STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

FILED
MAY 27 2014
Keith Brin
CIRCUIT CLERK

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

VERONICA VIDES, ET AL.,

PLAINTIFFS,

VS.

ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A ADVOCATE MEDICAL GROUP,

DEFENDANT.

Case No. 13-CH-2701

Memorandum Opinion and Order

This matter now comes before the Court on the Defendant's combined 735 ILCS 5/2-619(a)(9) and 735 ILCS 5/2-615 motion to dismiss the Complaint filed by Plaintiffs, Veronica Vides, et al. Having heard arguments on the motion, considered the statutory authority and case law, and being fully advised in the premises, the Court now FINDS AS FOLLOWS:

Background

Advocate Medical Group (hereinafter "Advocate") is an Illinois corporation with its principal place of business in Downers Grove, Illinois. (Compl. ¶22.) Advocate is a network of affiliated doctors and hospitals that systematically and regularly conduct business in and throughout Lake County Illinois. (Compl. ¶23.) Advocate, during the regular course of its business, collected and maintained possession, custody, and control of a wide variety of patient's personal and confidential information, including: Patients' names, addresses, dates of birth, Social Security numbers, treating physician and/or departments for each individual, their medical

dismissal of negligence claim of credit unions who issued the compromised credit cards because the credit unions cannot sue in tort for purely economic losses).

This Court finds persuasive the reasoning of the courts cited above. Given the nature of the injuries Plaintiffs' have claimed, the economic loss doctrine operates to bar the Plaintiffs' tort claims.

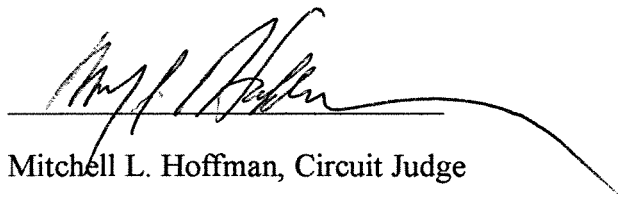
Conclusion

Plaintiffs' claimed injuries are insufficient to establish standing. Additionally, the Plaintiffs' causes of action in their Complaint fail to state claims upon which relief can be granted. Further, Plaintiffs cannot sustain their tort claims due to the economic loss doctrine.

NOW, THEREFORE, IT IS ORDERED:

Defendant's combined Motion to Dismiss pursuant to 735 ILCS 5/2-619(a)(9) and 735 ILCS 5/2-615 is granted and Plaintiffs' Complaint is dismissed with prejudice.

DATE: May 27, 2014

ENTER: 

Mitchell L. Hoffman, Circuit Judge

diagnoses, medical record numbers, medical service codes, and health insurance information. (Compl. ¶33.) At all relevant times, Plaintiffs were patients of Advocate. (Compl. ¶32.) Advocate stored Plaintiffs' personal, private and confidential data in an unencrypted format on four laptop computers at Advocate's administrative offices in Park Ridge, Illinois. (Compl. ¶34.) On or about July 15, 2013, the four laptop computers containing Plaintiffs' personal and confidential information were removed from Advocates Park Ridge facility during a burglary. (Compl. ¶37.) On August 23, 2013, Advocate sent out letters to affected patients, notifying them of the breach of the security of the system data. (Compl. ¶46.)

As of the current date, Advocate is unaware of the whereabouts of the four laptop computers and their respective hard drives containing the personal, private and confidential patient data. (Compl. ¶38.)

Plaintiffs have filed a Class Action against Defendant, Advocate, alleging six causes of action: (I) Negligence; (II) Violation of Consumer Fraud and Deceptive Business Practices Act; (III) Invasion of Privacy by Public Disclosure of Private Facts; (IV) Consumer Fraud Act; (V) Intentional Infliction of Emotional Distress; and (VI) Injunctive Relief. Plaintiffs in this action were:

> All persons who were, prior to July 15, 2013, (1) treated at any ADVOCATE facility and/or (2) treated by a physician, physician assistant, nurse, nurse practitioner, technician, laboratory assistant, or any other medical specialist, who was employed by and/or contracted with ADVOCATE to provide treatment and/or care, and who was caused to provide ADVOCATE with personal, private and/or confidential information, including but not limited to names, addresses, dates of birth, social security numbers, health insurance data, medical diagnoses, diagnoses codes, and medical record numbers. (Compl. ¶25.)

