UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION	)	MDL No. 1:19md2915 (AJT/JFA)
	)	This Document Relates to CONSUMER Cases

ORDER CERTIFYING A QUESTION OF LAW TO THE SUPREME COURT OF VIRGINIA

The Court, having concluded that the questions of law recited herein are determinative of Plaintiffs' negligence claims, and it appearing that there is no controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, the Court states the following in accordance with Va. Sup. Ct. R. 5:40(c):

1. The nature of the controversy in which the question arises

In these consolidated cases transferred to this Court by the Judicial Panel on Multidistrict Litigation, Plaintiffs' claims arise out of a cyber-attack that resulted in the theft of Plaintiffs' personally identifiable information ("PII") being held by Capital One. Plaintiffs allege a variety of causes of action against Capital One, including, as relevant here, that Capital One was negligent with respect to the security measures it employed to protect Plaintiffs' PII.

2. The questions of law to be answered

The Court certifies the following questions of law:

> Whether the economic loss rule precludes Plaintiffs' negligence claims under the facts and circumstances alleged?
>
> If not barred by the economic loss rule, does there exist under the circumstances alleged, a cause of action for negligence against Capital One based on either an extra-contractual, independent tort duty to use reasonable care to protect consumers' personal information from disclosure or the voluntary assumption of such a duty?

assumption of such a duty?

3. A statement of all facts relevant to the question certified

Plaintiffs allege the following:

Capital One is a financial services company that provides banking and financial products to customers, including credit cards to qualifying applicants. [Doc. No. 971] (the "Second Amended Representative Consumer Class Action Complaint" or "Second Am. Compl.") ¶¶ 1-4. Capital One required customers' PII as a pre-condition for considering whether to provide credit card services to the customer; it then continued to possess and aggregate that PII with other customer's PII for its own business purposes, beyond those pertaining to the particular customer whose PII was obtained. *Id.* ¶¶ 26-34. As a result, Capital One created a massive concentration of PII, a "data lake," in which Capital One mines customers' data for purposes of product development, targeted solicitation for new products, and target marketing of new partners. *Id.* ¶¶ 28, 45.

On July 29, 2019, Capital One announced it had experienced a data breach of Capital One's Amazon Web Services ("AWS") cloud environment where Capital One was storing consumers' confidential PII. The stolen data included, *inter alia*, names, addresses, zip codes, phone numbers, email addresses, dates of birth, self-reported income, approximately 140,000 Social Security Numbers, 80,000 bank account numbers, credit scores, and credit card limits, balances, and payment histories (the "Cyber Incident"). *Id.* ¶¶ 1-2 n.1. Overall, the Cyber Incident involved information pertaining to over 100 million Capital One credit cardholders and applicants in the United States and six million in Canada. *Id.* ¶¶ 1, 60.

The data was stolen from simple storage service buckets known as S3 buckets in Capital One's AWS cloud environment by a former AWS systems engineer, who exploited a

misconfigured Web Application Firewall ("WAF"). *See id.* ¶¶ 44-59. Both Capital One and AWS were aware before the Cyber Incident of well- known AWS cloud-specific vulnerabilities with respect to S3 buckets and the Cyber Incident occurred because of these vulnerabilities. *Id.* ¶¶ 56-59, 69-70. Capital One and AWS were also both aware that they were targets for such a cyber-attack and anticipated attempts to gain unauthorized access and use of the PII stored on the AWS cloud. Capital One acknowledged its obligation to safeguard that PII, *id.* ¶¶ 44-59, 88-95, made multiple promises to its applicants and cardholders that it would keep their data safe, *id*. ¶¶ 96-99, and engaged in efforts jointly with AWS to develop a security product ("Cloud Custodian") whose purpose was to protect against these vulnerability flaws. *Id.* ¶¶ 44-59, 61. However, Capital One and AWS failed to comply with regulatory and industry-standard practices governing the protection of PII. *See id.* ¶¶ 100-122. Following Capital One's discovery of the Cyber Incident, it remediated the vulnerability that had been exploited.

Plaintiffs are individuals whose PII was stolen in the Cyber Incident and they assert contract, tort, and statutory claims on behalf of putative national and statewide classes of individuals whose personal information was compromised in the Cyber Incident. As relevant here, Plaintiffs assert a claim for negligence under Virginia law relating to their core allegation that Capital One failed to adequately protect their PII, and that as a result of Capital One's negligence, they suffered certain economic harms, including the time and money spent to address actual fraud and to mitigate the risk of future fraud. *Id.* ¶¶ 15-25,126; *see also id.* ¶¶ 127-143. Plaintiffs do not allege that they suffered any physical harms or damages to their person, property, land, or chattels. *Id.* ¶¶ 15-25.

