiffs to recover through the card brands costs the issuers incur when payment card data is stolen from a data handler by means of a data security violation.¹¹ These protective contractual mechanisms negate any need for a common-law duty to protect payment card issuers against the risk of payment card data being stolen from third parties who are handling such data. Those mechanisms therefore fatally undermine Plaintiffs' claim that such a duty exists under New Jersey law.

B. Other Decisions in the Data Breach Context Do Not Support the Existence of the Common-Law Duty That Is the Basis for Plaintiffs' Negligence Claim

To the extent New Jersey case law did not dispositively negate the existence of the common-law duty claimed by Plaintiffs (which it does), the Court would then consider other sources in order to predict whether New Jersey law imposes that duty. Those other sources include "decisions from other jurisdictions whose doctrinal approach is substantially the same." *See Haralson v. State Farm Mut. Auto. Ins. Co.*, 564 F. Supp. 2d 616, 621 (N.D. Tex. 2008). Other states' decisions, however, provide no basis to predict that New Jersey law imposes a common-law duty requiring handlers of payment card data to safeguard that data for the benefit of payment card issuers.

The most notable such decision is *Merrick Bank*, which Plaintiffs do not address. There, an insurer asserted negligence claims on behalf of credit unions allegedly injured by an unauthorized intrusion into the computer system of another payment card processor. *See Merrick Bank*, 2008 WL 4277877, at *11-12. Just as Plaintiffs do here, the plaintiff contended

¹¹ *See* Br. at 16 nn. 18-20 (describing Visa and MasterCard recovery mechanisms); *see also In re TJX Cos., Inc. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 398-99 (D. Mass. 2007) (providing further details about efficacy of Visa's ADCR procedure, which "was created to address precisely the type of incident at issue" here, *i.e.*, a data security breach); *CUMIS Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, No. SJC-10400, 2009 WL 4679684, at *6 (Mass. Dec. 11, 2009) (dismissing as without merit suggestion by issuing banks that they have no alternative means to recover damages resulting from theft of payment card data, noting plaintiffs "could have filed claims with Visa and MasterCard to recoup losses they suffered due to fraudulent use of the compromised accounts").

that the defendant, the processor's sponsoring bank, had "an ordinary duty of care to take reasonable measures to prevent foreseeable harm" allegedly resulting from the intrusion. *See id.* at *12. The court refused to endorse the same expansive common-law duty Plaintiffs now urge this Court to recognize, and dismissed the negligence claims under Arizona law.¹²

In sum, because there is no basis for concluding that New Jersey law imposes the sweeping common-law duty underpinning Plaintiffs' negligence claim, the Court should dismiss Plaintiffs' negligence count. *See John Doe I v. Roman Catholic Diocese of Galveston-Houston*, No. H-05-1047, 2007 WL 2817999, at *32 (S.D. Tex. Sept. 26, 2007) (Rosenthal, J.) ("declin[ing] to impose a common-law duty that Texas courts have not imposed").

III. PLAINTIFFS' MISREPRESENTATION CLAIMS FAIL

A. Plaintiffs Have Not Alleged that Heartland Made Actionable Misrepresentations

Although Plaintiffs concede they must allege the way in which Heartland's statements were false as made or rendered misleading by omitted facts, Opp. at 26, the Master Complaint merely recites which Heartland statements allegedly were false or misleading without ever specifying what was false or misleading about them.¹³ Such recitations, standing alone, are insufficient to state a claim for negligent or intentional misrepresentation, as evidenced by a case heavily cited in Plaintiffs' Opposition, *Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 510-11 (D.N.J. 2008). In *Dewey*, plaintiffs set forth not only the defendants' allegedly misleading

¹² Other courts have arrived at the same outcome in this context under the economic loss doctrine. *See, e.g., CUMIS Ins. Soc'y, Inc.*, 2009 WL 4679684, at *7 (affirming dismissal of issuing banks' negligence claim on the basis of the economic loss doctrine under Massachusetts law); *see also In re TJX Cos., Inc. Retail Sec. Breach Litig.*, 564 F.3d 489, 498-99 (1st Cir. 2009) (same); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 179-80 (3d Cir. 2008) (same under Pennsylvania law); *see also* Br. at 15 n.14 (collecting authorities).