Plaintiffs claim they suffered different types of injuries due to the security breach, including: increased risk of identity theft and/or fraud, out-of-pocket expenses incurred to

mitigate the increased risk of identity theft and/or fraud, time lost mitigating the increased risk of identity theft and/or fraud, loss of privacy, and anxiety and emotional distress. (Compl. ¶68.)

Advocate moves to dismiss the Complaint pursuant to 735 ILCS 5/2-619(a)(9) and 735 ILCS 5/2-615, asserting both lack of standing to brings the claims alleged in the Complaint and failure to state a claim upon which relief may be granted.

Discussion

I. Standing

Section 2-619(a)(9) permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). Lack of standing is an "affirmative matter" that is properly raised under section 2-619(a)(9). See *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 494 (1988) (holding that lack of standing is an "affirmative" defense).

The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit. The doctrine assures that issues are raised only by those parties with a real interest in the outcome of the controversy. *Glisson v. City of Marion*, 188 Ill.2d 211, 221 (1999). The general principle was set forth in *Greer v. Illinois Housing Development Authority*. The claimed injury, whether "actual or threatened" must be: (1) "distinct and palpable"; (2) "fairly traceable" to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93.

a. Increased Risk of Future Harm

Plaintiffs argue injury in the form of increased risk of identity theft and/or fraud due to the exposure of their personal information. Plaintiffs have not cited an Illinois decision specifically addressing the issue of standing in this circumstance. However, the Illinois Supreme Court has held that "as a matter of law, an increased risk of future harm is an *element of damages* that can be recovered for a present injury—it is not the injury itself." *Williams v. Manchester*, 228 Ill.2d 404, 425 (2008) (emphasis in original). Applying *Williams*, the federal courts have held that a plaintiff whose personal data had been compromised "may collect damages based on the increased risk of future harm he incurred, but only if he can show that he suffered from some present injury beyond the mere exposure of his information to the public." *Rowe v. UniCare Life and Health Ins. Co.*, No. 09 C 2286, 2010 WL 86391, at *6 (N.D.Ill. 2010).

A recent decision by the United States Supreme Court appears to have addressed the issue of whether a court can confer standing based on the risk of future harm. In *Clapper v. Amnesty Intern'l USA*, 133 S.Ct. 1138 (2012), the Supreme Court dismissed for lack of standing a suit brought by attorneys and organizers who alleged that their communications were likely to be monitored under a purportedly unconstitutional federal surveillance statute, given that they worked with persons likely to be targeted for surveillance. As explained in Clapper, "allegations of possible future injury are not sufficient" to establish standing. *Id.* at 1147. The Court acknowledged that "imminence is concededly a somewhat elastic concept," but reemphasized its statements in prior cases that to confer standing the threatened injury must be "certainly impending." *Id.* at 1147, 1160. Employing that standard, the *Clapper* Court held that the threat of government interception of private communications between the plaintiffs and foreign contacts suspected of terrorism was too speculative to confer standing on the plaintiffs to challenge the law authorizing government surveillance of "non-United States persons" because realization of

the harm alleged–the interception of the plaintiffs' communications with such persons–was dependent on a variety of events and actions by independent third parties that might never come to pass. *Id.* at 1148–50.

In the present matter, *Clapper* compels rejection of Plaintiffs' argument that an increased risk of identity theft is sufficient to satisfy the injury-in-fact requirement for standing. Whether Plaintiffs actually become victims of identity theft as a result of the removal of the computers depends on a number of variables, such as whether their data was actually taken after the removal, whether it was subsequently sold or otherwise transferred, whether anyone who obtained the data attempted to use it, and whether or not they succeeded. Plaintiffs' Complaint provides no basis to believe that any of these events have come to pass or are imminent. Like the plaintiffs in *Clapper,* the harm that Plaintiffs fear is contingent on a chain of attenuated hypothetical events and actions by third parties independent of the defendant. *Id.* at 1148. Although Plaintiffs do not need to show that they are "literally certain" they will be victims of identity theft and/or fraud, they have not alleged facts that would plausibly establish an "imminent" or "certainly impending" risk that they will be victimized. Under *Clapper,* the mere fact that the risk has been increased does not suffice to establish standing.

