UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JESSIE SACKIN, PETER HARRIS, STEPHEN LUSTIGSON, NICHOLAS MIUCCIO, and SARAH HENDERSON individually and on behalf of all other similarly situated, **Plaintiff,** **v.** **TRANSPERFECT GLOBAL, INC.** **Defendant.**	**Case No.: 17-cv-1469 (LGS)**

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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Defendant TransPerfect Global, Inc. ("TransPerfect"), by and through undersigned counsel, hereby submits its Memorandum in Support of its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. INTRODUCTION

On January 17, 2017, an employee of Defendant TransPerfect responded to a fraudulent phishing email. Phishing occurs when the sender of an email fraudulently impersonates someone else with the intent to obtain personal information. In this case, the criminal tricked an employee of Defendant into an unauthorized release of private information, including employee W-2 Tax Forms. The named Plaintiffs, former employees whose information was allegedly stolen, have not alleged actual harm as a result of this incident. For the reasons more fully stated below, Plaintiffs lack standing to sue in the absence of such harm. Plaintiffs also fail to state a valid claim upon which relief can be granted for the causes of action alleged. Consequently, Plaintiffs' Amended Class Action Complaint (referred to hereinafter as "Amended Complaint") should be dismissed.

II. RELEVANT FACTUAL ALLEGATIONS

For the purposes of this motion only, the allegations of the Amended Complaint are treated as true and viewed in the light most favorable to Plaintiffs. The Complaint alleges the following: that Plaintiff Sackin is a resident of Maplewood, New Jersey. Am. Compl. ¶ 8. Plaintiff Sackin was employed by Defendant at its New York office in 2015. Am. Compl. ¶ 8. Plaintiff Harris is a resident of New Haven, Connecticut. Am. Compl. ¶ 9. Plaintiff Harris was employed by Defendant at its New York office from approximately 2011 through 2013. Am. Compl. ¶ 9. Plaintiff Lustigson is a resident of San Francisco, California. Am. Compl. ¶ 10. Plaintiff Lustigson was employed by Defendant at its San Diego, California office from 2011 through 2012. Am. Compl. ¶ 10. Plaintiff Miuccio is a resident of Hoboken, New Jersey. Am. Compl. ¶ 11. Plaintiff

Miuccio was employed by Defendant at its Philadelphia, Pennsylvania office from 2013 through 2014. Am. Compl. ¶ 11. Plaintiff Henderson is a resident of New York, New York. Am. Compl. ¶ 12. Plaintiff Henderson was employed by Defendant at its New York, New York office from September through December 2011. Am. Compl. ¶ 12.

On January 17, 2017, an unauthorized individual contacted a TransPerfect employee by email requesting IRS Tax Form W-2 information and payroll information for the period that ended on January 13, 2017. Am. Compl. ¶¶ 14, 16. Before it was determined that the email was fraudulent, the employee provided 2015 W-2 information for current and former employees as well as the requested payroll information. Am. Compl. ¶¶ 14, 16. The payroll information provided to the unauthorized individual also contained personally identifiable information ("PII") for the putative class members, which included their name, direct deposit bank account number, routing number, and Social Security number. Am. Compl. ¶ 3. Plaintiffs' payroll information was not provided to the unauthorized individual. Am. Compl. ¶¶ 8-12. Defendant notified affected individuals of this incident on January 20, 2017. Am. Compl. ¶ 17. Plaintiffs received notice of the incident between January 20, 2017 and January 23, 2017. Am. Compl. ¶¶ 8-12. Plaintiffs' Amended Complaint alleges damages in the form of "attempted identity theft", but does not contain any factual averments of misuse or attempted misuse of their information by the unauthorized individual. Am. Compl. ¶ 36. Rather, Plaintiffs have alleged that they are at "an imminent, immediate, and continuing increased risk of identity theft and identity fraud." Am. Compl. ¶ 36. Plaintiffs allege they have been "deprived value of [their] PII" as a result of this incident. Am. Compl. ¶ 34. However, Plaintiffs do not allege how it has lost value. Plaintiffs allege that their decisions to purchased LifeLock credit monitoring rather than accept the free credit monitoring services provided by Defendant through Experian constitutes an injury. Am. Compl.

¶ 34. Finally, Plaintiffs allege that compliance with IRS procedures for verifying their identities and tax returns constitutes damages. Am. Compl. ¶ 37.

Plaintiffs seek to represent a proposed national class of "[a]ll persons whose PII was compromised as a result of the Data Breach." Am. Compl. ¶ 41. Plaintiffs, individually and on behalf of the putative class, assert claims based on negligence, breach of express contract, breach of implied contract, unjust enrichment, and violation of N.Y. Labor Law § 203-d. Am. Compl. ¶¶ 57-105. Plaintiffs demand: certification of the class action; injunctive relief and declaratory relief; a decree that Defendant engaged in the conduct alleged; compensatory and general damages; reimbursement, restitution, and disgorgement on certain causes of action; pre- and post-judgement interest; reasonable attorney's fees and costs; and all other relief deemed just, including punitive and exemplary damages. Am. Compl., Prayer for Relief.

III. ARGUMENT

A. Plaintiffs Lack Article III Standing to Pursue Their Claims.

1. Plaintiffs have the burden to show that standing exists.

Article III of the U.S. Constitution restricts the exercise of jurisdiction of the federal courts to actual cases or controversies. U.S. Const., art. III. Standing to sue under Article III requires an injury-in-fact which is actual or "clearly impending." A plaintiff must have an injury that is concrete, particularized, and actual or imminent, not merely conjectural or hypothetical. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs may not rely on conclusory allegations or legal conclusions "masquerading" as factual averments. *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d 2006). The Complaint must "clearly and specifically set forth facts sufficient to satisfy Article III." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

In a class action, plaintiffs representing a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1972). Unless a named plaintiff can demonstrate the requisite case or controversy between themselves and defendant "none may seek relief on behalf of himself or any other member of the class." *Id.*

2. Apprehension of future injury without more does not create standing to sue.

The U.S. Supreme Court examined whether apprehension of future injury is sufficient to confer standing under Article III in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), a case that originated in the Second Circuit. In *Clapper*, individuals who feared that they would be targeted for surveillance by the government filed suit claiming that this constituted a present manifestation of future harm. *Id*. at 1145-46. The Court found that future injuries and future damages alone are not sufficient to establish standing under Article III. *Id*. at 1148. "Threatened injury must be certainly impending to constitute injury in fact, and ... [a]llegations of possible future injury are not sufficient." *Id*. The Court found that plaintiffs' claims for costs incurred to mitigate potential future harm were insufficient to confer standing and that plaintiffs cannot "manufacture" standing by so pleading. *Id*. at 1151. The *Clapper* opinion held that apprehension of future injury is not sufficient to establish injury-in-fact. *Id*.

Recently, the United States Court of Appeals for the Second Circuit addressed whether an increased risk of injury constituted an injury-in-fact in *Ross v. AXA Equitable Life Ins. Co.*, No. 15-2665-cv, 2017 WL 730266 (2d Cir. Feb. 23 2017). In *Ross*, the plaintiffs argued they suffered an injury-in-fact due to an increased risk that the defendants would be unable to pay their claims in the event of an economic downturn. *Id*. at 3. Applying *Clapper's* "certainly impending"

standard, the court held that the allegations traveled too far down the speculative chain of possibilities to be "clearly impending." *Id.*

In *Whalen v. Michaels Stores, Inc.*, 153 F. Supp. 3d 577, 582 (E.D.N.Y. 2015), the United States District Court for the Eastern District of New York followed *Clapper's* "certainly impending" standard where the plaintiff alleged she was at an increased risk of future harm due to the exposure of her PII in a data breach. The court held that the plaintiff failed to allege an injury that was "certainly impending" where she did not allege that she had experienced fraud and alleged that she may not experience fraud for years. *Id* at 583.

Similarly, this Court applied the "certainly impending" standard in *Hammond v. The Bank of New York Mellon Corp.*, No. 08-Civ-6060, 2010 WL 2644407 (S.D.N.Y. June 25, 2010). In *Hammond*, four named plaintiffs failed to allege identity theft while two named plaintiffs alleged unauthorized credit transactions which were reimbursed. *Id* at 5. The final named plaintiff alleged an unauthorized charge which was unrelated to the incident. *Id.* This Court held that these plaintiffs lacked standing because their claims were "future-oriented, hypothetical, and conjectural." *Id*. at 7.

3. The majority of courts have held that an increased risk of identity theft and mitigation costs are not injury-in-fact.

