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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION
11

12 JOHN ROE 1, an individual, JANE
ROE 1, an individual, JANE ROE 2 an
13 individual, JANE ROE 3, an individual,
JOHN ROE 2, on behalf of themselves
14 and all others similarly situated,

15 Plaintiffs,

16 v.

17 THE STATE BAR OF CALIFORNIA,
TYLER TECHNOLOGIES, INC.,
18 KEVAN SCHWITZER, RICK
RANKIN, and DOES 4 through 10,
19 inclusive,

20 Defendants.
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Case No. 8-22-CV-00983-DOC-DFM

**DEFENDANT RICK RANKIN’S
NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFFS’ FIRST AMENDED
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Declaration of Justin A. Anderson,
Request for Judicial Notice, and
[Proposed] Order filed concurrently

Date: August 8, 2022
Time: 8:30 a.m.
Place: Ronald Reagan Federal
Building and United States
Courthouse
411 West 4th St., Santa Ana
Santa Ana, California 92701-
4516

Judge: David O. Carter

First Amended
Complaint filed: April 13, 2022

Notice of
Removal filed: May 13, 2022

Trial Date: Not Set

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on August 8, 2022, at 8:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom 10A of the above-entitled Court, located at 411 West 4th St., Santa Ana, California 92701-4516, the Honorable David O. Carter presiding, defendant Rick Rankin (“Rankin”) will and hereby does move this Court for an order dismissing without leave to amend the First Amended Class Action Complaint (“Complaint” or “FAC”) filed by Plaintiffs John Roe 1, Jane Roe 1, Jane Roe 2, Jane Roe 3, and John Roe 2 (“Plaintiffs”) as to Rankin.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on May 26, 2022. *See* Declaration of Justin A. Anderson, submitted concurrently herewith, ¶ 2.

This Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that (1) Plaintiffs’ invasion of privacy claim against Rankin under the California Constitution fails to adequately allege that a legally protected privacy interest or that a serious—and intentional—invasion of privacy occurred and (2) Plaintiffs’ also fail to sufficiently allege duty or actual damages in support of their negligence and negligence *per se* tort claims against Rankin.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Justin A. Anderson filed concurrently herewith, the Complaint, any reply Defendant may make, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to or at the hearing on this Motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State Bar of California (the “State Bar”) utilizes the Odyssey Portal, an online case management system created and maintained by defendant Tyler Technologies, Inc. (“Tyler”). On February 24, 2022, the State Bar learned that certain nonpublic case profile data—case number, filing date, case type, case status, and respondent and complaining witness names (“Docket Data”)—had been inadvertently harvested from the Odyssey Portal and posted on JudyRecords.com, a third-party website that aggregates court records and is managed by Kevan Schwitzer (the “Incident”). The State Bar, Tyler, Schwitzer, and the State Bar’s interim I.T. Director, Rick Rankin (Rankin, and collectively, “Defendants”), promptly acted to remove the Docket Data from JudyRecords.com, which was completed two days later, on February 26.

The same day, the State Bar began posting regularly-updated Frequently Asked Questions (“FAQ[s]”) about the Incident, and informed the public that: only Docket Data had been harvested or posted; only 1,034 records showed signs of being viewed (“Viewed Records”), and; only six of those Viewed Records were listed as the case type “Mental Health/Substance Abuse.”

Plaintiffs are five anonymous individuals who are either (a) attorneys who have been the subject of a disciplinary proceeding or (b) non-attorneys who have submitted complaints to the State Bar against attorneys. Mere days after the State Bar announced the Incident, Plaintiffs filed a lawsuit asserting seven causes of action.

Plaintiffs assert three purported causes of action against Rankin: (1) invasion of privacy under the California Constitution, (2) negligence, and (3) negligence *per se*.

Each of Plaintiffs’ causes of action against Rankin fails to state a claim, for the following reasons:

1 *First*, Plaintiffs’ invasion of privacy claim under the California Constitution
2 fails to adequately allege that a legally protected privacy interest or that a serious—
3 and intentional—invasion of privacy occurred.

4 *Second*, Plaintiffs’ also fail to sufficiently allege duty or actual damages in
5 support of their negligence and negligence *per se* tort claims.

6 For the reasons below, and because no amendment could cure the deficiencies
7 inherent in the already-amended Complaint, the case should be dismissed with
8 prejudice as to Rankin.

9 **II. STATEMENT OF FACTS**

10 **A. The State Bar And Rick Rankin**

11 The State Bar is a constitutional entity, established by article VI, section 9 of
12 the California Constitution, and an integral part of the judicial function of the State
13 of California. *See* Cal. Const., art. VI, § 9; Cal. Bus. & Prof. Code, § 6001; *In re*
14 *Rose*, 22 Cal.4th 430, 438 (Cal. 2000).¹

15 Rankin is the principal of RPR Impact, LLC, and an independent contractor
16 acting as interim IT Director for the State Bar. FAC ¶ 7.

