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Shopify (USA) Inc. and Shopify Inc.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION
16

17 NAEEM SEIRAFI, EDWARD BATON,
18 ANTHONY COMILLA, BRETT DEENEY,
and ABRAHAM VILINGER, Individually and
19 on Behalf of All Others Similarly Situated,

20 Plaintiffs,

21 v.

22 LEDGER SAS, SHOPIFY (USA) INC., and
23 SHOPIFY INC.,

24 Defendants.
25

Case No. 21-cv-02470-EMC

**DEFENDANT SHOPIFY (USA) INC.'S
MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED CLASS ACTION
COMPLAINT FOR LACK OF
PERSONAL JURISDICTION AND
FAILURE TO STATE A CLAIM**

Date: October 21, 2021
Time: 1:30 p.m.
Location: Courtroom 5, 17th Floor
450 Golden Gate Ave.
San Francisco, California

Judge: The Honorable Edward Chen

NOTICE OF MOTION TO DISMISS

1
2 **PLEASE TAKE NOTICE** that on October 21, 2021 at 1:30 p.m., or as soon thereafter as
3 the matter may be heard in Courtroom 5 (17th Floor) of the above-entitled court, located at 450
4 Golden Gate Avenue, San Francisco, California 94102, defendant Shopify (USA) Inc. (“Shopify
5 USA”) will, and hereby does, move the Court under Federal Rules of Civil Procedure 12(b)(2), 8,
6 and 12(b)(6) for an order dismissing the First Amended Class Action Complaint (“FAC”) (ECF No.
7 33) of plaintiffs Naeem Seirafi, Edward Baton, Anthony Comilla, Brett Deeney, and Abraham
8 Villinger (together “Plaintiffs”). This motion is based on this notice, the concurrently filed
9 memorandum of points and authorities and declaration of Sarah Harris-John, and all other facts the
10 court may or should take notice of, all files, records, and proceedings in this case, and any oral
11 argument the Court may entertain.

12 **STATEMENT OF RELIEF SOUGHT (CIVIL L.R. 7-2(B)(3)).** Shopify USA seeks an
13 Order pursuant to Federal Rule of Civil Procedure 12(b)(2) dismissing the FAC for lack of personal
14 jurisdiction or, in the alternative, pursuant to Federal Rule of Civil Procedure 8(a)(2) for failure to
15 provide adequate notice of the claims against Shopify USA or, in the further alternative, pursuant
16 to Federal Rule of Civil Procedure 12(b)(6) dismissing the FAC for failure to state a claim upon
17 which relief can be granted.

18
19 Dated: July 26, 2021

ORRICK, HERRINGTON & SUTCLIFFE LLP

20
21 By: /s/ Douglas H. Meal

22 DOUGLAS H. MEAL
23 SETH C. HARRINGTON
24 MICHELLE VISSER

Attorneys for Defendants
Shopify (USA), Inc. and Shopify Inc.

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1 Plaintiffs' claims arise from an incident in which criminal actors exploited the computer
2 systems of what Plaintiffs' First Amended Complaint ("FAC") labels as "Shopify" – a fictitious
3 entity in which Shopify (USA) Inc. ("Shopify USA") is lumped together with its ultimate parent
4 company and co-defendant, Shopify Inc. According to the FAC, the criminals who perpetrated this
5 incident stole certain information that Plaintiffs had provided to Defendant Ledger (SAS), which
6 information the criminals then made available on the dark web, purportedly enabling other
7 criminals to use the stolen information to target Plaintiffs and their crypto assets. "Shopify" is
8 liable for these criminal actions, according to the FAC, because the criminals stole the information
9 in question from the Ledger (SAS) website that Ledger (SAS) had contracted with "Shopify" to
10 host on the "Shopify" platform that "Shopify" makes available to e-commerce merchants such as
11 Ledger (SAS).

12 Despite Plaintiffs' attempt to treat Shopify USA and Shopify Inc. as a singular actor in their
13 theory of liability, Shopify USA is a wholly separate entity from Shopify Inc. that does not contract
14 with or furnish e-commerce services to Shopify Inc.'s merchants, such as Ledger (SAS), and thus
15 is not responsible for handling customer data, such as that of Plaintiffs. There is therefore no basis
16 for Shopify USA to be named in this action, which arises out of an alleged data security incident
17 related to Shopify Inc.'s e-commerce platform, Ledger (SAS)'s website on that platform, and
18 Plaintiffs' information stored on that website. Nonetheless, apparently recognizing that they cannot
19 establish personal jurisdiction over Shopify Inc., a Canadian corporation, Plaintiffs bring their
20 claims against both Shopify Inc. and Shopify USA, despite Shopify USA's having no relationship
21 whatsoever to the Plaintiffs, Ledger (SAS), or the incident giving rise to this dispute.