4. The names of each of the parties involved

This is a putative class action. The Plaintiffs named in the Second Amended Representative Consumer Class Action Complaint [Doc. No. 971] are Brandon Hausauer (CA), Caralyn Tada (CA), Emily Behar (FL), Gary Zielicke (FL), Emily Gershen (NY), Brandi Edmondson (TX), John Spacek (VA), and Sara Sharp (WA). The named Defendants are Capital One Financial Corporation, Capital One Bank (USA) N.A., Capital One, N.A., Amazon.com, Inc., and Amazon Web Services, Inc.

5. ***The name, Virginia State Bar number, mailing address, telephone number (including any applicable extension), facsimile number (if any), and e-mail address (if any) of counsel for each of the parties involved***

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6. ***A brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court***

The Court and parties agree that Plaintiffs' negligence claims are governed by Virginia law. The viability of Plaintiffs' negligence claim therefore depends on whether under the circumstances alleged Virginia law imposes an extra-contractual, tort duty to use reasonable care to protect consumers' personal information from disclosure, either as an independent duty imposed by law or as one voluntarily assumed.

7. A brief statement setting forth relevant decisions, if any, of the Supreme Court of Virginia and the Court of Appeals of Virginia and the reasons why such decisions are not controlling

There are no Supreme Court of Virginia or the Court of Appeals of Virginia decisions which have considered whether a tort duty of care exists with respect to the accumulation of PII under the circumstances of this case. The Supreme Court of Virginia has issued decisions adopting the assumption of duty doctrine, but only in cases where physical harm is alleged. *See Kellerman v. McDonough*, 684 S.E.2d 786, 791 (Va. 2009) (wrongful death); *Fruiterman v. Granata*, 668 S.E.2d 127, 137 (Va. 2008) (wrongful birth); *Didato v. Strehler*, 554 S.E.2d 42, 48 (Va. 2001) (wrongful birth); *Ring v. Poelman*, 397 S.E.2d 824, 826–27 (Va. 1990) (negligent driving); *Cofield v. Nuckles*, 387 S.E.2d 493, 496–97 (Va. 1990) (negligent driving); *Nolde Bros., Inc. v. Wray*, 266 S.E.2d 882, 884 (Va. 1980) (negligent driving).

Two Virginia cases have tangentially addressed whether there is a duty to protect PII independent of any duty arising from contract, *Parker v. Carilion Clinic*, 819 S.E.2d 809 (Va. 2018) and *Deutsche Bank Nat'l Trust Co v. Buck*, 2019 WL 1440280 (E.D. Va. Mar. 29, 2019) (Lauck, J.). In *Parker*, the medical clinic's employees stole a laptop that contained confidential patient information; and the Supreme Court of Virginia held that the clinic did not have an independent common law duty to protect patient information from unauthorized

access in that manner. *Id.* at 347 (observing that no Virginia court "ha[d] ever imposed a tort duty on a healthcare provider to manage its confidential information systems so as to deter employees from willfully gaining unauthorized access to confidential medical information."). *Parker* did not address generally whether Virginia law imposes an extra-contractual, independent tort duty on businesses to protect their customers' personal information from disclosure. Months after *Parker* was decided, in *Deutsche Bank Nat'l Trust Co v. Buck*, a court in the Eastern District of Virginia declined to recognize under Virginia law a common law duty on the part of a closing agent in a real estate transaction to protect against an electronic data breach. 2019 WL 1440280, at *5.

In its Order dated September 18, 2020, denying Capital One's Motion to Dismiss Plaintiffs' Negligence Claim, this Court reviewed the Supreme Court of Virginia decisions pertaining to Virginia's economic loss rule and the source of duty rule. Attached are those portions of the Court's Order dated September 18, 2020 that pertain to the certified questions. [Doc. No. 879]. Also attached is its Order dated November 25, 2020 that further explains the basis for its decision denying Capital One's Motion to Dismiss the Negligence Claim. [Doc. No. 1059].

Accordingly, the questions of law listed herein are hereby **CERTIFIED** to the Supreme Court of Virginia pursuant to Va. Sup. Ct. R. 5:40; and the Clerk is **DIRECTED** to forward a copy of this Certification Order under the official seal of the Court to the Clerk, Supreme Court of Virginia.

