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and the Plaintiff Class(es)
9

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12

13 ARELIA DUFF, individually, and on
behalf of all others similarly situated,
14

Plaintiff,

15 vs.

16 MERCARI, INC.
17

Defendant.
18
19
20

Case No.

CLASS ACTION

**COMPLAINT FOR DAMAGES,
INJUNCTIVE AND EQUITABLE RELIEF
FOR:**

- 1. NEGLIGENCE;
- 2. BREACH OF IMPLIED CONTRACT;
- 3. BREACH OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING;
- 4. UNJUST ENRICHMENT

[JURY TRIAL DEMANDED]

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1 Representative Plaintiff alleges as follows:
2

3 **INTRODUCTION**

4 1. Representative Arelia Duff (“Duff” or “Representative Plaintiff”) brings this class
5 action against Defendant Mercari, Inc. for its failure to properly secure and safeguard
6 Representative Plaintiff’s and Class Members’ accounts and the personally identifiable
7 information stored within Defendant’s information network, including, without limitation, their
8 full names, addresses, email address, and payment card and bank account information, (these types
9 of information, *inter alia*, being hereafter referred to, collectively, as “personally identifiable
10 information” or “PII”),¹ and to properly secure and safeguard Representative Plaintiff’s and Class
11 Members’ PII and financial information stored within Defendant’s information network.

12 2. With this action, Representative Plaintiff seeks to hold Defendant responsible for
13 the harms it caused and will continue to cause Representative Plaintiff and the countless other
14 similarly situated persons in a security failure in or around the first few months of 2022, by which
15 cyber-criminals were able to infiltrate Defendant’s inadequately protected network servers and
16 access Representative Plaintiff’s and other users’ accounts, including the bank account and
17 payment card information stored thereon.

18 3. Representative Plaintiff further seeks to hold Defendant responsible for not
19 ensuring that the compromised PII and financial information was maintained in a manner
20 consistent with industry and other relevant standards.

21 4. Defendant did not inform Representative Plaintiff of any security issues on its app
22 or regarding her account. Instead, Representative Plaintiff only learned of these security failures
23 when she discovered fraudulent purchases (i.e., not made by her) on her Mercari account.
24

25 _____
26 ¹ Personally identifiable information (“PII”) generally incorporates information that can be
27 used to distinguish or trace an individual’s identity, either alone or when combined with other
28 personal or identifying information. 2 C.F.R. § 200.79. At a minimum, it includes all information
that on its face expressly identifies an individual. PII also is generally defined to include certain
identifiers that do not on their face name an individual, but that are considered to be particularly
sensitive and/or valuable if in the wrong hands (for example, Social Security numbers, passport
numbers, driver’s license numbers, financial account numbers).

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1 U.S.C. § 1332(d) because this is a class action where the amount in controversy exceeds the sum
2 or value of \$5 million, exclusive of interest and costs, there are more than 100 members in the
3 proposed class, and at least one other Class Member is a citizen of a state different from Defendant.

4 10. Supplemental jurisdiction to adjudicate issues pertaining to Indiana state law is
5 proper in this Court under 28 U.S.C. §1367.

6 11. Defendant is domiciled in this state for purposes of personal jurisdiction. It is
7 headquartered in and has its principal place of business in this judicial district. Defendant is at
8 home in California and in this judicial district and subject to this Court’s jurisdiction.

9 12. Venue is proper in this Court under 28 U.S.C. § 1391. Defendant resides in this
10 judicial district. Its headquarters and principal place of business is 1530 Page Mill Rd #100, Palo
11 Alto, CA 94304. A substantial portion of the underlying events and conduct occurred in this
12 judicial district and the means of proof are largely located here.

13
14 **PLAINTIFF**

15 13. Representative Plaintiff is an adult individual and, at all relevant times herein, a
16 resident of the State of Indiana. Representative Plaintiff’s Mercari account and the PII and financial
17 information stored thereon was accessed by unauthorized third parties.

18 14. Prior to this, Representative Plaintiff purchased goods/services using Defendant’s
19 app.

20 15. In connection with this use, Plaintiff created an account using Defendant’s app.
21 Vis-à-vis this application, Defendant collected Representative Plaintiff’s PII and financial
22 information. As a result of the breach events detailed herein, Representative Plaintiff’s account
23 was compromised, and the information stored thereon was accessed by unauthorized persons.

24 16. At all times herein relevant, Representative Plaintiff is and was a member of each
25 of the Classes.

26 17. As required in order to purchase goods/services from Defendant, Representative
27 Plaintiff provided Defendant with sensitive personal and financial information, including, without
28

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1 limitation, her name, address, email address, payment card information, and bank account
2 information.

3 18. Representative Plaintiff's information was accessed by unauthorized third parties
4 in light of Defendant's storage and/or sharing of Representative Plaintiff's PII and financial
5 information. Representative Plaintiff's PII and financial information was, at all relevant times,
6 within the possession and control of Defendant.

7 19. Due to Defendant's failure to adequately secure its system, unauthorized third
8 parties were able to access Representative Plaintiff's Mercari account and make fraudulent
9 purchases for which she was charged. Additionally, unauthorized third parties (perhaps the same
10 individual(s), though Representative Plaintiff does not presently know for certain) used the PII and
11 financial information stored in representative Plaintiff's Mercari account to gain access to
12 Representative Plaintiff's bank account and withdraw money therefrom.

13 20. In addition to the tangible financial losses, Representative Plaintiff has already
14 spent and will continue to spend time dealing with the consequences of this incident. This includes,
15 without limitation, time spent verifying the legitimacy of transactions on her Mercari account,
16 exploring credit monitoring and identity theft insurance options, self-monitoring her accounts, and
17 seeking legal counsel regarding options for remedying and/or mitigating the effects of this
18 incident. This time has been lost forever and cannot be recaptured.