The Federal Courts of Appeal have examined this issue and this Court finds persuasive the reasoning in the line of cases rejecting risk of harm as an injury-in-fact in the context of data breaches. See, e.g., *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3rd Cir. 2011) (finding plaintiffs lacked standing because harm depended on third parties reading, copying, and understanding their personal information, intending to use such information to commit future criminal acts, and being able to make unauthorized transactions in plaintiffs' names in the future); *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *3 (N.D.Ill. 2013) (citing *Clapper* and stating,

"[m]erely alleging an increased risk of identity theft or fraud is insufficient to establish standing."); *Hammond v. The Bank of New York Mellon Corp.*, 2010 WL 2643307, at *2 (S.D.N.Y. 2010) ("Plaintiffs here do not have Article III standing (*i.e.*, there is no "case or controversy") because they claim to have suffered little more than an increased risk of future harm from the loss (whether by accident or theft) of their personal information."); *Allison v. Aetna, Inc.*, 2010 WL 3719243, at *5 (E.D.Pa. 2010) (granting motion to dismiss for lack of standing because the plaintiffs "alleged injury of an increased risk of identity theft is far too speculative."); *Amburgy v. Express Scripts, Inc.*, 671 F.Supp.2d 1046, 1052 (E.D.Mo. 2009) ("[P]laintiff surmises that, as a result of the security breach, he faces an increased risk of identity theft at an unknown point in the future. On the facts as alleged in the Complaint, it cannot be said that the alleged injury to plaintiff is imminent."); *Hinton v. Heartland Payment Sys., Inc.*, 2009 WL 704139, at *1 (D.N.J. Mar. 16, 2009) (*sua sponte* dismissing case because plaintiff's allegations of increased risk of identity theft and fraud "amount to nothing more than mere speculation."); *Randolph v. ING Life Ins. and Annuity Co.*, 486 F.Supp.2d 1, 8 (D.D.C.2007) ("Plaintiffs' allegations therefore amount to mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft."); *Key v. DSW, Inc.*, 454 F.Supp.2d 684, 689 (S.D.Ohio 2006) ("In the identity theft context, courts have embraced the general rule that an alleged increase in risk of future injury is not an 'actual or imminent' injury."); *Bell v. Acxiom Corp.*, 2006 WL 2850042, at *2 (E.D.Ark. 2006) (rejecting plaintiff's allegation of increased risk of identity theft and stating, "[b]ecause Plaintiff has not alleged that she has suffered any concrete damages, she does not have standing under the case-or-controversy requirement.").

This Court acknowledges the holdings of the U.S. Court of Appeals for the Seventh and Ninth Circuits finding that the mere increased risk of theft or fraud is sufficiently concrete injury-in-fact to confer standing. See *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629 (7th Cir. 2007); *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010). However, those cases were decided prior to *Clapper*. The *Pisciotta* court held "a threat of future harm or . . . an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions" is sufficient to find standing. *Pisciotta*, 499 F.3d at 634. However, this holding did not discuss or address the requirement that a threat of harm be "imminent" or "certainly impending". Further, the "not merely speculative" standard for injury-in-fact, set forth by *Krottner*, does not stand up to the reasoning and holding in *Clapper*. More is required under *Clapper* to show that an injury is certainly impending.

The Court therefore finds that the increased risk that Plaintiffs will be victims of identity theft and/or identity fraud at some indeterminate point in the future does not constitute injury sufficient to confer standing. The occurrence of such future injury rests on the criminal actions of independent decision makers and the Plaintiffs' Complaint lacks sufficient factual allegations to show such future injury is imminent or certainly impending.

b. Statutory violations

Plaintiffs have alleged Defendants violated the Personal Information Protection Act (hereinafter "PIPA") by waiting six weeks to notify Plaintiffs' of the removal of the computers containing their personal information instead of notifying them "immediately following discovery" or notifying them "in the most expedient time possible and without unreasonable delay." 815 ILCS 530/10(a) (West 2014); (Compl. ¶60, 61.) A violation of PIPA constitutes an

unlawful practice under the Consumer Fraud and deceptive Business Practices Act (hereinafter "ICFA"). 815 ILCS 530/20 (West 2014).

Additionally, Plaintiffs allege Defendants violated the ICFA by making Plaintiffs' social security numbers available to the public when the four computers were removed from Defendant's administrative building. (Compl. ¶72.) The violations of these Acts, argue Plaintiffs, constitute actual injury sufficient to convey standing.

However, this argument is misplaced. Even assuming the statutes have been violated by the delay or inadequacy of Defendant's notification, breach of these statutes is insufficient to establish standing without any actual damages due to the breach. *People ex rel. Madigan v. United Const. of Am., Inc.*, 2012 IL App 120308, ¶15 (1st Dist. 2013). The ICFA provision cited by the Plaintiffs in their Supplemental Brief stipulates there must be damage beyond the mere violation of the statute. 815 ILCS 505/10a(c) (West 2014) (relief is granted to "[a]ny person who suffers actual damage as a result of a violation of this Act."). Accordingly, the purported untimely or inadequate notification of the security breach by Defendants is insufficient to establish Plaintiffs suffered actual injury for purposes of Article III standing. *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588 (N.D. Ill. 2013).

Thus, statutory violations by themselves are insufficient to establish standing. The Plaintiffs' Complaint must include allegations that they have been damaged by the violations to establish standing. *Strautins v. Trustwave Holdings, Inc.*, 12 C 09115, 2014 WL 960816 (N.D. Ill. 2014); see also *FMC Corp. v. Boesky*, 852 F.2d 981, 998 (7th Cir.1988). The complaint fails to do so.

c. Time and Expenses Incurred to Mitigate Risks of Identity Theft

Plaintiffs contend they suffered injury by incurring time and expenses for creditor monitoring and incurring costs to mitigate the increased risk of identity theft and/or identity fraud. The Complaint states the Plaintiffs "suffered and will continue to suffer ... out-of-pocket expenses incurred to mitigate the increased risk of identity theft and/or identity fraud. . . the value of their time spent mitigating actual or the increased risk of identity theft and/or identity fraud...." (Compl. ¶68.) This Court disagrees.

Such injury does not suffice to confer standing because Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper,* 133 S.Ct. at 1143, 1151 (rejecting respondents' alternative argument that they were suffering "present injury because the risk of ... surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications."). "[A]llowing [Plaintiffs] to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of [Plaintiffs'] first failed theory of standing." *Id.* (citing *Am. Civil Liberties Union v. Nat'l Sec. Agency,* 493 F.3d 655, 656–57 (6th Cir.2007)).

Lower federal courts have rejected Plaintiffs' argument in the data breach context as well. See, e.g., *Reilly,* 664 F.3d at 46 ("costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than the alleged 'increased risk of injury' which forms the basis for Appellants' claims."); *Brit Ins. Holdings N.V. v. Krantz,* 2012 WL 28342, at *9 (N.D.Ohio 2012) ("defendants' expenditure of resources to investigate the ramifications of plaintiffs' disclosure, and to purchase personal credit and identity protection services to protect against future harm, are insufficient to demonstrate that defendants

suffered an actual injury-in-fact."); *Giordano v. Wachovia Sec., LLC,* 2006 WL 2177036, at *4 (D.N.J. 2006) ("Plaintiffs allegations that ... she will incur costs associated with obtaining credit monitoring services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury.").

d. Anxiety and Emotional Distress

For the same reasons as stated in the above section, Plaintiffs' claim of injury in the form of anxiety and emotional distress is insufficient to establish standing. Any anxiety or emotional distress suffered by Plaintiffs' is not based on an imminent threat, but future criminal acts that are only speculative. As noted above, the anxiety or distress incurred "in response to a speculative threat would be tantamount to accepting a repackaged version of [Plaintiffs'] first failed theory of standing." *Clapper,* 133 S.Ct. at 1143, 1151.

The U.S. Court of Appeals for the Third Circuit and at least one lower federal court have addressed emotional distress as an injury in fact in the context of a data breach. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 42–43 (3d Cir.2011) (Emotional distress in the wake of a security breach is insufficient to establish standing, particularly in a case that does not involve an imminent threat to the information); *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013) ("[Plaintiff's] anxiety following the security breach is insufficient to establish standing, as there is no indication there is an imminent threat of her information being used in a malicious way. . . .").

Thus, this Court finds no standing conferred based on anxiety or emotional distress suffered by Plaintiffs.

e. Loss of Privacy

Injury in the form of loss of privacy is insufficient to establish standing in this case. Necessary to a claim of loss of privacy is the disclosure of personal information. However, Plaintiffs have not pled any facts to support the allegations that the information was disclosed. It appears Plaintiffs seek to establish that their information was disclosed because computers were removed from Defendant's administrative offices. The inference that the data on the computers was disclosed, based on the computers themselves being removed from the offices, is too tenuous to support a reasonable inference that can be made in Plaintiffs' favor. Without the inference that Plaintiffs' information was disclosed at all, there is only speculation that Plaintiffs have suffered the injury of loss of privacy in this matter.

In sum, Plaintiffs' Complaint does not sufficiently allege that the injury of identity theft and/or identity fraud is certainly impending. Therefore, the increased risk of such injury does not suffice to confer standing. Additionally, Plaintiffs cannot create standing by choosing to make expenditures in order to mitigate a purely speculative harm or by alleging anxiety and emotional distress based on the speculative harm. Further, the allegations in the complaint do not support the conclusion that any information has been disclosed. Therefore, there can be no actual injury for loss of privacy, which requires disclosure of information. Accordingly, none of Plaintiffs' claimed injuries constitute an injury-in-fact sufficient to confer standing for Plaintiffs' negligence, violation of PIPA, violation of ICFA, invasion of privacy, and intentional infliction of emotional distress claims.

II. Failure to State a Claim

In the alternative, Defendant argues that if Plaintiffs' assertions of various injuries are sufficient to confer standing to bring the instant causes of action, the Complaint should nevertheless be dismissed under 735 ILCS 2-615 for failure to state a claim.

A section 2-615 motion does not raise affirmative factual defenses, but attacks the legal sufficiency of a complaint by alleging only defects on the face of the complaint. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 86 (1996). A court must determine whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Id.*; *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475 (1991). "A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." *Id.*; *Gouge v. Central Illinois Public Service Co.*, 144 Ill.2d 535, 542 (1991).

Moreover, Illinois is a fact-pleading jurisdiction. A plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 408 (1996); *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 308 (1981). When reviewing a motion to dismiss under 735 ILCS 2-615, "a court must disregard the conclusions that are pleaded and look only to well-pleaded facts to determine whether they are sufficient to state a cause of action against the defendant." *City of Chicago v. Beretta U.S.A Corp.*, 213 Ill. 2d 351, 368 (2004).

Against this backdrop, the Court turns to each of Plaintiffs' claims to determine whether they state a claim upon which relief can be granted.

a. Negligence

In Count I of the Complaint, Plaintiffs allege the following: (1) Defendant had a duty to securely maintain, and not disseminate Plaintiffs' personal, private and confidential health information; (2) On or about July 15, 2013, Defendant wrongfully permitted the unauthorized and unlawful disclosure of Plaintiffs' personal, private and confidential information; and (3) As a result of Defendant's acts and omissions, Plaintiffs suffered personal and pecuniary damages. (Compl. ¶49, ¶54, ¶55.)

To succeed on their negligence claims, plaintiffs must allege and prove that (1) defendants owed a duty to plaintiffs; (2) defendants breached that duty; and (3) the breach caused injury to plaintiffs. *Cooney v. Chicago Public Schools*, 407 Ill.App.3d 358, 361 (1st Dist. 2010). Defendant argues that Plaintiffs' allegations fail to state a claim for relief inasmuch as Plaintiff fails to allege a compensable injury resulting in damage. This Court agrees.

Plaintiffs argue that they have suffered a present injury and damage in the loss and disclosure of their personal data and confidential medical information, from which future damages can flow. (Pl. Brief in Resp., Pg. 9) However, even Plaintiffs' argument acknowledges that they have not suffered actual damages such as the loss of property or money but rather, if anything, alleges only that they are subject to an increased risk of identity theft and they might now have to pay for credit monitoring.

In the somewhat analogous context of toxic tort liability, Illinois courts have suggested that compensable damage requires more than an exposure to a future potential harm. See *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill.App.3d 882, 898 (4th Dist. 1992); *Morrissy v. Eli Lilly & Co.*, 76 Ill.App.3d 753, 761 (1st Dist. 1979). Indeed, the Illinois Supreme Court in *Williams v. Manchester*, 228 Ill. 2d 404 (2008), held a plaintiff must show "a present, actionable

injury" resulting from radiation exposure. Specifically, the *Williams* court stated, "[A]s a matter of law, an increased risk of future harm is an element of damages that can be recovered for a present injury – it is not the injury itself." *Id.* at 425.

In federal court, the Seventh Circuit conducted such an examination to determine whether Indiana negligence law supported allegations similar to the Plaintiffs' against a bank whose website was breached by a hacker. *Pisciotta v. Old Nat'l Bancorp,* 499 F.3d 629 (7th Cir., 2007). After finding that no Indiana case established that credit monitoring costs constituted present injury, the court found that analogous cases from other jurisdictions all "rel[ied] on the same basic premise: Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy." *Id.* at 639.

Like the Seventh Circuit in *Pisciotta,* numerous federal courts applying state law have come to the same conclusion. See, *e.g., Krottner v. Starbucks Corp.,* 406 Fed.Appx. 129, 131–32 (9th Cir.2010); *Amburgy v. Express Scripts, Inc.,* 671 F.Supp.2d 1046, 1054–55 (E.D.Mo.2009); *Belle Chasse Auto. Care, Inc. v. Advanced Auto Parts, Inc.,* 2009 WL 799760, at *3 (E.D.La. Mar. 24, 2009); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.,* 580 F.Supp.2d 273, 281–82 (S.D.N.Y.2008); *Hendricks v. DSW Shoe Warehouse, Inc.,* 444 F.Supp.2d 775, 783 (W.D.Mich.2006); *Forbes v. Wells Fargo Bank, N.A.,* 420 F.Supp.2d 1018, 1020–21 (D.Minn.2006). In so holding, courts have sometimes noted that plaintiffs asserting these claims "have pointed to no case decided anywhere in the country where a court allowed a negligence claim to survive absent an allegation of actual identity theft." *McLoughlin v. People's United Bank, Inc.,* 2009 WL 2843269, at *8 (D.Conn. 2009); see also *Hammond v. Bank of New York Mellon Corp.,* 2010 WL 2643307, at *1 (S.D.N.Y. 2010) (collecting cases).

Many other decisions have echoed this reasoning. The Oregon Supreme Court held that allegations that did not include "actual identity theft or financial harm, other than credit monitoring and similar mitigation costs" did not allege sufficient "present injury" under the state's "well-established negligence requirements." *Paul v. Providence Health System–Oregon,* 351 Or. 587, 597 (2012) (internal quotation marks and citation omitted). The District of Columbia Court of Appeals has ruled similarly, citing a significant number of analogous decisions from other jurisdictions. *Randolph v. ING Life Ins. and Annuity Co.,* 973 A.2d 702, 708 (D.C.2009) (collecting cases). In particular, the court cited *Shafran v. Harley–Davidson, Inc.,* 2008 WL 763177, at *3 (S.D.N.Y. 2008), in which it was noted that "[c]ourts have uniformly ruled that the time and expense of credit monitoring to combat an increased risk of future identity theft is not, in itself, an injury that the law [of negligence] is prepared to remedy."

This Court holds that nothing in Plaintiffs' Complaint alleges actual injury or damages. Failure to state sufficient facts to constitute a legally cognizable present injury or damage mandates dismissal of the action. *Verb v. Motorola, Inc.,* 284 Ill.App.3d 460, 471 (1st Dist. 1996). As plaintiff's claims of negligence require actual injury or damage, this Court holds Plaintiffs' negligence claim is dismissed.

b. Consumer Fraud Act

Plaintiffs have alleged Defendants violated the Personal Information Protection Act and the Illinois Consumer Fraud Act and claim they have or will incur economic damages as a result of the Defendant's acts. (Compl. ¶73.)

As set forth in *Cooney v. Chicago Public Schools,* 407 Ill.App.3d 358 (1st Dist. 2010), Plaintiffs must allege actual damages to bring a Consumer Fraud Act action. See 815 ILCS 505/10a(a) (West 2014) ("[a]ny person who suffers actual damage as a result of a violation of

this Act committed by any other person may bring an action against such person"); *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill.App.3d 399, 402 (1st Dist. 2009) ("[t]he failure to allege specific, actual damages precludes a claim brought under the Consumer Fraud Act"). To support a Consumer Fraud Act claim, actual damages must arise from "purely economic injuries." *Morris,* 392 Ill.App.3d at 402.

Plaintiffs attempt to distinguish the *Cooney* case from the present matter, but fail because the court in *Cooney* directly addressed whether an increased risk of future identity theft can serve as actual damages to support a Consumer Fraud Act claim. The court in *Cooney* concluded the following:

> In *Yu v. International Business Machines Corp.*, 314 Ill.App.3d 892, 247 Ill.Dec. 841, 732 N.E.2d 1173 (2000), we held that allegations of potential harm arising from a software defect were insufficient to support a Consumer Fraud Act claim, justifying a section 2–615 dismissal. Without actual injury or damage, the plaintiff's claims "constitute[d] conjecture and speculation." *Yu,* 314 Ill.App.3d at 897, 247 Ill.Dec. 841, 732 N.E.2d 1173. See also *Williams v. Manchester,* 228 Ill.2d 404, 425, 320 Ill.Dec. 784, 888 N.E.2d 1 (2008) ("as a matter of law, an increased risk of future harm is an *element of damages* that can be recovered for a present injury-it is *not* the injury itself") (emphasis in original); *Pisciotta v. Old National Bancorp,* 499 F.3d 629, 639 (7th Cir.2007) ("[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy"); *Morris,* 392 Ill.App.3d at 403, 331 Ill.Dec. 819, 911 N.E.2d 1049, citing *Xydakis v. Target, Inc.*, 333 F.Supp.2d 686, 688 (N.D.Ill.2004) ("[t]here is no cause of action under the Consumer Fraud Act when a plaintiff alleges only aggravation and not actual damages").

Cooney v. Chicago Public Schools, 407 Ill. App. 3d at 366.

Plaintiffs' argument that damages under the ICFA can be presumed from the language of the ICFA is wholly misplaced. Plaintiffs cite no authority for this proposition other than quoting the language of 815 ILCS 505/10a(a) stating, "The court, in its discretion may award actual

economic damages or any other relief." However, the Plaintiff fails to recognize the significance of the first sentence of section 10a(a) which requires a person to suffer actual damage before bringing a cause of action. First, actual damages must be present, and then a court may award economic damages or other relief. Further, this Court is bound by decisions of the Second District appellate court holding, "damages may not be presumed under the Consumer Fraud Act." *Duran v. Leslie Oldsmobile, Inc.*, 229 Ill.App.3d 1032, 1041 (2nd Dist. 1992); See *Avery v. State Farm Mutual Ins. Co.*, 216 Ill.2d 100, 196 (2005) ("The language of the Consumer Fraud Act is plain. A plaintiff must prove 'actual damage' before he or she can recover under the Act.").

The *Cooney* case also held that the purchase of credit monitoring services cannot establish actual damages to support an ICFA claim, citing federal authority. *Cooney v. Chicago Public Schools*, 407 Ill.App at 366; See *Rowe v. UniCare Life & Health Insurance Co.*, 2010 WL 86391 (N.D.Ill. 2010) (finding the *provision* of credit monitoring services by the defendants "does not resolve the question of whether credit monitoring costs are actual damages" and finding that "the costs of credit monitoring services are not a present harm in and of themselves"); *Aliano v. Texas Roadhouse Holdings LLC,* 2008 WL 5397510 (N.D.Ill. 2008) (finding that the purchase of credit monitoring services does not constitute actual damages and citing district courts in Michigan, Minnesota, Ohio and New York in agreement); see also *Harris v. Wal-Mart Stores Inc.,* 2008 WL 5085132 (N.D.Ill. 2008) (rejecting claim for damages under the Credit and Debit Card Receipt Clarification Act of 2007, Pub.L. No. 110–241, 122 Stat. 1565 (2008) (codified at 15 U.S.C. § 1681) for the cost of credit monitoring services).

Thus, Counts II and IV of Plaintiffs' Compaint alleging violations of PIPA and ICFA are not viable causes of action. Plaintiffs' have not alleged actual damages arising from violations of

the statutes and cannot rely on speculative future damages or presumed damages to support their claims.

c. Invasion of Privacy By Public Disclosure of Private Facts

To state a cause of action for this tort, the plaintiff must plead and prove that (1) publicity was given to the disclosure of private facts; (2) the facts were private, and not public, facts; and (3) the matter made public was such as to be highly offensive to a reasonable person. *Miller v. Motorola, Inc.*, 202 Ill.App.3d 976, 978 (1st Dist. 1990).

First, there is no allegation in the Complaint that Defendant disclosed Plaintiffs' private information. While the Complaint alleges Defendant permitted the unauthorized and unlawful disclosure and dissemination of Plaintiffs' personal, private and confidential information, that allegation is conclusory. There are no factual allegations in the Complaint to make plausible the assertion that Defendant disclosed and disseminated Plaintiffs' private information. Rather, the Complaint alleges the computers containing the private information were *removed* from Defendant's administrative offices, not that Defendant disseminated it to anyone.

Second, even if the Complaint sufficiently alleged dissemination, the Complaint fails to allege publicity. The tort of invasion of privacy by publication of private facts includes as an element publicity to the public at large or to so many persons that the information is certain to become public knowledge. See, e.g., Restatement (second) of Torts § 652D, comment a. Illinois courts have adopted a modification of the Restatement's definition of "public" as those with whom the plaintiff has a special relationship, making even the relatively limited disclosure particularly embarrassing or devastating to the plaintiff. *Miller v. Motorola, Inc.*, 202 Ill.App.3d at 976-977.

Using either definition of "public", Plaintiff fails to allege publicity. The Complaint makes no allegations about what happened to the data on the computers once they were removed from the administrative offices. The Complaint only alleges that the "private and confidential information could have been bought and sold several times on the robust international cyber black market." (Compl ¶47.) The Complaint alleges no facts as to how many persons ever had the personal information and whether the persons sold the personal information to anyone, let alone whether the persons even were able to access the personal information from the computers removed. Therefore, the allegation that the removal of the computers "resulted in the public disclosure of such private information" is conclusory in that Plaintiffs allege no facts to make plausible the assertion that Plaintiffs' personal information was publicly disclosed. Without an allegation that the personal information here was disclosed to and viewed by someone unauthorized to do so, Plaintiffs have failed to state a claim for invasion of privacy.

d. Intentional Infliction of Emotional Distress

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege certain facts. First, the defendant's conduct must be truly extreme and outrageous. *McGrath v. Fahey*, 126 Ill.2d 78, 86 (1988). Second, the defendant either *intended* to inflict severe emotional distress, or knew that there was at least a high probability that the conduct would cause severe emotional distress. *Id.* Third, the defendant's conduct actually caused *severe* emotional distress. *Id.* In its motion to dismiss, Defendant asserts that the facts alleged in the Plaintiffs' complaint are insufficient to satisfy the first and third elements of the tort. This court agrees.

Similar to the reasoning in *Welsh v. Commonwealth Edison Co.*, 306 Ill.App.3d 148 (1st Dist. 1999), this Court holds that Plaintiffs fail to allege facts from which a level of severity of

emotional distress could be inferred. Instead, Plaintiffs simply set forth a conclusory allegation: "Defendant, ADVOCATE, knew or should have known that Defendant's unauthorized dissemination of Plaintiffs' and Class Members' personal, private and confidential information would inflict upon Plaintiffs' and Class Members' severe emotional distress, which did in fact cause emotional distress to Plaintiffs." (Compl. ¶80.) This statement in the Complaint does not support a conclusion that the emotional distress suffered was severe. "Merely characterizing emotional distress as severe is not sufficient." *Welsh*, 306 Ill.App.3d at 156.

Plaintiffs' respond to Defendant's argument by stating that the severity of the emotional distress meets the requisite level. (Pl. Brief in Resp., pg. 15.) However, no facts are forthcoming from the Plaintiffs to support such a statement. To state an action for intentional infliction of emotional distress, the complaint must be "specific, and detailed beyond what is normally considered permissible in pleading a tort action." *McCaskill v. Barr*, 92 Ill.App.3d 157, 158 (4th Dist. 1980). No allegations of hospital care or medical care sought are made by Plaintiffs. *Welsh*, 306 Ill.App.3d at 155. Nor are allegations made that any Plaintiffs were "afflicted with a physical or mental condition rendering him or her particularly vulnerable to emotional distress." *Id.* Plaintiffs' failure to sufficiently allege the degree of emotional distress requires dismissal of the cause of action.

III. Economic Loss doctrine

Defendant's Motion to Dismiss also asserts the economic loss doctrine as a basis to dismiss Plaintiff's tort claims pursuant to 735 ILCS 5/2-615. The economic loss doctrine bars recovery in tort actions solely for economic losses. *In re Ill. Bell Switching Station Litig.*, 161 Ill.2d 233 (1994). The rationale underlying this doctrine is that tort law affords the proper remedy for loss arising from personal injury or damages to one's property, whereas contract law

and the Uniform Commercial Code provide the appropriate remedy for economic loss stemming from diminished commercial expectations without related injury to person or property. *Id.*

There are three exceptions to the economic loss doctrine. The first is where the plaintiff sustained personal injury or property damage resulting from a sudden or dangerous occurrence. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 86-89 (1982). Next is where the plaintiff's damages are proximately caused by a defendant's intentional, false representation. *Id.* Finally, an exception lies where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. *Id.* Plaintiffs provided no response to Defendant's argument regarding the economic loss doctrine. Certainly, it appears that none of the three exceptions apply to the Plaintiffs' case. Most of Plaintiffs' alleged injuries are economic losses, with the exception of emotional distress. However, as discussed above, this court does not find emotional distress to be a viable injury when it is based on a purely speculative harm.

Notably, other courts dealing with data breach cases have held that the economic loss doctrine bars the plaintiff's tort claim because the plaintiff has not suffered personal injury or property damage. See, e.g., *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 498–99 (1st Cir. 2009) (applying Massachusetts law and affirming dismissal of bank's negligence claim based on economic loss doctrine because bank did not suffer property damage); see also *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175–77 (3d Cir.2008) (applying Pennsylvania law and affirming dismissal of bank's negligence claim based on economic loss doctrine because bank did not suffer property damage); see also *Cumis Ins. Society, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 46–47 (2009) (applying Massachusetts law and affirming