

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION**

**NICOLE MIZRAHI, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

**NATIONAL BOARD OF EXAMINERS IN
OPTOMETRY, INC.,**

**351 West Camden Street
Baltimore, Maryland 21201
Baltimore County**

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Nicole Mizrahi (“Plaintiff”), individually and on behalf of similarly situated individuals (the “Class” defined below), alleges upon personal knowledge as to herself and her own actions, and upon information and belief as to the Class, including the investigation of counsel, as follows:

NATURE OF ACTION

1. Defendant National Board of Examiners in Optometry, Inc. (the “NBEO” or “Defendant”) provides optometric licensure testing for all United States jurisdictions. As part of its licensure process, Defendant collects Sensitive Personal Information (“SPI”) of test-takers, including, but not limited to, names, dates of birth, Social Security numbers, addresses, and credit card information.

2. On or around July 23, 2016, optometrists around the country began to discover that fraudulent Chase Bank credit card accounts had been opened in their names. In particular, members of a Facebook group “ODs on Facebook,” of which Plaintiff was a participant,

discussed this fact and realized that numerous members, had been victims of the same type of fraud.

3. Members of this and other Facebook groups soon realized that the only possible source of this fraud was the NBEO, as it was the only entity to which affected members of the groups had each given the same set of SPI. In fact, one member of the Facebook group stated that the source could only have been the NBEO because the credit card taken out in her name was in her maiden name, which she had last (and possibly only) used when applying for the NBEO licensure examination.

4. For a number of days the NBEO declined to comment on the breach or accept responsibility. Then on August 2, 2016, the NBEO issued a statement through their Facebook page that “[a]fter a thorough investigation and extensive discussions with involved parties, the NBEO has concluded that our information systems have NOT been compromised.”¹

5. But on August 4, 2016, the NBEO posted a “revision” to the prior statement and its website stating that “the NBEO has decided further to investigate whether personal data was stolen from our information systems to support the perpetrators’ fraud on individuals and Chase.”²

6. Since then, the NBEO has deigned to update the public only once, on August 25, 2016, to state that the investigation is ongoing but that so far the investigation “does not establish whether an intrusion in fact occurred. Collection and technical analysis is therefore continuing, involving still more data, both current and retrospective.”³ The NBEO also stated that

¹ See https://www.facebook.com/NationalBoard/?hc_ref=NEWSFEED&fref=nf (last viewed September 13, 2016).

² *Id.*; see also <http://www.optometry.org/> (last viewed September 13, 2016).

³ *Id.*

“[d]epending on what that inquiry reveals and when, it could take a number of additional weeks to complete.”⁴

7. Plaintiff Nicole Mizrahi is a resident of Brooklyn, New York whose information was stolen from Defendant NBEO’s database, and whose credit score was damaged when unknown persons applied for a Chase Bank Amazon credit card in her name on August 26, 2016. Plaintiff now faces a long, arduous, and potentially costly struggle to prevent her SPI from being used in fraudulent transactions that may affect her finances. Plaintiff’s SPI has been compromised due to the NBEO’s failure to maintain reasonable and adequate security measures to protect the SPI it collected from Plaintiff and the Class in exchange for, *inter alia*, payments to the NBEO.

8. Plaintiff seeks damages and restitution for the loss suffered due to the NBEO’s actions, and injunctive relief ordering the NBEO to finally secure the SPI it collects in an appropriate and sufficient manner.

PARTIES

9. Plaintiff Nicole Mizrahi, O.D., is a resident of Brooklyn, New York. Plaintiff was required to pay thousands of dollars to the NBEO and provide it with her SPI in order to be able to sit for board certification examinations required to become an Optometrist. As detailed herein, the NBEO failed to properly secure the SPI of Plaintiff and members of the Class, which was then stolen by unknown individuals from the NBEO. These unknown individuals have used and may continue to use (or sell) the stolen SPI of Plaintiff and the Class to open fraudulent credit accounts and perform other fraudulent transactions. Plaintiff and the Class have been harmed by the NBEO’s failure to properly secure their SPI as detailed herein.