19 21. Representative Plaintiff furthered suffered actual injury in the form of damages to
20 and diminution in the value of Representative Plaintiff's PII—a form of intangible property that
21 Representative Plaintiff entrusted to Defendant for the purpose of purchasing products/services,
22 which was compromised as a result of Defendant's failure to protect this information.

23 22. Representative Plaintiff suffered lost time, annoyance, interference, and
24 inconvenience as a result of this incident and has anxiety and increased concerns for the loss of
25 privacy, as well as anxiety over the impact of cyber-criminals accessing and using sensitive PII
26 and/or financial information.

27 23. Representative Plaintiff has suffered imminent and impending injury arising from
28 the substantially increased risk of fraud, identity theft, and misuse resulting from Representative

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1 Plaintiff's PII and financial information, in combination with Representative Plaintiff's name,
2 being placed in the hands of unauthorized third parties.

3 24. Representative Plaintiff has a continuing interest in ensuring that her account and
4 the PII and financial information, which, upon information and belief, remains backed up and,
5 thus, in Defendant's possession, is protected and safeguarded from future attacks or breaches.

6
7 **DEFENDANT**

8 25. Defendant Mercari, Inc. is a Delaware corporation with a principal place of
9 business located at 1530 Page Mill Rd #100, Palo Alto, CA 94304.

10 26. Defendant Mercari, Inc. is an e-commerce company. Its principal business
11 operating a digital marketplace app which allows independent buyers and sellers around the United
12 States to connect for the sale of goods. Defendant claims it has been downloaded over 50 million
13 times in the United States and has over 350 thousand new items listed every day.²

14 27. The true names and capacities of persons or entities, whether individual, corporate,
15 associate, or otherwise, who may be responsible for some of the claims alleged here are currently
16 unknown to Representative Plaintiff. Representative Plaintiff will seek leave of court to amend
17 this Complaint to reflect the true names and capacities of such other responsible parties when their
18 identities become known.

19
20 **CLASS ACTION ALLEGATIONS**

21 28. Representative Plaintiff brings this action pursuant to the provisions of Rules 23(a),
22 (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, on behalf of Representative Plaintiff and
23 the following classes:

24
25 "All individuals within the United States of America who have had their
26 Mercari accounts, and the PII and/or financial information stored thereon,
27 accessed by unauthorized third parties during the limitations period."
28

² See, <https://www.mercari.com/about/> (last accessed May 10, 2022).

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1 29. Excluded from the Classes are the following individuals and/or entities: (a)
2 Defendant and Defendant’s parents, subsidiaries, affiliates, officers and directors, and any entity
3 in which Defendant has a controlling interest; (b) all individuals who make a timely election to be
4 excluded from this proceeding using the correct protocol for opting out; (c) any and all federal,
5 state or local governments, including but not limited to its departments, agencies, divisions,
6 bureaus, boards, sections, groups, counsels and/or subdivisions; and (d) all judges assigned to hear
7 any aspect of this litigation, as well as their immediate family members.

8 30. Representative Plaintiff reserves the right to request additional subclasses be added,
9 as necessary, based on the types of PII and financial information that were compromised and/or
10 the nature of certain Class Members’ relationship(s) to the Defendant. At present, collectively,
11 Class Members include, *inter alia*, all persons within the United States whose Mercari account and
12 the PII and/or financial information thereon have been accessed by unauthorized third parties.

13 31. Representative Plaintiff reserves the right to amend the above definition in
14 subsequent pleadings and/or motions for class certification.

15 32. This action has been brought and may properly be maintained as a class action
16 under Federal Rule of Civil Procedure Rule 23 because there is a well-defined community of
17 interest in the litigation and membership in the proposed classes is easily ascertainable.

18 a. Numerosity: A class action is the only available method for the fair and
19 efficient adjudication of this controversy. The members of the Plaintiff
20 Classes are so numerous that joinder of all members is impractical, if not
21 impossible. Representative Plaintiff is informed and believes and, on that
22 basis, alleges that the total number of Class Members is in the hundreds of
23 thousands of individuals. Membership in the Classes will be determined by
24 analysis of Defendant’s records.

25 b. Commonality: Representative Plaintiff and the Class Members share a
26 community of interests in that there are numerous common questions and
27 issues of fact and law which predominate over any questions and issues
28 solely affecting individual members, including, but not necessarily limited
to:

1) Whether Defendant had a legal duty to Representative Plaintiff and
the Classes to exercise due care in collecting, storing, using and/or
safeguarding their PII;

2) Whether Defendant knew or should have known of the susceptibility
of its data security systems to a data breach;

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- 3) Whether Defendant’s security procedures and practices to protect its systems were reasonable in light of the measures recommended by data security experts;
- 4) Whether Defendant’s failure to implement adequate data security measures allowed a data breach to occur;
- 5) Whether Defendant failed to comply with its own policies and applicable laws, regulations, and industry standards relating to data security;
- 6) Whether Defendant adequately, promptly, and accurately informed Representative Plaintiff and Class Members that their PII had been compromised;
- 7) How and when Defendant actually learned of the cyber-intrusion;
- 8) Whether Defendant’s conduct, including its failure to act, resulted in or was the proximate cause of the breach of its systems, resulting in the loss of the PII of Representative Plaintiff and Class Members;
- 9) Whether Defendant adequately addressed and fixed the vulnerabilities which permitted the unauthorized access to occur;
- 10) Whether Defendant engaged in unfair, unlawful, or deceptive practices by failing to safeguard the PII of Representative Plaintiff and Class Members;
- 11) Whether Representative Plaintiff and Class Members are entitled to actual and/or statutory damages and/or whether injunctive, corrective and/or declaratory relief and/or an accounting is/are appropriate as a result of Defendant’s wrongful conduct;
- 12) Whether Representative Plaintiff and Class Members are entitled to restitution as a result of Defendant’s wrongful conduct.

c. Typicality: Representative Plaintiff’s claims are typical of the claims of the Plaintiff Classes. Representative Plaintiff and all members of the Plaintiff Classes sustained damages arising out of and caused by Defendant’s common course of conduct in violation of law, as alleged herein. The same event and conduct that gave rise to Representative Plaintiff’s claims are identical to those that give rise to the claims of every Class Member because Representative Plaintiff and Class Members alike had their Stored Data compromised in the same way by the same conduct of Defendant. Representative Plaintiff and Class Members face identical threats resulting from the resetting of their hard drives and/or access by cyber-criminals to the Stored Data maintained thereon.

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- d. Adequacy of Representation: Representative Plaintiff in this class action is an adequate representative of each of the Plaintiff Classes in that Representative Plaintiff has the same interest in the litigation of this case as the Class Members, is committed to vigorous prosecution of this case, and has retained competent counsel who are experienced in conducting litigation of this nature. Representative Plaintiff is not subject to any individual defenses unique from those conceivably applicable to other Class Members or the Classes in their entirety. Representative Plaintiff anticipate no management difficulties in this litigation. Representative Plaintiff and its counsel will fairly and adequately protect the interests of all Class Members.
- e. Superiority of Class Action: The damages suffered by individual Class Members are significant but may be small relative to the enormous expense of individual litigation by each member. This makes or may make it impractical for members of the Plaintiff Classes to seek redress individually for the wrongful conduct alleged herein. Even if Class Members could afford such individual litigation, the court system could not. Should separate actions be brought or be required to be brought by each individual member of the Plaintiff Classes, the resulting multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings which might be dispositive of the interests of other Class Members who are not parties to the adjudications and/or may substantially impede their ability to adequately protect their interests. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties and provides benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

33. Class certification is proper because the questions raised by this Complaint are of common or general interest affecting numerous persons, such that it is impracticable to bring all Class Members before the Court.

34. This class action is also appropriate for certification because Defendant has acted and/or has refused to act on grounds generally applicable to the Classes, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward Class Members and making final injunctive relief appropriate with respect to the Classes in their entireties. Defendant's conduct challenged herein applies to and affects Class Members uniformly, and Representative Plaintiff's challenge to this conduct hinges on Defendant's conduct with respect to the Classes, and each of them, not on facts or law applicable only to the Representative Plaintiff.

1 35. Unless a Class-wide injunction is issued, Defendant’s violations may continue, and
2 Defendant may continue to act unlawfully as set forth in this Complaint.

3
4 **COMMON FACTUAL ALLEGATIONS**

5 **The Cyber-attack**

6 36. One or more unauthorized third parties accessed Class Members’ Mercari accounts
7 and the sensitive data stored therein including, but not limited to, full names, addresses, email
8 addresses, and payment card and bank account information. Representative Plaintiff was among
9 the individuals whose account was infiltrated and whose information was accessed.

10 37. Representative Plaintiff is not currently aware of the precise number of individuals
11 similarly affected by Defendant’s security lapses but believes it to be—at minimum—in the
12 thousands. Representative Plaintiff bases this allegation on, *inter alia*, public statements by other
13 Mercari users reporting precisely the same problems as Representative Plaintiff during
14 approximately the same time.

15 38. Representative Plaintiff was not aware of these security issues until learning that
16 someone had gained access to her Mercari account and, thereupon, used the information stored
17 there to unlawfully gain access to her bank account. To date, Defendant has not provided any
18 explanation as to how or why someone was able to gain access to Representative Plaintiff’s
19 account and/or what steps it has and/or intends to take(n) to prevent further security failures.

20 39. Upon information and belief, the unauthorized third party cyber-criminals gained
21 access to Representative Plaintiff’s and Class Members’ PII and financial information with the
22 intent of engaging in misuse of the heretofore-described PII and financial information, including
23 marketing and selling Representative Plaintiff’s and Class Members’ PII.

24 40. Defendant had and continues to have obligations created by reasonable industry
25 standards, common law, state statutory law, and its own assurances and representations to keep
26 Representative Plaintiff’s and Class Members’ PII confidential and to protect such PII from
27 unauthorized access.
28

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1 41. Representative Plaintiff and Class Members were required to provide their PII and
2 financial information to Defendant with the reasonable expectation and mutual understanding that
3 Defendant would comply with its obligations to keep such information confidential and secure
4 from unauthorized access.

5 42. Despite this, Representative Plaintiff and the Class Members remain, even today,
6 in the dark regarding what particular data was stolen, the particular malware used, and what steps
7 Defendant intends to take, if any, to secure Class Members’ PII and financial information going
8 forward. Representative Plaintiff and Class Members are left to speculate as to the full impact of
9 this cyber-incident and how exactly Defendant intends to take so as to enhance its information
10 security systems and/or monitoring capabilities so as to prevent further breaches.

11 43. Representative Plaintiff’s and Class Members’ PII and financial information may
12 end up for sale on the dark web, or simply fall into the hands of companies that will use the detailed
13 PII and financial information for targeted marketing without the approval of Representative
14 Plaintiff and/or Class Members. Either way, unauthorized individuals can now easily access the
15 PII and/or financial information of Representative Plaintiff and Class Members.

16
17 **Defendant Collected/Stored Class Members’ PII and Financial Information**

18 44. Defendant acquired, collected, and stored and assured reasonable security over
19 Representative Plaintiff’s and Class Members’ PII and financial information.

20 45. To use its app, Defendant required that Representative Plaintiff and Class Members
21 provide them with their full name, email address, address, and payment card and/or bank account
22 information.