The Clerk is directed to docket this Order in the lead case (1:19md2915), as required per PTO-1.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
May 7, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION	)	MDL No. 1:19md2915 (AJT/JFA)
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ORDER

Defendants Capital One and Amazon have filed Motions to Dismiss the Amended Corrected Representative Complaint. [Doc. 386] ("Capital One Motion"); [Doc. 394] ("Amazon Motion") (the "Motions").[1] For the reasons stated herein, the Motions are **GRANTED** in part and **DENIED** in part as follows:

1. As to Count 1 (negligence), the negligence claims under the laws of Washington are dismissed; and the Motions are otherwise denied;
2. [redacted]
3. [redacted]
4. [redacted]
5. [redacted]
6. [redacted]

[1] Unless indicated otherwise, all docket references are made to 1:19-md-2915.

7. [redacted]

8. [redacted]

9. [redacted]

10. [redacted]

[redacted]

11. [redacted]

[redacted]

12. [redacted]

[redacted]

13. [redacted]

[redacted]

14. [redacted]

[redacted]

15. [redacted]

I. BACKGROUND

The following facts are alleged in Plaintiff's Amended Corrected Representative Consumer Class Action Complaint [Doc. 826] ("Amended Complaint" or "Am. Compl."), which are accepted as true for purposes of this Order.[2] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

On July 29, 2019, Capital One announced it had experienced a data breach of Capital One's Amazon Web Services ("AWS") cloud environment where Capital One was storing

[2] On September 7, 2020, Plaintiff, without objection from Defendants, filed the Amended Complaint, in which the only change was the substitution of the Texas Plaintiff. At the September 8, 2020 monthly status conference, the Court ordered that the Amended Complaint shall be deemed filed and served as the operative complaint; and that the then-pending Motions would be deemed filed and ruled on with respect to the Amended Complaint.

consumers' confidential personal information ("PII") (the "Data Breach"). The Data Breach was the result of a well-known vulnerability of the AWS cloud to an SSRF attack. *See id.* ¶¶ 2, 46-61. Over 100 million people in the United States and six million people in Canada were affected. Am. Compl. ¶¶ 1, 62. Amazon has described the Data Breach through this alleged SSRF breach as follows:

> As Capital One outlined in their public announcement, the attack occurred due to a misconfiguration error at the application layer of a firewall installed by Capital One, exacerbated by permissions set by Capital One that were likely broader than intended. After gaining access through the misconfigured firewall and having broader permission to access resources, we believe a SSRF attack was used (which is one of several ways an attacker could have potentially gotten access to data once they got in through the misconfigured firewall).

Id. ¶ 70.

Despite the sophisticated nature of the hack, *id.* ¶ 72, Defendants were well-aware of the AWS cloud's vulnerabilities to unauthorized access through a SSRF attack, *Id.* ¶¶ 46-49. Nevertheless, Capital One chose to place and aggregate its most sensitive consumer information on these susceptible servers and behind AWS's flawed firewall, *Id.* ¶¶ 44, 47-50, and in an attempt to protect against this vulnerability, Capital One and Amazon jointly developed a product called Cloud Custodian, whose purpose was to address the SSRF threat by encrypting data on the AWS servers. *Id.* ¶¶ 56-58. But these efforts were inadequate to secure Capital One customers' data. *Id.* ¶ 58. Indeed, if an unauthorized individual were able to gain access to a credential in the AWS cloud environment, known technically as an "Identity Access Management" role, the credential would allow the unauthorized individual broad access beyond the firewall protecting the cloud and automatic decryption of the data stored in the cloud. *Id.* ¶¶ 47-54, 58-61. In other words, once in the AWS server environment, any individual could access, in Capital One's internal servers an aggregated collection of customers' PII (a data lake), the

precise vulnerability exploited to exfiltrate Capital One's customer data in the Data Breach. *See id.* ¶¶ 65-73.