¹³ Specifically, Plaintiffs cite to the Master Complaint's allegations that (1) prior to the Intrusion, Heartland made public statements about its computer security (¶¶ 4, 45-49, 51); (2) prior to the Intrusion, Heartland acknowledged that it was subject to data security requirements (¶¶ 27, 56); and (3) after the Intrusion, Heartland made statements to the effect that it would upgrade its computer security (¶¶ 7, 50). Nowhere does the Master Complaint allege what was false or misleading about these statements. The remaining paragraphs of the Master Complaint cited by Plaintiffs refer either to Plaintiffs' recitation of elements of negligent and intentional misrepresentation claims (¶¶ 3,

representations regarding the vehicles in question, but also the omitted facts that allegedly made those statements misleading: namely, that the vehicles had “defective pollen filters, pollen filter housing seals, plenum drains, powertrains, transmissions and transmission control modules . . . [and] that, as a result of these defects, the Class vehicles were damaged by flooding” when these items clogged with debris. *Id.* at 510-11. Here, by contrast, Plaintiffs nowhere specify what facts were either inaccurate in or misleadingly omitted from Heartland’s alleged statements.¹⁴ As a result, Plaintiffs have failed to plead an actionable misrepresentation.¹⁵

Plaintiffs’ failure to plead an actionable misrepresentation by Heartland is confirmed by the holding in *In re Heartland Payment Systems, Inc. Securities Litigation* (Ex. A hereto), at 8. There, the court evaluated the *very same* statements that Plaintiffs here contend are actionable misrepresentations¹⁶ and found as a matter of law that such statements were *not* false and misleading. *Id.* (“However, there is nothing inconsistent between Defendants’ statements and the fact that Heartland had suffered [the Intrusion.]”). The court therefore held that the false and/or misleading statements alleged there (and here) do “not satisfy Rule 8(a), let alone the

78, 122-25, 127) or, curiously, to statements made not by Heartland, but by third parties (¶ 62).

¹⁴ In particular, Plaintiffs’ misrepresentation claims are not salvaged by their allegation that Heartland misleadingly failed to disclose the risk that payment card data could be stolen from its computer system. *See* Opp. at 3 (“Heartland willfully omitted from these statements any indication that the sensitive information with which it was entrusted was extremely vulnerable to being compromised.”). Heartland expressly disclosed this risk in its 2007 Form 10-K (“Our computer systems could be penetrated by hackers and our encryption of data may not prevent unauthorized use”) and Plaintiffs and other issuing banks are well aware of the risk because the Visa and MasterCard Operating Regulations “themselves indicate that the system is not guaranteed to be fool-proof.” *CUMIS Ins. Soc’y Inc. v. BJ’s Wholesale Club*, No. 05-1158, 2008 WL 2345865, at *4 (Mass. Super. Ct. June 4, 2008), *aff’d*, 2009 WL 4679684, at *10-11 (Mass. Dec. 11, 2009).

¹⁵ Moreover, while Plaintiffs contend the Master Complaint alleges that Heartland was “well-aware of the substandard and deficient systems,” Opp. at 34, Plaintiffs support that contention by citing paragraphs in the Master Complaint that merely contain (1) statements that the Payment Card Industry Data Security Standard should be viewed as a minimum requirement; (2) a conclusory allegation that Heartland “intentionally withheld” information; and (3) statements made after the Intrusion, which are irrelevant to Heartland’s knowledge at the time the alleged misrepresentations were made. *See* Opp. at 34-35. Plaintiffs’ fraud claim thus fails to plead scienter adequately.

¹⁶ *Compare* Compl. ¶¶ 45, 56, with Ex. A hereto, at 8 (“Heartland ‘place[d] significant emphasis on maintaining a high level of security’ and maintained a network configuration that ‘provides multiple layers of security to isolate our databases from unauthorized access’”), 9-10 (discussing the November 4, 2008 analysts’ call).

[particularity requirements of] the PSLRA.” *Id.*¹⁷

B. Plaintiffs Have Not Alleged Justified or Reasonable Reliance

One searches the Master Complaint in vain for any allegation of the actions that Plaintiffs took or abstained from taking in reliance on Heartland’s alleged misrepresentations.¹⁸ Rather, the Master Complaint merely alleges, baldly and without a shred of specificity, that Plaintiffs somehow “justifiably” (¶ 125) or “reasonably” (¶ 129) relied to their detriment on Heartland’s alleged misrepresentations. The inadequacy of such conclusory and unsubstantiated allegations, standing alone, is underscored by cases that Plaintiffs cite, which included an express allegation of the specific action(s) the plaintiff(s) actually took in reliance on the alleged misrepresentations.¹⁹

