UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL SCOTT GREEN, on behalf of himself and all others similarly situated,
Plaintiff,

v. **Case No. 24-C-1519**

OLYMPUS GROUP, INC.,
Defendant.

DECISION AND ORDER

Plaintiff Michael Scott Green commenced this proposed class action against Olympus Group, Inc. He alleges that Olympus is liable for failing to prevent a data breach that compromised the personally identifiable information of its employees. Before me now is Olympus's motion to dismiss certain counts of the complaint under Federal Rule of Civil Procedure 12(b)(6).

I. BACKGROUND

According to the allegations of the complaint, Olympus manufactures flags, mascots, and other custom printing projects. As part of its operations, Olympus collects and maintains the personally identifiable information of its current and former employees, including names, dates of birth, addresses, Social Security numbers, driver's license numbers, and passport numbers. Plaintiff alleges that he was required to provide this information to Olympus as a condition of his employment. Olympus, in turn, represented that it would take all steps reasonably necessary to safeguard its employees' information.

On June 21, 2024, Olympus discovered that it had become the victim of a ransomware attack. Plaintiff alleges that the perpetrators of the attack gained access to

the personally identifiable information of Olympus's current and former employees. The compromised data included Social Security numbers, driver's license numbers, and passport numbers. According to plaintiff, the cybercriminals have since published the exfiltrated information on the dark web, where it may be sold to identity thieves, hackers, and fraudsters. Plaintiff alleges that his personally identifiable information either has already been published on the dark web or will be published imminently. (Compl. ¶ 52.)

Olympus notified plaintiff that his name, driver's license number, passport number, and Social Security number were compromised in the data breach. Plaintiff alleges that, after receiving this notice, he began expending significant time and effort monitoring his financial accounts to protect himself from identity theft. (Compl. ¶ 54.) In addition, he commenced this suit and proposes to represent a class comprising all individuals in the United States whose data was compromised in the data breach. The suit contends that Olympus is liable to the affected individuals because it failed to follow Federal Trade Commission guidelines for data security and failed to follow industry best practices for safeguarding sensitive information. The complaint is organized into eight causes of action, seven of which raise legal theories under Wisconsin law: (1) negligence, (2) negligence per se, (3) breach of implied contract, (4) invasion of privacy, (5) unjust enrichment, (6) breach of fiduciary duty, and (7) violation of the Wisconsin Deceptive Trade Practices Act.[1]

[1] Plaintiff's eighth cause of action is entitled "declaratory judgment." Because a declaratory judgment is a remedy rather than a distinct legal theory, I have omitted it from the list of legal theories.

Olympus has filed a motion to dismiss for failure to state a claim that applies to all causes of action alleged in the complaint other than negligence. I address this motion below.

II. DISCUSSION

To avoid dismissal under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must, at a minimum, "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. In evaluating a motion to dismiss under Rule 12(b)(6), I must "accept the well-pleaded facts in the complaint as true"; however, "legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *McCauley v. City of Chicago,* 671 F.3d 611, 616 (7th Cir. 2011).

Plaintiff has organized his complaint into seven counts that assert different legal theories. However, nothing in the Federal Rules required him to do this, s*ee Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992), and his having done so does not result in multiple "claims," *see Sojka v. Bovis Lend Lease, Inc.*, 686 F.3d 394, 399 (7th Cir. 2012). Instead, plaintiff has only a single claim for relief: that Olympus is liable to him for the injuries caused by its failure to safeguard his personal information. Each "count" does no more than identify a legal theory that might support this single claim. *See ACF 2006 Corp. v. Mark C. Ladendorf, Attorney at Law, P.C.*, 826 F.3d 976, 981 (7th Cir. 2016). And because a party is not required to plead legal theories in the first place,

dismissal of one or more of the "counts" would not result in dismissal of plaintiff's claim, provided that at least one viable legal theory remained. *Id.*

By not moving to dismiss plaintiff's negligence theory, Olympus implicitly concedes that his claim is supported by a viable legal theory. But Olympus contends that the remaining counts should be dismissed because plaintiff has not pleaded facts corresponding to the elements of the legal theories asserted in those counts. However, federal notice-pleading rules do not require plaintiffs to plead facts corresponding to the elements of a legal theory. *Chapman v. Yellow Cab Cooperative*, 875 F.3d 846, 848 (7th Cir. 2017). Indeed, "it is manifestly inappropriate for a district court to demand that complaints contain all legal elements (or factors) plus facts corresponding to each." *Id.* Thus, I must decline Olympus's invitation to dismiss plaintiff's various legal theories on the ground that he has not adequately pleaded facts corresponding to the elements of those theories.

It might be possible to construe Olympus's motion as seeking dismissal not on the ground that plaintiff has failed to plead facts corresponding to the elements of his theories, but on the ground that those theories fail as a matter of law on the facts alleged. If that were true, it might be appropriate to dismiss the legal theories at the pleading stage. *See Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (court may dismiss a claim if the defendant shows that an answer to a question of law defeats it). However, where, as here, the complaint is supported by at least one viable legal theory, there is limited utility to scrutinizing the remaining theories for potential legal defects. Because a single viable theory is enough to warrant discovery on a claim, dismissal of an alternative legal theory will not prevent discovery. Further, the case might develop in a way that makes a legal

ruling on each of plaintiffs' legal theories unnecessary. And any legal theories that are dismissed could be revived under the liberal amendment standards of Federal Rule of Civil Procedure 15. To be sure, if eliminating an alternative legal theory would drastically change the scope of discovery, then examining it for legal defects on a motion to dismiss might be worthwhile. But that is not the case here. All plaintiff's legal theories are variations on the same theme, which is that Olympus is liable for failing to prevent the data breach. Discovery for all theories is likely to be the same.

Finally, when alternative legal theories present novel questions of state law, a federal court sitting in diversity should be reluctant to decide those questions unnecessarily at the pleading stage. *See In re Generac Solar Power Sys. Mktg., Sales Practices & Prods. Liab. Litig.*, 735 F. Supp. 3d 1047, 1053, 1057–58 (E.D. Wis. 2024) (discussing reluctance to make "drive by *Erie* guesses" on questions of state law). Here, plaintiff's complaint seeks to apply established Wisconsin legal theories to the novel circumstances of cybercrime. Because the Wisconsin Supreme Court has yet to decide how those theories should be applied in this context, Olympus's motion effectively asks me to make a series of guesses as to how the Wisconsin Supreme Court would rule. It would be unwise to make those guesses at such an early stage of the case, on a limited factual record and limited briefing, especially when the issues raised might change or become moot as the case develops. *Id.* at 1053. So again, I will decline Olympus's invitation to scrutinize plaintiff's alternative legal theories. Instead, I will revisit Olympus's arguments, if necessary, at the summary-judgment stage.

One potential exception to this approach is that Olympus contends that plaintiff's claim for violation of the Wisconsin Deceptive Trade Practices Act ("DTPA"), Wis. Stat.

§ 100.18, is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Under that standard, the pleader must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). However, the Wisconsin Supreme Court has held that Wisconsin's own heightened pleading standard for fraud does not apply to § 100.18. *Hinrichs v. DOW Chem. Co.*, 389 Wis.2d 669, 706 (2020). Although federal pleading standards apply to state-law claims in federal court, *see Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 672 (7th Cir. 2008), the question is what federal pleading standard to apply—the heightened pleading standard of Rule 9(b) or the ordinary notice-pleading standard of Rule 8. And the answer turns on whether a claim under § 100.18 is one that involves an allegation of "fraud" as that term is used in Rule 9(b). *Hinrichs* shows that the Wisconsin Supreme Court does not believe that a cause of action under § 100.18 involves fraud. Instead, the statute "creates a new cause of action and does not simply provide a remedy for common law fraud claims." *Hinrichs*, 389 Wis. 2d at 703. In *Hinrichs*, the court also stated that applying a heightened pleading standard would "run counter" to the statute's purpose. *Id.* at 703–04. Even if the Wisconsin Supreme Court's conclusion that a § 100.18 claim does not involve fraud is not controlling for purposes of Rule 9(b), it would at least violate the spirit of comity and respect that federal courts ordinarily afford state courts to hold, contrary to *Hinrichs*, that a § 100.18 claim is one for fraud that must be pleaded with particularity. Accordingly, I conclude that Rule 9(b) does not apply to a claim for violation of the Wisconsin DTPA.

III. CONCLUSION

It is undisputed that plaintiff's complaint states a claim for relief that is supported by a negligence theory. Because plaintiff was not required to plead legal theories in the first place, and because it would be premature to scrutinize plaintiff's alternative legal theories at the pleading stage, **IT IS ORDERED** that Olympus's motion to dismiss the complaint (ECF No. 6) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 25th day of April, 2025.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge