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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LAVARIOUS GARDINER,  
Plaintiff,  
v.  
WALMART, INC.,  
Defendant.

Case No. 20-cv-04618-JSW

**ORDER GRANTING MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT**

Re: Dkt. No. 47

United States District Court  
Northern District of California

Now before the Court for consideration is the motion to dismiss Plaintiff’s first amended complaint (“FAC”), filed by Defendant Walmart, Inc. (“Walmart” or “Defendant”). The Court has considered the parties’ papers, relevant legal authority, and the record in the case, and it finds this matter suitable for disposition without oral argument. *See* N.D. Civ. L-R 7-1(b). The Court **HEREBY GRANTS** the motion to dismiss **WITH PREJUDICE**.

**BACKGROUND**

The Court previously set forth the facts giving rise to this dispute in its Order granting Walmart’s motion to dismiss Plaintiff Lavarious Gardiner’s (“Plaintiff”) original complaint. (*See* Dkt. No. 43.) The Court shall not repeat those facts here, except as necessary to the analysis. Plaintiff maintains his claims for violation of the California Consumer Privacy Act (“CCPA”), Civ. Code section 1798.150 *et seq.*, negligence, violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code section 17200, *et seq.*, breach of express contract, breach of implied contract, and breach of implied covenant of good faith and fair dealing. Plaintiff has amended to include a claim for unjust enrichment.

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1 ANALYSIS

2 **A. Legal Standard Applicable to Rule 12(b)(6).**

3 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the  
4 pleadings fail to state a claim upon which relief can be granted. The Court’s “inquiry is limited to  
5 the allegations in the complaint, which are accepted as true and construed in the light most  
6 favorable to the plaintiff.” *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).  
7 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s  
8 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
9 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell At.*  
10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

11 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but  
12 must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.  
13 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
14 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
15 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). If the allegations are  
16 insufficient to state a claim, a court should grant leave to amend, unless amendment would be  
17 futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss &*  
18 *Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990). Where, as here,  
19 a plaintiff has previously amended a complaint, a district court has broad discretion to deny further  
20 leave to amend. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (internal  
21 quotations and citation omitted).

22 **B. Plaintiff Fails to State a CCPA Claim.**

23 To have a viable claim against Walmart for a violation of the CCPA, Plaintiff must allege  
24 that Walmart’s “violation of the duty to implement and maintain reasonable security procedures  
25 and practices” that led to the breach occurred on or after January 1, 2020. *See* Cal. Civ. Code §  
26 1798.150(a)(1). In its prior Order, the Court determined that the challenged provision of the  
27 CCPA does not apply retroactively. Accordingly, Plaintiff’s CCPA claim fails unless the alleged  
28 breach occurred on or after January 1, 2020. Plaintiff alleges that he discovered his personal

1 identifying information (“PII”) available for sale online in 2019. (FAC ¶ 17.) The logical  
2 conclusion from this allegation is that the alleged breach of Walmart’s website occurred prior to  
3 January 1, 2020, which is fatal to Plaintiff’s CCPA claim.

4 In his opposition, Plaintiff contends that Defendant has taken his allegation out of context.  
5 He attaches a declaration to his opposition attesting that he discovered that his data was for sale on  
6 the dark web on June 9, 2020, not in 2019 as he alleges. (Dkt. No. 49-1, Declaration of Lavarious  
7 Gardiner, ¶ 3.) Generally, courts may not consider materials beyond the pleadings in ruling on a  
8 Federal Rule of Civil Procedure 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688  
9 (9th Cir.2001) (citing *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.1994)). There are two  
10 exceptions to this rule: (1) court may consider “material which is properly submitted as part of the  
11 complaint” on a motion to dismiss; and (2) under Federal Rule of Evidence 201, “a court may take  
12 judicial notice of ‘matters of public record.’” *Id.* (citing *Mack v. South Bay Beer Distrib.*, 798  
13 F.2d 1279, 1282 (9th Cir.1986)). Because Plaintiff’s declaration is not a pleading, is not attached  
14 to or relied on in the complaint, and is not a matter of public record, the first exception does not  
15 apply. The second exception is inapplicable because Plaintiff did not file a request for judicial  
16 notice or provide any legal argument supporting the Court’s ability to consider his declaration.  
17 Therefore, the Court will not consider Plaintiff’s declaration. *See Hitek Software, LLC v. Sunrise*  
18 *Broad. of New York, Inc.*, No. 12-cv-8004-JGB-MRWx, 2013 WL 12137879, at \*3 (C.D. Cal.  
19 Feb. 21, 2013) (refusing to consider declarations on a motion to dismiss).

