UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 18-9827-MWF (Ex) **Date: June 18, 2019**
Title: Teresa J. McGarry v. Delta Air Lines, Inc., et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT [126]

Before the Court is Defendants Delta Air Lines, Inc. ("Delta") and [24]7.AI, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint (the "Motion"), filed on May 13, 2019. (Docket No. 126). Plaintiff Teresa J. McGarry filed an Opposition on the same day. (Docket No. 127). The Court has read and considered the papers filed on the Motion.

For the reasons discussed below, the Motion is **GRANTED *with leave to amend***. Plaintiff's claims are either preempted by the Airline Deregulation Act of 1978 or Plaintiff's conclusory statements fall far short of what is required by the pleading standards.

I. BACKGROUND

The facts and procedural history are well known to the parties and the Court. Therefore, the Court will limit its recitation of facts to those necessary for context.

Plaintiff's operative First Amended Complaint ("FAC") contains the following allegations:

Delta, a major American airline, is a Delaware corporation with its principal place of business in Georgia. (*Id.* ¶ 9). Delta "maintains and operates a website where customers can book tickets for airline travel online." (*Id.*). [24]7, a California

corporation, is "a customer experience software and services company" that provides online chat services and collects end user data for Delta. (*Id.* ¶ 10).

On April 5, 2018, Delta "disclosed that a malware attack had occurred at [[24[7]] approximately six months earlier – between September 26 and October 12, 2017." (*Id.* ¶ 4). During this period, end users' customer data may have accessed and compromised. (*Id.*). On April 11, 2018, approximately six months after the data breach, Plaintiff received a letter from Delta notifying her of the breach. (*Id.* ¶ 11).

Plaintiff alleges that "a customer need not have even used the chat service on its website for his or her information to have been compromised," and that Delta's sharing of customer information with 24[7] "needlessly exposed Plaintiff and hundreds of thousands of other Class members to harm." (*Id.* ¶ 5).

Plaintiff also alleges that "data breaches have become a basic and foreseeable risk that must be protected against by any company," and Delta and [24]7's obligations to protect customers' data are set forth in "an integrated contract that includes Delta's Privacy Policy, the Contract of Carriage and ticket issued to customers." (*Id.* ¶¶ 36–38). Although the "Privacy Policy states, on its face, that it is not a contract, it creates reasonable expectations on the part of Delta customers and thus induces them to disclose their confidential information and purchase tickets." (*Id.* ¶ 46). "If Defendants had reviewed all security events daily as required, the Data Breach may not have occurred at all, or, if it did, the Data Breach would have been discovered sooner than it reportedly was, and the damage to the Class would have been limited." (*Id.* ¶ 66).

As a result of the data breach, Plaintiff alleges that she now faces "years of constant surveillance of [her] financial and personal records, monitoring, and loss of rights." (*Id.* ¶ 91). Plaintiff also alleges that she will continue to suffer damages. (*Id.* ¶¶ 91–98).

Plaintiff brings this putative class action on behalf of herself and the following classes:

> Nationwide Class: All persons residing in the United States who made a reservation on Delta's website from the time period September 26, 2017 to October 12, 2017 (the "Nationwide Class").
>
> "State Name" Class: All persons residing in (State Name) who made a reservation on Delta's website from the time period September 26, 2017 to October 12, 2017 (the "State Name Class").

(*Id.* ¶¶ 99–100).

Plaintiff asserts six claims for relief on behalf of herself and one or both of the proposed classes: (1) breach of contract as third-party beneficiary, against both Defendants; (2) breach of contract against Delta; (3) unjust enrichment against Delta; (4) bailment against Delta; (5) violation of the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 *et seq.*, against 24[7]; and (6) violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030 *et seq.*, against both Defendants. (*Id.* ¶¶ 109–178).

II. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id*. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co*., 751 F.3d 990, 996 (9th Cir. 2014). "Although 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,'

plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the Complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, No. 13-56644, 2016 WL 5389307, at *2 (9th Cir. Sept. 27, 2016) (as amended) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the Complaint indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties*, 751 F.3d at 996–97; *see also Somers*, 729 F.3d at 960.

III. DISCUSSION

Defendants argue that each of Plaintiff's six claims should be dismissed for various reasons. (Mot. at 1–5). The Court will first provide an overview of the relevant preemption law and then address, in turn, the claims.