C. Plaintiffs Were Not the Intended or Reasonably Foreseeable Recipients of Heartland’s Alleged Misrepresentations

Plaintiffs’ claim that they are the intended recipients of Heartland’s alleged misrepresentations is based solely on Heartland’s 2008 Annual Report to shareholders, which stated that Heartland is “widely recognized as an unrelenting advocate for merchants.” Compl. ¶

¹⁷ Plaintiffs rely in the alternative on an *implied* false or misleading representation as to the efficacy of Heartland’s data security measures that allegedly was inherent in Heartland’s “agreeing to process the credit cards and/or debit cards issued by” Plaintiffs. Opp. at 28. In claiming that such a representation both was impliedly made and is legally actionable, Plaintiffs rely exclusively on *In re TJX Cos. Retail Sec. Litig.*, 524 F. Supp. 2d 83, 91-92 (D. Mass. 2007), in which the district court denied a motion to dismiss a negligent misrepresentation claim based on a similar theory. The precedential value of *TJX* on this point is questionable after the Massachusetts Supreme Judicial Court’s recent decision in the *CUMIS* litigation, affirming the trial court’s holding that negligent misrepresentation claims could not be predicated on such implied misrepresentations. *CUMIS Ins. Soc’y, Inc.*, 2009 WL 4679684, at *10-11. In particular, while Plaintiffs correctly point out that this aspect of *TJX* was affirmed on appeal, the First Circuit noted in so holding that, after the trial court’s decision in *CUMIS*, the implied misrepresentation claim was “on life support,” and that had *CUMIS* been decided first, the district court could well have dismissed. 564 F.3d at 495.

¹⁸ Plaintiffs’ Opposition suggests in a footnote (for the first time) that had they “been aware of the true facts . . . they would have, at a minimum, alerted their customers to the increased risk of a data breach occurring.” Opp. at 39 n.29. The paragraphs of the Master Complaint cited by Plaintiffs contain no such allegation. See Compl. ¶¶ 122-25.

¹⁹ See *Dewey*, 558 F. Supp. 2d at 529 (misrepresentations regarding defects induced purchase or lease of vehicle); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2008 WL 4126264, at *18 (D.N.J. 2008) (same); Consolidated Class Action Complaint ¶ 93, *TJX*, No. 07-10162 (D. Mass. filed May 23, 2007 as document 81) (misrepresentations induced plaintiffs to become and to remain issuing banks).

49. However, nothing in that statement suggests that Heartland intended for statements directed to its shareholders in securities filings and analysts' calls or statements directed to its merchant customers on its website to be repeated to and relied upon by payment card issuers.²⁰ Nor does *Port Liberte Homeowners Ass'n v. Sordoni Construction Co.*, 924 A.2d 592 (N.J. Super. Ct. App. Div. 2007), *see Opp.* at 31, support this claim. In *Port Liberte*, the court held, based upon the unique, statutory relationship between the developer and the condo association involved in the case, that the defendant manufacturer was on constructive notice that the condo association would be the ultimate recipient of representations made by the manufacturer to the developer. *Id.* at 598, 601-02. Here, in contrast, Plaintiffs have not alleged (and could not allege) that Heartland was on constructive notice that its statements directed to shareholders and merchant customers would be repeated to and relied upon by issuing banks.

IV. PLAINTIFFS' CONSUMER PROTECTION CLAIMS MUST BE DISMISSED

A. Choice of Law

Heartland understood the Master Complaint to contend that Plaintiffs' consumer protection causes of action arise under the New Jersey consumer protection statute and that the home-state consumer protection causes of action articulated in Counts VIII – X were pleaded only in the alternative, *i.e.*, in the event the Court were to rule that the New Jersey consumer protection statute is not the governing consumer protection statute. *See, e.g.*, Compl. p. 1, n. 1; p. 27, ¶ 81; p. 43. Now, however, Plaintiffs are apparently seeking to disassociate themselves from their election of the New Jersey consumer protection statute by refusing to take a position

²⁰ Plaintiffs erroneously claim that Heartland failed to “cite any authority holding that misrepresentations made publically in SEC filings and/or on websites do not constitute statements for which the FIs were the intended and/or reasonably foreseeable recipients.” *Opp.* at 31-32. To the contrary, as noted by Heartland, *see Br.* at 22, because Plaintiffs are not current or prospective shareholders, they are not entitled to rely upon Heartland's securities filings and analysts' calls to support their negligent and intentional misrepresentation claims, *see Sw. Props. Ltd. v. Brinker Int'l Inc.*, No. 05-95-01721-CV, 1997 WL 407750, at *3 (Tex. App. Ct. July 22, 1997), especially given that those materials expressly disclose the risks at issue. *In re Heartland Payment Sys., Inc. Sec. Litig.*, Ex. A hereto, at 8-9.

as to which state's consumer protection laws govern their consumer protection claims.²¹ *See* Opp. at 35. Plaintiffs' revised position, however, cannot save their consumer protection claims from dismissal. To the extent the New Jersey statute is the governing consumer protection law here, those claims should be dismissed because Plaintiffs lack standing and have failed to state a claim under the New Jersey Consumer Fraud Act ("NJCFA"). Alternatively, to the extent the consumer protection laws of Plaintiffs' home states are the governing statutes, Plaintiffs likewise have failed to state a claim under any of those laws.

