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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ARMANDO J. ALEXANDER,  
Plaintiff,  
v.  
WELLS FARGO BANK, N.A.; and  
DOES 1 through 10, inclusive,  
Defendant.

Case No.: 23-cv-617-DMS-BLM

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION TO DISMISS**

Pending before the Court is Defendant’s motion to dismiss Plaintiff’s Complaint for failure to state a claim (ECF No. 4). Plaintiff filed an opposition, (ECF No. 5), and Defendant filed a reply (ECF No. 6). For the following reasons, Defendant’s motion to dismiss is GRANTED in part and DENIED in part.

**I.  
BACKGROUND**

Plaintiff was a 29-year customer of Wells Fargo. (Compl. ¶ 5.) On or about December 15, 2022, Plaintiff and his son went to a Wells Fargo location in San Diego County with the intention of depositing funds in Plaintiff’s account. (*Id.* ¶¶ 6-7.) Upon arrival, Plaintiff was “shocked to discover his accounts were practically depleted.” (*Id.* ¶ 8.) Plaintiff alleges he had close to \$35,000 in his account, but “the Wells Fargo

1 representative unilaterally closed his accounts and provided him with two checks totaling  
2 around \$200 that did not reflect the money that he had deposited there.” (*Id.*) Plaintiff  
3 informed Wells Fargo that he did not authorize the activity which depleted his accounts,  
4 and Wells Fargo representatives told Plaintiff to return in two weeks so it could investigate  
5 the issue. (*Id.* ¶ 10.) Plaintiff did not use any online or mobile banking applications. (*Id.*  
6 ¶ 9.)

7 Plaintiff returned, as instructed, and spent nearly an entire day at Wells Fargo. (*Id.*  
8 ¶ 11.) While at Wells Fargo, “Plaintiff was informed that an unknown individual accessed  
9 his accounts and switched Plaintiff’s contact information, such as his email address, and  
10 changed his account pin numbers as well.” (*Id.* ¶ 12.) The “unauthorized person(s) also  
11 obtained new account cards to make purchases without Plaintiff’s knowledge, consent, or  
12 benefit.” (*Id.*) After this interaction, Wells Fargo returned approximately \$5,738 to  
13 Plaintiff following his complaint. (*Id.* ¶ 14.) As a result, Plaintiff filed suit. Plaintiff  
14 asserts four causes of action: (1) violation of the California Customer Records Act  
15 (“CCRA”); (2) violation of the California Consumer Privacy Act (“CCPA”); (3)  
16 negligence; and (4) elder abuse.

## 17 II. 18 LEGAL STANDARD

19 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss  
20 on the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.”  
21 Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) “tests the legal  
22 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive  
23 a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true,  
24 to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,  
25 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim  
26 has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
27 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*  
28 “Determining whether a complaint states a plausible claim for relief will . . . be a context-

1 specific task that requires the reviewing court to draw on its judicial experience and  
2 common sense.” *Id.* at 679. “Factual allegations must be enough to raise a right to relief  
3 above the speculative level.” *Twombly*, 550 U.S. at 555. If Plaintiff “ha[s] not nudged  
4 [his] claims across the line from conceivable to plausible,” the complaint “must be  
5 dismissed.” *Id.* at 570.

6 In reviewing the plausibility of a complaint on a motion to dismiss, a court must  
7 “accept factual allegations in the complaint as true and construe the pleadings in the light  
8 most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,  
9 519 F.3d 1025, 1031 (9th Cir. 2008). But courts are not “required to accept as true  
10 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
11 inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting  
12 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). If dismissal is  
13 warranted, leave to amend “shall be freely given when justice so requires,” Fed. R. Civ. P.  
14 15(a), and “this policy is to be applied with extreme liberality.” *Morongo Band of Mission*  
15 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