23 46. By obtaining, collecting, and storing Representative Plaintiff’s and Class Members’
24 PII and financial information, Defendant assumed legal and equitable duties and knew or should
25 have known that they were thereafter responsible for protecting Representative Plaintiff’s and
26 Class Members’ PII and financial information from unauthorized disclosure.

27 47. Representative Plaintiff and Class Members have taken reasonable steps to
28 maintain the confidentiality of their PII and financial information. Representative Plaintiff and

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1 Class Members relied on Defendant to keep their PII and financial information confidential and
2 securely maintained, to use this information for business purposes only, and to make only
3 authorized disclosures of this information.

4 48. Defendant could have prevented the breach of Representative Plaintiff and Class
5 Members' accounts by properly securing and encrypting and/or more securely encrypting its
6 servers generally, as well as Representative Plaintiff's and Class Members' PII and financial
7 information.

8 49. Defendant's negligence in safeguarding Representative Plaintiff's and Class
9 Members' PII and financial information is exacerbated by repeated warnings and alerts directed to
10 protecting and securing sensitive data, as evidenced by the trending cyber-attacks in recent years.

11 50. Due to the high-profile nature of many recent cyber-attacks, Defendant was and/or
12 certainly should have been on notice and aware of such attacks occurring and, therefore, should
13 have assumed and adequately performed the duty of preparing for such an imminent attack. This
14 is especially true given that Defendant is an e-commerce company and derives its revenue from
15 operating an online marketplace.

16 51. Yet, despite the prevalence of public announcements of cyber-attacks and data
17 security compromises, Defendant failed to take appropriate steps to protect Representative
18 Plaintiff's and Class Members' PII and financial information from being compromised

19
20 **Defendant Had an Obligation to Protect the Stolen Information**

21 52. Defendant's failure to adequately secure Representative Plaintiff's and Class
22 Members' sensitive data breaches duties it owed Representative Plaintiff and Class Members
23 under statutory and common law. Representative Plaintiff and Class Members surrendered their
24 highly sensitive personal data to Defendant under the implied condition that Defendant would keep
25 it private and secure. Accordingly, Defendant also had an implied duty to safeguard their data,
26 independent of any statute.

27 53. In addition to its obligations under federal and state laws, Defendant owed a duty
28 to Representative Plaintiff and Class Members to exercise reasonable care in obtaining, retaining,

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1 | securing, safeguarding, deleting, and protecting the PII and financial information in Defendant’s
2 | possession from being compromised, lost, stolen, accessed, and misused by unauthorized persons.
3 | Defendant owed a duty to Representative Plaintiff and Class Members to provide reasonable
4 | security, including consistency with industry standards and requirements, and to ensure that its
5 | computer systems, networks, and protocols adequately protected the PII and financial information
6 | of Representative Plaintiff and Class Members.

7 | 54. Defendant owed a duty to Representative Plaintiff and Class Members to design,
8 | maintain, and test its computer systems, servers and networks to ensure that the PII and financial
9 | information in its possession was adequately secured and protected.

10 | 55. Defendant owed a duty to Representative Plaintiff and Class Members to create and
11 | implement reasonable data security practices and procedures to protect the PII and financial
12 | information in its possession, including not sharing information with other entities who maintained
13 | sub-standard data security systems.

14 | 56. Defendant owed a duty to Representative Plaintiff and Class Members to
15 | implement processes that would detect a breach on its data security systems in a timely manner.

16 | 57. Defendant owed a duty to Representative Plaintiff and Class Members to act upon
17 | data security warnings and alerts in a timely fashion.

18 | 58. Defendant owed a duty to Representative Plaintiff and Class Members to disclose
19 | if its computer systems and data security practices were inadequate to safeguard individuals’ PII
20 | and/or financial information from theft because such an inadequacy would be a material fact in
21 | their decision to entrust this PII and/or financial information to Defendant.

22 | 59. Defendant owed a duty of care to Representative Plaintiff and Class Members
23 | because they were foreseeable and probable victims of any inadequate data security practices.

24 | 60. Defendant owed a duty to Representative Plaintiff and Class Members to encrypt
25 | and/or more reliably encrypt Representative Plaintiff’s and Class Members’ PII and financial
26 | information and monitor user behavior and activity in order to identify possible threats.
27 |
28 |

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1 **Value of the Relevant Sensitive Information**

2 61. The ramifications of Defendant’s failure to keep secure Representative Plaintiff’s
3 and Class Members’ PII and financial information are long lasting and severe. Once PII and
4 financial information is stolen, fraudulent use of that information and damage to victims may
5 continue for years. Indeed, the PII and/or financial information of Representative Plaintiff and
6 Class Members was taken by hackers to engage in identity theft or to sell it to other criminals who
7 will purchase the PII and/or financial information for that purpose. The fraudulent activity
8 resulting from this may not come to light for years.

9 62. These criminal activities have and will result in devastating financial and personal
10 losses to Representative Plaintiff and Class Members. For example, it is believed that certain PII
11 compromised in the 2017 Experian data breach was being used, three years later, by identity
12 thieves to apply for COVID-19-related benefits in the state of Oklahoma. Such fraud will be an
13 omnipresent threat for Representative Plaintiff and Class Members for the rest of their lives. They
14 will need to remain constantly vigilant.

15 63. The FTC defines “identity theft” as “a fraud committed or attempted using the
16 identifying information of another person without authority.” The FTC describes “identifying
17 information” as “any name or number that may be used, alone or in conjunction with any other
18 information, to identify a specific person,” including, among other things, “[n]ame, Social Security
19 number, date of birth, official State or government issued driver’s license or identification number,
20 alien registration number, government passport number, employer or taxpayer identification
21 number.”