⁴ *Id.*

10. Defendant National Board of Examiners in Optometry, Inc. is a privately-held not-for-profit corporation established in 1951 that creates and administers examinations required to be taken to obtain an optometry license. Defendant is incorporated in Maryland with its principal office at 351 West Camden St., Baltimore, Maryland, 21201, and its principal place of business at 200 S. College Street, Suite 2010, Charlotte, North Carolina, 28202.

JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) (“The Class Action Fairness Act”) because sufficient diversity of citizenship exists between parties in this action, the aggregate amount in controversy exceeds \$5,000,000, and there are 100 or more members of the Class.

12. This Court has personal jurisdiction over the NBEO because it is incorporated in Maryland, has its principal office in Maryland, and regularly conducts business in Maryland.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant is incorporated in this District, has its principal office in this District, and regularly conducts business in this District.

FACTUAL ALLEGATIONS

The NBEO’s Data Collection Practices

14. The NBEO creates and administers numerous examinations that are required to be passed in order for an optometrist to achieve licensure to practice in the profession. These examinations occur during and after individuals have had to invest tens or hundreds of thousands of dollars to attend optometry school.⁵ Fees charged by the NBEO to apply for and take the examinations can run into the thousands of dollars. The current President of the NBEO, William

⁵ See, e.g., <http://education.costhelper.com/optometry.html> (just tuition in optometry schools can run from \$42,000 to \$173,600 for the four-year program) (last viewed September 13, 2016).

B. Rafferty, O.D., states on the NBEO website that its “mission is to protect the public by accurately assessing the competence of practicing optometrists.”⁶

15. The NBEO further states on its website, where one must go to register and pay for required NBEO examinations, that the NBEO gathers, uses, and shares the personal information (in the context of this case, the SPI) of its test-takers.⁷ The website also states that the NBEO “may share segments of your personal information with our affiliated organizations to complete a transaction you specifically request. The information we share are name, address, last 4-digits of social security number, oe tracker number, birth year, scores, and graduation year.”⁸ While the NBEO does not state that it voluntarily shares the full Social Security number of its test-takers, it does collect the full Social Security number from such individuals (and did so from Plaintiff). This information is sufficient to apply for a credit card and other financial products.

16. On its website, the NBEO acknowledges the sensitivity of this information, stating in bold caps that “**THE NBEO TAKES THE PRIVACY AND SECURITY OF OUR CANDIDATES VERY SERIOUSLY. WE PROVIDE THIS ONLINE PRIVACY AND SECURITY STATEMENT BECAUSE YOU HAVE A RIGHT TO KNOW WHAT INFORMATION WE COLLECT, HOW IT IS PROTECTED, AND HOW IT IS USED.**”⁹

The website further assures test-takers that the NBEO “has implemented a variety of encryption and security technologies and procedures to protect information stored in our computer systems from unauthorized access” and uses “128-bit encryption technology and Secure Socket Layers (“SSL”) in all areas where your personal and account information is required. Our Web site is

⁶ <http://www.optometry.org/president.cfm> (last viewed September 13, 2016).

⁷ <http://www.optometry.org/privacy.cfm> (last viewed September 13, 2016).

⁸ *Id.*

⁹ *Id.*

certified by VeriSign, which verifies that our Web site is authentic and that we use SSL security.”¹⁰

17. However, in spite of the NBEO’s claims that it takes security of SPI seriously, it has failed to do so. As one example of this failure, if one has lost their NBEO password, the individual can access their account by entering the last six digits of their Social Security number.

18. Security experts have pointed out that Social Security numbers “were never intended to be secure,” and in fact, have been assigned largely based on a geographical and sequential system.¹¹

19. As a result, security experts routinely advise people to never use any part of their Social Security number as a password or PIN code.¹²

The Data Breach

20. At some time before July 23, 2016, an unauthorized hacker breached the NBEO database of previous test-takers and stole the SPI of an unknown number of people whose SPI was stored by the NBEO, including Plaintiff and members of the Class.

21. This information included everything needed to fraudulently apply for a credit card, including names, Social Security numbers, and dates of birth.