### 16 III. 17 DISCUSSION

#### 18 A. California Consumer Records Act Claim

19 Plaintiff alleges Defendant violated the CCRA under Cal. Civ. Code § 1798.81.5(b)  
20 by failing to implement reasonable measures to protect Plaintiff’s personal data, and §  
21 1798.82 by not timely notifying Plaintiff that his account was breached. Financial  
22 institutions, as defined under Fin. Code § 4052, are exempt from Cal. Civ. Code §  
23 1798.81.5(b). *Id.* § 1798.81.5(e)(2). “‘Financial institution’ means any institution the  
24 business of which is engaging in financial activities as described in [12 U.S.C. § 1843k].”  
25 Fin. Code § 4052(c). Under 12 U.S.C. § 1843(k)(4)(A), financial activities include  
26 “[l]ending, exchanging, transferring, investing for others, or safeguarding money or  
27 securities.” This case arises from Wells Fargo’s “safeguarding [of] money.” Wells Fargo  
28 is therefore a financial institution and is exempt from Cal. Civ. Code § 1798.81.5(b).

1 Plaintiff's allegation that Defendant violated the CCRA by failing to implement reasonable  
2 measures to protect Plaintiff's personal data in violation of § 1798.81.5(b) is therefore  
3 **DISMISSED** with prejudice.

4 As to Plaintiff's allegation that Defendant violated § 1798.82, it is insufficiently  
5 pled. The CCRA "requires businesses to notify customers of a breach 'without  
6 unreasonable delay' after the business 'discovers' or is 'notified' of the breach." *In re*  
7 *Bank of America California Unemployment Benefits Litigation*, No. 21-md-2992, 2023 WL  
8 3668535, at \*16 (S.D. Cal. May 25, 2023). Plaintiff fails to allege facts stating when  
9 Defendant discovered, or was notified of, the alleged breach. In addition, Plaintiff does  
10 not allege how his personal information was subject to a data breach. Accordingly,  
11 Plaintiff fails to allege a violation of § 1798.82. Defendant's motion is therefore  
12 **GRANTED** as to the CCRA claim and **DISMISSED** without prejudice, with leave to  
13 amend.

#### 14 **B. California Consumer Privacy Act Claim**

15 Plaintiff alleges that Defendant violated the CCPA, Cal. Civil Code § 1798.100 *et*  
16 *seq.*, by breaching its "duty to implement and maintain reasonable security procedures and  
17 practices appropriate to the nature of Plaintiff's personal information." (Compl. ¶ 32.) As  
18 a result, Plaintiff alleges he "suffered unauthorized access and disclosure of [his] personal  
19 information" and "was injured and lost money and privacy interests." (*Id.* ¶¶ 33-34.)

20 Defendant cites Cal. Civil Code § 1798.82 for the proposition that Plaintiff must  
21 allege a data breach occurred in order to state a CCPA violation. However, § 1798.82 is a  
22 provision of the CCRA, not the CCPA. Defendant argues that Plaintiff "does not allege  
23 that his information (username, password, etc.) was part of a breach of data maintained by  
24 Defendant." (Def. Mot. at 5.) The Court disagrees. Plaintiff alleges he "was informed  
25 that an unknown individual accessed his accounts and switched Plaintiff's contact  
26 information, such as his email address, and changed his account pin numbers as well; the  
27 unauthorized person(s) also obtained new account cards to make purchases without  
28 Plaintiff's knowledge, consent, or benefit." (Compl. ¶ 12.) Plaintiff also alleges that due

1 to Defendant’s “failure to implement and maintain reasonable security procedures and  
2 practices . . . Plaintiff suffered unauthorized access and disclosure of their personal  
3 information.” (*Id.* ¶ 33.) Plaintiff has sufficiently alleged a violation of the CCPA.  
4 Defendant’s motion is therefore **DENIED** as to the CCPA claim.

