

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE: HEARTLAND PAYMENT	§	4:09MD02046
SYSTEMS, INC. CUSTOMER DATA	§	
SECURITY BREACH LITIGATION	§	MDL NO. 2046
	§	
	§	HON. LEE H. ROSENTHAL
	§	
THIS DOCUMENT RELATES TO:	§	
FINANCIAL INSTITUTION TRACK	§	CLASS ACTION
ACTIONS	§	
	§	JURY TRIAL DEMANDED

**FINANCIAL INSTITUTION PLAINTIFFS' SURREPLY IN OPPOSITION TO
DEFENDANT HEARTLAND PAYMENT SYSTEMS, INC.'S
MOTION TO DISMISS THE MASTER COMPLAINT**

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INTRODUCTION

Dissatisfied with the strength of its motion to dismiss, Heartland peppers its reply with new authorities and arguments it apparently thinks are better suited to meet its dismissal objective. First, ignoring multiple, significant distinctions with the instant case, Heartland dedicates much of its reply to its recent victory in the District of New Jersey, in which it procured dismissal of federal securities law claims brought by investors who lost money when Heartland stock decreased in value following the Data Breach. Given key differences between the claims at issue in the Securities Case and those at issue here (a distinction pointedly confirmed by the Judicial Panel on Multidistrict Litigation (“JPML”) when it refused to transfer that case to these proceedings), the Securities Case has no persuasive value. Second, regarding FIs’ negligence claim, Heartland all but concedes that New Jersey law applies, and is reduced to making insupportable arguments under New Jersey law that are easily rebutted by even a cursory review of the applicable authorities. Third, FIs have more than adequately pleaded that they are intended third-party beneficiaries of the contracts between Heartland and its acquiring banks and merchants, and Heartland’s arguments to the contrary depend on ignoring the plain language of the controlling Restatement of Contracts. Finally, neither Heartland’s effort to limit the consumer fraud claims to New Jersey law nor its attack under the consumer fraud statutes of the various other jurisdictions at issue can withstand scrutiny. As such, Heartland’s Motion to Dismiss should be denied.

ARGUMENT

I. The Out-of-Jurisdiction Decision in a Securities Fraud Case Against Heartland Does Not Support Dismissal Here

Heartland relies heavily on the recent unpublished opinion by Judge Thompson in the District of New Jersey, which granted Heartland’s motion to dismiss a case brought against it

pursuant to the federal securities laws. *In re Heartland Payment Sys., Inc. Sec. Litig.*, No. 09-1043, 2009 U.S. Dist. LEXIS 114866 (D.N.J. Dec. 7, 2009) (the “Securities Case”). This decision is inapposite for several reasons.

First, unlike FIs’ allegations here, in the Securities Case, plaintiffs alleged that Heartland violated the federal securities laws and asserted claims pursuant to Sections 10(b) and 20(a) of the Exchange Act.¹ The Securities Case was brought on behalf of investors who purchased Heartland-issued stock, and who sought damages from the stock-price drop that occurred after the Data Breach was revealed. The instant case, by contrast, has nothing to do with Heartland securities or its declining stock price; rather, it primarily focuses on Heartland’s failure to take appropriate measures to safeguard the sensitive information at issue and the out-of-pocket damages FIs suffered as a result of the Data Breach.

In light of these fundamentally different legal claims (and factual circumstances), the JPML previously rejected Heartland’s argument that the Securities Case was sufficiently similar to this case to warrant its inclusion in these MDL proceedings. Leaving no room to argue similarity between the two cases, the JPML bluntly stated that:

There is ***no overlap*** between the putative classes alleged in the present [securities fraud] action and MDL No. 2046, and the differing factual and legal issues suggest that any mutual discovery is not substantial.

(*See* Ex. 1, Oct. 6, 2009 Order Denying Transfer at 1 (emphasis added).)

Second, in addition to being based on different legal claims and theories, FIs’ Master Complaint (“MC”) contains several critical facts wholly absent from the Securities Case

¹ As Judge Thompson explained, the fact that the Securities Case was brought under the Exchange Act was significant because it meant that Heartland’s motion to dismiss would be judged under the heightened pleading standard contained in the Private Securities Litigation Reform Act of 1995 (“PSLRA”). *In re Heartland*, 2009 U.S. Dist. LEXIS 114866, at *5-6. Among other things, the PSLRA requires a complaint to state with particularity facts giving rise to a strong inference that the defendant acted with scienter; a complaint only meets this standard if the facts alleged “support an inference of scienter that is ‘cogent and at least as compelling as any opposing inference of nonfraudulent intent.’” *Id.* at *6 (quoting *Tellabs, Inc. v. Mankor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)). In sharp contrast, none of the claims asserted by FIs are subject to the PSLRA’s heightened pleading standard.

complaint. In particular, the MC highlights Heartland's statements specifically touting the reliability of its Exchange platform (which was where the Data Breach occurred),² and cites to Heartland's "Merchant Bill of Rights," explaining how and why it was designed to assure the public that Heartland had adequate safeguards in place to protect the sensitive data with which Heartland was entrusted.³ Such critical, factual allegations are nowhere to be found in the Securities Case complaint. Also absent is any mention of the trademarks listed below the Heartland logo (which describe Heartland's use of the "highest standards"),⁴ and the post-Data Breach remarks contained on Heartland's website.⁵ Nor does the Securities Case complaint reference the assertion by Visa's Chief Enterprise Risk Officer that the Data Breach resulted from Heartland's "lack of ongoing vigilance in maintaining compliance"⁶ Given the numerous, additional allegations contained in the MC, Judge Thompson's conclusion that the Securities Case plaintiffs could point to no materially misleading statement by Heartland has no bearing on this case.

Third, even if this Court were to conclude that the MC fails to allege a materially misleading statement, it still would not warrant dismissal of many of the MC's claims. As Judge Thompson indicated, a plaintiff in a securities fraud case must prove, among other things, a material misrepresentation (or omission) and scienter. *In re Heartland*, 2009 U.S. Dist. LEXIS 114866, at *8 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)). Judge Thompson dismissed the Securities Case because she concluded that these two elements were lacking. *Id.* at *23. Here, however, several of the claims asserted in the MC contain no scienter

² See MC ¶¶ 46-47.

³ *Id.* ¶¶ 48-49.

⁴ *Id.* ¶ 51.

⁵ *Id.* ¶ 50.

⁶ *Id.* ¶¶ 61-62.

or materiality requirement.⁷ Accordingly, even if the Securities Case analysis were sound—which it is not—and even if it could be applied to the substantially more detailed allegations in this case—which it cannot—the decision still fails to provide any basis to dismiss FIs’ claims that do not involve a materiality or scienter requirement (such as Counts I through IV).

Fourth, FIs respectfully submit that the District of New Jersey’s analysis of the allegedly misleading statements relied on by the Securities Case plaintiffs is unpersuasive and should not be followed here. Judge Thompson found that Heartland’s statement that it placed “significant emphasis on maintaining a high level of security” was not materially misleading or inconsistent with the breach because “[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*, 2009 U.S. Dist. LEXIS 114866, at *14. This analysis is contrary to the well-known rule that a court deciding a motion to dismiss must accept the facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff’s favor. *See, e.g., In re Moody’s Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 503 (S.D.N.Y. 2009) (citations omitted).⁸ Had the New Jersey District Court applied this standard, it would have found it plausible that Heartland’s statements regarding its security systems were materially false. As such, even the Securities Case complaint’s less detailed allegations should have survived a motion to dismiss.

II. FIs’ Negligence Claim Easily Survives under New Jersey Law

Recognizing that FIs’ negligence claims are more than adequately pleaded under New Jersey law, Heartland initially avoided its application. Now, essentially conceding that New

⁷ *See, e.g., Polzo v. County of Essex*, 960 A.2d 375, 384 (N.J. 2008) (“In order to sustain a common law cause of action in negligence, a plaintiff must prove four core elements: (1) [a] duty of care, (2)[a] breach of [that] duty, (3) proximate cause, and (4) actual damages.”) (citations omitted); *YAPAK, LLC v. Mass. Bay Ins. Co.*, No. 3:09-cv-3370, 2009 U.S. Dist. LEXIS 96361, at *2 (D.N.J. Oct. 16, 2009) (“The classic elements of a breach of contract claim are (1) the existence of a valid contract, (2) defective performance, and (3) damages.”).

⁸ *Cf. Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (remarking that *scienter* is subject to competing inferences under the PSLRA) (citing 15 U.S.C. § 78u-4(b)(2)).

Jersey law governs FIs' claims, Heartland provides only a cursory, footnoted response to FIs' choice-of-law analysis (*see* Dkt. No. 56 at 4 n.4) while leveling insupportable arguments for dismissal under New Jersey law. As demonstrated below, Heartland's contention that FIs' negligence claims fail under New Jersey law cannot withstand scrutiny.

A. New Jersey Law Does Not Restrict Duty to Particular Factual Scenarios

Under New Jersey law, the test for recovery of economic loss in tort is both straightforward and well-settled: Plaintiffs may recover purely economic loss if they are members of an identifiable class that the defendant should have reasonably foreseen was likely to be injured by its conduct. *Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc.*, 638 A.2d 1288, 1294 (N.J. 1994) (citing *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985)). Acutely aware that FIs easily satisfy this standard (*see* Dkt. No. 50 at 17-23), Heartland attempts to truncate the analysis by erroneously contending that New Jersey law somehow limits negligence claims for economic injuries to situations involving a special relationship or where the defendant's conduct either caused or threatened physical harm. (*See* Dkt. No. 56 at 5.) Heartland likewise wrongly asserts that New Jersey does not recognize a common law duty when a plaintiff has the supposed ability to protect itself against risk. (*See id.* at 7.) As demonstrated below, New Jersey law provides otherwise.

1. Establishing duty does not depend on a special relationship or physical injury showing

The New Jersey Supreme Court unequivocally eliminated a *per se* ban on recovering economic loss in tort twenty-five years ago in *People Express*, 495 A.2d 107. There, the court extensively analyzed the economic loss doctrine and its origins, and specifically *rejected* the requirements Heartland seeks to impose here: namely, the necessity of either a special relationship or a physical injury to recover purely economic loss in tort. 485 A.2d at 116.

Regarding the former, the court addressed the special relationship exception in a lengthy discussion of numerous exceptions to the economic loss doctrine, ultimately concluding that such exceptions “expose the hopeless artificiality of the *per se* rule against recovery for purely economic losses.” *Id.* at 114. Regarding the latter, the court unambiguously rejected any physical injury requirement (threatened or otherwise) when it held that plaintiffs may recover economic loss if they are a member of an identifiable class that the defendant should have foreseen would be injured by its conduct. *Id.* at 116.

Sacrificing its credibility in an effort to temper this unambiguous holding, Heartland suggests—for the first time—that *People Express* has been somehow limited by the subsequently-decided *Wang v. Allstate Insurance Co.*, 592 A.2d 527 (N.J. 1991). In *Wang*, the New Jersey Supreme Court found that an insurance agent has no duty to advise an insured to consider higher amounts of homeowner’s insurance. *Id.* at 536. Heartland erroneously suggests *Wang* requires a special relationship to recover economic loss. (See Dkt. No. 56 at 5.) Entirely absent from *Wang*, however, is any discussion of the economic loss doctrine, which was not even at issue in the case. Rather, the plaintiff in *Wang* argued that the defendant there breached a previously recognized duty of care owed by insurance agents to their insureds. *Id.* at 536. The court found that while insurance agents generally owe a duty to their insureds, the duty did not extend to the facts presented in that case. See *Carter Lincoln-Mercury*, 638 A.2d at 1292 (discussing the *Wang* holding). The *Wang* court therefore recognized that a special relationship *may* create a legal duty. It did not, as Heartland seems to contend, hold that a special relationship *must* be present for a legal duty to exist—a notion that defies even the most elementary tort law principles.