B. Plaintiffs Lack Standing, and Have Failed To State A Claim, Under the NJCFA

Plaintiffs' non-controversial point that business entities may bring claims under the NJCFA does not address the real point: business entities have no standing under the NJCFA if they are not engaged in "consumer transactions" for the goods or services that are at issue.²²

Applying this rule, Plaintiffs fail to meet the standing requirement for two reasons: (1) Heartland's provision of card processing services to a specific class of merchants does not amount to a consumer transaction under the NJCFA; and (2) Plaintiffs do not allege that they have ever purchased Heartland's services, either directly or indirectly.

First, Plaintiffs' Opposition completely ignores the Third Circuit's holding that the NJCFA "seeks to protect consumers who purchase goods or services generally sold to the public

²¹ To the extent Plaintiffs assert the consumer protection laws of more than one state can simultaneously apply to the same conduct, that position is incorrect. *See Bayside Chrysler Plymouth Jeep Eagle, Inc. v. Ma*, 2006 WL 1449783, at *3 (N.J. Super. Ct. App. Div. May 26, 2006) (making choice of law determination where counterclaim asserted claim under both New Jersey and New York consumer protection laws); *Garcia v. L&R Realty, Inc.*, 790 A.2d 936, 938-39 (N.J. Super. Ct. App. Div. 2002) (applying Massachusetts consumer protection law instead of New Jersey law); *Boyes v. Greenwich Boat Works, Inc.*, 27 F. Supp. 2d 543, 547-48 (D.N.J. 1998) (evaluating whether New Jersey or Pennsylvania consumer protection law applied). Plaintiffs' citations to the contrary are inapposite. *See Gen. Dev. Corp. v. Binstein*, 743 F. Supp. 1115, 1119-23 (D.N.J. 1990) (individual plaintiff asserted claims under multiple state statutes for separate and distinct conduct that occurred in different states); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83 (D. Mass. 2008) (applying the law of the home state to each class member).

²² Plaintiffs' Opposition did not challenge that they are not commercial competitors of Heartland, and accordingly, that allegation should be deemed waived.

at large . . . [and] is pointed to products and services sold to consumers in the popular sense.” *Cetel v. Kirwan Fin. Group, Inc.*, 460 F.3d 494, 514 (3d Cir. 2006) (internal citations and quotations omitted). In *Cetel*, the court applied this standard to the defendant’s conduct, the sale of complex insurance plans to a certain class of small businesses, and held that the NJCFA was inapplicable. *Id.* *Cetel*’s analysis confirms that when business entities are not in “consumer oriented situation[s],” *The BOC Group, Inc. v. Lummus Crest, Inc.*, 597 A.2d 1109, 1112 (N.J. Super. Ct. Law Div. 1990), the NJCFA does not apply to them. Plaintiffs’ citations to cases where corporations acted as consumers in purchasing boat sealant, tow trucks, or wall panels are all examples where the purchasing business entity was a consumer, acquiring for its own usage consumer goods that any individual consumer could just as easily have bought. By contrast, in this case, Heartland’s services are only made available to a certain class of merchants and it would be impossible for an individual consumer to purchase or use Heartland’s services.

Second, while Plaintiffs have baldly asserted that “this case is not premised on the *absence* of a consumer relationship,” Opp. at 38 n.25 (emphasis in original), they offer no facts to suggest that they ever once purchased, directly or indirectly, credit or debit card processing services from Heartland.²³ New Jersey law is clear that plaintiffs must have, at a minimum, purchased the services or goods at issue, *i.e.*, be a *bona fide* consumer of the product. *See Grauer v. Norman Chevrolet Geo*, 729 A. 2d 522, 524 (N.J. Super. Ct. App. Div. 1998); *Directv, Inc. v. Marino*, No. Civ. 03-5606, 2005 WL 1367232, at *3 (D.N.J. June 8, 2005). Indeed, if Plaintiffs were correct that as long as a plaintiff alleges an injury it has standing under the NJCFA, the entire line of cases where courts have disallowed NJCFA claims because the plaintiff lacked standing despite suffering an injury would be overturned. *See, e.g., Cetel*, 460