The Data Breach's occurrence is well documented. Capital One's logs showed a hacker's connections or attempted connections to the AWS server in March and April 2019. However, it was not until July 17, 2019, approximately four months after the Data Breach, that Capital One received an e-mail through its responsible disclosure program raising the possibility that someone had stolen data stored in Capital One's AWS cloud environment. *Id.* ¶¶ 64-65. Shortly thereafter, the person accused of perpetrating the attack, former AWS systems engineer Paige Thompson, was arrested and indicted in federal court. As alleged in the criminal complaint, Thompson gained unauthorized access to Capital One's AWS environment primarily by exploiting a Web Application Firewall ("WAF") that monitored traffic to and from Capital One's AWS cloud environment. *Id.* ¶¶ 65, 67. By exploiting the WAF, Thompson was able to retrieve, access, and exfiltrate data from a portion of the AWS Simple Storage Service buckets in Capital One's AWS environment. *Id.* ¶ 67. Thompson ultimately stole approximately 1.75 terabytes of data on March 22-23, 2019. In addition to the access on March 22, 2019 and 23, 2019, Thompson had also scanned, probed, or accessed Capital One's network on five (5) further instances over a three-month period: March 4, March 12, April 2, April 19, and May 26, 2019. *Id.* ¶ 74. And as further detailed in the criminal complaint, on April 21, 2019, Thompson publicly posted on Github instructions on how she carried out the SSRF attack. *Id.*[3] Thompson then posted openly on Twitter and on public Slack channels over the course of several months

[3] Following Thompson's arrest on July 29, 2019, law enforcement authorities appear to have recovered Capital One's stolen data from Thompson's devices and learned that she was maintaining the stolen data in an encrypted format. *See United States v. Paige A. Thompson, a/k/a "erratic,"* Criminal Compl. ¶¶ 20, 27, No. 2:19-cr-00159-RSL (W.D. Wash. July 29, 2019). The criminal complaint filed alleges that Thompson "intended to disseminate data stolen from victim entities, starting with Capital One." *Id.* ¶ 25.

that she found huge files of data intended to be secured on various AWS cloud servers—including the cloud server for Capital One. *Id.* ¶¶ 78-82.

Plaintiffs seek to represent a putative nationwide class of all individuals whose personal information was compromised in the Data Breach, *id.* ¶ 146, as well as statewide subclasses of affected individuals in California, Florida, New York, Texas, Virginia, and Washington, *id.* ¶ 148. Plaintiffs allege that, as a result of the Data Breach, they suffered various harms including mitigation efforts or expenses (such as time and money spent placing credit freezes on their accounts, setting up credit alerts, and purchasing credit monitoring), diminution in the value of their personal information, and increased risk of future identity theft or other fraud. *See* Am. Compl. ¶¶ 18-27, 142. Plaintiffs also allege they "did not receive the benefit of their bargain" because, had they known the "truth" about Capital One's "data security practices," they would not have applied for Capital One credit cards or been willing to pay as much as they did for Capital One's services. *Id.* ¶ 145. Finally, a subset of seven Plaintiffs—plaintiffs Behar, Gershen, Palencia, Spacek, Sharp, Tada, and Zielicke—allege that they "experienced identity theft and fraud," *id.* ¶¶ 20, 21, 23, 27, or have identified unauthorized activity on their accounts, such as unauthorized charges or attempts to open new accounts after the Data Breach, *id.* ¶¶ 19, 24, 26.

In its Amended Complaint, Plaintiffs asserts the following seven (7) causes of action on behalf of a putative nationwide class of all persons whose PII was compromised in the Data Breach: (1) negligence (Count 1); (2) negligence *per se* (Count 2); (3) unjust enrichment (Count 3); (4) declaratory judgment (Count 4);[4] (5) breach of confidence (Count 5); (6) breach of

[4] Capital One has not moved to dismiss Plaintiffs' claims for declaratory and injunctive relief pertaining to Capital One's allegedly inadequate data security measures. As discussed *infra*, Amazon has moved to dismiss Plaintiffs' claim of declaratory and injunctive relief.

implied contract (Count 6); and (7) breach of contract (Count 7).[5] Am. Compl. ¶¶ 160-229. The Amended Complaint also asserts claims under California, Florida,[6] New York, Texas, and Washington consumer protection statutes and Virginia and Washington data breach notification statutes (Counts 8- 15). *Id.* ¶¶ 230-310.

II. [redacted]

[redacted]

[5] Counts 5 (breach of confidence), 6 (breach of implied contract), and 7 (breach of contract) are not alleged against Amazon.

[6] Plaintiffs have since abandoned the Florida consumer protection claim as to Capital One. *See* [Doc. 427] at n.27 ("Plaintiffs do not dispute that they do not state a claim against Capital One for violation of the Florida Deceptive and Unfair Trade Practices Act."). Plaintiffs, however, continue to assert this claim against Amazon.