22. On or around July 23, 2016, optometrists around the nation who had previously provided their SPI to the NBEO in exchange for being able to sit for required examinations

¹⁰ *Id.*

¹¹ http://www.slate.com/articles/technology/webhead/2009/07/no_you_cant_have_my_social_security_number.html (last viewed September 13, 2016).

¹² *See, e.g.*, <http://www.tomsguide.com/us/how-to-protect-social-security-number,news-18741.html> (last viewed September 13, 2016); <https://www.law.berkeley.edu/files/identitytheft.pdf> (last viewed September 13, 2016).

began noticing that fraudulent Chase Bank credit card accounts – in particular the Chase Amazon credit card – were being applied for (either successfully or unsuccessfully) using their identities.

23. After discussing the unauthorized credit card applications on Facebook and through other channels, optometrists quickly discovered that the NBEO was the only possible common entity for all affected optometrists. Other potential sources of common information about the optometrists, including the American Optometric Association (AOA), the American Academy of Optometry (AAO), and the Associate of Schools and Colleges of Optometry (ASCO), have reported that they neither gather nor store Social Security numbers which are required to apply for a credit card.

24. By contrast, on information and belief, the NBEO not only gathers and stores Social Security numbers, credit card numbers, names, addresses and other SPI, but also inexplicably (and contrary to recommended security procedures) maintains such personal information, in some instances, for fifteen years or more.

25. The NBEO made no public statement about the breach or provided any warning to its test-taker customers until August 2, 2016, when it took to its Facebook page to flatly deny any responsibility for the breach by claiming (prematurely) that “[a]fter a thorough investigation and extensive discussions with involved parties, the NBEO has concluded that our information systems have NOT been compromised.”¹³

26. But just two days later, on August 4, 2016, the NBEO’s certitude as to its lack of culpability disintegrated, with the NBEO’s posting on its Facebook page and website a “revision” to its prior statement that “in light of the recent frauds, the NBEO has decided further to investigate whether personal data was stolen from our information systems to support the

¹³ https://www.facebook.com/NationalBoard/?hc_ref=NEWSFEED&fref=nf.

perpetrators' fraud on individuals and Chase."¹⁴ Such investigation would be commenced with "the assistance of counsel and a nationally-known cybersecurity firm" and would "evaluate whether, and if so how and to what extent, our systems were compromised in connection with the fraud and in any event, to plan further safeguards."¹⁵

27. In the more than a month since then the NBEO has only provided a single additional "update" on its website and Facebook page on August 25, 2016. The update informed the public that the NBEO's investigation was ongoing but that so far the investigation "does not establish whether an intrusion in fact occurred. Collection and technical analysis is therefore continuing, involving still more data, both current and retrospective."¹⁶ The NBEO certainly provided affected test-takers little comfort when it further informed them that "[d]epending on what that inquiry reveals and when, it could take a number of additional weeks to complete. If at any juncture, however, the inquiry establishes that NBEO's systems were breached, we will promptly notify affected parties as the law requires and undertake other security measures as appropriate."¹⁷

28. Despite now being aware of this issue for over a month, the NBEO still has not individually notified Plaintiff, nor upon information and belief the affected test-takers, that it has commenced an investigation into the data breach, that its database of SPI was hacked, or that numerous former registrants with the NBEO have reported similar or identical fraudulent activity. As a result of this delay many members of the Class are and will remain unaware that their SPI has been stolen and will not be able to take any steps to protect their finances and

¹⁴ *Id.*; see also <http://www.optometry.org/>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

personal information against hackers who possess the SPI or may later receive it from the original hackers.

Facts Specific to Plaintiff

29. Plaintiff is a member of a group of optometrists on Facebook called “ODs on Facebook” that first noticed the unauthorized credit applications shortly after they began occurring.

30. After becoming aware of this breach of SPI data provided to the NBEO, Plaintiff attempted to prevent the misuse of her SPI by placing a fraud alert with the credit reporting agency Transunion, which Transunion stated would be automatically forwarded to the other two major credit reporting agencies Equifax and Experian.

31. Despite these efforts, on August 26, 2016, an application for a Chase Amazon card in Plaintiff’s name was placed by an unknown individual. The application was automatically denied due to the fraud alert created by Plaintiff.