A. Overview of Relevant Preemption Law

The Constitution's Supremacy Clause provides that federal law is the "supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. State law is preempted "to the extent of any conflict with a federal statute," regardless of whether the conflict is express or implied. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Courts must "find preemption where it is impossible for a private party to comply with both state and federal law …, and where under the circumstances of a particular case, the

challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372–73 (internal quotation marks, citations, and alterations omitted).

Congress enacted the ADA in order to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quantity, variety, and price of air services, and for other purposes." 49 U.S.C. § 1301. The ADA says that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 238 (1995) (citing § 1305(a)(1)).

The relevant leading cases on preemption in this area are *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), *Wolens*, and *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014).

In *Morales*, the Court took a broad view of the phrase "relating to services of any air carrier." In that case, the National Association of Attorneys General (NAAG) adopted Air Travel Industry Enforcement Guidelines ("Guidelines"), containing the standards governing the content and format of airline advertising, the awarding of premiums to customers, and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights. 504 U.S. at 379. The Guidelines did not purport to "create new laws or regulations" but to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Id.* Several NAAG members then sent these Guidelines to several air carriers and warned that failure to comply with the Guidelines could result in liability under various states' consumer protection statutes. *Id.* at 378–79. The air carriers sued and argued that such state regulations were preempted by the ADA. *Id.* at 380. The Court agreed and concluded that the ADA—in "express[ing] a broad pre-emptive purpose"—preempts the Guidelines and prohibits NAAG members from enacting or enforcing law, regulation, rule, or standards having "a connection with" or "reference to" airline rates, routes, or services. *Id.* at 383–84. Notably, the Court provided examples—guidelines

against gambling and prostitution—that are "too tenuous, remote, or peripheral" to be preempted. *Id.* at 390.

In *Wolens*, the Court considered state law claims brought by members of an airline's frequent flyer program after a devaluation of accumulated miles for breach of contracts and violations of Illinois' Consumer Fraud and Deceptive Business Practices Act ("CFDBP" and an analogue of UCL). 513 U.S. at 224-25. The Court concluded that it "need not dwell on the question whether plaintiffs' complaints state claims relating to [air carrier] rates, routes, or services," since the plaintiffs' claims arise out of dissatisfaction with "access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Id.* at 226. These are unquestionably services provided by an airline. *Id.* Accordingly, the Court concluded that the ADA preempts plaintiffs' claims brought under the CFDBP. *Id.* The Court, however, concluded that the ADA does not preempt plaintiffs' breach of contract claims as those arise out of an airline's "own, self-imposed undertakings" unrelated to any state-imposed obligations. *Id.* at 228–29.

In *Northwest*, the High Court considered another challenge to an airline's frequent flyer program. In that case, the plaintiff brought claims for breach of implied covenant of good faith and fair dealing, among other claims that were dismissed prior to the appeal. 572 U.S. at 278. Plaintiff argued, in particular, that his claims are different than those presented in *Wolens* and therefore not preempted, as his claims concerned only the frequent flyer program rather than any "services" provided (*e.g.*, access to flight and upgrades). *Id.* at 284. The Court disagreed, finding that the "proffered distinction has no substance" and that his claims have some connection with the airline's services. *Id.* 284–285. The Court also concluded that the plaintiff's breach of implied covenant claims arise out of state-imposed obligations rather voluntary, self-imposed undertakings, since the covenant applies to every contract under Minnesota law, the relevant jurisdiction. *Id.* at 287–88. Accordingly, the Court held that the ADA preempts plaintiff's claims for breach of implied covenant of good faith and fair dealing.

The Ninth Circuit also recently addressed the contour of "services" and preemption in *National Federation of the Blind v. United Airlines, Inc.*, 813 F.3d 718 (9th Cir. 2016). There, an advocacy group on behalf of the blind and three blind individuals brought a putative class action against United Airlines, alleging that the airline's policy of using automatic kiosks inaccessible to blind travelers violated California's antidiscrimination laws. *Id.* at 722. The district court dismissed the action on the grounds that the claims were expressly preempted by the ADA. *Id.* The Ninth Circuit, affirming on different grounds, disagreed with United Airlines that "its kiosks are a 'service' as that term is used in the ADA." *Id.* at 726. In reaching its conclusion, the Ninth Circuit first noted that the term "services" is not broadly defined "to reach the various amenities provided by airlines, such as 'in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.'" *Id.* The court further also noted that "to the extent they regulate kiosks, California's antidiscrimination statutes regulate an amenity that United has chosen to provide," rather than being "connected to 'services,' *i.e.*, ***access to flights*** . . . ." *Id.* at 726–28 (emphasis added).