[redacted]

B. Negligence

The Amended Complaint asserts a negligence claim under the law of each jurisdiction where a representative plaintiff resides. In moving to dismiss these claims, Defendants argue that the economic loss rule bars each of these claims and that Plaintiffs have otherwise failed to assert a cognizable injury or theory of causation.

1. Economic Loss Rule

Broadly recognized in each of the relevant states, the economic loss rule bars a plaintiff from recovering for purely economic losses under a tort theory of negligence. The rule, as applied, reflects the belief "that tort law affords the proper remedy for loss arising from personal injury or damages to one's property, whereas contract law and the Uniform Commercial Code provide the appropriate remedy for economic loss stemming from diminished commercial expectations without related injury to person or property." *In re Target Corp. Customer Data*

Sec. Breach Litig., 66 F. Supp. 3d 1154, 1171, 2014 U.S. Dist. LEXIS 175768, at *40 (citation omitted).

Plaintiffs contend that the economic loss rule does not apply under any of the applicable state laws for two reasons: (1) each state recognizes that the rule does *not* apply where the duty allegedly violated is an "independent duty" that does not arise from commercial or contractual expectations; and (2) there exists under certain states' law a so-called "special relationship" exception that removes their claims from the scope of the economic loss rule.

i. [redacted]

[redacted]

v. Virginia

Virginia courts routinely enforce the distinction between tort (*i.e.*, issues concerning safety of persons and property) and contract (*i.e.*, economic loss and the protection of bargained-for expectations) claims by applying Virginia's economic loss rule. *See, e.g., Selective Ins. Co. of*

the Se. v. Williamsburg Christian Acad., 2020 U.S. Dist. LEXIS 76433, at *15 (E.D. Va. April 30, 2020); *1004 Palace Plaza, LLC v. Ebadom Food, LLC*, No. 1:18-cv-1376, 2019 U.S. Dist. LEXIS 118320, at *5-6 (E.D. Va. July 15, 2019) ("Virginia courts diligently protect the line between claims arising in contract and those in tort in order to prevent every breach of contract from being turned into a tort."); *Metro. Life Ins. Co. v. Gorman Hubka*, 2016 U.S. Dist. LEXIS 193165, at *9 (E.D. Va. Mar. 28, 2016). And as the Supreme Court of Virginia has explained, the economic loss doctrine reasons that:

> The law of torts is well equipped to offer redress for losses suffered by reason of a breach of some duty imposed by law to protect the broad interests of social policy. Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.

Sensenbrenner v. Rust, Orling & Neale, Artichitects, Inc., 236 Va. 419, 425, 374 S.E. 2d 55 (Va. 1988).

Related to the economic loss doctrine, the source of duty rule recognizes that tort recovery should not be allowed when the duty stems from (and solely because of) a contract. And Virginia courts have applied this rule regularly. *See Napier v. PSC & Son Builders, Inc.*, 95 Va. Cir. 134, 136 (Va. Cir. 2017) (applying the economic loss doctrine/source of duty rule to bar fraud and negligence claims when they were premised on the same conduct as a breach of contract claim, stating that "the plaintiff has sued for the exact same acts and damages under both breach of contract and negligence"); *Filak v. George*, 267 Va. 612, 618, 594 S.E. 2d 610 (Va. 2004) ("[L]osses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts . . . . [W]hen a plaintiff alleges and proves nothing more than disappointed economic expectations . . . the law

of contracts, not the law of torts, provides the remedy for such economic losses."). Nevertheless, when a tort duty exists alongside, or in addition to, a contractual right or obligation, Virginia courts have allowed an action to proceed with respect to both claims. *See, e.g.*, *JPMCCM 2010-C1 Aquia Office LLC v. Mosaic Aquia Owner*, LLC, No. CL17-250, 2019 Va. Cir. LEXIS 74, at *15-16 (Va. Cir. Jan. 15, 2019) ("Only in certain circumstances will a single act or omission support causes of action both for breach of contract and for breach of a duty arising in tort . . . . The salient issue is whether [Defendant] owed [Plaintiff] a common law duty, independent of their contractual agreements."); *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 558 (Va. 1998) ("If . . . the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the action is one of tort."). Thus, the source of duty rule permits a party to assert a tort claim, in spite of the presence of a contract, if the underlying duty arises independent of any contractual duties or covenants.

