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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAKE THOMAS, et al.,  
Plaintiffs,  
v.  
KIMPTON HOTEL & RESTAURANT  
GROUP, LLC,  
Defendant.

Case No. 19-cv-01860-MMC

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS; AFFORDING  
PLAINTIFFS LEAVE TO AMEND;  
CONTINUING CASE MANAGEMENT  
CONFERENCE**

Before the Court is defendant Kimpton Hotel & Restaurant Group, LLC's ("Kimpton") Motion, filed February 25, 2020, "to Dismiss Plaintiff's Third Amended Complaint." Plaintiffs Jake Thomas ("Thomas"), Salvatore Galati ("Galati"), and Jonathan Martin ("Martin") have filed opposition, to which Kimpton has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

**BACKGROUND**

In the operative complaint, the Third Amended Complaint ("TAC"), plaintiffs allege Kimpton, an entity that "own[s] or manage[s]" a number of hotels (see TAC ¶ 1), contracted with Sabre Corporation ("Sabre") "to provide a reservation system" (see TAC ¶ 3).<sup>2</sup> Plaintiffs further allege they booked hotel reservations at Kimpton hotels (see TAC ¶ 2), and, in so doing, provided Sabre with their "private identifiable information" ("PII") (see TAC ¶¶ 11, 13, 15), including "full name, credit and debit card account numbers,

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<sup>1</sup>By Clerk's notice filed March 18, 2020, the matter was taken under submission.

<sup>2</sup>Sabre is not a party to the above-titled action.

1 card expiration dates, card verification codes, emails, phone numbers, full addresses and  
2 other . . . information" (see TAC ¶ 8), which PII was subsequently "accessed by hackers"  
3 who "obtained credentials" for Sabre's "Central Reservations system" and "used those  
4 credentials to access customer data" (see TAC ¶¶ 6, 12, 14, 16). According to plaintiffs,  
5 if Sabre had "employed multiple levels of authentication," rather than "single factor  
6 authorization," the "breach" would not have occurred. (See FAC ¶ 6.)

7 Based on the above allegations, plaintiffs assert nine Claims for Relief arising  
8 under the laws of various states.

### 9 LEGAL STANDARD

10 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be  
11 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
12 under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
13 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of  
14 the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v.  
15 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a  
16 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
17 allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his  
18 entitlement to relief requires more than labels and conclusions, and a formulaic recitation  
19 of the elements of a cause of action will not do." See id. (internal quotation, citation, and  
20 alteration omitted).

21 In analyzing a motion to dismiss, a district court must accept as true all material  
22 allegations in the complaint and construe them in the light most favorable to the  
23 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To  
24 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted  
25 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S.  
26 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be  
27 enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555.  
28 Courts "are not bound to accept as true a legal conclusion couched as a factual

1 allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

2 **DISCUSSION**

3 By order filed November 1, 2019 ("November 1 Order"), the Court dismissed with  
4 leave to amend each of the claims asserted in plaintiffs' First Amended Complaint  
5 ("FAC"), after which ruling plaintiffs filed a Second Amended Complaint ("SAC").  
6 Thereafter, the Court approved the parties' stipulation to allow plaintiffs to file the TAC.  
7 By the instant motion, Kimpton argues that the TAC does not cure the deficiencies  
8 identified in the Court's November 1 Order, and, in addition, that seven of the claims  
9 asserted in the TAC are subject to dismissal for other reasons.

10 At the outset, the Court addresses whether, as Kimpton argues, the TAC includes  
11 insufficient facts to support a finding that Kimpton can be held liable for the acts and  
12 omissions of Sabre, which argument applies to each of the claims asserted in the TAC.

13 In the November 1 Order, the Court found the FAC lacked any factual allegations  
14 to support such a finding. In the TAC, plaintiffs now allege that Sabre, in operating  
15 Kimpton's reservations services, acted as an agent for Kimpton. Kimpton contends the  
16 TAC does not include factual allegations sufficient to show an agency relationship  
17 existed. As set forth below, the Court disagrees.