²³ Unlike here, the plaintiff in *Homa v. Am. Express Co.*, 558 F.3d 225, 227 (3d Cir. 2009), premised his claim for violations of the NJCFA on his personal and direct usage of an American Express credit card, not the general

F.3d at 514; *Arc Networks, Inc. v. Gold Phone Card Co.*, 756 A.2d 636, 638 (N.J. Super. Ct. Law Div. 2000).²⁴

C. Plaintiffs Have No Claim Under The Consumer Protection Laws Of Other States

Plaintiffs' alternative home-state consumer protection claims are based on the consumer protection laws of California, Colorado, Florida, Illinois, New York, Texas, and Washington.²⁵

Even if the Court is not inclined to hold Plaintiffs to their original assertion that the NJCFA is the governing consumer protection statute here,²⁶ the Court still should dismiss Plaintiffs' consumer protection claims *in toto*, because the Master Complaint fails to state a claim under the consumer protection laws of these other states. This is so not only because those claims fail to adequately plead unlawful conduct and causation, but also for the following particularized reasons:

- The California claims must be dismissed because fraud claims under California's unfair competition law require plaintiffs to plead (a) that the fraud was an immediate cause of their injury, and (b) actual reliance, neither of which Plaintiffs have done. *See In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009) (explaining that "immediate cause" is

existence of credit card processing services.

²⁴ In any event, even if Plaintiffs have standing under the NJCFA, they have failed to state a claim under that statute. Plaintiffs' Opposition does not assert that Heartland committed unconscionable conduct under the NJCFA, so the legal sufficiency of their NJCFA claim depends entirely on whether the Master Complaint contains allegations of actionable misstatements and knowing omissions by Heartland, and detrimental reliance by Plaintiffs, that are sufficient to satisfy the rigorous pleading standards of Rule 9(b). As shown in Point III *supra*, it does not.

²⁵ Plaintiffs allege no consumer protection claims under the state laws of Maine or Pennsylvania, states where two of the named plaintiffs are located. Plaintiffs have withdrawn their claims under the laws of Hawaii, Missouri, Oklahoma, Rhode Island, and Washington D.C. *See Opp.* at 42 n.31. No named plaintiff resides or has its principal place of business in Arkansas, Connecticut, Delaware, Idaho, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, or Vermont, and Plaintiffs have alleged no facts to support any claims under the laws of these states. Claims under the laws of these states should therefore be dismissed. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (establishing that a plaintiff lacks standing to assert claims on behalf of putative class members if the plaintiff itself has no individual claim).

²⁶ The Court need not relieve Plaintiffs from that assertion. Where, as here, a plaintiff argues that its claim is governed by the law of state A rather than state B, and it turns out that the law of state A affords the plaintiff no right of recovery on the claim even assuming the law of state A governs, it is not open to the plaintiff at that point to "take a mulligan" and argue that the law of state B actually governs its claim. *Lott v. Levitt*, 556 F.3d 564, 567-68 (7th Cir. 2009) (holding that plaintiff was "not entitled to get a free peek at how his dispute will shake out under Illinois law and, when things don't go his way, ask for a mulligan under the laws of a different jurisdiction"); *see In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, Civ. No. 2:08-md-1954, 2009 WL 3824393, at *3 (D. Me. Nov. 16, 2009) (refusing to relieve either party from its choice-of-law election when each affirmatively argued at the motion to dismiss stage that Maine law governed all claims).

demonstrated if plaintiff otherwise would not have engaged in the injury-producing conduct); *see* Point III.B. *supra* (noting the absence of any allegations identifying actions taken in reliance on Heartland’s alleged misrepresentations).