22 64. Identity thieves can use PII and financial information, such as that of Representative
23 Plaintiff and Class Members which Defendant failed to keep secure, to perpetrate a variety of
24 crimes that harm victims. For instance, identity thieves may commit various types of government
25 fraud such as immigration fraud, obtaining a driver’s license or identification card in the victim’s
26 name but with another’s picture, using the victim’s information to obtain government benefits, or
27 filing a fraudulent tax return using the victim’s information to obtain a fraudulent refund.
28

1 65. There may be a time lag between when harm occurs versus when it is discovered,
2 and also between when PII and/or financial information is stolen and when it is used. According
3 to the U.S. Government Accountability Office (“GAO”), which conducted a study regarding data
4 breaches:

5 [L]aw enforcement officials told us that in some cases, stolen data may be held for
6 up to a year or more before being used to commit identity theft. Further, once stolen
7 data have been sold or posted on the Web, fraudulent use of that information may
8 continue for years. As a result, studies that attempt to measure the harm resulting
9 from data breaches cannot necessarily rule out all future harm.³

10 66. If cyber-criminals manage to access to personally sensitive data—as they did
11 here—there is no limit to the amount of fraud to which Defendant may have exposed
12 Representative Plaintiff and Class Members.

13 67. Such security failures are easily preventable.⁴ As Lucy Thompson wrote in the
14 DATA BREACH AND ENCRYPTION HANDBOOK, “[i]n almost all cases, the data breaches that
15 occurred could have been prevented by proper planning and the correct design and implementation
16 of appropriate security solutions.”⁵ She added that “[o]rganizations that collect, use, store, and
17 share sensitive personal data must accept responsibility for protecting the information and ensuring
18 that it is not compromised”⁶

19 68. Most of the reported cyber-attacks are a result of lax security and the failure to
20 create or enforce appropriate security policies, rules, and procedures . . . Appropriate information
21 security controls, including encryption, must be implemented and enforced in a rigorous and
22 disciplined manner so that a *data breach never occurs*.⁷

23 69. Here, Defendant knew of the importance of safeguarding PII and financial
24 information and of the foreseeable consequences that would occur if Representative Plaintiff’s and
25 Class Members’ PII and financial information was stolen, including the significant costs that

26 ³ *Report to Congressional Requesters*, GAO, at 29 (June 2007), available at:
<http://www.gao.gov/new.items/d07737.pdf> (last accessed November 4, 2021).

27 ⁴ Lucy L. Thompson, “Despite the Alarming Trends, Data Breaches Are Preventable,” in
DATA BREACH AND ENCRYPTION HANDBOOK (Lucy Thompson, ed., 2012).

28 ⁵ *Id.* at 17.

⁶ *Id.* at 28.

⁷ *Id.*

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1 would be placed on Representative Plaintiff and Class Members as a result of a successful attack.
2 Defendant had the resources to deploy robust cybersecurity protocols. It knew, or should have
3 known, that the development and use of such protocols were necessary to fulfill its statutory and
4 common law duties to Representative Plaintiff and Class Members. Defendant’s failure to do so
5 is, therefore, intentional, willful, reckless, and/or grossly negligent.

6 70. Defendant disregarded the rights of Representative Plaintiff and Class Members by,
7 *inter alia*, (i) intentionally, willfully, recklessly, or negligently failing to take adequate and
8 reasonable measures to ensure that its network servers were protected against unauthorized
9 intrusions; (ii) failing to disclose that it did not have adequately robust security protocols and
10 training practices in place to adequately safeguard Representative Plaintiff’s and Class Members’
11 PII and/or financial information; (iii) failing to take standard and reasonably available steps to
12 secure representative Plaintiff and Class Members’ accounts; (iv) concealing the existence and
13 extent of the security failure for an unreasonable duration of time; and (v) failing to provide
14 Representative Plaintiff and Class Members prompt and accurate notice.

15 **FIRST CLAIM FOR RELIEF**
16 **Negligence**
17 **(On behalf of the Nationwide Class)**

18 71. Each and every allegation of the preceding paragraphs is incorporated in this cause
19 of action with the same force and effect as though fully set forth herein.

20 72. At all times herein relevant, Defendant owed Representative Plaintiff and Class
21 Members a duty of care, *inter alia*, to act with reasonable care to secure and safeguard their PII
22 and financial information and to use commercially reasonable methods to do so. Defendant took
23 on this obligation upon accepting and storing the PII and financial information of Representative
24 Plaintiff and Class Members in its computer systems and on its networks.

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- 73. Among these duties, Defendant was expected:
 - a. to exercise reasonable care in obtaining, retaining, securing, safeguarding, deleting and protecting the PII and financial information in its possession;
 - b. to protect Representative Plaintiff’s and Class Members’ PII and financial information using reasonable and adequate security procedures and systems that were/are compliant with industry-standard practices;
 - c. to implement processes to quickly detect any breaches and to timely act on warnings about cyber-attacks; and
 - d. to promptly notify Representative Plaintiff and Class Members of any data breach, security incident, or intrusion that affected or may have affected their PII and financial information.

74. Defendant knew the PII and financial information was private and confidential. Representative Plaintiff and Class Members were foreseeable and probable victims of these inadequate security practices. As such, Defendant owed a duty of care not to subject Representative Plaintiff and Class Members to an unreasonable risk of harm.

75. Defendant knew or should have known of the risks inherent in collecting and storing PII and financial information, the vulnerabilities of its data security systems, and the importance of adequate security. Defendant knew about numerous, well-publicized cyber-attacks.

76. Defendant knew or should have known that its data systems and networks did not adequately safeguard Representative Plaintiff’s and Class Members’ accounts and PII/financial information.

77. Only Defendant was in the position to ensure that its systems and protocols were sufficient to protect the PII and financial information that Representative Plaintiff and Class Members had entrusted to it.

78. Defendant breached its duties to Representative Plaintiff and Class Members by failing to provide fair, reasonable, or adequate computer systems and data security practices to safeguard the PII and financial information of Representative Plaintiff and Class Members.

79. Because Defendant knew that a breach of its systems could damage millions of individuals, including Representative Plaintiff and Class Members, Defendant had a duty to adequately protect those data systems and the PII and financial information contained thereon.

1 80. Representative Plaintiff's and Class Members' willingness to entrust Defendant
2 with their PII and financial information was predicated on the understanding that Defendant would
3 take adequate security precautions. Moreover, only Defendant had the ability to protect its systems
4 and the PII and financial information they stored on them from attack. Thus, Defendant had a
5 special relationship with Representative Plaintiff and Class Members.

6 81. Defendant also had independent duties under state and federal laws that required
7 Defendant to reasonably safeguard Representative Plaintiff's and Class Members' PII and
8 financial information and promptly notify them of any security failures. These "independent
9 duties" are untethered to any contract between Defendant and Representative Plaintiff and/or the
10 remaining Class Members.

11 82. Defendant breached its general duty of care to Representative Plaintiff and Class
12 Members in, but not necessarily limited to, the following ways:

- 13
- 14 a. by failing to provide fair, reasonable, or adequate computer systems and
data security practices to safeguard the PII and financial information of
Representative Plaintiff and Class Members;
- 15
- 16 b. by failing to timely and accurately disclose that Representative Plaintiff's
and Class Members' PII and financial information had been improperly
acquired or accessed;
- 17
- 18 c. by failing to adequately protect and safeguard the PII and financial
information by knowingly disregarding standard information security
principles, despite obvious risks, and by allowing unmonitored and
unrestricted access to unsecured PII and financial information;
- 19
- 20 d. by failing to provide adequate supervision and oversight of the PII and
financial information with which they were and are entrusted, in spite of the
known risk and foreseeable likelihood of breach and misuse, which
permitted an unknown third party to gather PII and financial information of
Representative Plaintiff and Class Members, misuse the PII and
intentionally disclose it to others without consent.
- 21
- 22 e. by failing to adequately train its employees to not store PII and financial
information longer than absolutely necessary;
- 23
- 24 f. by failing to consistently enforce security policies aimed at protecting
Representative Plaintiff's and the Class Members' PII and financial
information;
- 25
- 26 g. by failing to implement processes to quickly detect data breaches, security
incidents, or intrusions; and
- 27
- 28

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1 h. by failing to encrypt Representative Plaintiff’s and Class Members’ PII and
2 financial information and monitor user behavior and activity in order to
3 identify possible threats.

4 83. Defendant’s willful failure to abide by these duties was wrongful, reckless and
5 grossly negligent in light of the foreseeable risks and known threats.

6 84. As a proximate and foreseeable result of Defendant’s grossly negligent conduct,
7 Representative Plaintiff and Class Members have suffered damages and are at imminent risk of
8 additional harms and damages (as alleged above).

9 85. The law further imposes an affirmative duty on Defendant to timely disclose the
10 unauthorized access and theft of the PII and financial information to Representative Plaintiff and
11 Class Members so that they could and/or still can take appropriate measures to mitigate damages,
12 protect against adverse consequences and thwart future misuse of their PII and financial
13 information.

14 86. Defendant breached its duty to notify Representative Plaintiff and Class Members
15 of the unauthorized access by failing to notify Representative Plaintiff and Class Members of any
16 security failures and then by failing and continuing to fail to provide Representative Plaintiff and
17 Class Members sufficient information regarding attacks. To date, Defendant has not provided
18 sufficient information to Representative Plaintiff and Class Members regarding the extent of the
19 unauthorized access and continues to breach its disclosure obligations to Representative Plaintiff
20 and Class Members.

21 87. Further, through its failure to provide timely and clear notification to
22 Representative Plaintiff and Class Members, Defendant prevented Representative Plaintiff and
23 Class Members from taking meaningful, proactive steps to secure their PII and financial
24 information.

25 88. There is a close causal connection between Defendant’s failure to implement
26 security measures to protect the accounts, PII, and financial information of Representative Plaintiff
27 and Class Members and the harm suffered, or risk of imminent harm suffered by Representative
28 Plaintiff and Class Members. Representative Plaintiff’s and Class Members’ PII and financial

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1 information was accessed as the proximate result of Defendant’s failure to exercise reasonable
 2 care in safeguarding such PII and financial information by adopting, implementing, and
 3 maintaining appropriate security measures.

4 89. Defendant’s wrongful actions, inactions, and omissions constituted (and continues
 5 to constitute) common law negligence.

6 90. The damages Representative Plaintiff and Class Members have suffered (as alleged
 7 above) and will suffer were and are the direct and proximate result of Defendant’s grossly
 8 negligent conduct.

9 91. Additionally, 15 U.S.C. §45 (FTC Act, Section 5) prohibits “unfair . . . practices in
 10 or affecting commerce,” including, as interpreted and enforced by the FTC, the unfair act or
 11 practice by businesses, such as Defendant, of failing to use reasonable measures to protect PII and
 12 financial information. The FTC publications and orders described above also form part of the basis
 13 of Defendant’s duty in this regard.

14 92. Defendant violated 15 U.S.C. §45 by failing to use reasonable measures to protect
 15 PII and financial information and not complying with applicable industry standards, as described
 16 in detail herein. Defendant’s conduct was particularly unreasonable given the nature and amount
 17 of PII and financial information it obtained and stored and the foreseeable consequences of the
 18 immense damages that would result to Representative Plaintiff and Class Members.