32. Plaintiff did not become aware of this until on or about August 27, 2016, when a credit monitoring service informed her that her credit score had decreased 11 points between August 23, 2016 and August 31, 2016. This decrease was due to the application made under her name on August 26, 2016. Plaintiff had been monitoring her credit score daily since learning about the NBEO breach.

33. On or about September 2, 2016, Plaintiff received a letter from Chase dated August 31, 2016, notifying her of steps to be taken to protect personal information that may have been compromised but not specifically stating that any such compromise had occurred.

34. Plaintiff then contacted Chase on or about September 6, 2016, to inquire about the letter and whether any attempt had been made to apply for a Chase card in her name. The Chase

representative informed Plaintiff that an application had been made in her name for a Chase Amazon card on August 26, 2016, and that the applicant for the Chase card had used Plaintiff's correct name, address, social security number and Plaintiff's Mother's maiden name in completing the application.

35. Plaintiff was also informed that it would take approximately 60 days to reverse the decrease in her credit score stemming from the fraudulent application. Plaintiff must also send certified letters to Chase, the major credit reporting companies, and others to inform them of this unauthorized event. Prior to sending these letters Plaintiff will have to spend several weeks acquiring the necessary documentation, including a police report. Plaintiff has begun this laborious process.

36. Plaintiff has paid the NBEO approximately \$2,500 in exchange for being able to sit for examinations that she was required to take in order to complete her licensure as an Optometrist. Plaintiff provided SPI to the NBEO with the expectation that the NBEO would maintain her highly sensitive information with an appropriate level of security.

37. As detailed herein, Plaintiff has suffered and will likely continue to suffer due to the NBEO's failure to securely maintain her SPI.

The Effect of the Data Breach on Plaintiff and the Class

38. The negative ramifications of the NBEO's failure to protect the SPI of its test-takers are widespread. In addition to the fraudulent credit card applications outlined above, identity thieves can use the social security numbers, dates of birth, and physical addresses to perpetrate a wide variety of crimes, including tax fraud. The IRS will direct-deposit the refund to the bank account or prepaid debit card (which are virtually untraceable) provided by the fraudster.

39. According to the IRS, tax-refund fraud is expected to account for \$21 billion in 2016, up from \$6.5 billion two years ago. One of the primary reasons for this rapid growth is that it only takes a name, date of birth and social security number to file a fraudulent return, and the fraud is typically not detected until after the fraudulent refund has been disbursed and the criminals have long disappeared.

40. The stolen SPI also permits identity thieves to commit other types of fraud including taking out loans in the victim's name, obtaining a driver's license or identification card in the victim's name but with another's picture, using the victim's information to obtain government benefits, changing immigration status using the victim's name, or even giving false information to police during an arrest.

41. The U.S. Social Security Administration ("SSA") warns that:

Identity theft is one of the fastest growing crimes in America. A dishonest person who has your Social Security number can use it to get other personal information about you. Identity thieves can use your number and your good credit to apply for more credit in your name. Then, they use the credit cards and don't pay the bills. You may not find out that someone is using your number until you're turned down for credit, or you begin to get calls from unknown creditors demanding payment for items you never bought.¹⁸

42. Despite the meteoric growth of identify fraud in the U.S., the SSA does not permit individuals to obtain a new Social Security number until there is evidence of ongoing problems due to misuse of the Social Security number. Even then, the SSA recognizes that "a new number probably will not solve all your problems. This is because other governmental agencies (such as the IRS and state motor vehicle agencies) and private businesses (such as banks and credit reporting companies) will have records under your old number. Along with other personal

¹⁸ *Identity Theft And Your Social Security Number*, Social Security Administration (Dec. 2013), available at <http://www.ssa.gov/pubs/EN-05-10064.pdf> (last viewed September 13, 2016).

information, credit reporting companies use the number to identify your credit record. So using a new number will not guarantee you a fresh start.”¹⁹

43. In fact, a new Social Security number is substantially less effective where “other personal information, such as [the victim’s] name and address, remains the same” and for some victims, “a new number actually creates new problems. If the old credit information is not associated with [the victim’s] new number, the absence of any credit history under your new number may make it more difficult for [the victim] to get credit.”²⁰

44. As a result, Plaintiff and members of the Class now face a real and immediate risk of identity theft and other problems associated with the disclosure of their SSN, and will need to monitor, and continue to monitor, their credit and tax filings for an indefinite duration, potentially with the assistance of paid services.