20 Plaintiff also argues that the allegation that he discovered his PII for sale in 2019 is  
21 “clearly the result of scrivener’s error.” (Opp. at 2.) The Court’s previous Order put Plaintiff on  
22 notice that his CCPA claim could not survive absent allegations that the violation occurred on or  
23 after January 1, 2020. Following that Order, it is not credible that this allegation, which is central  
24 to Plaintiff’s CCPA claim, is the result of a typo or misunderstanding. Moreover, Plaintiff  
25 employed the same “drafting error” tactic to avoid problematic allegations in his original  
26 complaint, which renders his use of the argument here even less credible. Plaintiff’s attempt to  
27 amend his complaint through his opposition by casting the allegation as a drafting error and  
28 attaching a self-serving declaration is improper. *Johnson v. Cty. of Santa Clara*, No. 5:18-cv-

1 06264-EJD, 2019 WL 1597488, at \*3 (N.D. Cal. Apr. 15, 2019) (“[A] complaint may not be  
2 amended by briefs in opposition to a motion to dismiss.”) (quoting *Barbera v. WMC Mortg. Corp.*,  
3 2006 WL 167632, at \*2 n. 4 (N.D. Cal. Jan. 19, 2006)).

4 The Court GRANTS Defendant’s motion to dismiss Plaintiff’s CCPA claim. The Court  
5 also concludes that further leave to amend would be futile. Were Plaintiff to amend his complaint  
6 to allege that the violation occurred on or after January 1, 2020, it would directly contradict the  
7 allegation in the FAC that he discovered his PII for sale in 2019. *Reddy*, 912 F.2d at 296–97  
8 (amended complaint may only allege other facts consistent with the challenged pleading). For  
9 these reasons, Plaintiff’s CCPA claim is dismissed with prejudice.

10 **C. Plaintiff’s Fails to Allege Injury to Support His UCL, Negligence, and Contract**  
11 **Claims.**

12 Walmart moves to dismiss Plaintiff’s claims for negligence, breach of contract, and  
13 violations of the UCL for failure to plead cognizable damages. The majority of Plaintiff’s  
14 allegations regarding injury remain unchanged from the original complaint, and the Court will  
15 focus its analysis on the new allegations in the FAC.

16 **1. Loss of Value of PII.**

17 Diminution of value of personal information can be a viable damages theory. *See In re*  
18 *Facebook Privacy Litig.*, 572 F. App’x 494 (9th Cir. 2014). A plaintiff must establish the  
19 existence of a market for the personal information and an impairment of the ability to participate  
20 in that market. *Svenson v. Google Inc.*, No. 13-cv-04080-BLF, 2016 WL 8943301, at \*9 (N.D.  
21 Cal. Dec. 21, 2016). Recently, in *Pruchnicki v. Envision Healthcare Corp.*, the Ninth Circuit  
22 affirmed the district court’s finding that allegations of diminution of value of personal information  
23 were insufficient to establish the damages element for her state law claims. 845 F. App’x 613,  
24 614-15 (9th Cir. 2021). The Ninth Circuit explained that although the plaintiff cited studies  
25 establishing that personal information may have value in general, the plaintiff “failed to  
26 adequately allege that *her* personal information actually lost value.” *Id.* The “‘mere  
27 misappropriation of personal information’ does not establish compensable damages.” *Id.* at 615  
28 (quoting *In re Google, Inc. Privacy Pol’y Litig.*, No. 5:12-cv-001382-PSG, 2015 WL 4317479, at

1 \*5 n.63 (N.D. Cal. July 15, 2015).