18 A "principal who personally engages in no misconduct may be vicariously liable for  
19 [a] tortious act committed by an agent within the course and scope of the agency." See  
20 Peredia v. HR Mobile Services, Inc., 25 Cal. App. 5th 680, 691 (2018). "For an agency  
21 relationship to exist, an agent must have authority to act on behalf of the principal and the  
22 person represented must have a right to control the actions of the agent." See Mavrix  
23 Photographs, LLC v. Livejournal, Inc., 873 F.3d 1045, 1054 (9th Cir. 2017) (internal  
24 quotation, alteration, and citation omitted).

25 Here, plaintiffs allege facts sufficient to show Sabre had the authority to act on  
26 behalf of Kimpton. In particular, plaintiffs allege Kimpton's "online reservation system is  
27 operated by . . . Sabre" (see TAC ¶ 23) pursuant to an agreement between Kimpton and  
28 Sabre (see TAC ¶¶ 3, 79), and that Sabre, pursuant to said agreement, accepted

1 reservations from customers on behalf of Kimpton (see TAC ¶ 23). Additionally, plaintiffs  
2 allege sufficient facts to show Kimpton had the right to control Sabre's actions,  
3 specifically, that Kimpton set the prices Sabre charged for rooms, selected the rooms  
4 Sabre could show as available to customers, decided how Sabre "would be portrayed on  
5 [Kimpton's] website," e.g., that Sabre would be "completely in the background," and,  
6 perhaps most importantly here, decided "how Sabre would safeguard customer  
7 information." (See id.)

8         Accordingly, as plaintiffs have sufficiently alleged the existence of an agency  
9 relationship between Kimpton and Sabre, the Court next considers, in turn, Kimpton's  
10 arguments that seven of the nine Claims for Relief are subject to dismissal for additional  
11 reasons.<sup>3</sup>

12 **A. Second Claim for Relief: Breach of Contract**

13         In the Second Claim for Relief, plaintiffs allege Kimpton breached the "agreement  
14 between Sabre and Kimpton," which agreement was "for the express intended benefit of  
15 Kimpton's customers." (See TAC ¶¶ 79, 81, 83.) Kimpton argues said claim is  
16 procedurally improper and substantively deficient.

17         As Kimpton observes, the November 1 Order, in dismissing the claims in the FAC,  
18 afforded plaintiffs leave to amend to cure the deficiencies the Court had identified. As the  
19 FAC did not include a claim that Kimpton had breached its contract with Sabre, plaintiffs'  
20 inclusion in the TAC of such claim is procedurally improper.<sup>4</sup> In their opposition, plaintiffs  
21 do not argue their assertion of this new claim was procedurally proper; rather, plaintiffs, in  
22 essence, request they be afforded leave to amend to include such claim in the TAC.

23         Under Rule 15(a) of the Federal Rules of Civil Procedure, a "court should freely  
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25 <sup>3</sup>Kimpton raises no additional arguments as to the First and Third Claims for  
26 Relief.

27 <sup>4</sup>Although the claim was included in the SAC, the TAC, as noted, was filed  
28 pursuant to stipulation. In the stipulation, Kimpton reserved the right to "contest whether  
[p]laintiffs improperly added the new second cause of action alleging third party breach of  
contract." (See Stipulation, filed February 5, 2020, at 2:15-20.)

1 give leave [to amend] when justice so requires." See Fed. R. Civ. P. 15(a)(2). Leave to  
2 amend, however, "need not be granted where the amendment of the complaint would  
3 cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise  
4 in futility, or creates undue delay." See Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d  
5 1149, 1160 (9th Cir. 1989).