45. The processes of discovering and dealing with the repercussions of identity theft are time consuming and difficult. The Bureau of Justice Statistics found that “among victims who had personal information used for fraudulent purposes, 29% spent a month or more resolving problems.”²¹

46. Additionally, there is commonly lag time between when harm occurs and when it is discovered, and also between when personal information is stolen and when it is used. According to the U.S. Government Accountability Office, which conducted a study regarding data breaches:

¹⁹ *Id.*

²⁰ *Id.*

²¹ Erika Harrell and Lynn Langton, *Victims of Identity Theft, 2012*, (Bureau of Justice Statistics Dec. 2013), available at <http://www.bjs.gov/content/pub/pdf/vit12.pdf> (last viewed September 13, 2016).

[L]aw enforcement officials told us that in some cases, stolen data may be held for up to a year or more before being used to commit identity theft. Further, once stolen data have been sold or posted on the Web, fraudulent use of that information may continue for years. As a result, studies that attempt to measure the harm resulting from data breaches cannot necessarily rule out all future harm.²²

47. There is a very strong probability that those impacted by the NBEO's failure to secure the SPI could be at risk of fraud and identity theft for extended periods of time.

48. As a result of the NBEO's negligent security practices, Plaintiff and the Class have been exposed to fraud and a heightened and imminent risk of fraud and identity theft. Plaintiff and the Class must now and in the future closely monitor their financial accounts to guard against identity theft and tax fraud. Plaintiff and the Class may be faced with fraudulent debt, or incur costs for, among other things, paying monthly or annual fees for identity theft and credit monitoring services, obtaining credit reports, credit freezes, and other protective measures to deter, detect, and mitigate the risk of identity theft and fraud. Some, like Plaintiff, have already incurred costs in doing so.

CLASS ACTION ALLEGATIONS

49. Plaintiff brings this action on behalf of herself and as a class action under Federal Rules of Civil Procedure 23(a), (b)(2) and (b)(3), seeking damages and equitable relief on behalf of the following Class:

All current and former NBEO test-takers in the United States whose SPI was accessed and/or compromised by unauthorized individuals as part of the data breach at issue in this litigation.

50. Excluded from the Class are Defendant, any parent, affiliate, or subsidiary of Defendant; any entity in which Defendant has a controlling interest; any of Defendant's officers

²² U.S. Government Accountability Office, GAO Report to Congressional Requesters, *Data Breaches Are Frequent, but Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown* (June 2007), available at <http://www.gao.gov/new.items/d07737.pdf> (last viewed September 13, 2016).

or directors; any successor or assign of Defendant. Also excluded are any Judge or court personnel assigned to this case and members of their immediate families.

51. The Class is so numerous that joinder of all members is impracticable. While Plaintiff does not know the exact number of the members of the Class, Plaintiff believes it contains tens of thousands of members.

52. Common questions of law and fact exist as to all members of the Class. Such questions of law and fact common to the Class include, but are not limited to:

- (a) Whether Defendant engaged in the wrongful conduct alleged herein;
- (b) Whether Defendant owed a duty to Plaintiff and members of the Class to adequately protect their SPI;
- (c) Whether Defendant breached its duty to adequately protect the SPI of Plaintiff and members of the Class;
- (d) Whether Defendant should have known that its data systems and processes were vulnerable to attack and taken sufficient steps to prevent such attack;
- (e) Whether Defendant's conduct, including its failure to act, was the proximate cause of, or resulted in, the breach of its database containing SPI;
- (f) Whether Plaintiff and members of the Class suffered legally cognizable damages as a result of Defendant's conduct and are entitled to recover damages;
- (g) Whether Plaintiff and members of the Class are entitled to equitable relief.