In the vast majority of data breach cases, courts have followed *Clapper* in holding that allegations like Plaintiffs' do not establish standing because the apprehension of future harm and actions taken based on it, such as the purchase of credit monitoring, are not actual harm or imminent injury that is "certainly impending" absent identity theft or attempted identity theft. *Chantal Attias v. CareFirst, Inc.*, 199 F. Supp. 3d 193 (D.D.C. Aug. 10, 2016); *Duqum v. Scottrade, Inc.*, No. 15-cv-1537, 2016 WL 3683001 (E.D. Mo. July 12, 2016); *Alonso v. Blue Sky Resorts*, LLC, 179 F. Supp. 3d 857 (S.D. Ind. 2016); *In re: SuperValu, Inc. Customer Data Security*

Breach Litig., No. 14-MD-2586, 2016 WL 81792 (D. Minn. Jan. 7, 2016); *Peters v. St. Joseph Serv. Corp.*, 74 F. Supp. 3d 847 (S.D. Tex. 2015); *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359 (W.D. Pa. 2015); *In re Sci. Applications Int'l (SAIC)Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14 (D.D.C. 2014); *Strautins v. Trustware Holdings, Inc.*, 27 F. Supp. 3d 871 (N.D. Ill. 2014); *In re Barnes & Noble Pin Pad Litig*, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013). *See also Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011) (reaching a similar conclusion before *Clapper*).

The Third Circuit analyzed whether plaintiffs had standing to bring a class action under circumstances similar to the present case. In *Reilly v. Ceridian Corp.*, the plaintiffs alleged that as a result of a data breach, a hacker accessed plaintiffs' personal information. 664 F.3d at 41. The plaintiffs did not allege that they had been the victim of identity theft or even attempted identity theft. Rather, they claimed that they suffered an injury-in-fact because of an "increased risk" of identity theft, and costs incurred to monitor their credit activity. *Id.*

Applying settled Article III principles pronounced by the Supreme Court, the Third Circuit held that plaintiffs did not have standing because their allegations of possible future injury did not constitute a "certainly impending" threatened injury, but rather, "hypothetical speculation" concerning the possibility of future injury. *Id.* at 42. Furthermore, the court stated that plaintiffs' threatened injuries were too speculative to confer standing because those injuries were entirely dependent on the decisions of a third party, i.e., the hacker. *Id. See also SAIC Backup Tape Data Theft Litig.*, 45 F. Supp. 3d at 25 (increased risk of identity theft is not a certainly impending injury because whether identity theft would occur sometime in the future was dependent on the actions of a third party, the thief).

Additionally, the *Reilly* court held that expenses incurred to prevent the threatened injury, such as credit monitoring, could not confer standing because "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.'" *Id* at 46. *See also, e.g., Peters,* 74 F. Supp. 3d at 856 ("standing cannot be 'manufactured' by the plaintiffs' choice to inflict harm on themselves by making expenditures based on hypothetical future harm").

Recently, the Fourth Circuit also analyzed whether plaintiffs had standing to bring a class action based on allegations of an increased risk of future identity theft in connection with two separate data breaches in *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017). The court held that the plaintiffs' allegations of a threatened injury or future identity theft were too speculative to constitute an injury-in-fact where the plaintiffs failed to allege instances of harm or identity theft. *Id* at 274-76. The Fourth Circuit stated that they would be required to engage in the same "attenuated chain of possibilities" rejected in *Clapper*. *Id* at 275.

4. While a minority of courts have concluded that increased risk of identity theft may confer standing, those decisions misapply U.S. Supreme Court precedent.

A minority of courts have found that an increased risk of identity theft may confer standing.[1] In *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), the Seventh Circuit held that *Clapper's* "certainly impending" standard was not so strict as to exclude allegations of an increased, but not imminent, risk of identity theft. The *Remijas* court stated that the increased risk of future identity theft confers standing because there is a "substantial risk" or "objectively reasonable likelihood" that persons affected by a data breach would become victims of identity theft. *Id.* at 693; *see also Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed.Appx. 384, 388

[1] *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7th Cir. 2007) held that risk of future harm from a "sophisticated, intentional and malicious" security breach conferred standing. However, *Pisciotta* was decided prior to *Clapper's* holding that threatened injury must be "certainly impending" to constitute injury in fact.

(6th Cir. 2016); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967¬68 (7th Cir. 2016); *Moyer v. Michaels Stores*, No. 14-c-561, 2014 WL 3511500, *5 (N.D. Ill. July 14, 2014) (disagreeing with the view that *Clapper* calls for a stricter interpretation of "certainly impending").