22 The FAC should be dismissed as to Shopify USA for three separate reasons. First, the FAC
23 must be dismissed as to Shopify USA under Rule 12(b)(2) for failure to allege sufficient facts to
24 establish personal jurisdiction over Shopify USA in this forum. Shopify USA does not have
25 sufficient contacts with California to establish general jurisdiction over it, nor have Plaintiffs
26 plausibly alleged facts to sustain any assertion of specific jurisdiction.

27 Alternatively, the FAC should be dismissed as to Shopify USA for failure to meet Rule 8's
28

1 notice pleading requirement because it impermissibly groups two separate entities, Shopify Inc.
2 and Shopify USA, together into one fictitious “Shopify” entity, with no regard for their legal and
3 functional separateness. As explained in detail in Shopify Inc.’s Motion to Dismiss Plaintiffs’ FAC
4 filed concurrently herewith, Plaintiffs do not (and cannot) sufficiently allege that Shopify USA and
5 Shopify Inc. are alter egos. There is no basis for the FAC’s treatment of the two companies as a
6 single entity, which leaves Shopify USA without notice of which (if any) of the FAC’s allegations
7 are specific to Shopify USA as opposed to Shopify Inc. Because the FAC does not give Shopify
8 USA fair notice of the claims against it as required by Rule 8, the FAC should be dismissed in its
9 entirety as to Shopify USA.

10 Alternatively, the FAC should be dismissed as to Shopify USA for failure to state a claim
11 under Rule 12(b)(6), as the FAC fails to plausibly allege claims as to Shopify USA for negligence,
12 negligence per se, deceit by concealment, or declaratory judgment and injunctive relief.

13 **I. STATEMENT OF ISSUES TO BE DECIDED (CIVIL L.R. 7-4(a)(3))**

14 Shopify USA seeks a Rule 12(b)(2) dismissal of the FAC because this Court lacks either
15 general or specific jurisdiction over Shopify USA. Shopify USA seeks in the alternative dismissal
16 under Rule 8 for failure to plead facts showing that Shopify USA caused Plaintiffs’ alleged harm.
17 Shopify USA seeks in the further alternative a Rule 12(b)(6) dismissal as Plaintiffs’ causes of action
18 for negligence, negligence per se, deceit by concealment, and declaratory judgment and injunctive
19 relief all fail to allege facts sufficient to state a plausible claim for relief against Shopify USA.

20 **II. SUMMARY OF RELEVANT FACTS**

21 Shopify USA is a Delaware corporation that provides services and support to various
22 aspects of Shopify Inc.’s business, such as messaging and mobile applications that merchants can
23 use to improve their marketing and customer service, as well as support for shipping-related
24 services. Declaration of Sarah Harris-John (“Harris-John Decl.”) ¶¶ 3, 6. Shopify USA has never
25 had a business relationship with Defendant Ledger (SAS) (“Ledger”). Harris-John Decl. ¶ 6.

26 From the time Shopify USA was acquired by a Shopify Inc. subsidiary in 2016, until
27 December 2020, all its executive officers were located in Ontario, Canada. Harris-John Decl. ¶ 5.
28 On December 22, 2020, an individual located in New York assumed the roles of Chief Executive

1 Officer and Chief Financial Officer previously held by individuals located in Ontario. *Id.* For a
2 period of time after 2016 Shopify USA continued to maintain an office at 33 New Montgomery
3 Street, Suite 750, San Francisco, CA. Harris-John Decl. ¶ 3. That office was closed in May 2020,
4 however, as a result of the COVID-19 pandemic. *Id.*

5 According to the FAC, Shopify Inc. announced on September 22, 2020 that it had recently
6 discovered that “two rogue members of [its] support team were engaged in a scheme to obtain
7 customer transactional records of certain merchants” (the “Shopify Incident”). FAC ¶ 79. These
8 individuals “took advantage of Shopify[Inc.]’s access to the personal information of Ledger’s
9 customers and acquired and exported Ledger’s customer transactional records.” FAC ¶ 78. The
10 Shopify Incident was not the result of a technical vulnerability in Shopify Inc.’s platform but those
11 whose stores were illegitimately accessed may have had customer data exposed. *See* Shopify Inc.
12 MTD Br. Part II. The “rogue members of [Shopify Inc.’s] support team” referenced in the FAC
13 were not employees of Shopify Inc., Shopify USA, or any other affiliate of Shopify Inc., but rather
14 were independent contractors of a third-party service provider that contracted with Shopify Inc.’s
15 Irish affiliate, Shopify International Ltd. (“Shopify International”). Harris-John Decl. ¶ 10.
16 Throughout the relevant time period, these independent contractors of Shopify International’s
17 independent contractor were not located in the United States but rather were located in the
18 Philippines. Harris-John Decl. ¶ 11. Shopify International contracted with the third-party service
19 provider to provide support services to merchants who use Shopify Inc.’s e-commerce services.
20 Harris-John Decl. ¶ 10. The third-party service provider does not provide services to the customers
21 of Shopify Inc.’s merchants, nor does it provide services for or on behalf of Shopify USA. Harris-
22 John Decl. ¶ 10. Moreover, Shopify USA is not responsible for handling customer data. Harris-
23 John Decl. ¶ 6.

24 **III. LEGAL STANDARD**

25 If a defendant moves to dismiss under Rule 12(b)(2), the plaintiff bears the burden of
26 establishing that the court may lawfully exercise personal jurisdiction over that defendant. *Pebble*
27 *Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). The court is not limited to the pleadings
28 and “may consider extrinsic evidence . . . including affidavits submitted by the parties” in

1 determining whether jurisdiction lies. *Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d
2 938, 951 (N.D. Cal. 2015).

3 Where, on the other hand, a defendant moves to dismiss under Rule 8, the court looks only
4 to the face of the complaint in deciding the motion. A complaint survives a motion to dismiss under
5 Rule 8 only if, as relevant here, it provides each “defendant[] fair notice of the claims against [it].”
6 *Bravo v. Cnty. of San Diego*, 2014 WL 555195, at *2 (N.D. Cal. 2014). “[L]umping together
7 multiple defendants in one broad allegation fails to satisfy [this] notice requirement.” *Id.*
8 Importantly, the “propriety of dismissal for failure to comply with Rule 8 does not depend on
9 whether the complaint is wholly without merit.” *Id.* (quoting *McHenry v. Renne*, 84 F.3d 1172,
10 1179 (9th Cir. 1996)). A Rule 8 dismissal is proper where the complaint fails to give each defendant
11 proper notice, “[e]ven if the factual elements of the cause of action are present.” *Id.*

12 Likewise, a motion to dismiss under Rule 12(b)(6) is resolved solely on the face of the
13 complaint. To survive a motion under Rule 12(b)(6), “a complaint must contain sufficient factual
14 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
15 556 U.S. 662, 678 (2009). Facial plausibility requires that there be sufficient factual allegations
16 from which “to draw the reasonable inference that the defendant is liable for the misconduct
17 alleged.” *Id.* “[L]abels and conclusions, and a formulaic recitation of the elements” of claims will
18 not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court must take all of the
19 well-pled factual allegations in the complaint as true but is “not bound to accept as true a legal
20 conclusion couched as a factual allegation.” *Id.* (quoting *Papasan v. Allain*, 478 U.S. 265, 286
21 (1986)). A complaint offering only “conclusory allegations of law and unwarranted inferences”
22 cannot survive a motion to dismiss. *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

23 **IV. ARGUMENT**

24 **A. This Court Lacks Jurisdiction over Shopify USA.**

25 Due process provides that a court may not exercise personal jurisdiction over a defendant,
26 unless it has sufficient “minimum contacts” with the forum state (here California) such that the
27 exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.”
28

1 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).¹ Personal
2 jurisdiction may be “general or all-purpose jurisdiction” or only “specific or conduct-linked.”
3 *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). Here, neither type of personal jurisdiction may
4 be exercised over Shopify USA, so it should be dismissed from this suit.

5 1. *This Court lacks general jurisdiction over Shopify USA.*

6 The “paradigm forums” for the exercise of general jurisdiction over a corporation are “the
7 corporation’s place of incorporation and its principal place of business.” *BNSF Ry. Co. v. Tyrrell*,
8 137 S. Ct. 1549, 1558 (2017). General jurisdiction outside of those forums is available “[o]nly in
9 an exceptional case,” *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014), where the
10 defendant’s contacts are so “continuous and systematic” as to “‘approximate physical presence’ in
11 the forum state,” *Pestmaster Franchise Network, Inc. v. Mata*, 2017 WL 1956927, at *2 (N.D. Cal.
12 2017) (Chen, J.) (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223-24 (9th
13 Cir. 2011)). That standard is “exacting,” for good reason: a finding of general jurisdiction “permits
14 a defendant to be haled into court in the forum state to answer for any of its activities anywhere in
15 the world.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1074 (9th Cir. 2011). Here,
16 there is no basis for asserting general jurisdiction over Shopify USA.

17 Plaintiffs make no serious allegation that California is one of the “paradigm forums” where
18 general jurisdiction over Shopify USA is proper. They concede that Shopify USA is not
19 incorporated in California, but in “Delaware.” FAC ¶ 24. And Plaintiffs admit that, when this suit
20 was filed, Shopify USA’s operative filing with the California Secretary of State listed not
21 California, but “Ottawa, Canada as its principal place of business.” FAC ¶ 24. Indeed, it is not just
22 that Shopify USA *lists* its principal place of business as being outside of California; all of Shopify
23 USA’s executive officers in fact then resided (and now still reside) outside of this State as well.
24 Harris-John Decl. ¶ 5. When the suit was filed, then, Shopify USA’s “nerve center” was not in
25

26 ¹ “Because California’s long-arm jurisdictional statute is co-extensive with federal due process
27 requirements, the jurisdictional analyses under state law and federal due process are the same.”
28 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir.
2006); *see also* Cal. Civ. Proc. Code § 410.10 (“A court of this state may exercise jurisdiction on
any basis not inconsistent with the Constitution of this state or of the United States.”).

1 California. *See Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010) (“[P]rincipal place of business
2 refers to the place where the corporation’s high level officers direct, control, and coordinate the
3 corporation’s activities. Lower federal courts have often metaphorically called that place the
4 corporation’s ‘nerve center.’”). Plaintiffs make no allegations suggesting otherwise.

5 While Plaintiffs allege that Shopify USA used to have its principal place of business in San
6 Francisco, FAC ¶¶ 24, 27, that circumstance is wholly irrelevant to the inquiry here. Courts have
7 “uniformly held” that general jurisdiction is to be determined no earlier than the time of filing of
8 the complaint. *Sabre Int’l Sec. v. Torres Advanced Enter. Sols., LLC*, 60 F. Supp. 3d 21, 30 (D.D.C.
9 2014) (collecting cases); *see also Young v. Daimler AG*, 228 Cal. App. 4th 855, 864 (2014) (“Unlike
10 specific jurisdiction, general jurisdiction is determined no earlier than at the time a suit is filed.”).²
11 And here there can be no dispute that, at the time the complaint (either the initial one or the
12 operative, amended one) was filed, Shopify USA’s principal place of business was located outside
13 of California.

14 To avoid the natural consequence of this indisputable fact, Plaintiffs insinuate that Shopify
15 USA moved its headquarters tactically, to evade general jurisdiction here. FAC ¶ 24. Not only are
16 the reasons for any such change irrelevant to whether Shopify USA is subject to general jurisdiction
17 in California, but the insinuation is both false and nonsensical. *See* FAC ¶ 24. As Shopify USA
18 has explained—and Plaintiffs make no allegations contesting—Shopify USA’s executive officers
19 have been located outside of California since 2016—well before any of the events at issue here.
20 Harris-John Decl. ¶ 5. To the extent Plaintiffs are referring to the office Shopify USA continued
21 to maintain in San Francisco for a period of time after 2016, that office was closed in May 2020,
22 and its closure had nothing to do with this case but was instead driven by the COVID-19 pandemic.
23 Harris-John Decl. ¶ 3. Moreover, Shopify USA had nothing to do with the Shopify Incident—
24 indeed, it had no business relationship with Ledger at all, Harris-John Decl. ¶ 6—so it would make

25 _____
26 ² Even though some courts have been ambiguous as to whether the relevant time for assessing
27 general jurisdiction is “at the time suit was filed” or at the time the defendant was “served,” *Wells*
28 *Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 422 (9th Cir. 1977), such a discrepancy
(to the extent it exists) is of no moment, as Shopify (USA)’s principal place of business was not in
California at either of those times, Harris-John Decl. ¶¶ 3-5, so under either rule the result is the
same.

1 no sense for Shopify USA to respond to the Shopify Incident by doing something as extreme as
2 relocating its corporate headquarters to a different country. That is especially so given that, because
3 Shopify USA remains subject to general jurisdiction in Delaware (where it is incorporated),
4 relocating its headquarters would hardly be a get-out-of-jail-free card for Shopify USA; the most it
5 would accomplish is funneling to Delaware U.S.-based lawsuits brought against Shopify USA on
6 the basis of general jurisdiction.

7 For similar reasons, there can be no sound argument that this is the exceptional case where
8 Shopify USA, despite having neither its principal place of business nor place of incorporation here,
9 is nevertheless “so heavily engaged in activity in [California] as to render it essentially at home.”
10 *BNSF*, 137 S. Ct. at 1559. Once again, general jurisdiction is determined no earlier than the time
11 of filing of the complaint. Shopify USA’s connections with California at that time were (and
12 continue to be) minimal. Approximately three-quarters of Shopify USA’s employees work
13 somewhere other than California, and its executive officers all work elsewhere. Harris-John Decl.
14 ¶¶ 5, 7. Moreover, the vast majority of Shopify USA’s business activities are conducted outside
15 of, and have no relationship to, California. Harris-John Decl. ¶ 8. There is thus nothing
16 “exceptional” about Shopify USA’s contacts with California—and so the usual rules continue to
17 apply, meaning that because this is neither Shopify USA’s place of incorporation nor its principal
18 place of business, general jurisdictional does not lie here. *See Ranza v. Nike, Inc.*, 793 F.3d 1059,
19 1070 (9th Cir. 2015) (finding no general jurisdiction based on Dutch company’s “limited activities
20 in Oregon” compared to “extensive contacts in Europe, where the vast majority of its employees
21 and business activities are located”).

22 Indeed, aside from Plaintiffs’ (irrelevant) allegation that Shopify USA used to have its
23 principal place of business here, Plaintiffs make only two allegations about Shopify USA’s
24 connections to California: that it (1) “is registered to do business in California,” FAC ¶ 27; and (2)
25 “solicit[s] customers and transact[s] business in California, including with Ledger and those who
26 purchased products or services from Ledger,” FAC ¶ 31. Neither, however, distinguishes Shopify
27 USA from any of the thousands of other out-of-state companies that transact business in California
28 every day but are undisputedly not subject to general jurisdiction here. Indeed, ““doing business”

1 has long been abandoned as the test for general jurisdiction.” *Ranza*, 793 F.3d at 1070. As this
2 Court recently put it: the Supreme Court has squarely “rejected the proposition that there is general
3 jurisdiction over a corporation in every State in which a corporation engages in a substantial,
4 continuous, and systematic course of business.” *Caces-Tiamson v. Equifax*, 2020 WL 1322889, at
5 *2 (N.D. Cal. 2020) (Chen, J.).³ Especially in light of Shopify USA’s “extensive contacts
6 [elsewhere], where the vast majority of its employees and business activities are located,” it is
7 impossible to conclude that Shopify USA is “essentially at home” in California. *Id.*

8 Accordingly, there is no basis for exercising general jurisdiction over Shopify USA.

9 2. *This Court also lacks specific jurisdiction over Shopify USA.*

10 Specific jurisdiction exists over a defendant only when (among other requirements) the
11 claim before the court “arises out of or relates to the defendant’s forum-related activities.” *Caces-*
12 *Tiamson*, 2020 WL 1322889, at *3 (citing *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*,
13 905 F.3d 597, 603 (9th Cir. 2018)). Here, Plaintiffs offer two theories for the exercise of specific
14 jurisdiction. First, they say that this Court “has personal jurisdiction over ... Shopify (USA)
15 because [it] solicit[s] customers and transact[s] business in California.” FAC ¶ 31. Second, they
16 contend that personal jurisdiction lies over Shopify USA because “substantial events leading up to
17 the breach at issue have occurred in California.” FAC ¶ 26. But the first theory fails because
18 Plaintiffs have not alleged (much less established) that any of their claims arise out of any business
19 Shopify USA transacts in California. And the second fails because it is both contradicted by the
20 allegations in the FAC and, as demonstrated by Shopify USA’s declarations supporting this motion,
21 demonstrably inaccurate.

22 As to Plaintiffs’ first theory, Plaintiffs offer no allegations showing that their claims *arise*
23 *out of or relate to* the customers Shopify USA allegedly solicits, or the business it allegedly
24 transacts, in California. Whether a plaintiff “satisfies the second requirement for specific
25 jurisdiction” turns on whether his or her claim would not have arisen “but-for” the defendant’s
26

27 ³ Additionally, as explained below, Plaintiffs are simply wrong when they say that Shopify USA
28 transacted business “with Ledger and those who purchased products or service from Ledger,” FAC
¶ 31.