Regardless, the New Jersey Supreme Court resolved any potential confusion regarding the validity of *People Express* in *Carter Lincoln-Mercury*, 638 A.2d 1288, which was decided

three years after *Wang*. There, the court found that an insurance broker *did* owe a duty, not only to its insureds, but also to loss-payees, to conduct a reasonable inquiry of the general financial soundness of proposed insurance carriers. *Id.* at 1298. In so holding, the court squarely affirmed the *People Express* standard, which allows plaintiffs to recover economic loss if they are members of an identifiable class that the defendant should have foreseen would be injured by its conduct:

In *People Express Airlines v. Consolidated Rail*, 100 N.J. 246, 495 A.2d 107 (1985), we held that a plaintiff could bring an action for purely economic losses, ***regardless of any accompanying physical harm or property damage, if the plaintiff was a member of an identifiable class that the defendant should have reasonably foreseen was likely to be injured by the defendant's conduct*** and the plaintiff's injuries had been proximately caused by the defendant's negligence. *Id.* at 263, 495 A.2d 107. We found it appropriate to impose a duty on tortfeasors who by virtue of their activities, training, or preparation for their work had particular knowledge or reason to know that others would be harmed by their negligent conduct, *id.* at 258, 495 A.2d 107, and we stated that "the more particular is the foreseeability that economic loss will be suffered by the plaintiff as a result of defendant's negligence, the more just is it that liability be imposed and recovery allowed." *Id.* at 263, 495 A.2d 107.

Id. at 1294 (emphasis added).

Carter Lincoln-Mercury also addressed *Wang*, which it cited for the limited proposition that the duty of an insurance broker is not without limitation. *Id.* at 1291. *Carter Lincoln-Mercury* conclusively invalidates Heartland's dubious suggestion that *Wang* limited *People Express* in any way. *Carter Lincoln-Mercury* likewise lays to rest Heartland's phantom "threatened physical injury" requirement, as the court made clear that recovery for economic loss may be had "regardless of any accompanying physical harm or property damage." *Id.* at 1294. To be clear, *none* of Heartland's proffered authorities even discuss the concept of threatened (as opposed to actual) physical injury, much less hold that it is a prerequisite to recovery for economic loss. Simply put, it appears that Heartland has wholly invented the distinction, which cannot withstand scrutiny under either *People Express* or *Carter Lincoln-Mercury*. Indeed, both

authorities expressly reject the rigid distinctions Heartland strains to impose in favor of a general analysis of foreseeability as it relates to duty and proximate cause. *See Carter Lincoln-Mercury*, 638 A.2d at 1294; *People Express*, 495 A.2d at 115. Under this test, FIs' claims easily survive. (*See* Dkt. No. 50 at 17-25.)

2. Establishing duty does not require a plaintiff to show that it could not have avoided the harm wrongfully inflicted by the defendant

Heartland likewise overreaches when it claims, apparently without reservation, that “New Jersey law does recognize a common-law duty where the class of persons the duty would benefit has the ability to protect itself against the risk.” (*See* Dkt. No. 56 at 7.) Neither of the authorities Heartland cites (which are, tellingly, relegated to a footnote) supports this sweeping contention, much less Heartland’s further contention (supported by no authority at all) that FIs must “establish that payment card issuers have so limited an ability to protect themselves against the risk of payment card data being stolen by third parties that the common law should do so.” (*See id.*).

In *Piscitelli v. Classic Residence by Hyatt*, 973 A.2d 948 (N.J. Super. Ct. App. Div. 2009), an identity theft victim sued Hyatt, the employer of an identity thief who stole the victim’s social security number in order to obtain a job with Hyatt. 973 A.2d at 951. The victim argued that Hyatt owed her a duty to verify the identity of prospective employees. *Id.* at 965. In conducting the lengthy foreseeability analysis that Heartland studiously avoids here, the court “noted” that the victim could likewise have discovered the identify theft by examining her social security earnings history or by obtaining a free credit report. *Id.* at 967. To suggest (as Heartland does) that the court’s opinion turned on this observation would be to ignore the numerous other bases for the court’s holding—all absent here—including the lack of relationship between the parties, the considerable costs of requiring employers to verify the identity of all

employees, and the extensive ramifications such a duty would have on the field of employer liability. *See id.* at 967-68.