It is respectfully submitted that if *Remijas* holds that *Clapper's* "certainly impending" standard is satisfied by allegations of an increased, but not imminent, risk of identity theft, it is incorrectly decided. Indeed, by holding that the plaintiffs had alleged a sufficient injury-in-fact because of the "objectively reasonable likelihood" of identity theft, the *Remijas* court's holding runs directly contrary to *Clapper*. In *Clapper*, the Supreme Court explicitly rejected the Second Circuit's holding that standing could be established by an "objectively reasonable likelihood" of future injury. 133 S. Ct. at 1147. Courts have continued to follow *Clapper's* mandate that a risk of future harm must be imminent, notwithstanding the *Remijas* decision. *See Alonso*, 179 F. Supp. 3d at 864 (declining to apply *Remijas* in data breach class action and stating that *Remijas* was directly "at odds with binding Supreme Court precedent governing standing."); *In re Zappos.com, Inc.*, 108 F. Supp. 3d 949 951 (D. Nev. 2015) (holding that plaintiffs could not meet their burden to show that they faced an imminent injury where plaintiffs did not allege identity theft).

5. Courts have concluded that allegations of a decrease value of personal information are insufficient to confer standing.

Courts throughout the country have held that allegations that personal information has lost value as a result of a data breach cannot support standing. *See In re Zappos.com, Inc.*, 108 F. Supp. 3d at 954; *In re Sci. Applications*, 45 F. Supp. 3d at 30; *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *5; *Green v. eBay, Inc.*, Civ. No. 14-1688, 2015 WL 206653, 5-6, n. 59 (E.D. La. May 4, 2015); *In re SuperValu, Inc*, 2016 WL 81792, at *7.

In *Fero v. Excellus Health Plan, Inc.*, 15-CV-06569, 2017 WL 713660 (W.D.N.Y. Feb. 22, 2017), plaintiffs alleged that their personal information had diminished in value as a result of

a data breach. The court held that allegations of a diminution in value of personal information was insufficient to establish standing. *Id* at 12. The court reasoned that the plaintiffs had failed to allege how their personal information was made less valuable as a result of the breach, or that the breach negatively impacted the value of their personal information. *Id.*

6. The Supreme Court's Decision in *Spokeo, Inc. v. Robins* has not altered the *Clapper* standard.

The Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) has not altered the standard set forth in *Clapper*. In *Spokeo, Inc.*, the Supreme Court addressed whether the plaintiff could bring a claim under the Fair Credit Reporting Act without any evidence of actual injury. *Id*. at 1550. The Supreme Court reversed and remanded to the Ninth Circuit stating that it had failed to examine whether the alleged injury was sufficiently "concrete" to confer standing. *Id.* The Supreme Court stressed that a plaintiff must establish a "concrete" injury and by reference reaffirmed its *Clapper* decision stating that a risk of real harm may satisfy the requirement of concreteness. *Id.* at 1548-1549. This decision reiterates that in order to establish an injury-in-fact, a plaintiff must show that he or she suffered an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

7. Plaintiffs have not met their burden to show standing exists.

It is the burden of the party invoking federal jurisdiction to establish standing at the pleading stage. *Spokeo, Inc.*, 136 S. Ct. at 1547. A plaintiff's complaint must set forth clear and specific facts that are sufficient to satisfy the Article III requirement. *Id.* A complaint must allege facts that raise a right to relief above the speculative level, and a court should not assume that the plaintiff can provide facts that she has not alleged. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). A court is "not bound to accept as true legal conclusions couched as factual allegations."

Marino v. City Univ. of N.Y., 18 F. Supp. 320, 335 (E.D. N.Y. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973). "A plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged . . . action, not that he can imagine circumstances in which he could be affected by . . . the action." *Id.*

Plaintiffs fail to establish an injury-in-fact that is "certainly impending." Plaintiffs attempt to couch their alleged injuries as those that may constitute sufficient injury-in-fact to confer standing by inserting language similar to language from *Clapper* and decisions of other courts considering standing in data breach cases. For example, Plaintiffs allege that their data has been "compromised" and that they face "an imminent, immediate, and continuing increased risk of identity theft and fraud." Am. Compl. ¶¶ 20, 22, 36. Moreover, Plaintiffs attempt to demonstrate standing by asserting that they were forced to purchase credit monitoring and that they were required to comply with IRS procedures. Am. Compl. ¶¶ 8-12, 34, 37. These are prophylactic measures to prevent hypothetical future harm, not actual harm themselves. Plaintiffs' allegations of a loss of privacy and that they have been deprived of the value of their PII are unsupported by factual allegations. Am. Compl. ¶ 34. These conclusory statements are nothing more than formulaic recitations that are unsupported by true factual allegations. Plaintiffs are required to allege sufficient factual allegations in order to establish standing, a standard that the Amended Complaint utterly fails to meet. *Iqbal*, 556 U.S. at 664; *Whitmore*, 495 U.S. at 149.