2 As in *Pruchnicki*, Plaintiff does not allege that he has been unable to sell, profit from, or  
3 monetize his personal information. Instead, he alleges that whether he ever intended to sell his  
4 information is irrelevant because it is possible to assign a monetary value to PII using a market  
5 approach. (FAC ¶ 41.) Apart from allegations about the value of PII in general, Plaintiff has not  
6 alleged that his purportedly stolen personal information—his name, home address, phone number,  
7 and the last four digits and expiration dates of two of his debit cards—is less valuable *because of*  
8 the breach. Indeed, Plaintiff’s allegations suggest that his PII may be valueless for reasons  
9 unrelated to the alleged breach. He alleges that credit cards expire after three years, and he alleges  
10 that he provided his card information to Walmart in 2016. The reasonable inference from  
11 Plaintiff’s allegations is that his allegedly hacked card information has expired and is invalid,  
12 suggesting that no market would exist for this information and rendering the information of little  
13 value independent of the alleged breach. *See Razuki v. Caliber Home Loans, Inc.*, No. CV 17-  
14 1718-LAB (WVGx), 2018 WL 6018361, at \*1 (S.D. Cal. Nov. 15, 2018) (finding allegations of  
15 damages based on diminution of value of personal data insufficient where plaintiff failed to allege  
16 enough facts to establish how his personal information was less valuable as a result of the breach).  
17 Accordingly, Plaintiff’s allegations of the loss of value of PII are insufficient to satisfy the  
18 damages element of his UCL, negligence, and breach of contract claims.

19 **2. Risk of Future Harm.**

20 In the original complaint, Plaintiff alleged that he and class members canceled credit cards  
21 and closed financial accounts as a result of the breach. Defendant argued that this allegation  
22 foreclosed the risk of future harm, but Plaintiff contended that the allegation was a drafting error  
23 not intended to mean that Plaintiff had canceled the cards implicated in the breach. The Court  
24 permitted Plaintiff the opportunity to amend to clarify this allegation. Plaintiff has not done so.  
25 Instead, in his opposition, Plaintiff again characterizes the allegation as inartful pleading and again  
26 seeks leave to amend. However, he does not explain why he failed to clarify this allegation when  
27 previously afforded the opportunity to amend or explain how he proposes to do so if afforded  
28 another chance. Given Plaintiff’s failure to amend or clarify this allegation in the FAC, it is

1 implausible for the Court to infer that the allegation is a drafting error. Instead, the reasonable  
 2 inference from Plaintiff's allegation is that he has canceled the cards associated with the alleged  
 3 data breach. Additionally, as discussed above, Plaintiff alleges that: (1) he provided his credit card  
 4 information to Walmart in 2016; and (2) credit cards expire after three years. The Court must  
 5 infer from these allegations that credit card information Plaintiff provided to Walmart expired in  
 6 2019 and is no longer valid. Plaintiff does not argue otherwise. Instead, he raises an argument  
 7 seemingly related to the statute of limitations for his claims, but this has no bearing on whether  
 8 Plaintiff can show a risk of future harm for a card that is expired. It is hard to see how Plaintiff  
 9 faces a risk of future harm if the cards at issue were canceled or have expired.

10 Because Plaintiff's allegations establish that he canceled the credit cards associated with  
 11 the breach and that those cards have expired, there is no risk of future harm stemming from  
 12 hackers' possession of that information. *Jackson v. Loews Hotels, Inc.*, 2019 WL 2619656, at \*3  
 13 (C.D. Cal. Jan. 4, 2019) (plaintiff's allegations that she closed or modified her financial accounts  
 14 "foreclose[d] the possibility of certainly impending future harm."); *Smith v. Sabre*, No. 17-cv-  
 15 5149, at 4 n.2 (C.D. Cal. Jan. 23, 2018) (ECF No. 36) ("[T]he fact that Smith admitted that she  
 16 cancelled her cards was fatal to her claims because it meant that there could be no future risk to  
 17 those accounts and nothing to 'constantly monitor' them for."). Plaintiff has failed to allege a  
 18 cognizable injury based on the risk of future harm to prevail on his negligence, contract, and UCL  
 19 claims.