19 93. As a direct and proximate result of Defendant’s negligence and negligence *per se*,
 20 Representative Plaintiff and Class Members have suffered and will suffer injury, including, but
 21 not limited to: (i) actual identity theft; (ii) the loss of the opportunity of how their PII and financial
 22 information is used; (iii) the compromise, publication and/or theft of their PII and financial
 23 information; (iv) out-of-pocket expenses associated with the prevention, detection and recovery
 24 from identity theft, tax fraud and/or unauthorized use of their PII and financial information; (v)
 25 lost opportunity costs associated with effort expended and the loss of productivity; (vi) addressing
 26 and attempting to mitigate actual and future consequences, including, but not limited to, efforts
 27 spent researching ways to prevent, detect, contest and/or recover from embarrassment and identity
 28 theft; (vii) the continued risk to their PII and financial information, which may remain in

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1 Defendant’s possession and be the subject of further unauthorized disclosures so long as Defendant
2 fails to undertake adequate measures to protect Representative Plaintiff’s and Class Members’ PII
3 and financial information; and (viii) future costs (e.g., time, effort, money) that may/will be
4 expended to prevent, detect, contest and/or repair the harm(s) attendant to the compromise of
5 Representative Plaintiff’s and Class Members’ PII and financial information.

6 94. As a direct and proximate result of Defendant’s negligence and negligence *per se*,
7 Representative Plaintiff and Class Members have suffered and will continue to suffer other forms
8 of injury and/or harm, including, but not limited to, anxiety, emotional distress, loss of privacy,
9 and other economic and non-economic losses.

10 95. Additionally, as a direct and proximate result of Defendant’s negligence and
11 negligence *per se*, Representative Plaintiff and Class Members have suffered and will suffer the
12 continued risks of exposure of their PII and financial information, which remain in Defendant’s
13 possession and are subject to further unauthorized disclosures so long as Defendant fails to
14 undertake appropriate and adequate measures to protect the PII and financial information in its
15 continued possession.

16
17 **SECOND CLAIM FOR RELIEF**
18 **Breach of Implied Contract**
(On behalf of the Nationwide Class)

19 96. Each and every allegation of the preceding paragraphs is incorporated in this cause
20 of action with the same force and effect as though fully set forth herein.

21 97. Through its course of conduct, Defendant, Representative Plaintiff and Class
22 Members entered into implied contracts for Defendant to implement data security adequate to
23 safeguard and protect the privacy of Representative Plaintiff’s and Class Members’ PII and
24 financial information.

25 98. Defendant required Representative Plaintiff and Class Members to provide and
26 entrust their PII and financial information, including full names and credit/debit card information
27 to purchase products/services.
28

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1 99. Defendant solicited and invited Representative Plaintiff and Class Members to
2 provide their PII and financial information as part of Defendant’s regular business practices.
3 Representative Plaintiff and Class Members accepted Defendant’s offers and provided their PII
4 and financial information to Defendant.

5 100. As a condition of being direct customers of Defendant, Representative Plaintiff and
6 Class Members provided and entrusted their PII and financial information to Defendant. In so
7 doing, Representative Plaintiff and Class Members entered into implied contracts with Defendant
8 by which Defendant agreed to safeguard and protect such non-public information, to keep such
9 information secure and confidential, and to timely and accurately notify Representative Plaintiff
10 and Class Members if their data had been breached and compromised or stolen.

11 101. A meeting of the minds occurred when Representative Plaintiff and Class Members
12 agreed to, and did, provide their PII and financial information to Defendant, in exchange for,
13 amongst other things, the protection of their PII and financial information.

14 102. Representative Plaintiff and Class Members fully performed their obligations under
15 the implied contracts with Defendant.

16 103. Defendant breached the implied contracts it made with Representative Plaintiff and
17 Class Members by failing to safeguard and protect their PII and financial information and by
18 failing to provide timely and accurate notice to them that their PII and financial information was
19 compromised as a result of the attack.

20 104. As a direct and proximate result of Defendant’s above-described breach of implied
21 contract, Representative Plaintiff and Class Members have suffered (and will continue to suffer)
22 (a) ongoing, imminent, and impending threat of identity theft crimes, fraud, and abuse, resulting
23 in monetary loss and economic harm; (b) actual identity theft crimes, fraud, and abuse, resulting
24 in monetary loss and economic harm; (c) loss of the confidentiality of the stolen confidential data;
25 (d) the illegal sale of the compromised data on the dark web; (e) lost work time; and (f) other
26 economic and non-economic harm.

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THIRD CLAIM FOR RELIEF
Breach of the Implied Covenant of Good Faith and Fair Dealing
(On behalf of the Nationwide Class)

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105. Each and every allegation of the preceding paragraphs is incorporated in this cause of action with the same force and effect as though fully set forth herein.

106. Every contract has an implied covenant of good faith and fair dealing. This implied covenant is an independent duty and may be breached even when there is no breach of a contract’s actual and/or express terms.

107. Representative Plaintiff and Class Members have complied with and performed all conditions of their contracts with Defendant.

108. Defendant breached the implied covenant of good faith and fair dealing by failing to maintain adequate computer systems and data security practices to safeguard PII and financial information, failing to timely and accurately disclose the security breach to Representative Plaintiff and Class Members and continued acceptance of PII and financial information and storage of other personal information after Defendant knew, or should have known, of the security vulnerabilities of the systems that were exploited.

109. Defendant acted in bad faith and/or with malicious motive in denying Representative Plaintiff and Class Members the full benefit of their bargains as originally intended by the parties, thereby causing them injury in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF
Unjust Enrichment
(On behalf of the Nationwide Class)

110. Each and every allegation of the preceding paragraphs is incorporated in this cause of action with the same force and effect as though fully set forth herein.

111. By its wrongful acts and omissions described herein, Defendant has obtained a benefit by unduly taking advantage of Representative Plaintiff and Class Members.

112. Defendant, prior to and at the time Representative Plaintiff and Class Members entrusted their PII and financial information to Defendant for the purpose of buying/selling goods

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1 through Defendant’s app, caused Representative Plaintiff and Class Members to reasonably
2 believe that Defendant would keep such PII and financial information secure.

3 113. Defendant was aware, or should have been aware, that reasonable consumers would
4 have wanted their PII and financial information kept secure and would not have contracted with
5 Defendant, directly or indirectly, had they known that Defendant’s information systems were sub-
6 standard for that purpose.

7 114. Defendant was also aware that, if the substandard condition of and vulnerabilities
8 in its information systems were disclosed, it would negatively affect Representative Plaintiff’s and
9 Class Members’ decisions to seek services therefrom.

10 115. Defendant failed to disclose facts pertaining to its substandard information systems,
11 defects, and vulnerabilities therein before Representative Plaintiff and Class Members made their
12 decisions to make purchases, engage in commerce therewith, and seek services or information.
13 Instead, Defendant suppressed and concealed such information. By concealing and suppressing
14 that information, Defendant denied Representative Plaintiff and Class Members the ability to make
15 a rational and informed purchasing decision and took undue advantage of Representative Plaintiff
16 and Class Members.

17 116. Defendant was unjustly enriched at the expense of Representative Plaintiff and
18 Class Members. Defendant received profits, benefits, and compensation, in part, at the expense of
19 Representative Plaintiff and Class Members. By contrast, Representative Plaintiff and Class
20 Members did not receive the benefit of their bargain because they paid for products/services that did
21 not satisfy the purposes for which they bought/sought them.

22 117. Since Defendant’s profits, benefits, and other compensation were obtained by
23 improper means, Defendant is not legally or equitably entitled to retain any of the benefits,
24 compensation or profits they realized from these transactions.

25 118. Representative Plaintiff and Class Members seek an Order of this Court requiring
26 Defendant to refund, disgorge, and pay as restitution any profits, benefits, and other compensation
27 obtained by Defendant from its wrongful conduct and/or the establishment of a constructive
28 trust from which Representative Plaintiff and Class Members may seek restitution.

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RELIEF SOUGHT

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WHEREFORE, Representative Plaintiff, individually and on behalf and each member of the proposed National Class and any subclasses, respectfully request that the Court enter judgment in favor of the Plaintiff Class(es) and for the following specific relief against Defendant as follows:

1. That the Court declare, adjudge, and decree that this action is a proper class action and certify each of the proposed classes and/or any other appropriate subclasses under F.R.C.P. Rule 23 (b)(1), (b)(2), and/or (b)(3), including appointment of Representative Plaintiff’s counsel as Class Counsel;

2. For an award of damages, including actual, nominal, and consequential damages, as allowed by law in an amount to be determined;

3. That the Court enjoin Defendant, ordering them to cease and desist from unlawful activities in further violation of California Business and Professions Code §17200, *et seq.*;

4. For equitable relief enjoining Defendant from engaging in the wrongful conduct complained of herein pertaining to the misuse and/or disclosure of Representative Plaintiff’s and Class Members’ PII, and from refusing to issue prompt, complete, any accurate disclosures to Representative Plaintiff and Class Members;

5. For injunctive relief requested by Representative Plaintiff, including but not limited to, injunctive and other equitable relief as is necessary to protect the interests of Representative Plaintiff and Class Members, including but not limited to an Order:

- a. prohibiting Defendant from engaging in the wrongful and unlawful acts described herein;
- b. requiring Defendant to protect, including through encryption, all data collected through the course of business in accordance with all applicable regulations, industry standards, and federal, state or local laws;
- c. requiring Defendant to delete and purge the PII of Representative Plaintiff and Class Members unless Defendant can provide to the Court reasonable justification for the retention and use of such information when weighed against the privacy interests of Representative Plaintiff and Class Members;
- d. requiring Defendant to implement and maintain a comprehensive Information Security Program designed to protect the confidentiality and integrity of Representative Plaintiff’s and Class Members’ PII;

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- e. requiring Defendant to engage independent third party security auditors and internal personnel to run automated security monitoring, simulated attacks, penetration tests, and audits on Defendant’s systems on a periodic basis;
- f. prohibiting Defendant from maintaining Representative Plaintiff’s and Class Members’ PII on a cloud-based database;
- g. requiring Defendant to segment data by creating firewalls and access controls so that, if one area of Defendant’s network is compromised, hackers cannot gain access to other portions of Defendant’s systems;
- h. requiring Defendant to conduct regular database scanning and securing checks;
- i. requiring Defendant to establish an information security training program that includes at least annual information security training for all employees, with additional training to be provided as appropriate based upon the employees’ respective responsibilities with handling PII, as well as protecting the PII of Representative Plaintiff and Class Members;
- j. requiring Defendant to implement a system of tests to assess its respective employees’ knowledge of the education programs discussed in the preceding subparagraphs, as well as randomly and periodically testing employees’ compliance with Defendant’s policies, programs, and systems for protecting personal identifying information;
- k. requiring Defendant to implement, maintain, review, and revise as necessary a threat management program to appropriately monitor Defendant’s networks for internal and external threats, and assess whether monitoring tools are properly configured, tested, and updated;
- l. requiring Defendant to meaningfully educate all Class Members about the threats that they face as a result of the loss of their confidential personal identifying information to third parties, as well as the steps affected individuals must take to protect themselves.

- 6. For prejudgment interest on all amounts awarded, at the prevailing legal rate;
- 7. For an award of attorneys’ fees, costs, and litigation expenses, as allowed by law;
- 8. For all other Orders, findings, and determinations identified and sought in this

Complaint.