B. Plaintiffs Have Failed to State a Valid Claim for Relief.

Even if this Court were to determine that Plaintiffs have satisfied the injury-in-fact requirement, it should dismiss Plaintiffs' Amended Complaint in its entirety pursuant to Rule 12(b)(6) because Plaintiffs have failed to state a claim for relief.

To withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiffs must allege facts that raise a right to relief "above the speculative level." *Twombly*, 550 U.S. at 555-56. Alleging "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" is not sufficient. *Id.* at 555; *see also Iqbal*, 556 U.S. at 677-78. This is especially true where, as here, Plaintiff seeks to bring a "potentially massive . . . controversy" through class action litigation. *See Twombly*, 550 U.S. at 558. To satisfy his burden and avoid dismissal, Plaintiff must allege "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678.

In diversity cases, it is well settled that federal courts must look to the laws of the forum state to resolve issues regarding choice of law. *Licci ex rel Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155, 157 (2d Cir. 2012). Here, New York law controls as there is no conflict between the laws of California, Connecticut, New Jersey, New York, and Pennsylvania.

1. Plaintiffs do not state a negligence claim.

Plaintiffs must allege that: (1) Defendant owed a duty of care to Plaintiffs; (2) breach of that duty; (3) Plaintiffs suffered an injury proximately caused by the breach; and (4) Plaintiffs incurred damages as a result. *Rivera v. N.Y. City Health & Hospitals Corp.*, 191 F. Supp. 2d 412, 417 (S.D.N.Y. 2002). Whether a duty of care exists is a matter of law to be decided by the court. *Id.*

(a) Plaintiffs do not allege necessary elements of a claim for Negligence: a duty that was breached or injury.

It is well established that a "defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practicable matter defendant can exercise such control." *D'Amico v. Christie*, 518 N.E.2d 896, 901 (N.Y. Ct. App. 1987).

Plaintiffs do not properly plead the existence of a duty. Plaintiffs merely allege, in a conclusory fashion, that Defendant "had a duty to Plaintiffs and each Class Member to exercise reasonable care in holding, safeguarding, and protecting [their] information" and that "Plaintiffs and Class Members were the foreseeable victims of any inadequate safety and security practices." Am. Compl. ¶¶ 60-61. Further, Plaintiffs allege, in conclusory fashion, that "Defendant assumed a duty of care" and "had a duty to use ordinary care." Am. Compl. ¶¶ 62-63. These statements are not supported by factual allegations, and are not enough to establish that Defendant owed Plaintiffs a common law duty. *See Twombly*, 550 U.S. at 570. On the contrary, Defendant does not owe a common law duty to Plaintiffs, who, if harmed, were victimized by third-party criminals.

Courts throughout the country have held that no common law duty of care exists in the context of data breaches. *See Worix v. MedAssets, Inc.*, 869 F. Supp. 2d 893, 897 (N.D. Ill. 2012) (rejecting plaintiffs' argument that defendant had a common law duty to reasonably handle and safeguard patient medical information); *Dolmage v. Combined Ins. Co. of Am.*, 14-C-3809, 2015 WL 292947, *6 (N.D. Ill. Jan. 21, 2015) (dismissing claim because there is no common law duty to protect personal information); *Dittman v. UPMC*, 154 A.3d 318, 325 (Pa. Sup. Ct. 2017) (dismissing claim because there is no common law duty for an employer to protect employee personal information); *Cooney v. Chi. Pub. Schs.*, 943 N.E.2d 23, 29 (Ill. App. Ct. 2010) (affirming trial court's dismissal of claim because plaintiff's claims did not amount to a common law duty to protect personal information); *Hammond*, 2010 WL 2643307, at *10 (same); *Willingham v. Global Payments, Inc.*, No. 12-CV-01157, 2013 WL 440702, *19 (N.D. Ga. Feb. 5, 2013) (same).

Second, Plaintiffs do not properly plead that they suffered any actual cognizable injury. *See Caronia v. Phillip Morris USA, Inc.*, 982 N.E.3d 11, 14 (N.Y. 2013) (citing *Prosser & Keeton,*

Torts § 30 at 165 (5th ed. 1984)) ("[a] threat of future harm is insufficient to impose liability against a defendant in a tort context"). The *Caronia* court further stated that:

> "[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system . . . [t]he physical harm requirement serves a number of important purposes: it defines the class of persons who actually possesses a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims."

Id.

