

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

WINES, VINES AND CORKS, LLC,

Plaintiff,

v.

FIRST NATIONAL OF NEBRASKA,  
INC., FIRST NATIONAL BANK OF  
OMAHA; FIRST NATIONAL  
MERCHANT SOLUTIONS, LLC; and  
FRONTSTREAM PAYMENTS, INC.

Defendants.

CASE NO.: 8:14-CV-00082

**Defendant First National  
Merchant Solutions, LLC's (n/k/a  
TSYS Merchant Solutions, LLC)  
Brief in Support of Motion to  
Dismiss Class Action Complaint**

**INTRODUCTION**

Defendant First National Merchant Solutions, LLC (n/k/a TSYS Merchant Solutions, LLC) (hereinafter "TMS") respectfully requests that this Court dismiss Plaintiff Wines, Vines and Corks, LLC's ("Plaintiff") Class Action Complaint (the "Complaint") under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Initially, Plaintiff fails to adequately plead any plausible causes of action. Each of the four counts in the Complaint rests on the conclusory claim that there was an unspecified data breach at Defendants' premises. (Compl. ¶ 11). Plaintiff does not allege any factual content to support the conclusory data breach allegation—in fact, the predicate allegation for the entire Complaint is alleged on "information and belief." Plaintiff's total failure to provide any factual content to support this central, and yet conclusory, allegation means that all four claims should be dismissed for failure to state a claim.

Counts II through IV should also be dismissed because they are barred by the economic loss rule. These tort claims are barred by the economic loss rule because the only alleged damage is economic and the duty underlying the alleged torts arises from the parties' contractual relationship.

Plaintiff's Nebraska Consumer Protection Act ("NCPA") claim, its Deceptive Trade Practices Act ("DTPA") claim, and its negligence claim, all fail for additional reasons – including that Plaintiff has failed to allege enough factual content to make it plausible that Plaintiff could meet the required elements of those claims. For these reasons, which are more fully set forth below, TMS respectfully requests that this Court dismiss the Complaint.

### **BACKGROUND**

Plaintiff's Complaint rests on allegations that Plaintiff was damaged by "Unauthorized Fees" charged to its account for transactions processed with "account information" gained by unnamed persons through an alleged "data security breach . . . at Defendants' premises." (Compl. ¶¶ 11, 14). Plaintiff uses this unspecified data breach as the basis for four causes of action—breach of contract, violation of the NCPA, violation of the DTPA, and negligence. (Compl. ¶¶ 27, 32, 35, 42, 44, 45, 48, 49, 50).

Plaintiff describes the contract at issue as one wherein Defendants agreed to "perform credit card processing in exchange for fees" for Plaintiff. (Compl. ¶ 30). Pursuant to the contract, Plaintiff claims it set up a bank account from which Defendants could withdraw properly authorized fees, not

fees for unauthorized transactions. (Compl. ¶¶ 10, 17). For its breach of contract claim, Plaintiff alleges that Defendants breached the contract(s) at issue by charging fees for certain “Unauthorized Transactions.” (Compl. ¶ 32).

Each of the remaining causes of action is styled as a tort claim, but the remaining claims all relate to matters covered by the contract—the charging of fees and processing of information. Plaintiff summarily claims that Defendants violated the NCPA and the DTPA by withdrawing unauthorized fees, causing Plaintiff “financial injury.” (Compl. ¶¶ 37, 39, 45, 46). Plaintiff’s negligence claim similarly rests on Defendants’ alleged breach of the alleged duty to properly process such information and fees, two items which the Plaintiff admits are covered by the contract at issue. (Compl. ¶¶ 49-51).

### STANDARD

A court must dismiss a complaint that does not plead a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A complaint fails to plead a plausible claim for relief when the well-pled facts therein do not show “that the pleader is entitled to relief.” *Id.* at 679. “[M]ere conclusory statements” and “[t]hreadbare recitals of the elements of a cause of action” are not well-pled facts. *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Although for purposes of a motion to dismiss, [the court] must take all of the factual allegations in a complaint as true, [the court is]

not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* (quoting *Twombly*, 550 U.S. at 555). In addition, when a complaint makes allegations of fraud, Rule 9(b) “requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story.” *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011).