17 **B. Judy Records Collects And Indexes Docket Data**

18 On February 24, 2022, the State Bar learned that certain confidential Docket
19 Data related to disciplinary proceedings, as well as nonconfidential records from the
20 State Bar’s database, were publicly available on JudyRecords.com.² Ex. B, at 3.³

21 The State Bar and Rankin swiftly responded to the Incident.

22 By February 26, 2022, JudyRecords.com had permanently removed from the
23

24 _____
25 ¹ The State Bar’s functions and its information technology systems are described in the State Bar’s
26 Motion to Dismiss the Complaint.

26 ² The State Bar and Rankin’s response to the Incident is more fully described in the State Bar’s
27 Motion to Dismiss the Complaint.

27 ³ All citations to “Ex.” refer to the Exhibits attached to the Request for Judicial Notice in Support
28 of Rankin’s Motion to Dismiss the FAC. Rankin’s Request for Judicial Notice filed with this
Motion further explains why the Exhibits are incorporated by reference into the FAC and properly
judicially noticeable.

1 website all non-public Docket Data. *Id.* There is no allegation that the Docket Data
 2 was available on any other website or internet archive. Plaintiffs do not allege that
 3 any entity besides JudyRecords.com obtained the Docket Data.

4 Defendants' investigation revealed the limited scope of the information that
 5 may have been viewed on JudyRecords.com. *Id.* Overall, JudyRecords.com
 6 scraped and indexed 322,525 Docket Data records, which would not ordinarily have
 7 been viewable by the public on the Odyssey Portal. *Id.* at 1. Only 1,034 of the
 8 322,525 records showed signs of having been viewed (i.e., a page view). *Id.*⁴ Of
 9 the 1,034 Viewed Records, six contained the case type: "Inactive 6007(b)(3) Mental
 10 Illness or Substance Abuse." *Id.* None of the Plaintiffs allege that their complaints
 11 involved allegations of mental illness or substance abuse, and none allege that their
 12 Docket Data showed evidence of a page view. *See* FAC ¶¶ 1-5.

13 Although not subject to any statutory notification requirement, the State Bar
 14 already has notified the six individuals whose Docket Data contained a reference to
 15 mental illness or substance abuse. *Id.* None of the Plaintiffs allege they were
 16 among these six individuals.

17 **C. Plaintiffs**

18 Plaintiffs are five anonymous individuals who allege that the State Bar
 19 maintains disciplinary process records that include their information in some way.
 20 John Roe 1 and Jane Roe 1 allegedly filed complaints against attorneys. FAC ¶¶ 1,
 21 2. Jane Roe 2, Jane Roe 3, and John Roe 2 are or were allegedly licensed by the
 22 State Bar and the subjects of complaints. *Id.* ¶¶ 3–5. Plaintiffs say they live in
 23 California but otherwise provide no details about themselves. Nor do Plaintiffs
 24 allege that they received notification letters from the State Bar indicating their
 25 Docket Data was affected in any way by the Incident. Ex. B, at 1.

26
 27
 28 ⁴ Only one Docket Data record included a Social Security number, and it showed no sign of
 having been viewed. Ex. B, at 2.

D. The First Amended Complaint

On March 18, 2022, Plaintiffs filed the first iteration of the Complaint in California state court on behalf of Plaintiffs, alleging claims arising from the Incident against the State Bar, JudyRecords.com, and a series of anonymous “Doe” defendants. Plaintiffs have since amended the Complaint three times. First, on March 24, they substituted Schwitzer for JudyRecords.com.⁵ Second, on March 25, they substituted Tyler for Doe 1. Third, on April 13, Plaintiffs filed the first amended complaint (“FAC”). Among other changes, the FAC: (1) added an additional anonymous plaintiff (John Roe 2); (2) substituted Rankin for the Employee Doe; (3) removed two causes of action alleging violations of Plaintiffs’ rights to informational privacy and equal protection under 42 U.S.C. § 1983; (4) added causes of action for common-law negligence and negligence *per se*; and (5) altered various other substantive allegations.

The FAC asserts three causes of action against Rankin: (1) invasion of privacy under article 1, section 1 of the California Constitution; (2) negligence; and (3) negligence *per se*. The FAC also alleges a putative class of California residents who are identified in the “nonpublic” records indexed on JudyRecords.com, excluding the Court, Defendants, and any associates.

On May 13, with consent from all named defendants, Tyler removed the case to federal court. Dkt. 1. Rankin now files this motion to dismiss.

III. LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Such factual allegations must suffice to create “more than a sheer possibility that a defendant has acted unlawfully,” *Ashcroft v. Iqbal*, 556 U.S. 662,

⁵ Plaintiffs voluntarily dismissed Schwitzer with prejudice on May 20, 2022.

1 678 (2009), and thereby “raise a right to relief above the speculative level,”
 2 *Twombly*, 550 U.S. at 555. In other words, a complaint must contain “more than
 3 labels and conclusions, and a formulaic recitation of the elements of a cause of
 4 action will not do.” *Id.* Although a court must accept the allegations in the
 5 complaint as true and construe them in the light most favorable to the plaintiff, the
 6 “court is not required to accept legal conclusions cast in the form of factual
 7 allegations if those conclusions cannot reasonably be drawn from the facts alleged.”
 8 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994). Mere
 9 conclusory allegations of law and unwarranted inferences are insufficient to defeat a
 10 motion to dismiss. *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord*
 11 *Ashcroft*, 556 U.S. at 678.

12 A district court generally will not consider evidence or documents beyond the
 13 complaint in the context of a Rule 12(b)(6) motion to dismiss. *See Hal Roach*
 14 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).
 15 Courts may, however, “consider certain materials—documents attached to the
 16 complaint, documents incorporated by reference in the complaint, or matters of
 17 judicial notice—without converting the motion to dismiss into a motion for
 18 summary judgment.” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Here, the
 19 FAQs—and a Whittier Daily News article (FAC ¶ 32; Ex. C)—were incorporated
 20 into and referenced in the FAC (¶¶ 6, 8, 30, 36) and are proper for this Court to
 21 consider. Moreover, because the FAQs—and a State Bar press release pertinent to
 22 the Incident (Ex. A)—are posted on a publicly-available website of a public
 23 corporation created as an administrative arm of the California Supreme Court, they
 24 are properly the subject of judicial notice by this Court. *Calop Bus. Sys., Inc. v. City*
 25 *of Los Angeles*, 984 F. Supp. 2d 981, 993 (C.D. Cal. 2013) (taking judicial notice of
 26 “Frequently Asked Questions” section of government website about city ordinance).
 27
 28

1 **IV. ARGUMENT**

2 **A. Plaintiffs Fail To State A Claim For Invasion Of Privacy Under**
 3 **The California Constitution**

4 The California Constitution creates a privacy right that protects individuals
 5 from the invasion of their privacy by private parties. *Am. Acad. Of Pediatrics v.*
 6 *Lungren*, 940 P.3d 797, 808 (1997). But the California Constitution sets a “high
 7 bar” for establishing an invasion of privacy claim. *Low v. LinkedIn Corp.*, 900 F.
 8 Supp. 2d 1010, 1025 (N.D. Cal. 2012) *citing Belluomini v. Citigroup, Inc.*, No. CV
 9 13-01743 CRB, 2013 WL 3855589, at *6 (N. D. Cal., July 24, 2013).

10 To state a claim for invasion of privacy in violation of the California
 11 Constitution, Plaintiffs must sufficiently allege three threshold elements: (1) a
 12 legally protected privacy interest; (2) a reasonable expectation of privacy in the
 13 circumstances; and (3) conduct by defendant constituting a serious invasion of
 14 privacy.” *Hill v. Nat’l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39–40 (1994). In order
 15 to qualify as a “serious invasion of privacy,” the defendant’s conduct must be “an
 16 egregious breach of the social norms underlying the privacy right.” *Hill*, 7 Cal.4th
 17 at 37.

18 “Whether a legally recognizable privacy interest is present in a given case is a
 19 question of law to be decided by the court.” *Id.* at 40. Likewise, whether
 20 defendant’s conduct constitutes a serious invasion of privacy “may be adjudicated as
 21 a matter of law” if “the undisputed material facts show...an insubstantial impact on
 22 privacy interests.” *Id.* Here, Plaintiffs have failed to sufficiently allege the required
 23 elements of a constitutional invasion of privacy claim as a matter of law.

24 *First*, Plaintiffs fail to plead a serious invasion of privacy because the FAC
 25 does not plead either an egregious or intentional act. As a matter of law, “[l]osing
 26 personal data through insufficient security doesn’t rise to the level of an egregious
 27 breach of social norms underlying the protection of sensitive data.” *Razuki v.*
 28 *Caliber Home Loans, Inc.*, No. 17cv1718-LAB (WVG), 2018 WL 2761818, at *2

1 (S.D. Cal., June 8, 2018). “Even negligent conduct that leads to theft of highly
2 personal information, including social security numbers, does not approach the
3 standard of actionable conduct under the California Constitution and thus does not
4 constitute a violation of Plaintiff’s right to privacy.” *Id.*, quoting *In re iPhone*
5 *Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012); *see also Schnitt v.*
6 *SN Servicing Corp.*, No. 21-cv-03355-WHO, 2021 WL 3493754, at *7-8 (N.D. Cal.,
7 Aug. 9, 2021) (finding even negligent data breach exposing personal and financial
8 information, including names, addresses, loan numbers, balance and billing
9 information, not sufficient to state a claim).

10 Additionally, for an invasion to be “serious,” the plaintiff must allege that
11 their privacy was intentionally invaded. *Dugas v. Starwood Hotels & Resorts*
12 *Worldwide, Inc.*, 2016 WL 6523428, at *12 (S.D. Cal. Nov. 3, 2016) (dismissing
13 complaint that failed to allege facts “suggest[ing] that the data breach was an
14 intentional violation of Plaintiff’s and other class members’ privacy, as opposed to
15 merely a negligent one”).

16 Here, the nature of the incident does not rise to the level of an “egregious”
17 breach. Although Plaintiffs make the conclusory allegation that Defendants’ actions
18 involved “intentional conduct” (FAC ¶ 25), the FAC fails to allege any intentionally
19 malicious or criminal conduct. Rather, Plaintiffs have alleged mere negligence that
20 exposed otherwise non-public information as a result of allegedly insufficient
21 security. FAC ¶¶ 112-120. Such allegations are, as a matter of law, insufficient to
22 rise to the level of an egregious breach of social norms required to state a claim
23 under the California Constitution. *See, e.g., Dugas*, 2016 WL 6523428, at *12
24 (“Plaintiff fails, for example, to allege any facts that would suggest that the data
25 breach was an intentional violation of Plaintiff’s and other class members’ privacy,
26 as opposed to merely a negligent one.”). And the FAC’s summary allegation that
27 records were published on JudyRecords.com “[a]s a direct and proximate result of
28 the intentional conduct by Rick Rankin” (FAC ¶ 25), is simply too vague. This is

1 especially true given the absence of any allegation about what specific information
 2 about any Plaintiff was posted online or how it was sensitive in nature.

3 Moreover, “[e]ven disclosure of very personal information has not been
 4 deemed an ‘egregious breach of social norms’ sufficient to establish a constitutional
 5 right to privacy.” *In re Yahoo Mail Litigation*, 7 F. Supp. 3d 1016, 1038 (N.D. Cal.
 6 2014); *see also Shapiro v. AT&T Mobility, LLC*, No. 2:19-CV-8972-CBM-FFM,
 7 2020 WL 4341778, at *2 (C.D. Cal., May 18, 2020) (“The alleged disclosure of
 8 Plaintiff’s AT&T account information and CPNI, and Plaintiff and his family’s
 9 personal, business, legal, and financial information does not constitute an egregious
 10 breach of social norms.”); *In re iPhone*, 844 F. Supp. 2d at 1063 (even conduct that
 11 “leads to theft of highly personal information, including social security numbers,
 12 does not approach the standard of actionable conduct under the California
 13 Constitution and thus does not constitute a violation of Plaintiffs’ right to privacy”
 14 and holding that disclosure of unique device identifier number, personal data, and
 15 geolocation information did not constitute an egregious breach of privacy); *Ruiz v.*
 16 *Gap, Inc.*, 540 F. Supp. 2d 1121, 1127-28 (N.D. Cal. 2008), *aff’d*, 380 Fed. App’x
 17 689 (9th Cir. 2010) (theft of laptop containing personal information, including social
 18 security numbers, was not egregious breach of privacy); *Folgelstrom v. Lamps Plus,*
 19 *Inc.*, 195 Cal.App.4th 986, 992 (2011) (disclosure of plaintiff’s address not
 20 egregious breach of privacy); *see also Belluomini*, 2013 WL 3855589, at *6 (N.D.
 21 Cal. July 24, 2013) (disclosure of Social Security numbers and contact information
 22 does not constitute an “egregious breach”).

23 Plaintiffs here do not even allege that any of their highly personal information
 24 was affected by the Incident, and thus cannot satisfy the third element of their claim.

25 *Second*, as to the first two elements required of an invasion of privacy claim,
 26 the FAC avers only that Plaintiffs “had a legally protected privacy interest” and “a
 27 reasonable expectation of privacy” in the Docket Data. FAC ¶¶ 66, 68. Such
 28 allegations are “simply a bare recitation of the elements of a privacy claim,” and

1 thus are “fatally conclusory.” *In re Yahoo*, 7 F. Supp. 3d at 1041; *see also Zbitnoff*
 2 *v. Nationstar Mortg., LLC*, No. C 13-05221 WHA, 2014 WL 1101161, at *4 (N.D.
 3 Cal. Mar. 18, 2014) (dismissing claim because the “plaintiff fail[ed] to plead her
 4 [California] constitutional [privacy] claim with the required specificity”); *Scott–*
 5 *Codiga v. Cnty. of Monterey*, 10–CV–05450–LHK, 2011 WL 4434812, at *7 (N.D.
 6 Cal. Sept. 23, 2011) (dismissing claim because the plaintiff had not “specified the
 7 material defendants released to the public in enough detail for the Court to
 8 determine whether it might conceivably fall within a recognized privacy interest
 9 protected by the [California] constitution” (internal citation omitted)). Moreover,
 10 “the California Constitution protects only the ‘dissemination or misuse of *sensitive*
 11 and *confidential* information.’” *In re Yahoo*, 7 F. Supp. 3d at 1040, *citing Hill* 7
 12 Cal.4th at 35 (emphasis in original).

13 The FAC’s allegations regarding Docket Data being posted on
 14 JudyRecords.com (*see, e.g.*, FAC ¶¶ 21-22), are plainly inadequate – Plaintiffs fail
 15 to allege what specific information belonging to them was actually published to
 16 JudyRecords.com, whether any member of the public actually accessed that
 17 information, or how their particular Docket Data qualifies as confidential or
 18 sensitive information. Plaintiffs do not even allege what data of theirs was
 19 breached.

20 Also, during the four months that the State Bar Docket Data records were
 21 available for search on JudyRecords.com, there are only 1,034 Docket Data records
 22 for which there is an indication of a page view. Exhibit A, pp. 1, 3. The Plaintiffs
 23 have not alleged that any specific Docket Data related to them was actually accessed
 24 or that any member of the public actually viewed that information.⁶

25 _____
 26 ⁶ Because Plaintiffs have chosen to proceed anonymously, there is no way to confirm whether any
 27 of their information was accessed, and, if so, whether what was accessed was legally protected
 28 confidential or sensitive information. The State Bar has made notification to all individuals that
 had information posted to JudyRecords.com; yet Plaintiffs have not amended their complaint to
 state that they were given notice that their records were made available for searching on

1 The court in *In Re Yahoo* faced a similar situation. There, the plaintiffs
 2 generally alleged that emails intercepted by Yahoo contained sensitive personal
 3 information, but did not allege what specific content in the emails was legally
 4 protected. 7 F. Supp. 3d at 1041. Instead, plaintiffs alleged in a conclusory fashion
 5 that the emails were “private.” *Id.* The court found that plaintiffs’ allegations failed
 6 as a matter of law and were “fatally conclusory.” *Id.*; *see also Zbitnoff*, 2014 WL
 7 1101161, at *4 (holding allegation that information was “private information” was
 8 too conclusory); *In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797, 830
 9 (N.D. Cal. 2020) (plaintiffs failed to alleged sufficient information about the content
 10 of conversations that were recorded to support a privacy claim); *Shapiro*, 2020 WL
 11 4341778, at *2 (“Plaintiff’s use of the phrases ‘account information,’ ‘personal,
 12 legal, and business information,’ and ‘confidential financial, business, and legal
 13 information,’ are too vague for the Court to determine whether Plaintiff has a right
 14 to protection of such information under the California Constitution.”); *Low*, 900 F.
 15 Supp. 2d 1025 (N.D. Cal. 2012) (refusing to find serious invasion of privacy where
 16 plaintiffs could not allege that third parties actually obtained or viewed any
 17 confidential information).

18 Here, other than generically alleging that “State Bar disciplinary records”
 19 (FAC ¶ 22), “confidential information from the State Bar” (*Id.*), and “confidential
 20 disciplinary records or other confidential information” (FAC ¶ 25), was made public
 21 on JudyRecords.com, Plaintiffs have not specifically identified what information
 22 was actually available for searching on JudyRecords.com or was accessed and then
 23 viewed by the public. Plaintiffs’ conclusory allegations do not suffice.

24 In sum, Plaintiffs have simply failed to allege any sufficient basis for a
 25 constitutional invasion of privacy claim. This Court should dismiss this claim
 26 without leave to amend.

27 _____
 28 JudyRecords.com, which suggests that none of the 322,525 Docket Data records involved these
 Plaintiffs.

1 **B. Plaintiffs Fail To State A Claim For Either Negligence Or**
 2 **Negligence Per Se**

3 Plaintiffs’ negligence claims should be dismissed for several independent
 4 reasons: (1) the FAC fails to sufficiently allege that Rankin owed Plaintiffs a duty;
 5 (2) the FAC does not allege actual damages sufficient to support negligence claims;
 6 and (3) Plaintiffs fail to establish that Rankin violated any law that would support a
 7 negligence *per se* theory.

8 **i. Plaintiffs Fail To Allege Duty**

9 To state a claim for negligence, Plaintiffs must sufficiently allege *inter alia*
 10 that Rankin owed Plaintiffs a duty. *See Paz v. State of California*, 22 Cal. 4th 550
 11 (2000). Here, Plaintiffs assert that Rankin owed them duties to (1) provide
 12 reasonable notice of the breach; (2) provide steps to take to protect themselves;
 13 (3) institute proper security measures to keep the information confidential; and/or
 14 (4) maintain proper security measures to ensure the information remained
 15 confidential. FAC ¶ 115. No such duties exist.

16 With respect to the first and second grounds, which both allege a duty to
 17 notify, Plaintiffs cite to no source of such a duty as to Rankin. Similarly, with
 18 respect to the third and fourth grounds, Plaintiffs offer no statute or other authority
 19 establishing that Rankin had a duty to institute or maintain any particular security
 20 measures, let alone “proper” measures as alleged in the FAC.

21 **ii. Plaintiffs’ Negligence Claims Fail For Lack Of Injury**

22 “Under California law, appreciable, nonspeculative, present harm is an
 23 essential element of a negligence cause of action.” *In re Sony Gaming Networks &*
 24 *Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 962 (S.D. Cal. 2012).

25 As a preliminary matter, Plaintiffs’ allegations of injury are too threadbare to
 26 support a negligence claim. For example, Plaintiffs allege that they suffered
 27 emotional distress, yet do not offer a single concrete detail describing how any
 28 individual Plaintiff was so affected. *Holly v. Alta Newport Hosp., Inc.*, 2020 WL

1 1853308, at *6 (C.D. Cal. Apr. 10, 2020) (holding “although actual damages can
 2 include emotional distress, a plaintiff must support [their] claim for pain and
 3 suffering with something more than [their] own conclusory allegations, such as
 4 specific claims of genuine injury”) (internal quotation marks and citation omitted).
 5 Similarly, Plaintiffs allege they spent time and incurred expense responding to the
 6 disclosure of their disciplinary records, but do not include any well-pled facts to
 7 support that claim, such as what remedial steps they took or costs they incurred (if
 8 any). Such barebones allegations do not suffice to state a claim.

9 In addition to being overly conclusory, the types of damages are each
 10 insufficient as a matter of law:

11 ***Emotional Distress.*** Plaintiffs allege that the Incident has caused them
 12 emotional distress, such as worry, anxiety, fear, paranoia, shame, and depression.
 13 FAC ¶¶ 38, 41, 119, 128. But Plaintiffs’ premise their alleged emotional distress on
 14 the theory that “[t]he State Bar *could have* released [their] fingerprints and social
 15 security numbers along with investigation information.” FAC ¶ 38 (emphasis
 16 added). The FAC contains zero allegation about any of Plaintiffs’ information that
 17 was actually disclosed. Such hypothetical harm and injury cannot sustain a claim
 18 for emotional damages. *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 913-914 (N.D. Cal.
 19 2009), *aff’d*, 380 Fed. Appx. 689 (9th Cir. 2010) (Holding that “[u]nder California
 20 law, appreciable, nonspeculative, present harm is an essential element of a
 21 negligence cause of action.”)

22 Furthermore, the FAC and its incorporated documents support only that
 23 Docket Data was scraped and indexed by JudyRecords.com, nothing else. For
 24 example, the Whittier Daily News article cited in the FAC reported that the records
 25 on JudyRecords.com “included case number, type, status, file date and respondent
 26 and complaining witness names.” FAC ¶ 32; Ex. C. Similarly, the State Bar’s
 27 website—which the FAC specifically cites several times, (*see, e.g.*, FAC ¶¶ 6, 30,
 28 36)—states only that “limited case profile data” (*i.e.*, Docket Data) was available.

1 Ex. A, at 3. At most, the Docket Data contained six records with the words “mental
 2 health/substance abuse” (none of the Plaintiffs allege their records contain this
 3 notation) and a single Social Security number (for which there is no evidence of a
 4 page view). Taken together, the allegations and incorporated documents contradict
 5 and render implausible Plaintiffs’ unsupported suggestion that their fingerprints and
 6 Social Security numbers “could have” been released in the Incident, or that they had
 7 any plausible ground to believe this occurred. Plaintiffs’ claims for emotional
 8 distress therefore should be rejected as unsupported. *Colony Cove Properties, LLC*
 9 *v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) (ruling “court need not accept
 10 as true conclusory allegations that are contradicted by documents referred to in the
 11 complaint”) (citing *Iqbal*, 556 U.S. at 679).

12 ***Lost Time and Expense.*** Plaintiffs allege that due to the State Bar’s
 13 purported breach they “spen[t] time and expense trying to figure out what they could
 14 do to protect themselves, their reputation and/or their health wellbeing.” FAC ¶
 15 128; *see also* ¶¶ 41, 119. Yet again, Plaintiffs’ allegations are deficient: they do not
 16 identify a single concrete action they took or expense they incurred to mitigate any
 17 purported effect of the Incident. Lacking such well-pled facts, the claim is fatally
 18 conclusory.

19 Plaintiffs also fail to show that spending time and expense was “reasonable
 20 and necessary” in context. *Gardiner v. Walmart Inc.*, 2021 WL 2520103, at *6
 21 (N.D. Cal. Mar. 5, 2021); *see also, e.g., Greenstein v. Noblr Reciprocal Exch.*, 2022
 22 WL 472183, at *6 (N.D. Cal. Feb. 15, 2022) (ruling in Article III standing context
 23 that “mitigation expenses cannot establish an injury in the absence of a real and
 24 imminent risk of harm”); *Antman v. Uber Techs., Inc.*, 2018 WL 2151231, at *10
 25 (N.D. Cal. May 10, 2018) (holding “mitigation expenses do not qualify as injury
 26 because the risk of identity theft must be real before mitigation can establish [Article
 27 III] injury in fact”); *Corona v. Sony Pictures Entm’t, Inc.*, 2015 WL 3916744, at *4
 28 (C.D. Cal. June 15, 2015) (finding credit monitoring may be “compensable where

1 evidence shows that the need for future monitoring is a reasonably certain
 2 consequence of the defendant’s breach of duty”). Nowhere in the FAC do Plaintiffs
 3 allege that any particular action or expense would have been a reasonable and
 4 necessary response to this Incident, especially when the information at issue—the
 5 Docket Data—is not the type that can be used to steal someone’s identity. *Burns v.*
 6 *Mammoth Media, Inc.*, 2021 WL 3500964, at *3 (C.D. Cal. Aug. 6, 2021) (holding
 7 that “Plaintiff’s allegations as to the likelihood of identity theft and fraud” were
 8 “impossible to square” with the fact that “Plaintiff’s compromised information did
 9 not include his birth date, address, social security number, or any financial
 10 information.”)

11 ***Future Injury.*** Although Plaintiffs rattle off a list of what “could” happen as
 12 a result of the disclosure, such as “reputational harm” or “stalking,” these allegations
 13 are wholly speculative. FAC ¶¶ 38–39. At no point does the FAC allege that any of
 14 these harms actually occurred. Allegations of “mere danger of future harm,
 15 unaccompanied by present damage, will not support a negligence claim.” *See*
 16 *Aguilar v. Hartford Accident & Indem. Co.*, 2019 WL 2912861, at *2 (C.D. Cal.
 17 Mar. 13, 2019); *see also Holly v. Alta Newport Hosp., Inc.*, 2020 WL 1853308, at *6
 18 (C.D. Cal. Apr. 10, 2020) (explaining that “bare allegation of increased risk of
 19 identity theft is too speculative to satisfy the pleading requirement to show actual
 20 damages” (internal quotation marks and citation omitted)). Such alleged future
 21 injury thus cannot sustain the damages element here.

22 ***Delayed Notification.*** To the extent Plaintiffs’ negligence claim is predicated
 23 on Rankin’s alleged “delay and failure to notify” them, that argument also fails.
 24 FAC ¶ 119; *see also* ¶¶ 28, 41, 91. To adequately state a negligence claim on this
 25 theory, Plaintiffs must allege “cognizable injury proximately caused” by the delay.
 26 *In re Sony Gaming Networks*, 996 F. Supp. 2d at 965 (dismissing negligence claim
 27 predicated on delay in notification because plaintiffs’ allegations of economic injury
 28 traceable to delay were “implausible”); *see also In re Adobe Sys., Inc. Priv. Litig.*,

1 66 F. Supp. 3d 1197, 1217 (N.D. Cal. 2014) (ruling plaintiffs must show
2 “incremental harm as a result of the delay”). Here, even if Rankin owed a duty to
3 notify—and no such duty exists, *see* Section B(i), *supra*—Plaintiffs allege no
4 incremental injury arising from the delayed notification.

5 ***Physical Injury.*** The FAC does not allege any physical injuries apart from
6 one unsupported allegation that Plaintiffs suffered a “loss of sleep.” FAC ¶¶ 119,
7 129. That allegation is too conclusory to withstand a motion to dismiss. *See, e.g.,*
8 *Gadomski v. Patelco Credit Union*, 2022 WL 223878, at *3 (E.D. Cal. Jan. 25,
9 2022) (holding that an allegation that plaintiff “suffered humiliation,
10 embarrassment, anxiety, loss of sleep, emotional distress, and defamation of
11 character” was too conclusory to survive a motion to dismiss.).

12 ***Economic Damages.*** To the extent that Plaintiffs allege economic losses,
13 those injuries are barred by the “economic loss rule,” which prohibits the recovery
14 of purely economic loss in the “absence of (1) personal injury, (2) physical damage
15 to property, (3) a ‘special relationship’ existing between the parties, or (4) some
16 other common law exception to the rule.” *Kalitta Air, L.L.C. v. Cent. Texas*
17 *Airborne Sys., Inc.*, 315 F. App’x 603, 605 (9th Cir. 2008) (finding “recovery of
18 purely economic loss is foreclosed”). Plaintiffs’ bare recitation of these elements,
19 including a “special relationship” between the parties, does not suffice.

20 **iii. Plaintiffs Identify No Law That Would Support A Negligence**
21 **Per Se Theory**

22 Plaintiffs assert negligence and negligence per se as two separate claims.
23 FAC ¶¶ 112-29. However, “under California law, negligence *per se* is a doctrine,
24 not an independent cause of action.” *Dent v. Nat’l Football League*, 902 F.3d 1109,
25 1117 (9th Cir. 2018). In California, negligence *per se* is a “presumption of
26 negligence that arises from the violation of a statute which was enacted to protect a
27 class of persons of which the plaintiff is a member against the type of harm which
28 the plaintiff suffered as a result of the violation of the statute.” *See, e.g., Hoff v.*

1 *Vacaville Unified Sch. Dist.*, 19 Cal.4th 925, 938 (Cal. 1998). Accordingly,
 2 negligence *per se* is simply a codified evidentiary doctrine and does not *per se*
 3 establish tort liability.” *Dugas*, 1016 WL 6523428, at *12, citing *Quiroz v. Seventh*
 4 *Ave. Ctr.*, 140 Cal.App.4th 1256, 1284-85 (Cal. Ct. App. 2006). “[N]egligence *per*
 5 *se* does not state an independent cause of action because “[t]he doctrine does not
 6 provide a private right of action for violation of a statute.”” *Dugas*, 2016 WL
 7 6523428, at *12, quoting *People of Cal. v. Kinder Morgan Energy Partners, L.P.*,
 8 569 F. Supp. 2d 1073, 1087 (S.D. Cal. 2008). Thus, to the extent Plaintiffs’ FAC
 9 purports to assert an independent cause of action for negligence *per se*, that cause of
 10 action should be dismissed.

11 Moreover, because Rankin is not alleged to have violated any statute, or the
 12 California Constitution, Plaintiffs’ negligence *per se* claim fails for this reason as
 13 well.

14 **C. Plaintiffs’ Anonymous Pleading Is Improper**

15 Federal Rule of Civil Procedure 10(a) requires that a complaint “name all the
 16 parties.” A plaintiff may proceed under a pseudonym after she has sought and been
 17 granted leave from the court. *See Doe v. U.S. Healthworks Inc.*, No.
 18 CV1505689SJOAFMX, 2016 WL 11745513, at *6 (C.D. Cal. Feb. 4, 2016)
 19 (dismissing complaint for improper pseudonymous pleading). Plaintiffs have not
 20 sought or obtained leave to proceed pseudonymously, and their use of fictitious
 21 names is improper and prejudicial to Rankin. Rankin cannot sufficiently investigate
 22 Plaintiffs’ allegations without knowing their names.

23 **D. Plaintiffs’ Claims For Equitable Relief Should Be Dismissed**

24 To obtain injunctive relief, Plaintiffs must show that they (1) “personally
 25 would benefit in a tangible way” from the requested injunction and are (2)
 26 “realistically threatened by a repetition of the violation.” *Dugas*, 2016 WL
 27 6523428, at *8 (internal quotation marks and citation omitted). Here, neither
 28 element is met.

1 Once the State Bar became aware of the issue concerning the Odyssey Portal,
 2 it immediately took remedial steps. Plaintiffs would therefore obtain no personal
 3 benefit from an injunction. Additionally, Plaintiffs allege no facts supporting that
 4 they are “realistically threatened by a repetition of the violation.” *Dugas*, 2016 WL
 5 6523428, at *8. The only allegation of a data incident occurring prior to the instant
 6 matter is a conclusory, two-sentence paragraph that identifies no actual disclosure of
 7 bar members’ information or misconduct by the State Bar or Rankin. *See* FAC ¶ 40.
 8 Thus, the FAC itself shows that the instant matter was a one-time occurrence that
 9 does not warrant injunctive or other equitable relief.

10 **V. CONCLUSION**

11 Courts consider five factors in determining whether a motion to dismiss
 12 should be granted with, or without, prejudice, including “bad faith, undue delay,
 13 prejudice to the opposing party, futility of amendment, and whether the plaintiff has
 14 previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077–78
 15 (9th Cir. 2004). Significantly, “[f]utility alone can justify the denial of a motion to
 16 amend.” *Id.* As discussed above, Plaintiffs’ already-amended FAC suffers several
 17 fatal deficiencies to each of their claims against Rankin. These deficiencies cannot
 18 be cured through another amendment. No leave to amend should be permitted in
 19 these circumstances.

20 For the foregoing reasons, Rankin respectfully requests that the Court grant
 21 his Motion and dismiss the FAC with prejudice.

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DATED: June 6, 2022

Respectfully submitted,
JEFFER MANGELS BUTLER &
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MICHAEL A. GOLD
JUSTIN ANDERSON

By: /s/ Michael A. Gold
 MICHAEL A. GOLD
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