Together, *Morales*, *Wolens*, *Northwest*, and *National Federation* hold that the broad scope of ADA preemption sweeps claims as broad as those related to state consumer protection statutes, frequent flyer programs, common law covenants, and advertising guidelines because they are all have a connection to the core part of the "services" that an airline provides, but does not sweep claims related to "amenities" that airlines provide (*e.g.*, in-flight beverages and personal assistance to passengers with a disability). With this background, the Court will now turn to the merits of the Motion.

B. Breach of Contract as a Third-Party Beneficiary (Claim One)

Plaintiff contends that she has adequately alleged a claim for breach of contract as a third-party beneficiary because the Subscription Services Agreement between Delta and 24[7] "was intended to benefit Delta's customers." (Opp. at 1). Plaintiff argues that [24]7, among other things, "voluntarily undertook to protect the Customer Data"; promised that it "shall not permit or allow any unauthorized person or third

party to access, use or modify [its system and security]"; and promised to "take commercially reasonable efforts to protect Customer Data." (*Id.* (citing FAC ¶¶ 53–74)).

Defendants, in opposition, argue that Plaintiff's claim for breach of contract as a third-party beneficiary is preempted by the ADA. (Mot. at 1). Defendants point to a specific provision of the Subscription Services Agreement stating that "[n]o third party is intended to benefit from, nor may any third party seek to enforce, any of the terms of this Agreement." (*Id.*; *see* FAC ¶ 70)). Defendants argue that Plaintiff's "use of third-party beneficiary law to enforce [the Subscription Services Agreement] improperly expands [Defendants'] liability beyond the four corners of the contract." (Mot. at 1). The Court agrees with Defendants.

Here, Plaintiff's first claim does not seek to hold Defendants to the terms of any agreement they reached directly with Plaintiff. Nor did Delta enter into its own, self-imposed undertakings directly with Plaintiff. Instead, Plaintiff is pursuing this claim as a third-party beneficiary to an agreement between Delta and 24[7]. But in order to determine whether Plaintiff is entitled to such status, the Court must refer to law external to the Subscription Services Agreement, since it is state law that would allow Plaintiff to recover as a third-party beneficiary. That is, whether an airline could be held liable for breach of contract by a principal or third-party beneficiary would depend entirely upon the applicable California law.

But because the Court, in a breach of contract action, is "confine[d] . . . to the parties' bargain, with ***no enlargement or enhancement based on state laws or policies*** external to the agreement[,]" Plaintiff's first claim does not fall within the contractual exception to ADA preemption as articulated in *Wolens*. *See, e.g.*, *In re American Airlines, Inc., Privacy Litig.*, No. 3:04-MD-1627-D, 2005 WL 3323028, at *3–4 (N.D. Tex. Dec. 7, 2005) (dismissing action and concluding that the plaintiffs' breach of contract claim as third-party beneficiaries is preempted because they "seek to modify the contract to press a right that is external to its terms") (citations omitted and emphasis added); *A.C.L. Computers and Software, Inc. v. Fed. Express Corp.*, No. 15-CV-4202-HSG, 2016 WL 946127, at *4 (N.D. Cal. Mar. 14, 2016) (dismissing a

similar claim because it would require "applying various state agency and third-party beneficiary laws to airline contracts . . . creating a 'state regulatory patchwork' in direct contravention of Congress's intent when it enacted the ADA") (citations omitted).

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the claim for breach of contract as a third-party beneficiary.

C. Breach of Contract (Claim Two)

Plaintiff next argues that she has adequately alleged a breach of contract claim against Delta. (Opp. at 2). She contends that her claim is "based upon the Privacy Policy, the Contract of Carriage and the ticket issued to customers." (*Id.* (citing FAC ¶ 38)). Plaintiff argues that Delta's Privacy Policy is "a part of Delta's [unspecified] contract with its customers [due to] the interconnectedness among the relevant documents." (*Id.* (citing FAC ¶¶ 38–40)). Delta is alleged to have breached the contract by failing to, among other things, "adequately monitor [24[7]]"; "safeguard and protect Customer Data"; "regularly review its protocols to ensure Customer Data was protected"; "safeguard and protect Customer Data from unauthorized access, disclosure and improper use"; and "provide timely and accurate notice to Plaintiff . . . that [her] Customer Data was compromised as a result of the Data Breach." (*Id.* at 2–3 (citing FAC ¶¶ 38–52, 72–83, 130–142)). The Court disagrees with Plaintiff.

As an initial matter, it is unclear on which "contract" Plaintiff is basing her claim. To the extent she bases her claim on the Contract of Carriage, she cites to Rule 25, which states as follows:

> The passenger recognizes that personal data has been given to carrier for the ***purposes of making a reservation***, obtaining ancillary services, facilitating immigration and entry requirements, and making available such data to government agencies. For these purposes, the passenger authorizes carrier to retain such data and to transmit it to its own offices, other carriers, or the providers of such services, in whatever country they may be located.

(FAC ¶ 50 (emphasis added)).

But the Contract of Carriage itself contains no self-imposed promise from Delta as to ***how*** it will handle customer data. Neither does it promise specific procedures of third-parties, like [24]7, that have access to such data. Thus, permitting Plaintiff to read into the Contract of Carriage additional obligations would be a direct circumvention of the broad pre-emptive sweep of the ADA. *See, e.g.*, *Alatortev v. JetBlue Airways, Inc.*, No. 17-CV-4859-WHO, 2018 WL 784434, at *6 (N.D. Cal. Feb. 7, 2018) ("Alatortev's breach of contract claim depends on an 'enlargement or enhancement' of the parties' agreement, and is therefore preempted by the ADA."); *Varga v. United Airlines*, No. 09-CV-2278-SI, 2009 WL 2246208, at *7 (N.D. Cal. July 24, 2009) ("The Court agrees with defendant that, notwithstanding plaintiff's allegations that defendant's employees were responsible for the theft of plaintiff's belongings, plaintiff's claims [including one for breach of contract] are preempted by the ADA.").

To the extent Plaintiff relies on her ticket, her receipt states as follows: "Your privacy is important to us. Please review our Privacy Policy." (FAC ¶ 40, Ex. B). Delta's Privacy Policy, in turn, expressly states that it is not a contract:

> This Privacy Policy describes our practices related to the use, storage and disclosure of information we collect from or about you in the course of providing commercial air travel services at Delta.com and through our Fly Delta App. Delta reserves the right to modify this Privacy Policy at any time and without prior notice. We will post any changes on delta.com so please check regularly for the most recent version of our Privacy Policy. ***This Privacy Policy is not a contract and does not create any legal rights or obligations***.

(*Id.* ¶ 39, Ex. A (emphasis added)).

Finally, to the extent Plaintiff's claim is based upon an implied contract arising out of the "interconnectedness" nature of these documents, that implied contract is

preempted by the ADA because it would require an enlargement or enhancement of Delta's self-imposed obligations based on state laws or policies.

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the claim for breach of contract.

D. Unjust Enrichment (Claim Three)

California does not have a standalone cause of action for unjust enrichment. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). However, the theory of unjust enrichment—that a defendant has been unjustly conferred a benefit through, *inter alia*, fraud—survives as a remedy in a quasi-contract claim. *Id.* In *Astiana*, the Ninth Circuit held that "[w]hen a plaintiff alleges unjust enrichment, a court ***may*** 'construe the cause of action as a quasi-contract claim seeking restitution.'" *Id.* (emphasis added). Plaintiffs may plead unjust enrichment claims even when they are duplicative of other claims. *Id.*; *see also Romero v. Flowers Bakers, LLC*, No. 14-CV-5189-BLF, 2016 WL 469370, at *9 (N.D. Cal. Feb. 8, 2016) (permitting an unjust enrichment claim even though it might be duplicative of the plaintiff's other claims)

Here, Plaintiff argues that she has "adequately alleged that Delta has been unjustly enriched at the expense of Plaintiff and members of the Class" because Delta "accepted full payment for tickets but failed to provide adequate security of the Customer Data." (Opp. at 3 (citing FAC ¶¶ 97, 143–149)). In opposition, Delta contends that Plaintiff "cannot escape preemption by relying on the exception in *Wolens* because a claim for unjust enrichment—a quasi-contract claim enforceable in the ***absence*** of a contract—is the antithesis of enforcing a term the airline itself stipulated." (Mot. at 3 (internal quotation marks and citations omitted, emphasis in original)). Delta also argues that Plaintiff's unjust enrichment claim is an example of a state-imposed substantive standard of care that the Court in *Wolens* previously rejected. (*Id.* at 3–4).