Two Virginia cases have tangentially addressed whether there is a duty to protect PII independent of any duty arising from contract, *Parker v. Carilion Clinic*, 819 S.E.2d 809 (Va. 2018) and *Deutsche Bank Nat'l Trust Co v. Buck*, No. 3:17-cv-833, 2019 WL 1440280 (E.D. Va. Mar. 29, 2019). In *Parker*, the medical clinic's employees stole a laptop that contained confidential patient information; and the Supreme Court of Virginia held that the clinic did not have an independent common law duty to protect patient information from unauthorized access in that manner. *Id.* at 347 (observing that no Virginia court "ha[d] ever imposed a tort duty on a healthcare provider to manage its confidential information systems so as to deter employees from willfully gaining unauthorized access to confidential medical information."). Months after *Parker* was decided, this Court in *Deutsche Bank Nat'l Trust Co v. Buck* declined to recognize

under Virginia law a common law duty on the part of a closing agent in a real estate transaction to protect against an electronic data breach.[12] 2019 U.S. Dist. LEXIS 54774, at *13 (E.D. Va. Mar. 29, 2019) (Lauck, J.).

The alleged facts here are fundamentally different than in either *Parker* or *Buck*. Here, Capital One solicited customers' PII as a pre-condition for considering whether to provide credit card services to that customer; it then continued to possess and aggregate that PII with other customer's PII for its own business purposes, beyond those pertaining to the particular customer whose PII was obtained. Am. Compl. ¶¶ 26-34. As a result, Capital One created a massive concentration of PII, a "data lake," in which Capital One "mines [customers'] data for purposes of product development, targeted solicitation for new products, and target marketing of new partners—all in an effort to boost its profits." *Id.* ¶ 28. This undertaking was foreseeably vulnerable to a data attack, evidenced most clearly by Capital One's and Amazon's joint efforts to develop a security product (Cloud Custodian) whose purpose was to protect against these vulnerable flaws. *Id.* ¶¶ 44-59, 161. Indeed, Capital One acknowledged and anticipated attempts to gain unauthorized access and use of that PII, taking steps to protect against it, albeit inadequately. *Id.* ¶¶ 54-59.

Virginia has recognized the concept of assumption of duty: "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Kellermann v. McDonough*, 278 Va. 478, 493-494, 684 S.E.2d 786, 791 (Va. 2009); *see also Terry v. Irish Fleet, Inc.*, 296 Va. 129, 138, 818 S.E.2d 788, 793 ("As a general proposition,

[12] In *Buc*k, a non-party hacked and obtained information about the real estate transaction from the closing agent, Altisource, a third-party defendant who had been engaged by Deutsche Bank to close the transaction, and with that hacked information mimicked Altisource's e-mail tricking Buck into sending the closing funds to it, not Altisource. *Id.* at *2. At issue were the equitable indemnification and contribution claims of Deutsche Bank against Altisource.

a duty that does not otherwise exist may be impliedly assumed from the defendant's conduct.") (citing 2 Dan B. Dobbs et al., The Law of Torts § 410, at 671 (2011) (recognizing that an implied undertaking may give rise to an assumed duty)). Thus, by way of example, the Supreme Court of Virginia has recognized that an assumed duty may be undertaken gratuitously by a motorist to another motorist or a pedestrian when he signals to the other motorist or pedestrian that it is safe to proceed. *See Ring v. Poelman*, 240 Va. 323, 327, 397 S.E.2d 824, 826 (1990) (noting that an assumed duty could arise based on evidence that motorist signaled to another motorist that it was safe to proceed, but holding no evidence of proximate cause); *Cofield v. Nuckles*, 239 Va. 186, 192-93, 387 S.E.2d 493, 496-97 (1990) (noting that an assumed duty could arise based on evidence that the motorist signaled to a pedestrian that it was safe to proceed, but holding no evidence of breach of duty); *Nolde Bros. v. Wray*, 221 Va. 25, 28-29, 266 S.E.2d 882, 884 (Va. 1980) (driver's gesture could not be construed as a signal for the plaintiff to proceed across lanes of highway so driver did not assume a duty to the plaintiff).