Here, Plaintiffs do not allege that they have suffered any actual cognizable injury, such as an unreimbursed tax return refund, opened bank account, or unreimbursed charges. Rather, Plaintiffs injuries are entirely speculative as they allege that they have suffered damages in the form of "imminent, immediate, and continuing risk of identity theft and identity fraud" and due to a "loss of privacy." Am. Compl. ¶¶ 34, 36. Courts throughout the country have routinely found that such alleged damages are insufficient to support a negligence claim. *See Reilly v. Ceridien Corp.*, No. 10-5142, 2011 WL 735512, (D.N.J. Feb. 22, 2011) (holding that plaintiffs' allegations of a "threat of future injury" were insufficient to establish a compensable injury); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012) (finding that "increased, unexpected, and unreasonable risk to the security of sensitive personal information" is not enough to sustain a claim for negligence"); *Ruiz v. Gap*, 622 F. Supp. 2d 908, 913 (N.D. Cal. 2009) (holding that increased risk of future identity theft "does not rise to the level of appreciable harm necessary to assert a negligence claim"); *see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 613 F.Supp.2d 108, 133 (D. Me. 2009) (dismissing plaintiffs' claims where they failed to allege improper charges had not been reimbursed); *Paul v. Providence Health System-Oregon*, 273 P.3d 106, 110 (Or. 2012) (holding that the threat of future harm to credit or well-being does not establish damages for a negligence claim).

Nor do Plaintiffs' allegations of steps taken to protect themselves against future identity theft satisfy the requirement of a cognizable injury. *Doe v. Henry Ford Health Sys.*, 865 N.W.2d 915, 921 (Mich. Ct. App. 2014) (dismissing negligence claim for failure to show a present, actual injury and that the cost of credit monitoring services did not constitute an injury); *Hendricks v. DSW Shoe Warehouse, Inc.*, 444 F. Supp. 2d 775, 782 (W.D. Mich. 2006) (stating that purchase of credit monitoring does not constitute actual damages or a cognizable loss). Finally, Plaintiffs' assertion that they have suffered damages as a result of the deprivation of the value of their PII is without merit as they fail to allege that they have attempted to sell their PII and did not received fair value. *See Fero*, 2017 WL 713660, at *12.

Since Plaintiffs fail to allege a non-speculative and cognizable injury, their negligence claim does not meet the federal pleading standard and should be dismissed.

(b) Plaintiffs' negligence claim is barred by the economic loss rule.

Plaintiffs allege various economic damages arising from Defendant's alleged negligence. *See* Am. Compl. ¶¶ 34, 36. Under the economic loss rule, economic damages can only support a claim for negligence when there is some form of physical harm, such as personal injury or property damages. *EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265, 277 (S.D.N.Y. 2004) ("If the damages suffered are of the type remediable in contract, a plaintiff may not recover in tort."). Courts throughout the country have dismissed negligence causes of action in data breach litigation pursuant to the economic loss doctrine. *See In re Google Android Consumer Privacy Litig*, No. 11-MD-02264-JSW, 2013 WL 1283236, *12-13 (N.D. Cal. Mar. 26, 2013) (dismissing negligence claims based on the economic loss doctrine); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 531 (N.D. Ill. 2011) (same); *In re Heartland Payment Sys., Inc., Customer Data Sec. Breach Litig.*, 834 F. Supp. 2d 566, 590 (S.D. Tex. 2011) (same); *In re Zappos.com*, Civ. No.

12-cv-00325, 2016 WL 2637810, *6 (D. Nev. May 6, 2016) (same); *Willingham*, 2013 WL 440702, *18-19 (same). Here, Plaintiffs do not allege any physical harm, personal injury, or property damage. *See* Am. Compl. ¶¶ 34, 36. Therefore, the economic loss rule bars Plaintiffs' claims for negligence.

2. Plaintiffs do not state a breach of express contract claim.

To state a claim for breach of contract under New York law, Plaintiff must allege (1) the existence of a contract between the parties; (2) performance by the Plaintiff; (3) breach by the Defendant; and (4) damage as a result of the breach. *Prince of Peace Enterprises, Inc. v. Top Quality Food Market, LLC*, 760 F. Supp. 2d 384, 397 (S.D.N.Y. 2011).

(a) Plaintiffs fail to allege the existence of a contract.

"Existence of a contract requires 'an offer, acceptance, consideration and a mutual assent and intent to be bound.'" *Id* (quoting *Benicorp Ins. Co. v. Nat'l Med. Health Card Sys., Inc.*, 447 F. Supp. 2d 329, 337 (S.D.N.Y. 2006)). Mutual assent requires a meeting of the minds of the parties on all essential terms of the contract. *Id.* If there is no meeting of the minds, there is no contract. *Id.* Plaintiff must allege in nonconclusory language the essential terms of the contract. *Negrete v. Citibank, N.A.*, 15-Civ-7250, 2016 WL 3002421, *12 (S.D. N.Y. May 19, 2016).

Here, Plaintiffs generally allege that Defendant and Plaintiffs entered into employment agreements "in exchange for . . . secure PII." Am. Compl. ¶ 74. This conclusory statement fails to establish that the parties reached a meeting of the minds on all essential terms of the contract. Plaintiffs fail to allege any provisions of their employment agreements that address data security. *See Mumin v. Uber Tech., Inc.*, 2017 WL 934703, (E.D.N.Y. March 8, 2017) (dismissing breach of contract claim where the plaintiff cited no contractual provisions).

In addition, Plaintiffs' allegations of performance pursuant to the alleged contract are without merit. Plaintiffs allege that they performed job responsibilities in exchange for secure PII.

Am. Compl. ¶ 74. This allegation is without merit. Plaintiffs performed their job duties in exchange for a promise of compensation, not for security measures. Therefore, Plaintiffs have failed to properly alleged performance. Accordingly, Plaintiffs' cause of action for breach of contract should be dismiss for failure to plead the existence of a contract and performance by the Plaintiff.

(b) Plaintiffs have failed to allege actual damages.

As set forth above, Plaintiffs' claim for breach of contract fails under *Prince of Peace*, *supra*, because Plaintiffs do not allege actual, non-speculative damages arising from the alleged breach of contract. *See Kenford Co., Inc. v. Erie County*, 493 N.E.2d 257, 261 (N.Y. Ct. App. 1986) (stating that "damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach [of contract], not remote or the result of other intervening causes.") Under well-established law, an injury-in-fact is one that is concrete, particularized, and actual or imminent, not merely conjectural or hypothetic. *See Clapper*, 113 S. Ct. at 1147. In addition, costs associated with complying with IRS procedures do not constitute actual damages. Finally, Plaintiffs' allegations of expenses incurred to prevent the threatened injury, such as credit monitoring, because "costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' than the alleged 'increased risk of injury.'" *See, e.g.*, *Reilly*, 664 F.3d at 46; *see also Peters*, 74 F. Supp. 3d at 856; *Kenford*, 493 N.E.2d at 261.

3. Plaintiffs do not state a claim for breach of implied contract.

(a) Plaintiffs have failed to allege a meeting of the minds.

A cause of action for breach of implied contract requires the same elements as a cause of action for breach of contract. *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 507 (2d Cir 2009). "[A]

contract cannot be implied in facts where the facts are inconsistent with its existence." *Bader v. Wells Fargo Home Mortg., Inc.*, 773 F. Supp. 2d 397, 413 (S.D.N.Y. 2011). Plaintiffs must allege that the "parties' conduct and the surrounding facts and circumstances show a mutual intent to contract and a meeting of the minds." *Robert S. Nusinov, Inc. v. Principal Mut. Life Ins. Co.*, 80 F. Supp. 2d 101, 107 (W.D.N.Y. 2000). Plaintiffs must do more than just state an implied contract existed, they must allege facts from which one can plausibly infer a meeting of the minds on the contract terms. *Twombly*, 550 U.S. at 550.

Recently, in *Longenecker-Wells v. Benecard Services, Inc.*, 658 Fed.App'x. 659, 662 (3d Cir. 2016), the Third Circuit addressed whether an implied contract arises when an individual provides personal information as a prerequisite for employment under Pennsylvania law. The court dismissed the plaintiffs' breach of implied contract claim stating that requiring an individual to provide their personal information for employment "did not create a contractual promise to safeguard the information, especially from hackers." *Id.* Further the court stated that "[m]erely claiming that an implied contract arose 'from the course of conduct' between [p]laintiffs and [defendant] is insufficient to defeat a motion to dismiss." *Id*. at 663.

Here, Plaintiffs' conclusory allegations are insufficient to establish that Defendant intended to enter into an implied contract with Plaintiffs. *See Hammond*, 2010 WL 2643307, at *11 (granting summary judgement where plaintiff failed to show defendant's assent to be bound). Like *Longenecker-Wells*, Plaintiff contends that an implied contract arose from an implicit promise. Plaintiffs simply state that "TransPerfect implicitly promised ... that it would take adequate measures to protect their PII" and that a "material term of this contract [is] ... that it will take reasonable efforts to safeguard Employees' PII." Am. Compl. ¶¶ 82-83. However, Plaintiffs fail

to allege any facts to support these conclusory statements. Accordingly, Plaintiffs' claim for breach of implied contract should be dismissed for failure to allege a meeting of the minds.