The Court agrees with Delta because under California law, a claim for unjust enrichment imposes a state-created obligation outside the parties' private agreement. "Whether termed unjust enrichment, quasi-contract, or quantum meruit, the equitable

remedy of restitution when unjust enrichment has occurred is an obligation . . . created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money." *See Federal Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 346, 84 Cal. Rptr. 3d 38 (2008) (concluding that claims for unjust enrichment "are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises" but instead are "obligations created by law for reasons of justice") (internal quotation marks and citation omitted).

The Court therefore concludes that Plaintiff's unjust enrichment claim disregards the intent of the parties, resulting in an "enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233; *see Hakimi v. Societe Air France, S.A.*, No. 18-CV-1387-JSC, 2018 WL 4826487, at *5 (N.D. Cal. Oct. 4, 2018) (concluding that because the "remedy for unjust enrichment would impose an obligation created by California law without considering the parties' bargain, the unjust enrichment claim is pre-empted by the ADA").

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the claim for unjust enrichment.

E. Bailment (Claim Four)

Bailment is "the deposit of personal property with another, usually for a particular purpose," with an express or implied contract to redeliver the personal property when the purpose has been fulfilled or to otherwise deal with the goods according to the bailor's directions. *See Worldwide Media, Inc. v. Twitter, Inc.*, No.17-CV-7335-VKD, 2018 WL 5304852, at *11 (N.D. Cal. Oct. 24, 2018) (citing *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 (9th Cir. 1996)).

Plaintiff argues that she has adequately alleged bailment because she "provided her Property (her Customer Data) to Delta; Delta accepted possession of the Customer Data; and Delta understood that Plaintiff and other Class members expected Delta to adequately safeguard the Property," but failed to take appropriate measures to do so. (Opp. at 3 (citing FAC ¶¶ 2, 8, 20, 46, 90, 92, 95, 150–154)).

The Court is not persuaded and views as particularly persuasive the reasoning in *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 903 F. Supp. 942 (S.D. Cal. 2012). There, the plaintiffs alleged that Sony failed to follow basic industry-standard protocols to safeguard its customers' personal and financial information, thus permitting a criminal intrusion into Sony's PlayStation Network computer system. *Id.* at 950. In addition to negligence, the plaintiffs asserted a claim for bailment of their personal information that was stolen, like here, as the result of a hack into Sony's network. *Id.* at 950–51, 974–75. The district court dismissed the bailment claim with prejudice because the district court was "hard pressed to conceive of how Plaintiffs' Personal Information could be construed to be personal property so that Plaintiffs somehow 'delivered' this property to Sony and then expected it to be returned." *Id.* at 974. Moreover, the district court found the bailment claim to be duplicative of the plaintiffs' negligence claim. *Id.* at 974–75.

Here, Plaintiff has failed to adequately allege a claim for bailment. As in *Sony*, the Court concludes that Plaintiff's personal property was not "delivered" to Delta and Delta did not take custody of Plaintiff's customer data. Nor was the personal data subject to return to Plaintiff at some later time. Plaintiff's customer data was indeed shared with Delta, but that sharing does not fit the "bailment" mold that is typically associated with physical property.

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the bailment claim.

F. Violation of the SCA (Claim Five)

[24]7 argues that Plaintiff's claim for a violation of §§ 2701, 2702 of the SCA also fails. (Mot. 4–5).

Section 2701 of the SCA "provides a cause of action against anyone who 'intentionally accesses ***without authorization a facility*** through which an electronic communication service is provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic

storage.'" *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072 (9th Cir. 2004) (quoting § 2701(a)(1)) (emphasis added).

Here, the Court is not convinced that Plaintiff has adequately alleged a claim for violation of § 2701 under the SCA and concludes that the issue of "unauthorized access to a facility" dispositive. Plaintiff argues that she "has adequately plead a claim under § 2701 of the SCA" because she "did not give informed consent for [24]7 to access her Customer Data." (Opp. at 3–4 (citing FAC ¶¶2, 159–163)). But Plaintiff's customer data is not a "facility" (*i.e.*, servers and databases) through which an electronic communication service is provided.

Section 2702 of the SCA prohibits a person or an entity providing either an "electronic communication service" or "remote computing service" to the public from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." § 2702(a)(1)–(2).