1 contacts with the forum state. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995).⁴ The key
2 inquiry is whether the alleged harm would still have occurred even if the defendant had not engaged
3 in its forum-related activities. *Young v. Actions Semiconductor Co., Ltd.*, 386 F. App'x 623, 627
4 (9th Cir. 2010) (finding no specific jurisdiction where alleged harm arose from transaction that
5 would have occurred “even if [defendant] never marketed or sold its securities in” forum state);
6 *Caces-Tiamson*, 2020 WL 1322889, at *4 (no specific jurisdiction in California where plaintiff
7 “ha[d] not shown that data breach or the failure to prevent the data breach [was] tied to” operation
8 of two branch offices in California by Georgia-based defendant). Here, Plaintiffs do not even allege
9 what business Shopify USA supposedly transacts in California, other than the statement that the
10 counterparties to those transactions were “Ledger and those who purchased products or services
11 from Ledger.” FAC ¶ 31. But that is simply incorrect. “Shopify (USA) Inc. has never had a
12 business relationship with Ledger.” Harris-John Decl. ¶ 6. As to the remaining business
13 connections that Shopify USA supposedly had with California, Plaintiffs offer nothing at all—
14 much less allegations sufficient to show that the claims at issue in this lawsuit would not have arisen
15 but for those contacts. Because Plaintiffs do not describe *any* business contacts that Shopify USA
16 actually had with California, they have not shown that their claims arise out of or relate to those
17 contacts.

18 Plaintiffs’ second theory fares no better. While Plaintiffs do not specify what they mean by
19 “substantial events leading up to the breach at issue have occurred in California,” FAC ¶ 26, they
20 appear to be referring to their allegation that the “rogue employees” responsible for the Shopify
21 Incident “were most probably employed by [Shopify USA’s] California office,” FAC ¶ 80. But
22 every part of that statement is incorrect. For one thing, the “rogue members of [Shopify Inc.’s]
23 support team” referenced in paragraphs 79 and 80 of the FAC were not employees of Shopify USA

24 ⁴ Although the Supreme Court recently suggested that where the defendant’s connection with a
25 forum is purely physical, the requisite connection between the claims and the forum-state contacts
26 may be satisfied by something less than a “strict causal relationship,” that opinion stated expressly
27 that it “d[id] not ... consider internet transactions, which may raise doctrinal questions of their
28 own.” *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026, 1028 n.4 (2021).
Unsurprisingly, courts have recognized that *Ford* thus “did not bear on the ‘doctrinal questions’
associated with personal jurisdiction in the online context.” *Massie v. Gen. Motors Co.*, 2021 WL
2142728, at *6 (E.D. Cal. 2021). And so *Ford* did not, and could not have, changed the law for
cases like this involving websites and data breaches. *See id.*

1 but rather were independent contractors of a third-party service provider to Shopify Inc.'s Irish
2 affiliate, Shopify International. Harris-John Decl. ¶ 10. For another, throughout the relevant period
3 those independent contractors were located not in California, but rather in the Philippines. Harris-
4 John Decl. ¶ 11. Accordingly, far from showing that their claims would not have arisen but for
5 Shopify USA's contacts with California, the record shows that Plaintiffs' claims would not have
6 arisen but for actions in the Philippines of independent contractors of an independent contractor
7 that contracted with a Shopify Inc. affiliate based in Ireland.⁵ And even if Plaintiffs could allege
8 some event connected to the Shopify Incident that occurred in California, that event would *still* not
9 subject Shopify USA to specific jurisdiction because, as summarized above, there could be no
10 connection between any such event and Shopify USA (which has never had a business relationship
11 with Ledger, is not responsible for handling customer data, and has no relationship whatsoever with
12 the rogue actors alleged in the FAC) that would allow this Court to exercise jurisdiction over
13 Shopify USA in connection with this action.

14 Because Plaintiffs have failed to show that their claims would not have arisen but for
15 Shopify USA's contacts with California, there is no basis for exercising specific jurisdiction over
16 Shopify USA.

17 **B. The FAC Violates Rule 8 Because It Fails to Distinguish Between Shopify**
18 **USA and Shopify Inc. in Describing Defendants' Supposedly Unlawful**
19 **Conduct.**

20 Alternatively, Plaintiffs' claims against Shopify USA should be dismissed because the FAC
21 fails to provide it with sufficient notice as to the claims against it. Rule 8 requires a plaintiff to
22 "identify what action each Defendant took that caused Plaintiffs' harm, without resort to
23 generalized allegations against Defendants as a whole." *Adobe Sys. Inc. v Blue Source Grp., Inc.*,