### 5 **C. Negligence Claim**

6 To state a claim of negligence, Plaintiff must allege “(1) the defendant’s legal duty  
7 of care to the plaintiff; (2) breach of that duty; (3) causation; and (4) resulting injury to the  
8 plaintiff.” *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 500 (2001). Defendant argues that  
9 Plaintiff’s negligence claim is barred by California’s economic loss doctrine. (Def. Mot.  
10 at 6-7.) In California, “liability in negligence for purely economic losses . . . is the  
11 exception, not the rule.” *S. Cal. Gas Leak Cases*, 7 Cal.5th 391, 400 (2019). The economic  
12 loss doctrine precludes recovery for purely economic losses in tort actions. *NuCal Foods,*  
13 *Inc. v. Quality Egg LLC*, 918 F.Supp.2d 1023, 1028 (E.D. Cal. 2013). But “[n]ot all tort  
14 claims for monetary losses between contractual parties are barred by the economic loss  
15 rule.” *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal.5th 905, 923 (2022). “[S]uch claims are  
16 barred when they arise from—or are not independent of—the parties’ underlying contracts.”  
17 *Id.*

18 “In actions for negligence in California, recovery of purely economic loss is  
19 foreclosed in the absence of (1) personal injury, (2) physical damage to property, (3) a  
20 ‘special relationship’ existing between the parties, or (4) some other common law  
21 exception to the rule.” *Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc.*, 315 Fed.App’x  
22 603, 605 (9th Cir. 2008). Plaintiff argues the special relationship exception applies. (Pl.  
23 Oppo. at 8-9) (citing *J’Aire Corp. v. Gregory*, 24 Cal.3d 799, 804 (1979)). *J’Aire* requires  
24 a fact-intensive inquiry. However, Plaintiff has not pled sufficient facts for the Court to  
25 determine whether the special relationship exception applies. *See Johnson v. Marker*  
26 *Ecosystem Growth Holdings, Inc.*, No. 20-cv-2569, 2023 WL 2191214, at \*6 (N.D. Cal.  
27 Feb. 22, 2023) (dismissing negligence claim because Plaintiff failed to allege sufficient  
28 facts to apply the *J’Aire* factors). To the extent Plaintiff’s negligence claim is based on

1 damages for his economic losses, it is **DISMISSED** without prejudice, with leave to  
2 amend.

3 Plaintiff argues his loss of time and emotional distress preclude application of the  
4 economic loss doctrine. (Pl. Oppo. at 9.) Plaintiff alleges Defendant owed him a duty to  
5 protect his funds and personal private information, that it breached this duty by permitting  
6 unauthorized transactions, and as a result one of his injuries is lost time. (Compl. ¶¶ 11-  
7 12, 19, 36-39.) “[T]ime spent responding to a data breach is a non-economic injury, that  
8 when alleged to support a negligence claim, defeats an economic loss doctrine argument.”  
9 *Stasi v. Immediata Health Group Corp.*, 501 F.Supp.3d 898, 913 (S.D. Cal. 2020). Plaintiff  
10 alleges he spent nearly an entire business day at Wells Fargo in an attempt to learn how his  
11 bank accounts were allegedly depleted. (Compl. ¶¶ 11, 19.) His claim for negligence based  
12 upon an injury of lost time is therefore sufficiently pled, and Defendant’s motion is  
13 **DENIED** in this respect.

14 The same is not true for Plaintiff’s allegation of “emotional distress” and “shock” as  
15 a basis for his injury. Plaintiff alleges he “suffered emotional distress” as a result of Wells  
16 Fargo’s actions. (Compl. ¶ 19.) This allegation is conclusory and insufficient to support  
17 an injury under this claim. It is therefore **DISMISSED** without prejudice.

#### 18 **D. Elder Abuse Claim**

19 Plaintiff’s final claim is that Defendant violated the Elder Abuse Act, codified at  
20 Cal. Welf. & Isnt. Code § 15610.30(a)(2). Plaintiff alleges Defendant violated §  
21 15610.30(a)(2) “by taking, secreting, appropriating, obtaining, or retaining personal  
22 property of an elder, or assisting in those activities for a wrongful use or with intent to  
23 defraud, or both.” (Compl. ¶ 41.) Financial abuse of an elder occurs “when a person or  
24 entity . . . [t]akes, secretes, appropriates, obtains, or retains . . . [or] [a]ssits in taking,  
25 secreting, appropriating, obtaining, or retaining real or personal property of an elder . . . for  
26 a wrongful use or with intent to defraud, or both.” *Id.* §§ 15610.30(a)(1)-(2). An elder is  
27 a person, residing in California, 65 years of age or older. *Id.* § 15610.27. Plaintiff is over  
28 65 years old. (Compl. ¶ 42.)

1 Liability may be imposed for assisting in financial elder abuse under an aiding and  
2 abetting standard. *Das v. Bank of Am., N.A.*, 186 Cal.App.4th 727, 744-45 (2010). To state  
3 such a claim, the plaintiff must plead that the defendant “knows the other’s conduct  
4 constitutes a breach of duty and gives substantial assistance or encouragement to the other  
5 to so act.” *Id.* at 744. When “a bank provides ordinary services that effectuate financial  
6 abuse by a third party, the bank may be found to have ‘assisted’ in the financial abuse only  
7 if it knew of the third party’s wrongful conduct.” *Id.* at 745. To be liable for elder abuse,  
8 there must be actual knowledge, not constructive knowledge. *Bortz v. JPMorgan Chase*  
9 *Bank, N.A.*, No. 21-cv-618, 2021 WL 4819575, at \*5 (S.D. Cal. Oct. 15, 2021). Actual  
10 knowledge goes beyond “constructive knowledge of—i.e., they should have known  
11 about—the underlying fraud based on their unusual account activity.” *Id.* Here, Plaintiff  
12 alleges Wells Fargo informed him “that an unknown individual accessed his accounts and  
13 switched Plaintiff’s contact information.” (Compl. ¶ 12.) But Plaintiff fails to allege Wells  
14 Fargo knew that this unknown individual lacked authorization to Plaintiff’s account. It is  
15 not clear whether Wells Fargo “gave substantial assistance or encouragement” to the  
16 alleged unknown individual who accessed Plaintiff’s account. Plaintiff maintains that  
17 “Wells Fargo had its wrongful conduct authorized and/or ratified as Plaintiff disputed the  
18 unauthorized transactions which were not reversed,” (Pl. Oppo. at 10), therefore his elder  
19 abuse claim is sufficiently pled. However, the Court disagrees as the allegation is  
20 conclusory and insufficiently pled. Plaintiff’s allegation that Defendant violated §  
21 15610.30(a)(2) is therefore **DISMISSED** without prejudice, with leave to amend.

#### 22 IV.

#### 23 CONCLUSION AND ORDER

24 Based on the foregoing, the Court HEREBY ORDERS the following:

- 25 1. **Plaintiff’s California Records Act Claim.** Plaintiff’s allegation that Defendant  
26 violated the CCRA by failing to implement reasonable measures to protect  
27 Plaintiff’s personal data in violation of Cal. Civ. Code § 1798.81.5(b) is  
28

1 **DISMISSED** with prejudice. Plaintiff's allegation that Defendant violated Cal.  
2 Civ. Code § 1798.82 is **DISMISSED** without prejudice, with leave to amend

3 2. **Plaintiff's California Consumer Privacy Claim.** Defendant's motion is  
4 **DENIED** as to the CCPA claim.


5 3. **Plaintiff's Negligence Claim.** Plaintiff's negligence claim, to the extent it is  
6 based on injuries of economic losses, or emotional distress and shock, is  
7 **DISMISSED** without prejudice, with leave to amend. Plaintiff's negligence  
8 claim, to the extent it is based on the injury of lost time, is sufficiently pled and  
9 Defendant's motion is **DENIED**.

10 4. **Plaintiff's Elder Abuse Claim.** Plaintiff's allegation that Defendant violated  
11 Cal. Welf. & Isnt. Code § 15610.30(a)(2) is **DISMISSED** without prejudice,  
12 with leave to amend.

13 5. Plaintiff may file an amended complaint, curing the deficiencies noted, within  
14 fourteen (14) days of this Order.

15 **IT IS SO ORDERED.**

16 Dated: August 9, 2023



17 Hon. Dana M. Sabraw, Chief Judge  
18 United States District Court