## ARGUMENT

### I. **Plaintiff’s Complaint Is Completely Lacking In Any Factual Allegations To Support Its Bald Conclusions.**

One conclusory allegation underpins all of Plaintiff’s claims. That allegation is contained in Paragraph 11. Paragraph 11 claims that there was a data breach causing damage to Plaintiff. (Compl. ¶ 11). Each of Plaintiff’s claims relies on Paragraph 11 and the alleged data breach as the basis for damages. (Compl. ¶¶ 27, 32, 44, 45, 49, 50). The remaining allegations in the Complaint are insufficient to support Plaintiff’s claims. Because Plaintiff’s unsupported and conclusory allegations do not meet the pleading requirements of either Rule 8 or Rule 9(b), the Court should dismiss the entire Complaint.

#### A. **Plaintiff’s Complaint cannot survive when it is predicated on a bare conclusion pled on information and belief.**

The requirements of a well-pled complaint are set forth under Rule 8 of the Federal Rules of Civil Procedure. As explored in *Iqbal*, Rule 8 requires that each claim for relief be “plausible on its face.” *Iqbal*, 556 U.S. at 678. This means the Complaint must have enough “factual content” that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (emphasis added). Factual content does not include conclusory statements. *See id.* Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Id.* at 678-79.

The Court need look no further than *Twombly* for a case where a bald conclusion of conspiracy, without any supporting factual content, was found insufficient to state a claim. *Twombly*, 550 U.S. at 555. Similarly, the *Iqbal* Court found that allegations that Attorney General Ashcroft was the principal architect of an invidious policy to discriminate against the plaintiff and that FBI Director Mueller was instrumental in adopting and executing that policy were nothing but conclusions, which were insufficient to support the plaintiff’s claims. *Iqbal*, 556 U.S. at 678. Just as in *Twombly* and *Iqbal*, Plaintiff’s Complaint here is only an “unadorned, the-defendant-unlawfully-harmed-me accusation” based on nothing more than a conclusory allegation that is not entitled to any presumptive veracity.

Each “Count” in the Complaint rests on Plaintiff’s inadequate, conclusory “data breach” allegation. (Compl. ¶¶ 29, 32, 35, 37, 42, 44, 45, 48, and 49). That allegation is woven throughout the entire Complaint and provides the basis for each “Count.” Count I, the Breach of Contract claim, states that Defendants breached the “contracts with Plaintiff and other Class members” by charging fees for allegedly unauthorized transactions that purportedly resulted from the alleged data breach. (Compl. ¶¶ 32, 11, 14).

Count II, the Nebraska Consumer Protection Act (“NCPA”) claim, states that the withdrawal of fees caused by the alleged data breach is an “unfair or deceptive” act in violation of the NCPA. (Compl. ¶¶ 37, 11, 14). Count III, the DTPA claim, repetitively states that the fee arrangements and the withdrawal of fees were representations and fraudulent acts which violated the DTPA. (Compl. ¶¶ 44, 45, 11, 14). Finally, Count IV, Plaintiff’s negligence claim, states that the data breach was a breach of Defendants’ duty and promises regarding the processing of information. (Compl. ¶¶ 48-51). Count IV has the further allegation that “Plaintiff and the Class member [*sic*] had their account information stolen.” (Compl. ¶ 52). This is a further example of a bald conclusory statement unsupported by any factual allegations. Plaintiff does not allege any facts to support any of its conclusions, such as facts to show what information was stolen, from whom, under what circumstances, who stole such information, or even how Plaintiff knows such “theft” occurred. (*See generally* Compl.).

Recently, the United States Court of Appeals for the Eighth Circuit addressed an appeal from a decision dismissing a similar class action complaint that was predicated on nonspecific allegations of a data breach—one, like the Complaint here, that involved allegations in tort and of fraudulent activity. *E-Shops Corp. v. U.S. Bank Nat’l Ass’n*, 678 F.3d 659, 665 (8th Cir. 2012). The Eighth Circuit affirmed the order of dismissal, concluding that a party alleging a data breach must describe the

circumstances surrounding the data breach, particularly when allegations of fraud are also involved. *See id.* Just as the plaintiff in *E-Shops* failed to provide any “factual allegations describing the circumstances surrounding the alleged data breach,” so too does Plaintiff. *Id.* Here, Plaintiff fails to describe how the data breach occurred, when it occurred, who was affected by the data breach, who perpetrated the data breach, or any other fact that might support an inference that a data breach of its information occurred that resulted in some harm to Plaintiff. (*See generally*, Compl.). In fact, Plaintiff’s data breach allegation is pled “[o]n information and belief.” (Compl. ¶ 11).

Plaintiff simply makes conclusory claims that there was a data breach resulting in information taken to allow unauthorized transactions. More is required under the Federal Rules—specifically, there must be facts alleged to support *causation*. The federal rules require that a data breach claim “include allegations of a nexus between” the alleged data breach and the alleged harm “beyond allegations of time and sequence.” *See Resnick v. Avmed, Inc.*, 693 F.3d 1317, 1326 (11th Cir. 2012) (involving claims of data breach and identity theft). In other words, a plaintiff must plead facts showing a connection between any alleged data breach and Plaintiff’s claimed damages. *See id.* Plaintiff fails to allege any connection whatsoever in this case. Plaintiff simply alleges that there was a data breach. (Compl. ¶ 11).

Highlighting the factually deficient nature of the Complaint is the simple fact that the predicate allegations upon which the entire Complaint is based are summarily alleged “on information and belief.” (Compl. ¶¶ 11-14). While Rule 8 may allow pleading on information and belief in certain circumstances, it does not allow purely speculative and conclusory allegations to serve as the sole basis for relief. *Iqbal*, 556 U.S. at 678, 679. *Twombly* and *Iqbal* make clear that factual content is necessary to state a claim. Plaintiff does not provide any of that factual content. Plaintiff does not even allege *how* it knows that *Defendants* caused the purported data breach which forms the basis for its entire Complaint. Plaintiff has failed to provide a modicum of factual back-up for its statement regarding a “data breach,” and its Complaint should be dismissed. The doors of discovery should not be unlocked to Plaintiff based upon unfounded, inherently detrimental, and conclusory allegations of a “data breach.”

Another example of Plaintiff’s insufficient pleading is Plaintiff’s use, throughout the entire Complaint, of the collective word “Defendants.” (*See, e.g.*, Compl. ¶¶ 8, 9, 10, 11, 12, 13). Plaintiff makes no attempt to distinguish between the separate Defendants. (*See id.*). For example, Plaintiff claims that “Defendants” charged Plaintiff fees and that “Defendants” experienced a “data security breach” at their “premises.” (Compl. ¶¶ 10, 11, 15). Plaintiff claims, in conclusory fashion, that all defendants had a single “data security breach” at “premises” belonging to all of them. However, Defendants have

separate locations. As alleged in the Complaint, Defendant FrontStream Payments, Inc. is based in Tennessee, whereas the other defendants are based in Omaha, Nebraska. (Compl. ¶¶ 2-5). The blanket statements about all Defendants, present in each cause of action, are further evidence of Plaintiff's failure to plead a plausible claim.

**B. Plaintiff's conclusory allegations of fraud require dismissal of the DTPA claim.**

The DTPA claim should also be dismissed because Plaintiff did not plead its fraud claim under the DTPA with the required level of particularity. Fraud allegations are subject to heightened pleading standards under Rule 9(b), which "requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story." *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011). This requirement is "intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003).

Plaintiff's DTPA claim under Section 15 is a claim for fraud. (Compl. ¶ 45); NEB. REV. STAT. § 87-302(15) (Cum. Supp. 2012) (prohibiting the use of any scheme or device to "defraud by means of (i) Obtaining money or property by knowingly false or fraudulent pretenses, representations, or promises; or (ii) Selling, distributing, supplying, furnishing, or procuring any property for the purpose of furthering such scheme."). However, none of the nonspecific and conclusory allegations in the Complaint meet Rule 9(b)'s requirements.

Plaintiff merely alleges that fees were withdrawn in violation of the DTPA. (Compl. ¶ 45). The Complaint plainly does not even come close to alleging the who, what, when, where, why, how allegations that must be pled to support a fraud claim. (*See generally* Compl.). Thus, TMS respectfully requests that this Court dismiss Plaintiff's DTPA claim under section 15.

This failure to plead with particularity is even more acute here, given the incredibly detrimental impact such an allegation can have on businesses. Allegations of a "data breach" in a financial institution or an institution processing financial information are serious and have the potential to be incredibly detrimental to that institution's reputation with its consumers and business partners. Thus, Rule 9(b)'s requirement that Plaintiff plead the "who, what, when, where, and how" of the data breach applies with particular force in this case and Plaintiff's total failure to meet those pleading requirements necessitates the dismissal of Plaintiff's Complaint. *See Summerhill*, 637 F.3d at 880.