24 ⁵ Plaintiffs also mention that "a California man" was indicted "for his role in causing the data
25 breach," namely by "pa[ying] an employee of a Shopify vendor to provide him with Shopify's
26 merchant data." FAC ¶ 81. But when assessing specific jurisdiction, "the analysis must be
27 [restricted to] the defendant's 'own contacts' with the forum." *SKAPA Holdings LLC v. Seitz*, 2021
28 WL 672091, at *5 (D. Ariz. 2021) (quoting *Walden v. Fiore*, 571 U.S. 277, 289 (2014)).
Regardless, whether some criminal having no relationship with Shopify USA happened to live in
California when he supposedly paid an employee (in actuality, an independent contractor, Harris-
John Decl. ¶ 10) of an independent contractor of an affiliate of Shopify Inc. to steal data from
Ledger (SAS) is entirely irrelevant to whether *Shopify USA* engaged in any California-based
conduct without which the Shopify Incident would not have occurred.

1 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015). Plaintiffs, however, fail to recognize that Shopify Inc.
2 and Shopify USA are distinct legal entities. Instead, Plaintiffs simply lump the two companies
3 together with a single defined term of “Shopify,” FAC at 2, which term they then use to describe
4 various “Shopify” actions or omissions without specifying which of the two entities they are
5 referring to. FAC ¶¶ 1, 2, 8, 9, 12, 24, 74-81, 83-84, 94, 137, 145, 156, 157, 160-162, 164, 167,
6 169-177, 179-181, 183, 186-192, 240-241, 243-245, 247. In so doing, Plaintiffs “fail[] to allege
7 which defendants engaged in what activity and when.” *Bravo v. Cnty. of San Diego*, 2014 WL
8 555195, at *2 (N.D. Cal. 2014). As a result, neither Shopify USA nor Shopify Inc. can determine
9 what actions or omissions Plaintiffs mean to attribute to it, as opposed to its affiliated entity, leaving
10 each entity without a clear understanding of which allegations it must disprove in this action, and
11 thus depriving each entity of fair notice of and the ability to defend against Plaintiffs’ charges. *See*
12 *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (“[L]umping together of
13 multiple defendants in one broad allegation fails to satisfy notice requirement of Rule 8(a)(2).”);
14 *Austin v. Budget Rental Car, Inc.*, 2020 WL 8614183, at *2 (N.D. Cal. 2020) (“When defendants
15 are separate corporate entities[] and perform separate roles,” pleading as to defendants generally
16 “is insufficient to state a claim for relief.”).

17 It is no answer for Plaintiffs to assert that Shopify USA and Shopify Inc. are alter egos and
18 that, as such, conduct of one entity is *ipso facto* conduct of the other entity. As explained in detail
19 in Shopify Inc.’s Motion to Dismiss Plaintiffs’ FAC filed concurrently herewith (“Shopify Inc.’s
20 MTD Brief” or “Shopify Inc. Br.”), Plaintiffs have not sufficiently alleged that Shopify USA and
21 Shopify Inc. are alter egos, and the record shows they are not. Shopify Inc. Br. Part IV.A.3.
22 Accordingly, the FAC should be dismissed as to Shopify USA pursuant to Rule 8. *See Bravo*, 2014
23 WL 555195, at *2 (“A complaint that fails to comply with Rule 8 may be dismissed pursuant to
24 Federal Rule of Civil Procedure 41(b).”); *Austin*, 2020 WL 8614183, at *2 (dismissing complaint
25 for this reason).

26 **C. The Complaint Fails to State a Claim Against Shopify USA.**

27 Alternatively, this action should be dismissed as to Shopify USA for its failure to state a
28 claim against Shopify USA for (1) negligence; (2) negligence per se; (3) deceit by concealment; or

1 (4) declaratory judgment and injunctive relief.

2 1. *Plaintiffs fail to state a claim for negligence or negligence per se.*

3 Under California law,⁶ a plaintiff asserting a negligence claim must establish that: “(1) the
4 defendant had a duty, or an obligation to conform to a certain standard of conduct for the protection
5 of others against unreasonable risks, (2) the defendant breached that duty, (3) that breach
6 proximately caused the plaintiff's injuries, and (4) damages.” *In re Solara Med. Supplies, LLC*
7 *Customer Data Sec. Breach Litig.*, 2020 WL 2214152, at *3 (S.D. Cal. 2020) (citing *Corales v.*
8 *Bennett*, 567 F.3d 554, 572 (9th Cir. 2009)). The FAC contains no allegation of any duty owed by
9 Shopify USA or action taken by Shopify USA, as opposed to duties allegedly owed and actions
10 allegedly taken by its ultimate parent, Shopify Inc., and includes no specific facts regarding Shopify
11 USA that could support any finding of liability. Plaintiffs have failed to identify any legal duty
12 applicable to Shopify USA, any applicable standard of care or how Shopify USA failed to meet
13 that standard of care, or any cognizable injury allegedly caused by Shopify USA's failure to meet
14 such a standard of care, and they have insufficiently alleged proximate cause connecting any
15 alleged Shopify USA conduct to the harms complained of in the FAC. Plaintiffs' negligence claim
16 against Shopify USA must therefore be dismissed, as must their negligence per se claim.⁷

17 a. Shopify USA owed plaintiffs no duty in negligence to protect them
18 from harm imposed by criminal actors.

19 As shown in Shopify Inc.'s MTD Brief, Shopify Inc. owed Plaintiffs no duty in common-
20 law negligence to protect them against the criminal third-party attacks that allegedly injured them.

21 ⁶ For purposes of this portion of its present motion, Shopify USA will accept as true Plaintiffs'
22 assertion that California law governs their common-law claims against Shopify USA, *see* FAC
¶ 155-167, but does so reserving its right to challenge the application of California to these claims
in the event they are not dismissed for failure to state a claim.

23 ⁷ Plaintiffs' negligence per se claim falls on its face because, under California law, negligence per
24 se is not a separate cause of action from negligence. *Lobstein v. Washington Mut. Mortg. Pass-*
Through Certificates WMALT Series 2007-OC1, 2020 WL 3964788, at *5 (C.D. Cal. 2020).
25 Rather, California law “codifies the doctrine of negligence per se” as an “evidentiary presumption”
26 that a party failed to exercise due care if the conditions of that doctrine are met. *Id.* Said otherwise,
“[n]egligence per se is not an independent cause of action”; it is simply one way a plaintiff may try
27 to carry his or her burden of establishing certain elements of an ordinary negligence claim. *Id.*
Accordingly, Plaintiffs' attempt to bring a separate negligence per se claim fails. In any event,
28 even if negligence per se could be pled as a standalone claim, Plaintiffs' negligence per se claim
would fail for the same reasons as their negligence claim fails. *See Dent v. Nat'l Football League*,
968 F.3d 1126, 1130 (9th Cir. 2020) (affirming dismissal of negligence per se claim because
plaintiff failed to adequately plead ordinary negligence).

1 See Shopify Inc. MTD Br. Part IV.C.1.a. For the same reasons set forth there, Shopify USA owed
2 Plaintiffs no duty in common-law negligence to protect them against the criminal third-party attacks
3 that allegedly injured them.

4 b. Plaintiffs fails to plead a breach of any duty in common-law
5 negligence that Shopify USA may have owed them.

6 Because, as explained in detail in Shopify Inc.'s MTD Brief, Plaintiffs have failed to plead
7 any breach by Shopify Inc. of any duty it may have owed Plaintiffs in common-law negligence, *see*
8 Shopify Inc. MTD Br. Part IV.C.1.b, Plaintiffs have likewise failed to plead any breach by Shopify
9 USA of any such duty it may have owed to Plaintiffs.

10 c. Plaintiffs fail to plead proximate cause connecting any action by
11 Shopify USA to their alleged injuries.

12 Because, as explained in detail in Shopify Inc.'s MTD Brief, Plaintiffs have failed to plead
13 facts sufficient to establish that any of their alleged injuries was proximately caused by any conduct
14 attributable to Shopify Inc., *see* Shopify Inc. MTD Br. Part IV.C.1.c, Plaintiffs have likewise failed
15 to plead such proximate causation as to Shopify USA.

16 d. Plaintiffs fail to plead any actionable injury caused by any alleged
17 violation of an applicable standard of care.

18 Because, as explained in detail in Shopify Inc.'s MTD Brief, Plaintiffs have failed to plead
19 any injury actionable in common-law negligence as to Shopify Inc., *see* Shopify Inc. MTD Br.
20 Part IV.C.1.d, Plaintiffs have likewise failed to plead any such injury as to Shopify USA.

21 2. *Plaintiffs fail to state a claim for deceit by concealment against Shopify*
22 *USA.*

23 Because, as explained in detail in Shopify Inc.'s MTD Brief, Plaintiffs have failed to plead
24 an actionable claim for deceit by concealment against Shopify Inc., *see* Shopify Inc. MTD Br. Part
25 IV.C.2, Plaintiffs have likewise failed to plead any such claim against Shopify USA.
26
27
28