### 20 3. Out-of-Pocket Expenses and Lost Time.

21 The Court previously found Plaintiff's allegations of out-of-pocket expenses and lost time  
 22 insufficient to support the element of damages of his UCL, contract, and negligence claims  
 23 because he failed to allege facts in support of the credit monitoring services purchased or  
 24 sufficiently allege that such services were reasonable and necessary. In the FAC, Plaintiff now  
 25 alleges that he purchased Norton LifeLock, a credit monitoring service, in June 2020. However,  
 26 Plaintiff still fails to allege that the credit monitoring services were reasonable and necessary.

27 Plaintiff relies on *Corona v. Sony Pictures Entm't, Inc.*, in arguing that out-of-pocket  
 28 expenses for credit monitoring services qualify as compensable damages. No. 14-cv-09600-RGK-

1 EX, 2015 WL 3916744 (C.D. Cal. June 15, 2015). In *Corona*, the court considered whether costs  
2 relating to credit monitoring or other prophylactic measures sufficiently supported a negligence  
3 claim. *Id.* at \*4. The court determined that credit monitoring could be compensable where the  
4 evidence shows that the need for future monitoring is a reasonably certain consequence of the  
5 defendant's breach of duty, and that the monitoring is reasonable and necessary. *Id.* To determine  
6 the reasonableness and necessity of such monitoring, the court considered five factors: (1) the  
7 significance and extent of the compromise to the plaintiff's PII; (2) the sensitivity of the  
8 compromised information; (3) the relative increase in the risk of identity theft compared to the  
9 changes of identity theft had the breach no occurred and the chances of the public at large being  
10 subject to identity theft; (4) the seriousness of the consequences resulting from the identity theft;  
11 and (5) the objective value of early detection. *Id.* In applying those factors to the case at hand, the  
12 court in *Corona* found that the plaintiffs' allegations supported the reasonableness and necessity of  
13 credit monitoring. The breach at issue caused the disclosure of the plaintiffs' most sensitive, non-  
14 public PII, which included Social Security numbers, employment files, bank account information,  
15 health and medical information, passport numbers, retirement plan data, and home and email  
16 addresses. *Id.* at \*4. This information was posted on file-sharing websites, was copied over  
17 millions of times, and was used to by hackers to threaten the release of additional PII. *Id.*

18 Unlike in *Corona*, Plaintiff alleges that hackers obtained his name, home address, phone  
19 number, and the last four digits and expiration dates of two debit cards. The sensitivity of this  
20 information does not rise to the same level as the information at issue in *Corona*. Additionally, in  
21 *Corona*, several plaintiffs had already received notification of attempted identity theft. Here,  
22 Plaintiff does not allege that any fraud or identity theft has occurred. Moreover, given that  
23 Plaintiff alleges that cards at issue are expired and/or canceled, the severity of consequences that  
24 could result from the alleged identity theft, if any, are far less than those faced by the *Corona*  
25 plaintiffs.

26 Accordingly, Plaintiff's allegations again fail to establish that out-of-pocket expenses and  
27 lost time spent on credit monitoring were reasonable and necessary. Plaintiff has not alleged a  
28 cognizable injury based on out-of-pocket expenses for his negligence, UCL, or contract claims.



1 *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966  
2 (S.D. Cal. 2012) (allegations that the heightened risk of identity theft, time and money spent on  
3 mitigation of that risk, and property value in one's information, do not suffice as injury under the  
4 UCL).

5 **4. Benefit of the Bargain.**

6 Under the “benefit of the bargain” theory, courts generally recognize that plaintiffs have  
7 suffered a financial injury when they purchase a product in reliance on a false representation about  
8 the product's value and allege that they would not have made the purchase, or would not have paid  
9 as much as they did, had they known the truth. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th  
10 310, 332 (2011). The Court previously found that Plaintiff’s benefit of the bargain theory was  
11 deficient because Plaintiff failed to allege that Walmart represented that the cost of data security  
12 was included in the cost of its goods.

13 Plaintiff’s allegations in the FAC regarding the alleged benefit of the bargain remain  
14 virtually unchanged from the original complaint. Plaintiff again fails to allege that Defendant  
15 made any affirmative representation that data security was included in the cost of the goods. This  
16 distinguishes Plaintiff’s case from those he cites in his opposition involving defendants who made  
17 statements about data security practices upon which the plaintiff relied before providing personal  
18 information. *Jackson v. Loews Hotels, Inc.*, No. ED CV 18-827-DMG (JCx), 2019 WL 6721637,  
19 at \*1 (C.D. Cal. July 24, 2019). Plaintiff alleges that he and class members relied on the  
20 assumption that some proportion of the revenue earned by Walmart from its transactions would be  
21 allocated to the implementation of data security practices. (FAC ¶ 57(g).) He does not allege how  
22 that would occur or what gave rise to that assumption. This conclusory allegation cannot support  
23 Plaintiff’s benefit of the bargain theory. *See Jackson*, 2019 WL 6721637, at \*2 (finding similar  
24 allegations amounting to “an implied promise to earmark a portion of the purchase price for  
25 ensuring data security” insufficient to support benefit of the bargain theory).

26 Plaintiff contends in his opposition that the Privacy Policy contains a promise that  
27 Defendant will keep Plaintiff’s data safe. (*See* FAC, Ex. K at 10 (stating that Defendant is  
28 “responsible for helping to protect the security of your information” and will “use reasonable



1 security measures, including physical, administrative, and technical safeguards to protect your  
2 personal information.”.) He argues that customers would expect that a portion of its sales  
3 revenue would go to maintaining data security infrastructure based on this statement. Plaintiff,  
4 however, never alleges that he read or relied on the Privacy Policy and offers no facts to support  
5 this conclusory allegation. In any event, the Privacy Policy never discusses product pricing or  
6 charges for data security. Even if it did, Defendant’s Terms of Use caution customers that  
7 information sent or received on Defendant’s websites may not be secured and may be intercepted  
8 or otherwise accessed by unauthorized parties, alerting Plaintiff that Defendant’s security  
9 measures were not infallible.<sup>1</sup> *Jackson*, 2019 WL 6721637, at \*2 (citing *See In re Sony Gaming*,  
10 903 F. Supp. 2d at 968 (“[I]n the presence of clear admonitory language that Sony’s security was  
11 not ‘perfect,’ no reasonable consumer could have been deceived.”).) Plaintiff’s allegations in  
12 support of his benefit of the bargain theory of damages are again deficient.

13 Plaintiff has again failed to plausibly allege injury to support his UCL, breach of contract,  
14 and negligence claims. Therefore, the Court GRANTS Defendant’s motion to dismiss these  
15 claims.

16 **D. Plaintiff’s Claims Fail for Additional Reasons.**

17 Defendant moves to dismiss Plaintiff’s claims for independent reasons. Although the  
18 Court need not reach these arguments, it will briefly address other grounds for dismissal of  
19 Plaintiff’s claims.