A plaintiff's ability to prevent harm was mentioned in the context of a broader foreseeability analysis in *Cross v. County of Essex*, No. L-6149-08, 2007 WL 208531, at *1 (N.J. Super. Ct. App. Div. Jan 29, 2007). There, Cross sought to hold the Essex Vicinage Probation Division responsible for erroneously overpaying child-support payments that Essex received pursuant to court attachment order. *Id.* at *1. In declining to hold Essex owed a duty to Cross, the court observed that the question of whether a plaintiff lacked the ability or opportunity to avoid harm is related to the foreseeability analysis, but made no further elaboration. *Id.* at *2.

At most, *Piscitelli* and *Cross* stand for the proposition that a plaintiff's ability to avoid harm may be considered, among other factors, in the course of a foreseeability analysis. Yet such consideration does Heartland little good, as it defies logic to suggest that FIs are better positioned to prevent a security breach of Heartland's computer systems than Heartland itself. Heartland's claim that FIs have other means to recover for the injury *after* it has occurred (*see* Dkt. No. 56 at 7-8) likewise lacks merit, as it has nothing to do with *preventing* the risk (*i.e.* the Data Breach), and Heartland provides no authority suggesting that it does—*Piscitelli* and *Cross* certainly do not so hold. In short, New Jersey law does not require FIs to demonstrate that they could have avoided the harm caused by Heartland's negligence. Heartland's efforts to demonstrate otherwise are unpersuasive.

B. New Jersey Law Should Apply, But Even If It Does Not, Heartland's Arguments Are Still Unavailing

Unable to dispose of FIs' negligence claim under New Jersey law, Heartland next suggests that the Court should look beyond New Jersey law—in particular to Arizona law—for guidance. (*See* Dkt. No. 56 at 8) (citing *Cumis Ins. Society, Inc. v. Merrick Bank Corp.*, No. CIV

07-374-TUC-CKJ, 2008 WL 4277877, at *1 (D. Ariz. Sept. 18, 2008)). Should the Court do so, it will find that *Merrick Bank* actually *supports* the existence of a duty here, as the *Merrick Bank* court *rejected* arguments regarding the economic loss doctrine that are similar to those Heartland presents.

In *Merrick Bank*, Cumis, an insurer providing coverage to credit unions, brought suit against Merrick, CardSystems, and others following a security breach that required Cumis to pay millions of dollars for credit and debit card losses suffered by its insureds. *Id.* at *1. The security breach resulted from CardSystems' data-protection failure, and Merrick guaranteed CardSystems' compliance with industry standards and agreed to indemnify third parties for the losses that foreseeably followed. *Id.* at *1. Citing the economic loss doctrine, Merrick moved to dismiss Cumis's tort claims, arguing that Cumis had failed to allege a duty independent of any contractual rights. Finding the data breach in question "comparable to a tortious 'accident,'" the court disagreed, observed that "tortious damage may include purely economic damages," and refused to dismiss the claims on that basis. *Id.* at *8.

Heartland posits that the *Merrick Bank* court "refused to endorse the same expansive common law duty Plaintiffs now urge this Court to recognize," but that is an inaccurate reading of the case. (*See* Dkt. No. 56 at 9.) Separate from its economic-loss-doctrine arguments, Merrick moved to dismiss Cumis's negligence-based claims, asserting that Merrick had made no misrepresentations to Cumis or its insured that were distinct from the larger class of all participants in the VISA and MasterCard systems. *Id.* at *11. The court observed that Cumis alleged a general negligence duty, but ultimately dismissed the claims because of Cumis's failure to show misrepresentations distinct to itself. *Id.* at *12 (stating "[t]he Court agrees with Defendants that no representations were made to Cumis or its insureds distinct from the larger class of all participants in the VISA and MasterCard systems. The application of § 552(2)

mandates dismissal of the negligence claims.”). Read properly, *Merrick Bank* does not help Heartland here.