- The Colorado claims must be dismissed because the cited statute applies to deceptive pricing but the Master Complaint contains no allegations about pricing practices. *See* Colo. Rev. Stat. § 6-1-105(1)(l) (“A person engages in a deceptive trade practice when . . . [making] false or misleading statements of fact concerning the price of goods . . . or amounts of price reductions.”).
- The Florida claims must be dismissed because the most persuasive cases hold that an entity that is not a consumer or engaged in a consumer transaction has no right to recovery. *Kertesz v. Net Transactions, Ltd.*, 635 F. Supp. 2d 1339, 1350 (S.D. Fla. 2009) (discussing, and disagreeing with, contrary Florida case law).
- The Illinois claims should be dismissed because Plaintiffs are not consumers of Heartland’s services and the conduct does not relate to consumer protection issues. *See Am. Roller Co. v. Foster-Adams Leasing, LLP*, 472 F. Supp. 2d 1019, 1022-23 (N.D. Ill. 2007).²⁷
- Any New York consumer protection claims should be dismissed as the allegations do not involve consumer-oriented conduct. *See U.W. Marx Inc. v. Bonded Concrete, Inc.*, 7 A.D.3d 856, 858 (N.Y. App. Div. 2004).
- The Texas claims fail for any of three independent reasons: (1) entities with assets of \$25 million or more are barred from bringing claims, and the financial institutions do not and could not allege they have less than that, *see* Tex. Bus. & Com. Code § 17.45(4); (2) Heartland’s alleged “deceptive trade act or practice is not actionable under the DTPA unless it was committed *in connection with* the plaintiff’s transaction in goods or services,” *see Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 650 (Tex. 1996); and (3) Plaintiffs fail to plead that they relied on Heartland’s conduct to their detriment, *see Solano v. Landamerica Com. Title of Fort Worth, Inc.*, No. 2-07-152-CV, 2008 WL 5115294, at *10 (Tex. App. Dec. 4, 2008).
- Finally, claims under Washington’s consumer protection law are dismissible because Heartland’s alleged conduct toward payment card issuers is not alleged to have extended beyond the parties to deceive a substantial portion of the public or affect the public interest. *See Segal Co. (E. States), Inc. v. Amazon.Com*, 280 F. Supp. 2d 1229, 1232 (W.D. Wash. 2003).²⁸

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF CONTRACT

Plaintiffs’ Opposition shows that Plaintiffs do not and cannot allege claims as third-party

²⁷ In addition, Plaintiffs fail to adequately allege that Heartland intended for Plaintiffs to rely on its acts or statements. *See Griffin v. Universal Cas. Co.*, 654 N.E.2d 694, 700 (Ill. App. Ct. 1995); *Wobble Light, Inc. v. McLain/Smigiel P’ship*, 890 F. Supp. 721, 726 (N.D. Ill. 1995) (dismissing ICFA claim where plaintiff failed to establish that defendants intended plaintiff rely on their alleged deceptive acts).

²⁸ Washington law also requires a demonstration of reliance, which is not adequately pled here. *See Robinson v.*

beneficiaries (for the reasons discussed below) or for a breach of implied-in-fact contract.²⁹

A. Plaintiffs Are Not Donee or Creditor Beneficiaries

Plaintiffs' Opposition tacitly concedes that Plaintiffs do not and cannot allege they are creditor or donee beneficiaries of the contracts at issue.³⁰ Instead, citing no case, Plaintiffs aver that the concepts of creditor and donee beneficiaries are "antiquated" and have been "abolished" under the Restatement (Second) of Contracts. Opp. at 42 n.32. Plaintiffs ignore that courts have applied the creditor/donee requirement under both Ohio and New Jersey law *after* those states adopted the Second Restatement.³¹ Plaintiffs further ignore that Missouri, which generally follows the *First* Restatement for third-party beneficiary claims,³² also continues to require creditor or donee status. *Kansas City Hispanic Ass'n Contractors Enter., Inc. v. City of Kansas City*, 279 S.W.3d 551, 555 (Mo. Ct. App. 2009). Plaintiffs' third-party beneficiary claims

Avis Rent A Car Sys., Inc., 22 P.3d 818, 823 (Wash. Ct. App. 2001).

²⁹ In regard to their breach-of-implied-contract claim, Plaintiffs still fail to establish necessary elements (including mutual assent, consideration, breach, and causation), and they do not explain why any implied contract with Heartland is sufficiently definite to enforce. See Opp. at 48-49. The data breach rulings cited by Plaintiffs are inapposite, as both involved cases where the parties had clearly contracted for the sale of goods at a definite price. See Br. at 46-47. Further, Plaintiffs' claim that implied contract claims may not be tested on a motion to dismiss, Opp. at 48-49, is meritless given that Plaintiffs must plead facts suggesting entitlement to relief under the relevant pleading standards. Indeed, Plaintiffs neglect to mention that *Hannaford dismissed* two of the plaintiffs' proposed implied contract terms as a matter of law. See *In re Hannaford Bros. Co. Customer Data Sec. Litig.*, 613 F. Supp. 2d 108, 119 (D. Me. 2009).

³⁰ Plaintiffs attempt to avoid dismissal by surmising that the contracts attached to Heartland's motion are inapplicable or incomplete. See Opp. at 42-43, 45 & nn.33-34. While courts have previously differed on this issue (*compare Preece v. Physicians Surgical Care, Inc.*, No. 06-0715, 2006 WL 1470268, at *6 (S.D. Tex. May 26, 2006), with *Columbia Hosp. at Medical City Dallas Subsidiary v. Legend Asset Mgmt. Corp.*, No. Civ. A. 3:03-CV-3040G, 2004 WL 769253, at *3 (N.D. Tex. Apr. 9, 2004)), this Court recently clarified that a plaintiff cannot avoid dismissal by raising speculative questions about the documents' completeness or applicability. See *Lehman Bros. Holdings, Inc. v. Cornerstone Mortgage Co.*, No. H-09-0672, 2009 WL 2900740, at *1 & n.1,*6-7 (S.D. Tex. Aug. 31, 2009) (Rosenthal, J.) (rejecting as "speculative" the non-movant's claim that some contract other than the one attached by the Rule 12(b)(6) movant applied, as well as the non-movant's claim that a document attached by the movant was not the one incorporated by reference into the contract).

³¹ See Br. at 36-38, 42-43; see also, e.g., *ThorWorks Indus. v. E.I. DuPont De Nemours & Co.*, 606 F. Supp. 2d 691, 695 (N.D. Ohio 2008); *Nardi v. Stevens Inst. of Tech.*, 60 F. Supp. 2d 31, 44-45 (E.D.N.Y. 1999). Ohio's highest court adopted the Second Restatement in *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 521 N.E.2d 780, 784 (Ohio 1988), and New Jersey's highest court adopted it in *Broadway Maint. Corp. v. Rutgers, State Univ.*, 447 A.2d 906, 909 (N.J. 1982).

³² E.g., *Wood v. Centermark Props., Inc.*, 984 S.W.2d 517, 526 (Mo. Ct. App. 1998); *Laclede Inv. Corp. v. Kaiser*,

therefore fail on this ground alone as to all of the alleged contracts.

B. Heartland Contracts with the Acquiring Banks

In an effort to distract the Court from their inability to meet the donee/creditor beneficiary requirement, Plaintiffs grasp at straws to argue they are “intended” beneficiaries under the Acquiring Bank contracts. *See* Opp. at 43-44. Plaintiffs point to no fact alleged in the Master Complaint to support such status, which failure itself requires dismissal. *See, e.g., Lehman Bros.*, 2009 WL 2900740, at *5 (Rosenthal, J.) (dismissing contract claim for want of specific allegations). Plaintiffs instead cite provisions of the Acquiring Bank contracts that nowhere mention card issuers. Insofar as Plaintiffs rely on the contracts’ provisions that run to the parties’ “affiliates,” *see* Opp. at 43, Plaintiffs are not “affiliates” of Heartland Bank and KeyBank, as “affiliate” plainly means a “corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation.” Black’s Law Dictionary (8th ed. 2004). Nor do the contracts’ “confidentiality” sections, Johnson Decl., Ex. 4, ¶ 4.3(b) and Ex. 5, ¶ 4.3(b), assist Plaintiffs’ intended beneficiary argument, because these provisions do not cover payment card data,³³ and even if they did, there is no indication that Heartland and the Acquiring Banks created those sections to protect *Plaintiffs* as opposed to the Acquiring Banks, who would themselves be at risk under their contracts with Visa and MasterCard if Heartland mishandled payment card data.

In any event, Plaintiffs ignore that the card brand regulations they are suing under expressly disclaim third-party beneficiaries, making it impossible for Plaintiffs to be intended

596 S.W.2d 36, 42 (Mo. Ct. App. 1980).

³³ Given that Paragraph 1.1(f) covers payment card data through its explicit incorporation of Visa’s and MasterCard’s data security regulations, interpreting ¶ 4.3(b) to likewise cover such data would render superfluous the regulations incorporated into Paragraph 1.1(f). *See Wohl v. Swinney*, 888 N.E.2d 1062, 1065-66 (Ohio 2008) (courts avoid contract interpretations that render provisions superfluous); *TAP Pharm. Prods., Inc. v. State Bd. of Pharmacy*, 238 S.W.3d 140, 144 (Mo. 2007) (*en banc*) (same).

beneficiaries of Heartland's promise in the Acquiring Bank contracts to comply with those regulations even if Plaintiffs might be intended beneficiaries of some other aspect of the contracts.³⁴ Plaintiffs' arguments also fail to overcome the contracts' limitation-of-liability clauses. *See* Opp. at 44-45. Plaintiffs offer no explanation why their alleged damages are "general" rather than "consequential," and they instead argue only that they in fact suffered these damages.³⁵ Moreover, Plaintiffs' argument that they have alleged a "willful breach," as is required to recover such consequential damages, is without merit, because Plaintiffs' Opposition, like the Master Complaint, fails to allege facts plausibly supporting the claim that Heartland "knowingly" breached its contracts. *See* Opp. at 44-45.