## **II. The Economic Loss Rule Bars Plaintiff's Tort Claims.**

Counts II through IV of the Complaint are all tort claims that are barred by the economic loss rule. The economic loss rule bars tort claims that are founded in contract law. Simply put, Plaintiff has conflated contract and tort law, and has expressly done so by incorporating the breach of contract claim into each of its tort claims. (Compl. ¶¶ 35, 42, 48). Plaintiff is attempting to dress up a mere breach of contract claim as a variety of tort

claims. However, Plaintiff has “not alleged any facts showing that” its tort claims involve “anything more than an ordinary breach of contract,” and so the tort claims must be dismissed. *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp.2d 1082, 1087 (D. Neb. 2004) (Bataillon, J.) (dismissing NCPA claim).

The economic loss rule is a “judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.” *Lesiak v. Central Valley Ag Coop., Inc.*, 283 Neb. 103, 118-19, 808 N.W.2d 67, 80 (2012); *see, e.g., E3 Biofuels-Mead, LLC v. Skinner Tank Co.*, Case No. 8:06CV706, 2014 U.S. Dist. LEXIS 12302, at \*10-12 (D. Neb. Jan. 30, 2014) (recognizing the Nebraska Supreme Court’s articulation of the economic loss rule in *Lesiak*). “[T]he purpose of the doctrine is to preserve the distinction between tort law and contract law.” *Id.* 283 Neb. at 122, 808 N.W.2d at 82. Tort actions are barred when “only economic loss is suffered and the alleged breach is of only a contractual duty” because “the action should be in contract rather than in tort.” *Id.* 283 Neb. at 123, 808 N.W.2d at 83. A contractual duty is “a duty which arises only because the parties entered into a contract.” *Id.* 283 Neb. at 122, 808 N.W.2d at 82.

Here, each of Plaintiff’s claims meet both requirements of the economic loss rule. Each claim (1) describes only economic loss and (2) alleges a duty or breach which is only based in contract. Regarding economic loss, each tort claim recites that Plaintiff is seeking redress for “financial injury” or

“financial damage.” (Compl. ¶¶ 39, 46, 51, 52). Nowhere in the Complaint does Plaintiff provide factual allegations of non-financial damage. (*See generally* Compl.).

As to the second requirement of the economic loss rule, each alleged tort duty is based on the alleged contractual relationship between Plaintiff and Defendants. Plaintiff describes the contract as one which dictates the terms of when Plaintiff (and the other Class members) must pay fees for credit card processing. (Compl. ¶ 30). The contract also allegedly states when Defendants are permitted to charge fees to Plaintiff (Compl. ¶ 9) and when Defendants may withdraw those fees from Plaintiff’s established bank account. (Compl. ¶ 10). Plaintiff claims Defendants breached that contract (or contracts) by charging fees for transactions caused by the supposed data breach. (Compl. ¶ 32). Furthermore, Plaintiff alleges that Defendants cannot charge fees for “Unauthorized Transactions” because of the contract. (Compl. ¶ 17). Based on Plaintiff’s own allegations, the contract (or contracts) controls when Defendants could withdraw fees or charge fees and process transactions. (Compl. ¶¶ 9, 10, 17, 30, and 32). Any tort claim stating an alleged duty not to withdraw or charge fees in a particular manner or a duty relating to processing information is a duty arising from the contract.

Separately with regard to the allegations of each tort claim, Plaintiff pled that Defendants’ duty was not to withdraw fees for “Unauthorized

Transactions” and to process credit card information properly. (Compl. ¶¶ 37, 38, 44, 45, 49, 50). This duty is clearly, by Plaintiff’s own admissions in the Complaint, a “contractual duty” under *Lesiak*. Count II (the NCPA claim) alleges that the duty was not to withdraw fees for “Unauthorized Transactions” and not to keep those fees. (Compl. ¶ 37). Count III claims the duty arose from Defendants’ alleged representations in “its Agreements with Plaintiff and the other Class members” and from the withdrawal of fees for “Unauthorized Transactions.” (Compl. ¶¶ 44-45). Count IV claims there was a duty to “secure credit card processing information” and that the Unauthorized Transactions were a violation of that duty. (Compl. ¶¶ 49-52). By Plaintiff’s own admission, the duties are all contractual. (Compl. ¶¶ 9, 10, 17, 30, and 32).

The economic loss rule bars Plaintiff’s tort claims. The rule separates tort claims from contractual claims, and Plaintiff is attempting to intertwine the two. Therefore, TMS respectfully requests that this Court dismiss Counts II through IV of Plaintiff’s Complaint with prejudice.

### **III. Plaintiff’s Tort Claims Should Be Dismissed Even If the Economic Loss Rule Did Not Apply.**

Plaintiff’s tort claims each fail in any event. The NCPA claim is an antitrust claim, and Plaintiff has come nowhere near alleging the facts necessary for an antitrust claim. The DTPA claim is subject to dismissal for the additional reasons that it seeks monetary damages, which are unavailable, and that injunctive relief is not available because Plaintiff

makes no allegations regarding future harm. The negligence claim fails for all the various reasons already articulated throughout this Brief.

**A. The NCPA claim is essentially an antitrust claim that cannot be plausibly pled.**

The NCPA claim must be dismissed because Plaintiff does not allege facts constituting a violation of the NCPA. Plaintiff claims that Defendants violated sections 1602 and 1603 of the NCPA by withdrawing fees for unauthorized transactions and refusing to refund those fees. (Compl. ¶ 37). Section 1602 states that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.” NEB. REV. STAT. § 59-1602 (Reissue 2010). Section 1603 of the NCPA states, “Any contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful.” NEB. REV. STAT. § 59-1603 (Reissue 2010). These sections are antitrust in nature, and § 59-1603 is Nebraska’s “version of the Sherman Antitrust Act.” *State ex rel. Douglas v. Associated Grocers of Neb. Coop., Inc.*, 214 Neb. 79, 83, 332 N.W.2d 690, 693 (1983); *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004) (Bataillon, J.).

Plaintiff’s conclusory allegation that Defendants’ conduct “constitutes a violation” of section 1603 (Compl. ¶ 38) is not enough to meet the pleading requirements set forth in *Twombly*, which was itself an antitrust case. *Twombly*, 550 U.S. at 556 (explaining that stating a claim under the Sherman Act “requires a complaint with enough factual matter (taken as

true) to suggest that an agreement was made.”). There are simply no allegations explaining how Defendants’ alleged charging of fees to Plaintiff constitutes a “restraint of trade” or what “contract, combination, . . . or conspiracy” exists between Defendants. There are absolutely no allegations that bring this case within the antitrust laws—no allegations that Defendants conspired to fix prices, or rig bids, or anything of that nature. (*See generally* Compl.).

What is more, Plaintiff has not alleged any facts to plausibly suggest its claim involves anything more than an alleged ordinary breach of contract. *See Triple 7, Inc.*, 338 F. Supp. 2d at 1087. Specifically, under the NCPA, “a plaintiff must show aggravating factors indicating that the act in question is more than a mere breach of contract.” *Id.* Because Plaintiff has only alleged an ordinary breach of contract, Plaintiff is also not capable of establishing that Defendants’ actions may have “directly or indirectly affect[ed] the people of the State of Nebraska,” as required by the NCPA. NEB. REV. STAT. § 59-1601(2) (Reissue 2010). Although Plaintiff makes a conclusory allegation that Defendants’ alleged violations of the NCPA “have an impact of great or general importance on the public,” this unsupported allegation is not enough. *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 555) (making clear that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). Under the NCPA, the allegedly unfair or deceptive act or practice must have “an impact on consumers at

large” and cannot merely be concerned with “isolated transactions between individuals.” *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 684, 605 N.W.2d 136, 142 (2000).

Indeed, Plaintiff’s NCPA allegations constitute nothing more than an alleged breach of contract claim with no alleged impact on the general public. Plaintiff is simply attempting to set forth as many causes of action as possible for a supposed data breach, without any factual grounds to do so. This Court should reject Plaintiff’s attempt and dismiss the NCPA claim with prejudice.

**B. The DTPA claim fails because the DTPA does not create a private cause of action for damages and Plaintiff does not properly allege future harm, as required to support injunctive relief.**

Plaintiff attempts to bring a claim for damages under the DTPA, which is impossible. Plaintiff’s claim for injunctive relief under the DTPA further fails because Plaintiff does not allege any potential future harm to be enjoined. Finally, the Complaint does not allege facts that make it plausible that Plaintiff can meet the elements of a DTPA claim.

The DTPA allows a plaintiff to bring a cause of action only for injunctive relief. NEB. REV. STAT. § 87-303 (Cum. Supp. 2012). The DTPA does not provide a private right of action for damages. *Reinbrecht v. Walgreen Co.*, 16 Neb. App. 108, 113, 742 N.W.2d 243, 247 (Neb. Ct. App. 2007). For this reason, Plaintiff’s claim for damages under the DTPA should be dismissed with prejudice. (Compl. ¶ 47, p. 10 ¶ 8).

Additionally, Plaintiff's DTPA claim should be dismissed in its entirety because Plaintiff does not allege that Defendants' conduct is ongoing. Plaintiff's Complaint rests solely on an alleged past "data breach." (*See generally* Compl.) The DTPA "provides relief from future damage, not past damage." *Ugonwa Azike v. E-Loan, Inc.*, Case No. 8:09CV37, 2009 U.S. Dist. LEXIS 49666, at \*9 (D. Neb. Jun. 11, 2009); *Reinbrecht*, 16 Neb. App. at 113, 742 N.W.2d at 247. Because Plaintiff failed to plead the likelihood of future harm, the DTPA claim should be dismissed with prejudice. *See Ugonwa Azike*, 2009 U.S. Dist. LEXIS 49666, at \*9 (dismissing DTPA claim with prejudice because the plaintiff "asserts claims based on damages already incurred."). Put in most simple terms, if there are no allegations that Defendants are doing something that is subjecting Plaintiff to future damages, there is nothing to enjoin and the DTPA claim cannot survive.

Plaintiff also fails to allege non-conclusory facts to support its allegations that Defendants violated the DTPA sections cited in the Complaint. Plaintiff baldly alleges Defendants violated sections 5, 7, 9, and 15 of the DTPA. However, Plaintiff has failed to state a claim under any of those sections.

Sections 5 and 7 deal with representations of goods and services and are not applicable here. Section 5 of the DTPA makes it unlawful to represent "that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a

person has a sponsorship, approval, status, affiliation, or connection that he or she does not have.” NEB. REV. STAT. § 87-302(5) (Cum. Supp. 2012). Section 7 of the DTPA provides a cause of action when the defendant “[r]epresents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” NEB. REV. STAT. § 87-302(7) (Cum. Supp. 2012). Plaintiff does not allege that Defendants made any representations about the approval, quality, or grade of any goods or services. There are no allegations of “false advertising” or the like. Plaintiff’s claims all arise from the contract, and specifically, from Defendants’ alleged promises regarding the processing of transactions and what fees would be charged. No facts have been alleged that would support claims under either Section 5 or Section 7.

Likewise, no facts have been alleged to support a claim under Section 9. Section 9 states that it is a violation of the DTPA to “[a]dvertise[] goods or services with intent not to sell them as advertised or advertise[] the price in any manner calculated or tending to mislead or in any way deceive a person.” NEB. REV. STAT. § 87-302(9) (Cum. Supp. 2012). Plaintiff does not make any allegations relating to any advertising done by Defendants, let alone allege that Defendants engaged in any deceitful advertising.

As already addressed above, Section 15 of the DTPA is the fraud section. It prohibits someone from using any scheme or device to “defraud by means of (i) Obtaining money or property by knowingly false or fraudulent

pretenses, representations, or promises; or (ii) Selling, distributing, supplying, furnishing, or procuring any property for the purpose of furthering such scheme.” § 87-302(15). As explored in Section I, *supra*, Plaintiff’s Section 15 claim fails because the Complaint does not identify the “who, what, when, where, and how” of the alleged fraud. *See Summerhill*, 637 F.3d at 880.

Because (1) damages are not available under the DTPA; (2) Plaintiff has not alleged sufficient facts for injunctive relief; and (3) Plaintiff failed to state a claim under any section of the DTPA, TMS respectfully requests that this Court dismiss the DTPA claim with prejudice.

**C. The negligence claim has not been plausibly pled.**

The negligence claim (as well as the breach of contract claim) should be dismissed for the reasons expressed above in Section 1(A). As articulated throughout, the alleged duties that were allegedly breached all arise out of the alleged contract.

**CONCLUSION**

For the foregoing reasons, TMS respectfully requests that this Court grant its Motion to Dismiss and dismiss Plaintiff’s Complaint with prejudice.

Respectfully submitted this 18th day of April, 2014

FIRST NATIONAL MERCHANT SOLUTIONS,  
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LLC), Defendant

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### CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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## General Information

<b>Court</b>	United States District Court for the District of Nebraska; United States District Court for the District of Nebraska
<b>Nature of Suit</b>	Contract - Other[190]
<b>Docket Number</b>	8:14-cv-00082