Likewise, the Supreme Court of Virginia has recognized the assumption of a duty of care in the medical care context. *See Didato v. Strehler*, 262 Va. 617, 629, 554 S.E.2d 42, 48 (Va. 2001) (citing Restatement (Second) of Torts § 323) (finding that "the plaintiffs pled sufficient facts which, if proven at trial, would permit the finder of fact to conclude that the defendants assumed the duty to convey to the plaintiffs the correct results of their daughter's test, which indicated that she carried the sickle cell trait."); *Fruiterman v. Granata*, 276 Va. 629, 645, 668 S.E.2d 127, 136 (Va. 2008) (acknowledging principle but holding that physician did not undertake to provide health care). Across each of these cases, the Supreme Court of Virginia either "explicitly or implicitly required the defendant to 'personally engage in some affirmative act amounting to a rendering of services to another.'" *Bosworth v. Vornado Realty L.P.*, 83 Va.

Cir. 549, 557 (Va. Cir. 2010) (citing *Fruiterman*, 668 S.E.2d at 137). Whether, based on the facts alleged, the law will recognize an assumed duty in tort is a question of law. *Terry*, 818 S.E.2d at n.6.[13]

This case does not fit within the narrow band of Virginia's decided assumption of duty cases. But nothing in the cases that have applied the voluntary undertaking doctrine has expressly limited the doctrine only to the wrongful death, wrongful birth, or certain driving-related torts; and the Court concludes that if confronted with this case, the Supreme Court of Virginia would recognize an assumed duty, owed by Defendants to Plaintiffs.

As articulated by the Supreme Court of Virginia in *Burns*, liability under the voluntary duty doctrine is in lockstep with § 323 of the Restatement (Second) of Torts, which provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Burns, 727 S.E.2d at 644. Thus, a party can be subject to liability provided that the plaintiff prove that a party undertook an affirmative course of action and then either: (1) the defendants failed to exercise reasonable care in performing the undertaking thus increasing the risk of the

[13] Importantly, there is a distinction between this question (of law) and the separate question (of fact) regarding whether, based on the facts alleged, a defendant, by its conduct, in fact assumed a duty. *See Burns v. Gagnon*, 283 Va. 657, 672, 727 S.E.2d 634, 643 (Va. 2012) ("[W]hen the issue is not whether the law recognizes a duty, but rather whether the defendant by his conduct assumed a duty, the existence of that duty is a question for the fact-finder.") (citing *Kellermann*, 684 S.E.2d at 791-92 and *Didato*, 554 S.E.2d at 48)).

harm; (2) that defendants undertook to perform a duty owed by another to a third party; or (3) that the harm was a result of either party's reliance upon the defendant's undertaking." *Id.*

Here, the Amended Complaint alleges that Capital One and Amazon voluntarily undertook a duty to protect its customers' PII manifested via its affirmative acts and representations regarding its ability and responsibility to render adequate data protection services to its customers. Am. Compl. ¶¶ 96-98. The Amended Complaint further alleges that Capital One and Amazon, aware of the vulnerabilities and risks associated with their servers on which they stored Plaintiffs' PII, failed to take reasonable care to protect Plaintiffs' PII from unauthorized access, increasing the risk of harm. *Id.* ¶¶ 50-59, 60-75, 100-108. Together, these allegations plausibly satisfy the voluntary undertaking doctrine under Virginia law. Indeed, finding that a duty exists here would not in concept represent a marked deviation from existing Virginia case law on the subject, particularly considering the nature of the risks involved, the foreseeability of those risks, Defendants' alleged knowledge and awareness of those risks, the reasonableness of the measures allegedly available to adequately protect against these risks, and the attendant damages that followed. Overall, the nature of the context here is not altogether qualitatively different than those contexts Virginia courts have found an assumed duty of care to exist.

For the above reasons, Plaintiffs have alleged facts that make plausible negligence claims under Virginia law that would not be barred under the economic loss rule.

vi. [redacted]

[redacted]

IV. CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Defendant Capital One's Motion [Doc. 386] and Defendant Amazon's Motion to Dismiss [Doc. 394] be, and the same hereby are, **GRANTED** in part and **DENIED** in part, as follows:

1. As to Count 1 (negligence), the negligence claims under the laws of Washington are dismissed; and the Motions are otherwise denied;

2. [redacted]
3. [redacted]
4. [redacted]
5. [redacted]
6. [redacted]
7. [redacted]
8. [redacted]
9. [redacted]
10. [redacted]
11. [redacted]

12. [redacted]

13. [redacted]

14. [redacted]

15. [redacted]

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 18, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION) MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to CONSUMER Cases