6 Here, the Second Claim for Relief, as pleaded, is futile, as it is subject to dismissal  
7 for failure to state a claim. At the outset, the Court notes the TAC fails to include any  
8 facts to support a finding that customers of Kimpton hotels, such as plaintiffs, were  
9 intended third-party beneficiaries of the contract by which Sabre agreed to operate a  
10 reservation system for Kimpton. See Balsam v Tu cows Inc., 627 F.3d 1158, 1161 (9th  
11 Cir. 2010) (holding, under California law, "third party qualifies as a beneficiary under a  
12 contract if the parties intended to benefit the third party and the terms of the contract  
13 make that intent evident"; affirming dismissal, where nothing in contract indicated parties  
14 to agreement "intended to benefit, or confer any rights upon, [plaintiff]"). Moreover, the  
15 TAC lacks factual allegations to support plaintiffs' conclusory assertion that Kimpton  
16 "breached" its contract with Sabre by "failing to comply with the PCI DSS [Payment Card  
17 Industry Data Security Standards]." (See TAC ¶¶ 81-83.) Although it would appear  
18 plaintiffs are basing the claim on Sabre's alleged use of "single factor" as opposed to  
19 "multi-factor" authorization (see TAC ¶ 3), the TAC includes no facts to support a finding  
20 that Kimpton was contractually obligated to require Sabre to do so. See Frances T. v.  
21 Village Green Owners Ass'n, 42 Cal. 3d 490, 512-13 (1986) (holding "rights and  
22 responsibilities of contracting parties are determined by the terms of their contract";  
23 affirming dismissal of breach of contract claim, based on defendant's failure to "install  
24 additional lighting," where plaintiff failed to allege contract included provision requiring  
25 defendant to so act).

26 Accordingly, the Second Claim for Relief is subject to dismissal.

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1 **B. Fourth Claim for Relief: Violation of California's Unfair Competition Law**

2 In the Fourth Claim for Relief, plaintiffs allege Kimpton violated § 17200 of the  
3 California Business & Professions Code, which prohibits, inter alia, "unlawful" business  
4 practices. See Cal. Bus. & Prof. Code § 17200. Plaintiffs base their claim on Kimpton's  
5 alleged violations of two statutes: (1) California Civil Code § 1798.81.5 (see TAC ¶ 97),  
6 which statute requires a "business that owns, licenses, or maintains personal information  
7 about a California resident" to "implement and maintain reasonable security procedures  
8 and practices" to "protect the personal information from unauthorized access," see Cal.  
9 Civ. Code. § 1798.81.5(b); and (2) 15 U.S.C. § 45 (see TAC ¶¶ 98-101), which statute  
10 prohibits "[u]nfair methods of competition in or affecting commerce" and "unfair or  
11 deceptive acts or practices in or affecting commerce," see 15 U.S.C. § 45(a)(1).

12 The remedies available to a plaintiff under § 17200 are "limited"; specifically, a  
13 plaintiff may only seek injunctive relief and/or restitution. See Korea Supply Co. v.  
14 Lockheed Martin Corp., 29 Cal. 4th 1134, 1152 (2003). Kimpton argues plaintiffs have  
15 failed to allege any facts to support either a claim for injunctive relief or a claim for  
16 restitution. As set forth below, the Court agrees.

17 As Kimpton notes, the TAC does not make clear the nature of the injunctive relief  
18 sought. In their opposition, plaintiffs describe their need for injunctive relief as follows:  
19 "[T]here exists a hazard – [Kimpton's] data security measures – which, if not ameliorated,  
20 will likely result in additional damages to [p]laintiffs . . . [;] there is a real risk that  
21 [Kimpton] will move forward with its plainly inadequate security features[;] [and] [Kimpton]  
22 has not represented that it has instituted multi-factor authentication, and its single-factor  
23 system poses a significant risk of continuing harm." (See Pls.' Opp. at 18:2-7.) As the  
24 TAC does not allege Kimpton itself has inadequate data security measures, but, rather,  
25 that Sabre's measures were inadequate, the Court understands plaintiffs to be asserting  
26 they intend to seek an injunction requiring Kimpton to cause Sabre to institute multi-factor  
27 authentication. To have standing to seek injunctive relief, however, the plaintiff must  
28 show the existence of a "real or immediate threat that the plaintiff will be wronged again,"

1 see City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983), and, here, plaintiffs do not  
2 allege facts from which the Court can infer they face, by reason of Sabre's alleged  
3 inadequate data security system, a real or immediate threat of another breach.<sup>5</sup>  
4 Consequently, plaintiffs have not shown they are entitled to injunctive relief.

5 As to restitution, plaintiffs, in their opposition, clarify that they're seeking to recover  
6 the price they paid for Kimpton hotel rooms. Plaintiffs appear to base their claim to  
7 restitution on their allegation that they would not have stayed at a Kimpton hotel had they  
8 known of "the improper security" (see TAC ¶¶ 11, 13, 15), i.e., that Sabre employed  
9 inadequate data security measures in connection with on-line bookings. A claim for  
10 restitution is dependent, however, on a plaintiff's showing his entitlement to "the return of  
11 the excess of what the plaintiff gave the defendant over the value of what the plaintiff  
12 received." See Cortez v. Purolator Air Filtration Products Co., 23 Cal. 4th 163, 174  
13 (2000). Here, plaintiffs do not allege facts to support a finding that the hotel rooms for  
14 which they paid were in any manner inadequate, that some portion of the room charges  
15 were attributable to data security, or that some other basis exists upon which to support a  
16 finding that they did not receive the value paid for the hotel rooms. Consequently,  
17 plaintiffs have not shown they are entitled to restitution.

18 Accordingly, the Fourth Claim for Relief is subject to dismissal in its entirety.

19 **C. Fifth Claim for Relief: Violation of Colorado Consumer Protection Act**

20 In the Fifth Claim for Relief, brought on behalf of Thomas only, plaintiffs allege  
21 Kimpton violated the Colorado Consumer Protection Act ("CCPA"), which Act prohibits  
22 "deceptive trade practice[s]." See Colo. Rev. Stat. § 6-1-105(1). Plaintiffs allege Kimpton  
23 engaged in the following nine deceptive trade practices: (1) "[r]epresenting to its  
24 customers it would employ reasonable security and privacy measures," while "permitting  
25 to be employed single factor authorization on its reservation system," (2) "[r]epresenting  
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27 <sup>5</sup>Plaintiffs do not allege, for example, that Sabre still possesses plaintiffs' PII, let  
28 alone that it continues to employ single factor authorization.

1 to its customers that it would employ reasonable security and privacy measures and yet  
2 failing to implement a multi-layered security platform"; (3) "[f]ailing to implement and  
3 maintain reasonable security and privacy measures to protect . . . PII"; (4) "[f]ailing to  
4 identify foreseeable security and privacy risks, remediate identified security and privacy  
5 risks, and adequately improve security and privacy measures"; (5) "[f]ailing to comply  
6 with common law and statutory duties pertaining to the security and privacy";  
7 (6) "[m]isrepresenting that it would protect the privacy and confidentiality of . . . PII,  
8 including by implementing and maintaining reasonable security measures";  
9 (7) "[m]isrepresenting that it would comply with common law and statutory duties pertaining  
10 to the security and privacy"; (8) "[o]mitting, suppressing, and concealing the material fact  
11 that it did not reasonably or adequately secure . . . PII"; and (9) "[o]mitting, suppressing,  
12 and concealing the material fact it did not comply with common law and statutory duties  
13 pertaining to the security and privacy." (See TAC ¶ 110.)

14 Kimpton argues the CCPA does not apply extraterritorially and, consequently, that  
15 the claim is subject to dismissal, as Thomas is a resident of Arizona and plaintiffs do not  
16 allege the conduct on which the claim is based occurred in Colorado.