20 **1. Negligence Claim.**

21 The Court previously found that the economic loss doctrine barred Plaintiff’s negligence  
22 claim because Plaintiff failed to allege a “special relationship” with Defendant. Plaintiff alleges  
23 only economic loss in connection with his negligence claim. (FAC ¶ 113 (“Plaintiff has suffered  
24 monetary injury...”)) Therefore, Plaintiff’s negligence claim must be dismissed unless an  
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26 <sup>1</sup> Defendant asks the Court to take judicial notice of several iterations of Walmart.com’s Terms of  
27 Use. (Dkt. No. 48.) The Court grants Defendant’s unopposed request. *See United States ex rel.*  
28 *Hong v. Newport Sensors, Inc.*, No. SA 13-CV-1164-JLS (JPRX), 2016 WL 8929246, at \*3 (C.D.  
Cal. May 19, 2016) (taking judicial notice of contents of web pages available through the  
Wayback Machine).

1 exception to the economic loss rule applies.

2 Plaintiff continues to argue that a “special relationship” exists between him and Defendant,  
3 which permits him to recover economic losses for his negligence claim. To judge the existence of  
4 a special relationship giving rise to an independent duty, courts consider six factors: (1) the extent  
5 to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the  
6 plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the  
7 connection between the defendant's conduct and the injury suffered; (5) the moral blame attached  
8 to the defendant's conduct; and (6) the policy of preventing future harm. *J'Aire Corp. v. Gregory*,  
9 24 Cal.3d 709, 804 (1979).

10 First, as Defendant argues, multiple courts have found that the “special relationship”  
11 exception is inapplicable where the parties are in privity of contract with respect to contracts for  
12 goods. *See R Power Biofuels, LLC v. Chemex LLC*, No. 16-CV-00716-LHK, 2016 WL 6663002,  
13 at \*9 (N.D. Cal. Nov. 11, 2016) (finding that “the *J'aire* exception does not apply where the  
14 parties are in privity of contract with respect to a transaction involving goods”); *N. Am. Chem. Co.*  
15 *v. Superior Ct.*, 59 Cal. App. 4th 764, 784, 69 Cal. Rptr. 2d 466, 477 (1997) (concluding, without  
16 deciding, that “*J'Aire* could properly be applied in a goods or products case only when there is an  
17 absence of privity”). Here, the FAC alleges that Plaintiff entered in a contract with Defendant to  
18 purchase goods. (*See* FAC ¶¶ 107, 124.)

19 Regardless, Plaintiff has again failed to allege facts establishing the existence of a “special  
20 relationship.” Plaintiff adds vague and conclusory allegations to the FAC to bolster his argument  
21 that such a relationship existed between him and Defendant, but these general allegations lack  
22 facts to support the finding of a “special relationship.” Plaintiff again fails to allege that the  
23 transaction was intended to specifically benefit him in a way separate from other consumers. *See*  
24 *Whiteside v. E\*TRADE Sec., LLC*, No. 20-cv-05803-JSC, 2021 WL 930794, at \*6 (N.D. Cal. Mar.  
25 11, 2021) (finding first *J'Aire* factor weighed against imposing a special relationship where  
26 plaintiffs failed to plead to intent particular to them as opposed to all users); *see also In re Sony*  
27 *Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 972 (S.D. Cal. 2014)  
28 (first factor weighed against finding a special relationship where the defendant did not develop

1 goods and services for the plaintiffs’ “specific benefit, above and beyond what was offered to all  
2 consumers”). With regard to the remaining factors, Plaintiff’s unsupported conclusory allegations  
3 do not permit the inference that a special relationship existed. Plaintiff’s negligence claim fails.

4 **2. Breach of Contract Claims.**

5 The Court previously found Plaintiff’s breach of contract claims were barred by the  
6 limitation of liability clause in Walmart’s Terms of Use. The Court permitted Plaintiff leave to  
7 amend because it was conceivable that Plaintiff could allege facts establishing the procedural or  
8 substantive unconscionability of the contract. Plaintiff fails to do so. The FAC alleges in  
9 conclusory fashion that the contract is procedurally unconscionable because it is a contract of  
10 adhesion and substantively unconscionable because it eliminates the mutuality of the agreement.  
11 (See FAC ¶¶132-133.) The Court previously rejected these arguments, and Plaintiff fails to allege  
12 facts supporting his conclusory assertions of procedural and substantive unconscionability. *Iqbal*,  
13 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere  
14 conclusory statements, do not suffice.”). Plaintiff’s contract claims are dismissed.