(b) Plaintiffs do not allege actual damages from the purported breach of contract.

Plaintiffs must allege actual damages arising from the purported breach. *Prince of Peace*, 760 F. Supp. 2d at 39; *see also Counsel Fin. Services, LLC v. Melkersen Law, P.C.*, 602 F. Supp. 2d 448, 452 (W.D.N.Y. 2000) (stating that mere allegations of a breach of contract are insufficient to sustain a complaint in the absence of allegations of damages). As set forth above, Plaintiff fails to plead any actual damages.

4. Plaintiffs do not state a claim for unjust enrichment.

To state a claim for unjust enrichment, a plaintiff must allege: "(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000) (citation and internal quotation omitted).

(a) Plaintiffs' unjust enrichment claim is duplicative of their contract and tort claims.

A court will not permit an unjust enrichment claim to lie "where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-791 (N.Y. 2012), rearg. denied, 19 N.Y.3d 937, 973 (N.Y. 2012). In *Corsello*, the New York Court of Appeals cautioned that "unjust enrichment is not a catchall cause of action to be used when others fail." *Id.* The court further stated that "[i]t is available only in unusual situations when, though the defendant has not breached a contact nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. *Id.*

Here, as in *Corsello*, Plaintiffs' unjust enrichment claim should be dismissed because "to the extent the [breach of contract and tort claims] succeed, the unjust enrichment claim is

duplicative; if Plaintiff[s'] other claims are defective, an unjust enrichment claim cannot remedy the defects." *Id* at 791. Specifically, Plaintiffs' unjust enrichment claim cannot stand because Plaintiffs contend that Defendant was unjustly enriched by failing to protect their personal information. This allegation is the logical and factual core for Plaintiffs' negligence, breach of contract, and breach of implied contract claims. Moreover, Plaintiffs even allege that the Defendant was unjustly enriched due to a breach of contract. Am. Compl. ¶ 96. Plaintiffs offer no additional facts or arguments to distinguish their unjust enrichment claim from their contract and tort claims. Therefore, their claim for unjust enrichment should be dismissed.

(b) Plaintiffs fail to allege that Defendant was improperly enriched at the expense of Plaintiffs.

"A cause of action for unjust enrichment is stated where the plaintiffs have properly asserted that a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor." *Weiner v. Lazard Freres & Co.*, 241 A.D.2d 114, 119 (N.Y. App. Div. 1998) (internal quotation marks omitted). Plaintiffs' claim fails because Plaintiffs do not allege that Defendant received a benefit from Plaintiffs without adequately compensating Plaintiff. Plaintiffs allege that Defendant obtained a benefit from Plaintiffs' labor. Am. Compl. ¶ 94. However, the Amended Complaint contains no allegations that Plaintiffs' did not receive compensation for their labor. Therefore, Plaintiffs' unjust enrichment claim should be dismissed for failing to allege that Defendant obtained a benefit without compensating Plaintiffs.

5. Plaintiffs do not state a claim for violation of N.Y. Labor Law § 203-d

Plaintiffs allege that Defendant violated N.Y. Labor Law § 203-d as a result of the data breach. Am. Compl. ¶ 103. Further, Plaintiffs allege that Defendant violated N.Y. Labor Law § 203-d because Defendant does not have policies and procedures to safeguard PII. Am. Compl. ¶ 104. N.Y. Labor Law § 203-d does not permit a private right of action and only permits

enforcement by the commissioner for civil penalties. *See* N.Y. Labor Law § 203-d(1). Therefore, Plaintiffs' claim for violation of N.Y. Labor Law § 203-d should be dismissed.

IV. CONCLUSION

Plaintiffs have no actual or "certainly impending" injury. The alleged injuries are not sufficiently concrete to give rise to a case or controversy under Article III of the U.S. Constitution or to support Plaintiffs' alleged causes of action. In addition, Plaintiffs' causes of action are insufficient as Plaintiffs have not alleged the required elements of each. For all the foregoing reasons, Defendant respectfully requests that Plaintiffs' Amended Complaint be dismissed with prejudice.

Dated: June 9, 2017

Respectfully Submitted,

By: /s/Claudia McCarron

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CERTIFICATE OF SERVICE

I, Claudia D. McCarron, hereby certify that on June 9, 2017, I caused the foregoing Notice of Motion to Dismiss the Amended Complaint and Memorandum of Law in Support thereof to be filed electronically in the above-captioned action via the Court's CM/ECF system, which caused electronic copies to be served on all counsel of record.

By: /s/Claudia McCarron

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