ORDER

Defendants Capital One Financial Corporation, Capital One Bank (USA), N.A., and Capital One, N.A. (collectively, "Capital One") have filed a Motion for Reconsideration or, in the alternative, to Certify a Question of Law to the Supreme Court of Virginia [Doc. No. 916] (the "Motion" or "Mot.").[1] In its Motion, Capital One requests that the Court reconsider its conclusion in its Order dated September 18, 2020 [Doc. No. 879] (the "Order") that the Supreme Court of Virginia would recognize an exception to the economic loss rule under the alleged facts of this case. More specifically, Capital One contends that the Court erred when it concluded that Plaintiffs had plausibly alleged that Capital One had assumed a duty to safeguard Plaintiffs' personally identifiable information ("PII") and that liability may be imposed under Virginia's assumption-of-duty doctrine embodied in § 323 of the Restatement (Second) of Torts (the "Restatement").[2] Mot. at 1. In the alternative, Capital One requests that the Court certify this question of Virginia state law to the Supreme Court of Virginia. *Id.* A hearing was held before this Court on October 21, 2020, *see* [Doc. Nos. 972] (the transcript of proceedings on October

[1] Additionally, Defendant Amazon filed a Joinder in Support of Capitol One's Motion for Reconsideration or, in the alternative, to Certify a Question of Law to the Supreme Court of Virginia [Doc. No. 951].
[2] While the Order cites to § 323 of the Restatement, it quotes from § 324A. Although the two sections are related, § 323 concerns a defendant's liability directly to the party to whom the defendant agreed to render services, while § 324A concerns situations in which a defendant undertakes "to render services . . . for the protection of a third person." *Compare* Restatement (Second) of Torts § 323 (1965) *with id.* § 324A (emphasis added).

21, 2020), following which the Court took under advisement. The Objection was fully briefed, *see* [Doc. Nos. 934, 965], thus, this matter is ripe for decision.

Capital One contends that the Court "erred by stretching Virginia's assumption of duty doctrine beyond its well-defined boundaries." Mot. at 4. The Court, however, recognized that the alleged facts of this case do not fall within the existing Virginia applications of that duty, but nevertheless reasoned as follows:

> [t]his case does not fit within the narrow band of Virginia's decided assumption of duty cases. But nothing in the cases that have applied the voluntary undertaking doctrine has expressly limited the doctrine only to the wrongful death, wrongful birth, or certain driving-related torts; and the Court concludes that if confronted with this case, the Supreme Court of Virginia would recognize an assumed duty, owed by Defendants to Plaintiffs.
>
> . . .
>
> Together, [the allegations in the Amended Complaint [Doc. No. 826] at issue in the Motion] plausibly satisfy the voluntary undertaking doctrine under Virginia law. Indeed, finding that a duty exists here would not in concept represent a marked deviation from existing Virginia case law on the subject, particularly considering the nature of the risks involved, the foreseeability of those risks, Defendants' alleged knowledge and awareness of those risks, the reasonableness of the measures allegedly available to adequately protect against these risks, and the attendant damages that followed. Overall, the nature of the context here is not altogether qualitatively different than those contexts Virginia courts have found an assumed duty of care to exist.
>
> For the above reasons, Plaintiffs have alleged facts that make plausible negligence claims under Virginia law that would not be barred under the economic loss rule.
>
> Order at 23-24.

As reflected above, and contrary to Capital One's ostensible understanding of the Court's Order, the Court did not conclude that this case falls within the scope of the Restatement, but instead, dealt with an open issue under Virginia law and that under the alleged facts, liability might be imposed by a modest extension of the principles expressed under Virginia law and the

Restatement and that the Supreme Court of Virginia would do so, were it presented with the issue. *See id.*

With respect to CapitalOne's alternative request that the Court certify this issue to the Supreme Court of Virginia, the Court will postpone a decision on that issue pending its resolution of the choice of law issues raised in its Order.

Wherefore, upon consideration of the Motion, the memoranda of law in support thereof and in opposition thereto, the arguments of counsel, and for the reasons stated in open court during the October 21, 2020 hearing, it is hereby

ORDERED that Defendant's Motion for Reconsideration or, in the alternative, to Certify a Question of Law to the Supreme Court of Virginia [Doc. No. 916] (the "Motion" or "Mot."), with Defendant Amazon's accompanying Joinder in Support [Doc. No. 951], be, and the same hereby are, **DENIED** as to its request for reconsideration and **HELD IN ABEYANCE** as to its request for certification to the Supreme Court of Virginia.

The Clerk is directed to docket this Order in the lead case (1:19md2915), as required per PTO-1.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
November 25, 2020