15 **3. Claims for Equitable Relief.**

16 Plaintiff’s unjust enrichment claim and UCL claim are claims in equity. See *Silvercrest*  
17 *Realty, Inc. v. Great Am. E&S Ins. Co.*, 2012 WL 13028094, at \*2 (C.D. Cal. Apr. 4, 2012)  
18 (citing *Korea Supply Co. v. Lockheed Martin*, 29 Cal. 4th 1134, 1146-49, (2003) (“Remedies  
19 under the UCL are limited to restitution and injunctive relief, and do not include damages.”)). The  
20 Court previously found Plaintiff failed to allege a lack of adequate legal remedy under the Ninth  
21 Circuit’s recent decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020).  
22 Defendant again moves to dismiss Plaintiff’s claims for equitable relief fail on the basis that he  
23 has not pled that he lacks an adequate remedy at law.

24 Plaintiff argues that it is premature for the Court to determine the adequacy of legal  
25 remedies at this stage, arguing that *Sonner* requires detailed allegations of lack of adequate remedy  
26 at law only at the eve of trial. The Court rejects Plaintiff’s argument, and like numerous other  
27 courts, it finds *Sonner* applies at this stage of proceedings. See *Zaback v. Kellogg Sales Co.*, No  
28 3:20-cv-00268-BEN-MSB, 2020 WL 6381987, at \*4 (S.D. Cal. Oct. 29, 2020) (collecting cases);

1 *see also IntegrityMessageBoards.com v. Facebook, Inc.*, No. 18-cv-05286-PJH, 2020 WL  
 2 6544411, at \*4 (N.D. Cal. Nov. 6, 2020) (“The *Sonner* panel’s recitation of the subject common  
 3 law principles unequivocally applies to any request for equitable relief.”).

4 Plaintiff also argues that he lacks an adequate remedy at law because lost economic  
 5 opportunities related to reductions in credit scores and reputational concerns related to identity  
 6 theft cannot be remedied monetarily. However, Plaintiff does not allege that he suffered these  
 7 harms. Even if he had, he offers no explanation why monetary damages could not remedy these  
 8 harms. As to the losses Plaintiff does allege, including his out-of-pocket expenses, time spent  
 9 monitoring credit, benefit-of-the-bargain losses, and loss of value of his PII, these are  
 10 “compensable pecuniary losses with calculable monetary value.” (*See* FAC ¶¶ 120-122.)

11 Plaintiff also prays for injunctive relief “mandating that Defendants implement and  
 12 maintain reasonable security procedures and practices to protect Plaintiff’s and Class Members’  
 13 PII from unauthorized access, destruction, use, modification or disclosure, and notify Plaintiff and  
 14 the Class Members of all data breaches which have occurred.” (*See* FAC, Prayer for Relief.)  
 15 However, as discussed above, Plaintiff’s allegations foreclose the threat of future injury because  
 16 his credit cards have expired or been canceled, and an injunction requiring Defendant to improve  
 17 its security procedures in the future would not provide relief for injuries arising out of a past data  
 18 breach. As to potential future breaches, Plaintiff offers no explanation why monetary damages  
 19 would not provide adequate relief for purported future harms. *Clark v. Am. Honda Motor Co.*, No.  
 20 CV 20-03147 AB (MRWx), 2021 WL 1186338, at \*8 (C.D. Cal. Mar. 25, 2021) (dismissing claim  
 21 for prospective injunctive relief under *Sonner*). Because Plaintiff fails to allege that he lacks an  
 22 adequate remedy at law, his claims for equitable relief are dismissed.