53. Plaintiff's claims are typical of the claims of the members of the Class, and Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff and all members of the Class are similarly affected by Defendant's wrongful conduct in that their information was exposed to unauthorized users in violation of federal, state and common law.

54. Plaintiff's claims arise out of the same common course of conduct giving rise to the claims of the other members of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of the other members of the Class. Plaintiff is represented by counsel who are competent and experienced in the prosecution of security breach and class action litigation.

55. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

56. Class action treatment is a superior method for the fair and efficient adjudication of the controversy, in that, among other things, such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons or entities with a method for obtaining redress for claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in management of this class action.

57. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendant.

FIRST CLAIM FOR RELIEF
Negligence
(On behalf of Plaintiff and the Class)

58. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

59. Defendant solicited and took possession of the SPI of Plaintiff and the Class and had a duty to exercise reasonable care in securing that information from unauthorized access or

disclosure. Defendant also had a duty to timely notify Plaintiff and the Class that their SPI had been or may have been stolen. Defendant further had a duty to destroy the SPI of Plaintiff and members of the Class within an appropriate amount of time after it was no longer required by the NBEO in order to mitigate the risk of such non-essential SPI being compromised in a data breach.

60. Defendant's duties arose from its relationship to Plaintiff and Class members and from industry custom.

61. Defendant, through its actions and/or failures to act, unlawfully breached duties to Plaintiff and Class members by failing to implement standard industry protocols and to exercise reasonable care to secure and keep private the SPI entrusted to it.

62. Defendant's failure to exercise reasonable care in safeguarding SPI by adopting appropriate security measures, including encryption, was the direct and proximate cause of Plaintiff's and Class members' SPI being accessed and stolen through the data breach.

63. As a result of Defendant's breach of duties, Plaintiff and members of the Class have been injured and have suffered damages, including having credit card accounts fraudulently applied for in their names, lowered credit scores, and being required to expend time and money to prospectively and/or remedially address the harm created by the data breach.

SECOND CLAIM FOR RELIEF
Breach of Contract
(On behalf of Plaintiff and the Class)

64. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

65. The NBEO's Privacy Statement provides that the company "has implemented a variety of encryption and security technologies and procedures to protect information stored in our computer systems from unauthorized access. We reveal only the last 4 digits of your credit

card number when confirming orders as well as maintaining procedural safeguards that restrict your personal information to employees (or individuals working on our behalf and under confidentiality agreements) who need to know your personal information in order to provide products and/or services that you request.”²³ The NBEO also purports to “use 128-bit encryption technology and Secure Socket Layers (“SSL”) in all areas where your personal and account information is required. Our Web site is certified by VeriSign, which verifies that our Web site is authentic and that we use SSL security.”²⁴

66. These privacy policies constitute an agreement between (1) the NBEO and (2) its test-takers including Plaintiff and the Class. In exchange for this agreement and others, Plaintiff and members of the Class paid the NBEO thousands of dollars for the ability to take examinations administered by the NBEO and required in order to become an optometrist.

67. Plaintiff and members of the Class fully performed their obligations under their agreements with the NBEO.

68. The NBEO has breached its agreement with Plaintiff and members of the Class to protect their SPI by (1) failing to implement security measures designed to prevent this attack; (2) failing to employ sufficient security protocols to detect the unauthorized network activity, (3) failing to maintain basic security measures such as complex data encryption and separate storage of Social Security numbers so that if data were stolen it would be unreadable or unusable; and (4) failing to provide timely and accurate notice to Plaintiff and members of the Class that their SPI was accessed and compromised through the data breach.

69. Plaintiff and members of the Class have been damaged by the NBEO’s breach of its obligations because, *inter alia*, their SPI has been compromised and they have either had their

²³ <http://www.optometry.org/privacy.cfm>.

²⁴ *Id.*

identities stolen, or are at increased risk of future identity theft. Plaintiff and members of the Class have also been deprived of the value of their SPI and have lost money and property as a result of NBEO's unlawful and unfair conduct.