17 Under Colorado law, "a statute cannot be presumed to have any extraterritorial  
18 effect." See Peerless Ins. Co. v. Clark, 29 Colo. App. 436, 439-41 (1971). Plaintiffs cite  
19 to no exception to this rule. Nor do plaintiffs allege that Thomas was in Colorado when  
20 he made a reservation, that either Kimpton or Sabre is a resident of Colorado or engaged  
21 in any act in Colorado that induced Thomas to make a reservation, or that Sabre's  
22 reservation system is located in Colorado. Although plaintiffs rely on their allegation that  
23 one of the Kimpton hotels at which Thomas stayed is located in Colorado (see TAC  
24 ¶ 11.iv.), plaintiffs fail to allege any facts from which it reasonably can be inferred that a  
25 causal or any other legally cognizable relationship exists between the location of the hotel  
26 where Thomas stayed and the harm he is alleged to have incurred.

27 Accordingly, the Fifth Claim for Relief is subject to dismissal.

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1 **D. Sixth Claim for Relief: Violation of Pennsylvania UTPCPL**

2 In the Sixth Claim for Relief, brought on behalf of Thomas only, plaintiffs allege  
3 Kimpton violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law  
4 ("UTPCPL"), which Law prohibits "[u]nfair or deceptive acts in the conduct of any trade or  
5 commerce." See Pa. Cons. Stat. § 201-3. The practices on which the claim is based are  
6 the same nine practices on which plaintiffs base the Fifth Claim for Relief. (Compare  
7 TAC ¶ 121 with TAC ¶ 110.)

8 Kimpton argues the UTPCPL does not apply extraterritorially and, consequently,  
9 that the claim is subject to dismissal, as Thomas is a resident of Arizona and plaintiffs do  
10 not allege the conduct on which the claim is based occurred in Pennsylvania.

11 Plaintiffs do not allege that Thomas was in Pennsylvania when he made a  
12 reservation, that either Kimpton or Sabre is a resident of Pennsylvania or engaged in any  
13 act in Pennsylvania that induced Thomas to make a reservation, or that Sabre's  
14 reservation system is located in Pennsylvania.<sup>6</sup> Rather, similar to their argument made  
15 with respect to the Fifth Claim for Relief, plaintiffs rely on their allegation that one of the  
16 Kimpton hotels at which Thomas stayed is located in Pennsylvania. (See TAC ¶ 11.v.)  
17 As noted above with respect to the Fifth Claim for Relief, however, plaintiffs fail to allege  
18 any facts from which it be inferred that a causal or any other legally cognizable  
19 relationship exists between the location of the hotel where Thomas stayed and the harm  
20 he is alleged to have incurred.

21 Accordingly, the Sixth Claim for Relief is subject to dismissal.

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26 <sup>6</sup>Although the Pennsylvania Supreme Court has held that a claim under the  
27 UTPCPL may be brought by a non-Pennsylvania resident based on conduct occurring  
28 outside Pennsylvania where the defendant is headquartered in Pennsylvania, see  
Danganan v. Guardian Protection Services, 645 Pa. 181, 195-96 (2018), plaintiffs here  
allege Kimpton is a resident of California and Delaware (see TAC ¶ 18), not of  
Pennsylvania.

1 **E. Seventh Claim for Relief: Violation of New York General Business Law § 349**

2 In the Seventh Claim for Relief, brought on behalf of Thomas only, plaintiffs allege  
3 Kimpton violated New York General Business Law § 349, which Law prohibits  
4 "[d]eceptive acts or practices in the conduct of any business." See N.Y. Gen. Bus. Law  
5 § 349(a). The practices on which plaintiffs base this claim, with one exception, are the  
6 same practices on which plaintiffs base the Fifth Claim for Relief. (Compare TAC ¶ 129  
7 with TAC ¶¶ 110.)<sup>7</sup>

8 Kimpton argues § 349 does not apply extraterritorially and, consequently, that the  
9 claim is subject to dismissal, as Thomas is a resident of Arizona and plaintiffs do not  
10 allege the conduct on which the claim is based occurred in New York.

11 As the Second Circuit has explained, a split of authority exists as to the "proper  
12 territorial analysis under section § 349"; some courts "focus on where the deception of  
13 the plaintiff occurs and require, for example, that a plaintiff actually view a deceptive  
14 statement while in New York," while others "focus on where the underlying deception  
15 'transaction' takes place, regardless of the plaintiff's location or where the plaintiff is  
16 deceived." See Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 123 (2nd Cir. 2013).

17 Here, under either line of authority, plaintiffs fail to state a claim. Plaintiffs do not  
18 allege Thomas was deceived while in New York, nor do plaintiffs allege facts to support a  
19 finding that any of the alleged deceptive acts took place in New York, e.g., that either  
20 Kimpton or Sabre engaged in any act in New York that induced Thomas to make a  
21 reservation. To the extent plaintiffs rely on their allegation that one of the Kimpton hotels  
22 at which Thomas stayed is located in New York (see TAC ¶ 11.vi.), such reliance is  
23 unavailing, as plaintiffs fail to allege any facts from which it be inferred that a causal or  
24 any other legally cognizable relationship exists between the location of the hotel where  
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26 <sup>7</sup>The one exception is that the Seventh Claim for Relief, unlike the Fifth Claim for  
27 Relief, is not based on an allegation that Kimpton "misrepresent[ed] that it would comply  
28 with common law and statutory duties pertaining to [plaintiffs'] security and privacy." (See  
id.)

1 Thomas stayed and the harm he is alleged to have incurred.

2 Accordingly, the Seventh Claim for Relief is subject to dismissal.

3 **F. Eighth Claim for Relief: Violation of Texas Deceptive Trade Practices Act**

4 In the Eighth Claim for Relief, brought on behalf of Thomas and Martin only,  
5 plaintiffs allege Kimpton violated the Texas Deceptive Trade Practices – Consumer  
6 Protection Act ("TDTPA"), which Act prohibits "[f]alse, misleading, or deceptive acts or  
7 practices in the conduct of any trade or commerce." See Tex. Bus. & Com. Code  
8 § 17.46. The practices on which the claim is based are the same nine practices on which  
9 plaintiffs base the Fifth Claim for Relief. (Compare TAC ¶ 141 with TAC ¶ 110.)

10 Kimpton argues that, to the extent the claim is brought on behalf of Thomas, it is  
11 subject to dismissal on the ground the TDTPA does not apply extraterritorially and,  
12 consequently, that the claim is subject to dismissal, as Thomas is a resident of Arizona  
13 and plaintiffs do not allege the conduct on which his claim is based occurred in Texas.  
14 To the extent the claim is brought on behalf of Martin, who is a Texas resident, Kimpton  
15 argues the claim is subject to dismissal in part, specifically, as to those portions of his  
16 claim that are based on fraud.

17 **1. Thomas**

18 Under Texas law, "the presumption is that [a] statute is intended to have no  
19 extraterritorial effect." See Marmon v. Mustang Aviation, Inc., 430 S.W. 2d 182 (Tex.  
20 1968) (internal quotation and citation omitted). Plaintiffs do not assert such presumption,  
21 as applied to the TDTPA, can be rebutted. Nor do plaintiffs allege Thomas was in Texas  
22 when he made a reservation, that either Kimpton or Sabre is a resident of Texas or  
23 engaged in any acts in Texas that induced Thomas to make a reservation, or that Sabre's  
24 reservation system is located in Texas. Although plaintiffs rely on their allegation that  
25 one of the Kimpton hotels at which Thomas stayed is located in Texas (see TAC  
26 ¶ 11.vii.), plaintiffs fail to allege any facts from which it can be inferred that a causal or  
27 any other legally cognizable relationship exists between the location of the hotel where  
28 Thomas stayed and the harm he is alleged to have incurred.

1           Accordingly, the Eighth Claim for Relief is subject to dismissal to the extent it is  
2 asserted on behalf of Thomas.

3           **2. Martin**

4           Kimpton argues that, to the extent the Eighth Claim for Relief is based on  
5 Kimpton's having made false statements (see, e.g., TAC ¶ 141.i), the claim is subject to  
6 dismissal. In particular, Kimpton argues, plaintiffs have failed to allege facts sufficient to  
7 support a finding that Kimpton knew the subject statements were false when they were  
8 made.

9           The representations on which plaintiffs rely are the following

10           Your card is safe. Credit and Debit Card Safety. We at IGH<sup>8</sup> are committed  
11 to keeping your personal information safe. Our secure service software  
12 (SSL) is the industry standard and among the best software available today  
13 for secure commerce transactions. It encrypts all of your personal  
14 information, including payment card number, name, and address, so that it  
15 cannot be read as the information travels over the Internet.

16           (See TAC ¶ 27; see also TAC ¶ 30.)

17           **How we secure your information.** We are committed to protecting the  
18 confidentiality and security of the information that you provide to us. To do  
19 this, technical, physical and organizational security measures are put in  
20 place to protect against any unauthorized access, disclosure, damage or  
21 loss of your information. The collection, transmission and storage of  
22 information can never be guaranteed to be completely secure[;] however,  
23 we take steps to ensure that appropriate security safeguards are in place to  
24 protect your information.

25           (See TAC ¶ 32 (emphasis in original).)

26           [T]he privacy and security of your information is very important to us.  
27 Whether you are booking a room or are a member of one of our loyalty  
28 programs, we want you to trust that the information that you have provided  
to us is being properly managed and protected.

          (See TAC ¶ 35.)

          Data Privacy and Site Security. IGH takes your privacy seriously and works  
to protect you. All personal information you provide is encrypted and  
secure.

          (See id.)

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<sup>8</sup>Plaintiffs allege "IGH" is Kimpton's "parent company." (See TAC ¶ 35 n.1.)

1 Plaintiffs allege the above-quoted statements were false when made because  
2 Sabre did not have "the best security standards, as "it always used only single factor  
3 authentication, which has proven to be unsafe years before this data breach" (see TAC  
4 ¶ 28), and because Kimpton "permitted" Sabre to employ "single factor authorization"  
5 rather than "implement a multi-layered security platform including advanced behavioral  
6 analytics to recognize potential intrusions at the outset and stop them before they  
7 become serious" (see TAC ¶ 33).

8 Under Texas law, a plaintiff alleging a fraud claim must show "the defendant knew  
9 the representation was false or made it recklessly as a positive assertion without any  
10 knowledge of its truth." See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.,  
11 546 S.W. 3d 648, 653 (Tex. 2018) (internal quotation and citation omitted). Here, the  
12 TAC, while including a conclusory assertion that "Kimpton was aware that its agent,  
13 Sabre, did not have the best security standards" (see TAC ¶ 28), lacks facts to support  
14 such conclusion, e.g., that Kimpton knew, at the time it made the challenged statements,  
15 Sabre used single factor authorization and that it knew such a system was insufficient to  
16 protect PII.

17 Plaintiffs, in their opposition, rely on the principle that a defendant's knowledge of  
18 the falsity of a statement is often proven circumstantially, including by "acts that were  
19 subsequent to the actions at issue." See United States v. DiRoberto, 686 Fed. Appx. 458  
20 (9th Cir. 2017). Although plaintiffs' opposition fails to identify any such act, it appears  
21 plaintiffs are relying on their allegation that, subsequent to Kimpton's becoming "aware"  
22 of the data breach, "the statement noted [in ¶ 27 of the TAC] that 'Your card is safe' was  
23 still present" on Kimpton's website. (See TAC ¶ 28.) Plaintiffs do not, however, suggest  
24 how Kimpton's continued use of such language evidences its knowledge that the  
25 statements it made to Martin, namely, statements made before the data breach, were  
26 false when made. Moreover, plaintiffs do not allege that, at the time Kimpton learned of  
27 the breach, Sabre was still operating Kimpton's reservation system and was using single  
28 factor authorization.

1           Accordingly, the Eight Claim for Relief is subject to dismissal to the extent it is  
2 asserted on behalf of Martin and is based on Kimpton's having made false statements.

3 **G. Ninth Claim for Relief: Violation of Maryland Consumer Protection Act**

4           In the Ninth Claim for Relief, brought on behalf of Martin only, plaintiffs allege  
5 Kimpton violated the Maryland Consumer Protection Act ("MCPA"), which Act prohibits  
6 "any unfair, abusive, or deceptive trade practice." See Md. Com. Law § 13-303. The  
7 practices on which plaintiffs base this claim, with two exceptions, are the same practices  
8 on which plaintiffs base the Fifth Claim for Relief. (Compare TAC ¶ 155 with TAC  
9 ¶¶ 110.)<sup>9</sup>

10           Kimpton argues the MCPA does not apply extraterritorially and, consequently, the  
11 claim is subject to dismissal, as Martin is a resident of Texas and plaintiffs do not allege  
12 the conduct on which the claim is based occurred in Maryland.

13           Under Maryland law, "unless an intent to the contrary is expressly stated, acts of  
14 the legislature will be presumed not to have any extraterritorial effect." See Chairman v.  
15 Waldron, 285 Md. 175, 183-84 (1979). Plaintiffs do not assert such presumption, as  
16 applied to the MCPA, can be rebutted. Nor do plaintiffs allege that Martin was in  
17 Maryland when he made a reservation, that either Kimpton or Sabre is a resident of  
18 Maryland or engaged in any conduct in Maryland that induced Martin to make a  
19 reservation, or that Sabre's reservation system is located in Maryland. Although plaintiffs  
20 rely on their allegation that Martin stayed in a Kimpton hotel located in Maryland (see  
21 TAC ¶ 15), plaintiffs fail to allege any facts from which it be inferred that a causal or any  
22 other legally cognizable relationship exists between the location of the hotel where  
23 Thomas stayed and the harm Martin is alleged to have incurred.

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26           <sup>9</sup>The two exceptions are that the Ninth Claim for Relief, unlike the Fifth Claim for  
27 Relief, is not based on the allegations that Kimpton (1) "[r]epresent[ed] to its customers it  
28 would employ reasonable security and privacy measures," while "permitting to be  
employed single factor authorization on its reservation system" and (2) "[r]epresent[ed] to  
its customers that it would employ reasonable security and privacy measures and yet  
fail[ed] to implement a multi-layered security platform." (See id.)

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Accordingly, the Ninth Claim for Relief is subject to dismissal.

**CONCLUSION**

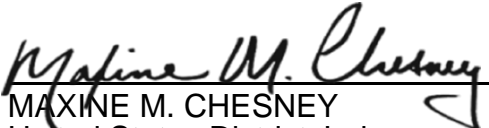
For the reasons stated above, Kimpton's motion to dismiss is hereby GRANTED in part and DENIED in part, as follow:

- 1. The Second, Fourth, Fifth, Sixth, Seventh, and Ninth Claims for Relief are hereby DISMISSED.
- 2. To the extent the Eighth Claim for Relief is brought on behalf of Thomas, and to the extent it is brought on behalf of Martin and based on Kimpton's having made false statements, the Eighth Claim for Relief is hereby DISMISSED.
- 3. In all other respects, the motion is DENIED.
- 4. Should plaintiffs wish to amend for purposes of curing the deficiencies discussed above, plaintiffs shall file their Fourth Amended Complaint no later than July 17, 2020. If plaintiffs elect not to amend, the instant action shall proceed on the remaining claims, specifically, the First Claim for Relief, the Third Claim for Relief, and the remaining portion of the Eighth Claim for Relief.

In light of the above, the Case Management Conference Is CONTINUED from July 24, 2020, to August 21, 2020, at 10:30 a.m., at which time the parties shall appear telephonically. A Joint Case Management Statement shall be filed no later than August 14, 2020.

**IT IS SO ORDERED.**

Dated: June 30, 2020

  
MAXINE M. CHESNEY  
United States District Judge