III. FIs’ Breach of Contract Claim is Adequately Pleaded

A. FIs are not Required to be Donees or Creditors in Order to be Third Party Beneficiaries of the Contracts Between Heartland and its Acquiring Banks and Merchants

The operative contracts between Heartland and its two acquiring banks (the “ACs”) and Heartland and its Merchants (the “MPAs”) (Dkt. No. 40, Exs. 4-6) are governed by Ohio, Missouri and/or New Jersey law. Heartland concedes that the Ohio Supreme Court and New Jersey Supreme Court long ago adopted the modern view of third-party-beneficiary status vis-à-vis breach of contract claims set forth in the RESTATEMENT (SECOND) OF CONTRACTS § 302 (“Section 302”). (Dkt. No. 56 at 17 n.31.) Section 302 states, in pertinent part:

(1) *Unless otherwise agreed* between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either—

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) *the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.*

(emphasis added). Notwithstanding the clear language of Section 302 and its footnote 31 concession, Heartland nevertheless argues that the *only* way FIs can qualify as third party beneficiaries of the ACs and MPAs is if they are donees or creditors. (Dkt. No. 56 at 17-18.) Heartland, however, apparently misunderstands the law.

While a third party *may* qualify for third-party-beneficiary status by virtue of being a donee or creditor, there are other routes to third-party-beneficiary status. For example, Section 302(1)(b) clearly confers third-party-beneficiary status where “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” *See also*

Hill v. Sonitrol of SW. Ohio, Inc., 521 N.E.2d 780, 784 (Ohio 1988) (citing Section 302 in its entirety); *TRINOVA Corp. v. Pilkington Bros., P.L.C.*, 638 N.E.2d 572, 577 (Ohio 1994) (specifically citing Section 302(1)(b)); *Broadway Maint. Corp. v. Rutgers, State Univ.*, 447 A.2d 906, 909 (N.J. 1982); *Andes v. Albano*, No. WD 44575, 1992 WL 84548, at *5 (Mo. Ct. App. April 29, 1992) (citing Section 302(1)). As discussed in greater detail in FIs’ response brief, this is precisely the case here—the circumstances demonstrate that FIs are intended third-party beneficiaries of the ACs and MPAs. (See Dkt. No. 56 at 42-47).

B. FIs Adequately Allege Intended Beneficiary Status

Heartland’s final assertion is that (1) the contracts lack express language definitively proving that the parties to the contracts intended to benefit FIs and (2) the absence of such language is fatal to the third-party-beneficiary claims. Citing no authority, Heartland essentially asks this Court to hold that, as a matter of law, such intent can never be implied—irrespective of the circumstances attending the execution of the contracts. In Ohio, however, such intent *can* be implied—and the relevant inquiry focuses on the “circumstances surrounding the promise” *DeNune v. Consol. Capital of N. Am., Inc.*, 288 F. Supp. 2d 844, 856 (N.D. Ohio 2003); *Anderson v. Olmsted Util. Equip., Inc.*, 573 N.E.2d 626, 631 n.5 (Ohio 1991); *Visintine & Co. v. N.Y., Chicago & St. Louis R.R. Co.*, 160 N.E.2d 311, 314 (Ohio 1959). As would be expected, determining this intent “is a factual inquiry.” *Boggs v. Columbus Steel Castings Co.*, No. 04AP-1239, 2005 WL 2210666, at *2 (Ohio Ct. App. Sept. 13, 2005).

In an effort to avoid a “factual inquiry,” Heartland argues that the Visa/MasterCard regulations make it “impossible for plaintiffs to be intended beneficiaries” because the regulations are “incorporated” into the contracts and because they contain, among other things, a third-party-beneficiary disclaimer. (Dkt. No. 56 at 26-28.) But a review of the lone clause

referenced by Heartland on this issue establishes there is no effective “incorporation” of the Visa/MasterCard regulations.⁹

Even if there was a valid “incorporation” clause, Heartland failed to provide the Court with the *actual* regulations Heartland represents in paragraph 1.1(f) it “received” and with which it agreed to comply as of the date the MPA was signed. Without an adequate disclaimer, the question of “intent” is too fact specific even for summary judgment—let alone a motion to dismiss. *Id.*; *DeNune*, 288 F. Supp. 2d at 856 (“There is no provision in the contract . . . which would prevent a third-party beneficiary claim I cannot decide, at the motion to dismiss stage, whether the ‘circumstances surrounding the promise . . . indicate[d] . . . [an] intent to benefit’ the plaintiff.”) (alterations in original).

In sum, *if* the contracts contained a valid incorporation clause, and *if* the applicable operating regulations were before the Court, and *if* the regulations contained an unequivocal disclaimer, the parties’ intent regarding third-party beneficiaries *might* arguably be more clear. Not only are each of these necessary predicates absent, FIs also allege that the contracting parties intended to benefit them. At best for Heartland, the “intent” issue—the “circumstances surrounding the promise”—requires discovery to resolve.