23 **E. The Court Dismisses Plaintiff’s Unjust Enrichment Claim.**

24 Plaintiff’s unjust enrichment claim independently fails because a valid contract exists  
 25 between the parties. In California, there is no independent claim for unjust enrichment because  
 26 unjust enrichment “describe[s] the theory underlying a claim that a defendant has been unjustly  
 27 conferred a benefit through mistake, fraud, coercion, or request.” *Astiana v. Hain Celestial Grp.*,  
 28 *Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (internal quotation marks omitted). While Plaintiff raises

1 an unjust enrichment claim, the Court “construe[s] the cause of action as a quasi-contract claim  
2 seeking restitution.” *Id.* (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th  
3 221, 231 (2014)).

4 As a matter of law, a quasi-contract claim for unjust enrichment “cannot lie where there  
5 exists between the parties a valid express contract covering the same subject matter.” *Rutherford*  
6 *Holdings, LLC*, 223 Cal. App. 4th at 231 (quoting *Lance Camper Mfg. Corp. v. Republic Indem.*  
7 *Co.*, 44 Cal. App. 4th 194, 203 (1996)); *see also Durell v. Sharp Healthcare*, 183 Cal. App. 4th  
8 1350, 1370 (2010) (“As a matter of law, an unjust enrichment claim does not lie where the parties  
9 have an enforceable express contract.”). To proceed on a claim for unjust enrichment, Plaintiff  
10 must allege that the alleged contract between him and Defendant was unenforceable or void. *See*  
11 *Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 999 (N.D. Cal. 2020) (noting a plaintiff may  
12 alternatively plead a breach of contract claim and quasi-contract claim only if “the plaintiff also  
13 pleads facts suggesting that the contract may be unenforceable or invalid”).

14 Here, Plaintiff alleges that an enforceable contract existed between him and Defendant but  
15 fails to allege that same contract was unenforceable or void. Plaintiff relies on *Bear, LLC v.*  
16 *Marine Grp. Boat Works, LLC* to argue that he has adequately pled unjust enrichment because the  
17 FAC contests the validity of at least some of the contract’s terms. No. 3:14-CV-02960-BTM,  
18 2015 WL 4255061, at \*5 (S.D. Cal. July 14, 2015). However, as Defendant argues, *Bear* is  
19 distinguishable because in that case the defendant conceded that the complaint contested the  
20 validity of the core of the contract. That is not the case here where Plaintiff expressly alleges the  
21 existence of an enforceable contract, “[s]ave for certain terms alleged to be invalid.” *Free Range*  
22 *Content, Inc. v. Google Inc.*, No. 14-CV-02329-BLF, 2016 WL 2902332, at \*16 (N.D. Cal. May  
23 13, 2016) (dismissing unjust enrichment claim where the parties agreed there was an enforceable  
24 contract).

25 Because Plaintiff has expressly pleaded the existence of an enforceable contract, he cannot  
26 bring a claim for unjust enrichment. *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1389–  
27 90 (2012) (affirming demurrer to unjust enrichment claim where “plaintiffs’ breach of contract  
28 claim pleaded the existence of an enforceable agreement and their unjust enrichment claim did not

United States District Court  
Northern District of California

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deny the existence or enforceability of that agreement”); *Huynh v. Quora, Inc.*, No. 18-CV-07597-BLF, 2019 WL 11502875, at \*12 (N.D. Cal. Dec. 19, 2019) (dismissing unjust enrichment claim without leave to amend where the existence of the contract was undisputed and the plaintiffs did not allege that the contract was void, rescinded, or otherwise unenforceable).

The Court GRANTS Defendant’s motion to dismiss Plaintiff’s unjust enrichment claim. Further, given that Plaintiff has pleaded the existence of a valid contract, the Court dismisses the claim without leave to amend.

**CONCLUSION**

For the foregoing reasons, the Court GRANTS the motion to dismiss. Plaintiff has failed to remedy the deficiencies previously identified by the Court and has not identified what information he would add to cure the deficiencies. Accordingly, the Court finds further amendment would be futile and DISMISSES the FAC WITH PREJUDICE.

**IT IS SO ORDERED.**

Dated: July 28, 2021

  
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JEFFREY S. WHITE  
United States District Judge