Here, the Court is also not convinced that Plaintiff has adequately plead a claim for violation of § 2702 under the SCA and concludes that she has failed to allege that [24]7 "knowingly divulged" her customer data. Plaintiff argues that the facts that 24[7] "was aware of the importance of data security and of the previous well-publicized data breaches at major corporations" and the concealment of the data breach for six months give rise a plausible inference of knowing divulgence. (Opp. at 4). These allegations, however, are insufficient to show that [24]7 divulged Plaintiffs' data and did so with a knowing state of mind within the meaning of § 2702.

As far as the Court is aware, only one court in the Ninth Circuit has previously addressed the scope of the term "knowingly" within the meaning of § 2702. *See In re Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-MD-2752-LHK, 2017 WL 3727318, at *42 (N.D. Cal. Aug. 30, 2017) (concluding that "[b]ased on the allegations in the [complaint], Plaintiffs have not plausibly alleged that Defendants' 'knowingly divulge[d]' Plaintiffs' PII in the Data Breaches"). The district court noted that "reckless" or "negligent" conduct is insufficient to constitute "knowing" disclosure of a communication under the SCA, and that plaintiffs cannot state a claim under § 2702

simply because a defendant, like here, failed to prevent a data breach. *Id.*; *see, e.g.*, *Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699, 703 (N.D. Ill. 2012) ("[T]the failure to take reasonable steps to safeguard data does not, without more, amount to divulging that data knowingly."); *Willingham v. Glob. Payments, Inc.*, No. 12-cv-1157-RWS, 2013 WL 440702, at *12 (N.D. Ga. Feb. 5, 2013) (concluding that, even where defendant "created or contributed to the breach of its data system," such conduct did not constitute "knowingly divulg[ing]" information within the meaning of the SCA); *Long v. Insight Commc'ns of Cent. Ohio, LLC*, 804 F.3d 791, 795–96 (6th Cir. 2015) (concluding that Time Warner Cable's mistaken disclosure of an IP address was not a violation of the SCA because "negligently or recklessly failing to ensure the accuracy of the information that [Time Warner Cable] disclosed" did not constitute Time Warner Cable "knowingly divulg[ing] this information" within the meaning of the SCA).

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the SCA claim.

G. Violation of the CFAA (Claim Six)

A claim for violation of the CFAA requires a plaintiff to show that a defendant (1) intentionally accessed a computer; (2) "without authorization or exceeding authorized access"; (3) "obtained information"; (4) causing a "loss"; and (5) resulting in a loss of "at least $5,000 in value." *See LVRC Holdings, Inc. v. Brekka*, 581 F. 3d 1127, 1130–32 (9th Cir. 2009).

According to Plaintiff, she adequately states a claim for violation of the CFAA because she "specifically alleges that [her] computer is a 'protected computer' within the meaning of the CFAA, Defendants placed 'cookies' and accessed her computer; Defendants unreasonably delayed disclosing the Data Breach; and as a result, Defendants caused ongoing harm." (Opp. at 5 (citing FAC ¶¶ 170–78)). The Court disagrees.

In connection with her CFAA claim, Plaintiff's primary allegation is that "Defendants placed cookies on [her] computer." (FAC ¶ 176). But as pointed out by

Defendants, Plaintiff does not allege that "Defendants gained access to her computer without authorization or that she revoked authorization (or even that the cookies remained on her computer since the breach)." (*See* Mot. at 5). Nor does she allege that her customer data was accessed through the placement of unauthorized cookies.

Without such plausible allegations, Plaintiff's CFAA claim is wholly insufficient. *See, e.g.*, *Ticketmaster L.L.C. v. Prestige Entm't, Inc.*, 306 F. Supp. 3d 1164, 1175–76 (C.D. Cal. 2018) (dismissing Ticketmaster's CFAA claim where "Ticketmaster's allegations in this case are limited to bot and automated software use . . . [and] Ticketmaster does not allege that Defendants gained access to unauthorized information"); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1067–68 (9th Cir. 2016) (affirming the district court's grant of the plaintiff's motion for summary judgment because the plaintiff rescinded permission by sending a cease-and-desist letter demanding that the defendant stop using its website and by imposing blocks on the defendant's IP addresses).

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the CFAA claim.

IV. CONCLUSION

The Motion is **GRANTED *with leave to amend***.

Plaintiff shall file a Second Amended Complaint, if any, by **June 26, 2019**. Defendants shall file a response to the Second Amended Complaint on or before **July 10, 2019**. While there may be a Second Amended Complaint, there will be no Third. Any future successful motion to dismiss filed by Defendants will be granted without leave to amend.

IT IS SO ORDERED.