C. Heartland Contracts with Its Merchant Customers

In straining to establish third-party beneficiary status under Heartland's agreements with its merchants, Plaintiffs fail to point to any fact alleged in their Master Complaint supporting any such status, which itself requires dismissal. Instead, Plaintiffs point to a single provision in the Merchant Agreement submitted by Heartland. *See* Opp. at 45-46 (citing ¶ 14.11, "Privacy Policy").³⁶ Nothing in that provision, however, states any indication that it was intended to

³⁴ Plaintiffs also overlook *TJX's* holding that "the issuing banks' argument that the contracts between Fifth Third and Visa and MasterCard empower them to bring suit is undermined fatally by the fact that the Operating Regulations, which were incorporated into these contracts, themselves appear to deny third parties the ability to bring suit." *See TJX*, 524 F. Supp. 2d at 90 (emphasis added), *aff'd in relevant part*, 564 F.3d 489, 499 (1st Cir. 2009). Plaintiffs further err in arguing that there is a conflict within the Visa regulations if they are read to deny Plaintiffs any ability to enforce them. *See* Opp. at 44 n.35. Plaintiffs are clearly free to enforce the regulations against the party with whom Plaintiffs contracted – Visa – and there is accordingly no ambiguity requiring discovery. *See Ohio Historical Soc'y v. Gen. Maint. & Eng'g Co.*, 583 N.E.2d 340, 344 (Ohio Ct. App. 1989) (extrinsic evidence only permissible to clarify ambiguous term); *Executive Bd. of Mo. Baptist Convention v. Windmere Baptist Conference Ctr.*, 280 S.W.3d 678, 696 (Mo. Ct. App. 2009) (same).

³⁵ In particular, Plaintiffs offer no argument why the Court should ignore the intervening acts of criminals and each Plaintiff's own individualized procedures for responding to alleged card compromises. Notably, the only two cases Plaintiffs cite, *see* Opp. at 45 n.36, do not address or define consequential damages.

³⁶ While a claim directly under ¶ 14.11 would not be barred by the warranty disclaimer provision in ¶ 8.8, the warranty disclaimer certainly would bar any claim by Plaintiffs that the Merchant Agreement impliedly warrants the efficacy of Heartland's computer system security. Contrary to Plaintiffs' assertion, the disclaimer of liability for the actions "of any Association, Card Issuer or Cardholder" appears only in the sentence *after* the sentence disclaiming any "warranty whatsoever," and is "[w]ithout limitation of the foregoing" all-inclusive disclaimer. ¶ 8.8.

protect, and to be enforced by, payment card issuers. *See* ¶ 14.11 (assuring “*Merchant[s]*” that Heartland will take reasonable steps to protect “*Merchants*” data) (emphases added).³⁷

Plaintiffs accordingly cannot claim to be intended third-party beneficiaries of ¶ 14.11.

Regardless, the limitation-of-liability provisions, particularly ¶ 8.7’s prohibition of consequential damage recovery under ¶ 8.6, bar a claim by Plaintiffs under ¶ 14.11. *See* Br. at 44 & nn.44-45; Opp. at 46-47; *see also Allgor v. Travelers Ins. Co.*, 654 A.2d 1375, 1379 (N.J. Super. Ct. App. Div. 1995) (contract’s restrictions bind third-party beneficiary). Plaintiffs also fail to address the fact that their damages are consequential under Merchant Agreement ¶ 8.7 and thus ineligible for recovery under ¶ 8.6, and they fail to cite *facts* suggesting that Heartland breached ¶ 14.11 or harmed Plaintiffs as a result. *See* Opp. at 47; Br. at 43, 44 & n.45.

CONCLUSION

For the foregoing reasons, in addition to those set forth in its moving papers, Heartland respectfully requests that the Court dismiss the Master Complaint with prejudice.

Respectfully submitted,

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³⁷ The provision’s mention of “personal financial information” is clearly a reference to *merchant* information, not *cardholder* information.

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Dated: December 18, 2009

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 18th day of December 2009 with a copy of this document via the Court's CM/ECF system per the Local Rules.

/s Harvey J. Wolkoff

Harvey J. Wolkoff