IV. Each of the Consumer Fraud Statutes in the Named Plaintiffs’ Home States are Applicable

Regarding the consumer protection claims, Heartland continues to insist that FIs must proceed exclusively under the New Jersey Consumer Fraud Act (“NJCFA”) even though the MC

⁹ “Incorporation” clauses must be unequivocal and express a clear intent to actually *incorporate* a specific agreement. Vague references to other documents which may have been reviewed or recite “incorporation” buzzwords do not suffice. *Allstate Ins. v. Boggs*, 271 N.E.2d 855, 859 (Ohio 1971); *Tovar v. Tovar*, No. 63933, 1993 WL 462869, at *2 (Ohio Ct. App. Nov. 10, 1993). Here, the paragraph cited by Heartland (§1.1(f) of the KeyBank MPA) as support for the “incorporation” claim fails to even use the term “incorporated,” let alone provide the necessary degree of specificity. Thus, there was no “incorporation” of the Visa/MasterCard regulations into the contract under Ohio law.

expressly pleads separate consumer fraud statutes in different counts. (*See* Counts VIII to X of the MC.) Heartland also contends in its reply brief (for the first time) that the consumer fraud statutes of California, Colorado, Florida, Illinois, New York, Texas, and Washington are inapplicable on the merits for various reasons. As set forth below, these arguments are unavailing.

- **California.** The MC expressly pleads reliance and causation. (*See* MC ¶¶ 98, 113, 125, 139, 142, 145.) The MC also alleges that FIs would not have been injured but for Heartland’s misconduct. (*Id.* ¶ 106.)
- **Colorado.** Heartland’s selective quotation from the Colorado Consumer Protection Act is misguided. (*See* Dkt. No. 40 at 16.) The section relied upon by Heartland, COLO. REV. STAT. § 6-1-105(1)(l), is one of approximately 45 different categories of conduct that are considered deceptive trade practices. *See* COLO. REV. STAT. § 6-1-105(1)(a)-(bbb).
- **Florida.** The Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) expressly defines a “consumer” with standing under the statute to include a “business; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; [and] any commercial entity, however denominated;...” FLA. STAT. ANN. § 501.203(7). As such, courts have held that FDUTPA applies “to any act or practice occurring in the conduct of any trade or commerce even as between purely commercial interests,” and that business entities may sue for damages pursuant to FLA. STAT. ANN. 501.211(2). *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007) (internal citations omitted). *See also Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So. 2d 274, 277-278 (Fla. Dist. Ct. App. 2004) (observing that the phrase “consumer transaction” has been deleted from the FDUTPA, and therefore it “is not limited to purely *consumer transactions*”) (emphasis in original).
- **Illinois.** Heartland’s claim that its “conduct does not relate to consumer protection issues” is undermined by the fact that it just recently reached a proposed settlement on behalf of consumers asserting consumer protection claims. (*See* Dkt. No. 56 at 16.) And because both FIs and Heartland are entities, the proper “test for standing is whether the alleged conduct invokes trade practices addressed to the market generally or otherwise implicates consumer protection concerns.” *Russian Media Group, LLC v. Cable Am.*, No. 06-3578, 2008 U.S. Dist. LEXIS 9788, at *10-11 (N.D.Ill. Feb. 7, 2008) (internal citations omitted). Here, Heartland’s conduct clearly does.
- **New York.** As explained above, the data breach involved consumer-oriented conduct by Heartland. Moreover, the language of the statute permits recovery by any person (including financial institutions), injured by reason of a deceptive business practice. *See e.g. Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir.1995) (allowing a corporation to use section 349 to combat a competitor’s deceptive consumer practices); Mem. of Atty. Gen., Bill Jacket, L. 1980, ch. 346 (“a business itself will be able to use

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Financial Institution Plaintiffs' Surreply in Opposition to Defendant Heartland Payment Systems, Inc.'s Motion to Dismiss the Master Complaint was filed via the Court's ECF system on January 15, 2010 and thereby served on all counsel of record.

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