THIRD CLAIM FOR RELIEF
Breach of Implied Contract
(On behalf of Plaintiff and the Class)

70. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

71. Plaintiff and members of the Class reasonably believed that in providing SPI to the NBEO, as well as fees, in exchange for the ability to sit for required examinations, their SPI would be protected with adequate security measures. This transaction amounts to an implied agreement with the NBEO that the SPI provided will be safeguarded as one of the obligations of the NBEO.

72. The NBEO solicited the SPI in exchange for allowing Plaintiff and members of the Class to sit for the required examinations. Plaintiff and the Class accepted the NBEO's offer and provided their SPI as well as paid for multiple required examinations.

73. This implied agreement was mutually agreed to between Plaintiff and members of the Class on one hand, and the NBEO on the other.

74. Plaintiff and members of the Class would not have provided the NBEO with their SPI in the absence of the implied agreement that the NBEO would protect such information.

75. Plaintiff and members of the Class fully performed their obligations under their implied agreements with the NBEO.

76. The NBEO has breached its implied agreement with Plaintiff and members of the Class to protect their SPI by (1) failing to implement security measures designed to prevent this attack; (2) failing to employ sufficient security protocols to detect the unauthorized network

activity; (3) failing to maintain basic security measures such as complex data encryption and separate storage of Social Security numbers so that if data were stolen it would be unreadable or unusable; and (4) failing to provide timely and accurate notice to Plaintiff and members of the Class that their SPI was accessed and compromised through the data breach. The NBEO's failure to properly secure the SPI and notify Plaintiff and members of the Class about the breach is the direct and proximate cause of the damages suffered by Plaintiff and the Class.

77. Plaintiff and members of the Class have been damaged by the NBEO's breach of its implied agreement because, *inter alia*, their SPI has been compromised and they have either had their identities stolen, or are at increased risk of future identity theft. Plaintiff and members of the Class have also been deprived of the value of their SPI and have lost money and property as a result of NBEO's unlawful and unfair conduct.

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

78. Plaintiff incorporates all prior paragraphs as though fully set forth herein.

79. Plaintiff and members of the Class enriched Defendant by entrusting their SPI to Defendant, as well as making monetary payments, in exchange for the ability to sit for required examinations administered by Defendant.

80. Defendant appreciated, accepted and retained the benefit bestowed upon it under inequitable and unjust circumstances arising from Defendant's conduct toward Plaintiff and Class Members as described herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the Class, respectfully seeks from the Court the following relief:

- a. Certification of the Class as requested herein;
- b. Appointment of Plaintiff as Class representative and her undersigned counsel as Class counsel;
- c. Award Plaintiff and members of the proposed Class damages;
- d. Award Plaintiff and members of the proposed Class equitable, injunctive and declaratory relief, including the enjoining of Defendant's insufficient data protection practices at issue herein and Defendant's continuation of its unlawful business practices as alleged herein;
- e. An order declaring that Defendant's acts and practices with respect to the safekeeping of SPI are negligent;
- f. Award Plaintiff and members of the proposed Class pre-judgment and post-judgment interest as permitted by law;
- g. Award Plaintiff and members of the proposed Class reasonable attorney fees and costs of suit, including expert witness fees; and
- h. Award Plaintiff and members of the proposed Class any further relief the Court deems proper.

JURY DEMAND

Plaintiff, on behalf of herself and the Class of all others similarly situated, hereby demands a trial by jury on all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Dated: September 13, 2016

Respectfully Submitted,

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Attorneys for Plaintiff and the Putative Class

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Nicole Mizrahi

(b) County of Residence of First Listed Plaintiff Kings (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See Attachment

DEFENDANTS

National Board of Examiners in Optometry, Inc.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. Section 1332(d)(2)

Brief description of cause: Negligence, Breach of Contract, Unjust Enrichment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE James K. Bredar DOCKET NUMBER 16-cv-03025-JKB

DATE 09/13/2016 SIGNATURE OF ATTORNEY OF RECORD /s/ Donald J. Enright

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

ATTACHMENT 1

Attorneys for Plaintiff Nicole Mizrahi

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Attorneys for Plaintiff and the Putative Class

Case 1:16-cv-03146-JKB Document 1-1 Filed 09/13/16 Page 3 of 3
INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: