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

PAMELA CHAMBLISS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 1:15-cv-2288-RDB**
	)	
CAREFIRST, INC., et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants CareFirst, Inc., and CareFirst of Maryland, Inc. (collectively "Defendants") move to dismiss Plaintiffs' Complaint (the "Complaint") in its entirety under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[1]

INTRODUCTION

Data theft is an unfortunate and increasingly common occurrence in contemporary life, victimizing literally millions of Americans. Fortunately, data loss does not always produce actual harm. Just as companies are learning how to harden their defenses against cyber theft, our Nation's courts are learning to sort out the claims of truly injured victims from those who launch class actions without having suffered any real harm. This action falls into the latter category. Plaintiffs' Complaint and others like it should be dismissed at the outset, lest every data breach spawn another series of actions that needlessly clog our Article III courts.

In 2014, a thief stole electronic data from Defendants. More than one year has elapsed since the theft, but the thief has not been apprehended or even identified. Plaintiffs claim that their identities have been or could be compromised as a result of the theft, but they do not allege that they have actually suffered any harm. Plaintiffs do not allege that the thief is in any way affiliated with either Defendant, yet through this litigation they seek to recover from Defendants

[1] This case is one of two largely identical class actions arising out of the same data breach. The other, *Attias, et al. v. CareFirst, Inc., et al.*, 1:15-cv-882-CRC, is pending in the U.S. District Court for the District of Columbia. Defendants are filing a similar motion to dismiss the *Attias* case in that court. Most of the *Attias* plaintiffs' alleged injuries are similar to Plaintiffs' alleged injuries in this case, although two plaintiffs in the *Attias* action vaguely allege that they have experienced issues with their tax returns. As discussed extensively in Defendants' *Attias* motion to dismiss, however, those plaintiffs fail to allege any facts suggesting that their tax refund issues were caused by conduct attributable to Defendants. The parties are considering potential consolidation options.

on behalf of themselves and unidentified others. In short, Plaintiffs ask for money to rectify a harm that has not occurred and which they cannot identify.

The Complaint cannot survive this motion to dismiss. Based on well-settled standing doctrine, as applied in a legion of decisions across the country, Plaintiffs lack standing and their claims should therefore be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Even if the named Plaintiffs had standing, their claims should be dismissed pursuant to Rule 12(b)(6) because they fail as a matter of law.

The named Plaintiffs have not alleged an "injury-in-fact" necessary to establish Article III standing. Although more than one year has elapsed since the data theft, Plaintiffs have not alleged that their identities have been compromised or misused in any way. Instead, they allege merely that they face an increased risk of such harm. The Supreme Court, however, recently confirmed in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1150 (2013), that plaintiffs who allege only a fear of future injury lack standing. Courts have consistently dismissed complaints in other data breach cases where the named plaintiffs cannot show concrete, particularized, and actual or imminent injury. *See, e.g.*, *In re Science Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 28 (D.D.C. 2014) (hereinafter "*SAIC*") ("In sum, increased risk of harm alone does not constitute an injury in fact. Nor do measures taken to prevent a future, speculative harm.").

Even if Plaintiffs had standing to bring the asserted claims, the Complaint contains no cognizable claims. Plaintiffs' inability to plead actual damages means that their negligence claim (Count I) must be dismissed. Their negligence claim fails for the separate reason that Maryland recognizes the economic loss doctrine, which precludes the recovery Plaintiffs seek. Next, Plaintiffs' claim for breach of implied contract (Count II) must be dismissed because

Plaintiffs do not actually allege the existence of an implied contract. Further, Plaintiffs' unjust enrichment claim (Count III) fails because an express contract existed between the parties. Plaintiffs' attempt at declaratory relief (Count IV) should be dismissed because it relies on the Declaratory Judgment Act, which is merely a procedural tool, not an independent cause of action. Lastly, Plaintiffs' claim under the Maryland Personal Information Protection Act ("MPIPA") (Count V) fails because Defendants, as insurers, are exempt from its enforcement provisions. Furthermore, Plaintiffs fail to allege they suffered an objectively identifiable injury as required under the MPIPA.

For these and other reasons discussed below, Plaintiffs' Complaint should be dismissed in its entirety. Plaintiffs should not be permitted, based on guesswork and speculative allegations, to pry open the doors of discovery at great and unnecessary cost and time to Defendants and the Court.

STATEMENT OF FACTS

I. Background

Plaintiffs' factual allegations are treated as true for purposes of this motion only.[2] Defendants are a network of health insurers that provide coverage to individuals primarily in Maryland, the District of Columbia, and Virginia. *See* Compl. ¶ 10. Plaintiffs are customers and insureds of Defendants. *Id.* ¶¶ 22-23. In June 2014, Defendants suffered a cyberattack. *Id.* ¶ 14. Defendants, after learning of the cyberattack, notified the public on May 20, 2015 that a cyberattack had occurred. *See id.* ¶¶ 13-14. Plaintiffs allege that the information stolen in the

[2] The standard for consideration of a motion to dismiss requires that a complaint contain sufficient factual allegations that, if accepted as true, state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Were the action to proceed, Defendants would dispute the factual allegations in Plaintiffs' Complaint.

cyberattack included their "names, birth dates, email addresses, and subscriber identification number[s]." *Id*. ¶ 1. Notably, Plaintiffs do not allege that the data stolen included Social Security numbers, credit card information, or logon passwords.

II. Plaintiffs' Alleged Injuries

Plaintiffs' allegations of injury are, to be charitable, sparse. The core allegations are that "Plaintiffs were harmed by having their personal information compromised" and that "they face the imminent and certainly impending threat of future additional harm from the increased threat of identity theft and fraud due to their personal information potentially being sold on the Internet black market and/or misused by criminals." Compl. ¶ 24. Plaintiffs do not allege, however, how they "were harmed." For example, they do not suggest that either of them has been the victim of identity theft, nor do they allege that either of them has incurred any direct or identifiable pecuniary harm such as fraudulent charges made in their names. In short, Plaintiffs vaguely allege that they are suffering discomfort from knowing that certain information about them was stolen.

Elsewhere in their Complaint, Plaintiffs suggest they "*will* incur economic damages related to the expenses for credit monitoring and the loss associated with paying for health services." *Id.* ¶ 73 (emphasis added). Plaintiffs do not allege, however, that they actually *have* purchased credit monitoring services. Moreover, this allegation introduces a theme common in the rest of the Complaint's allegations about potential injury: it is entirely unsupported by actual factual allegations, and it is entirely *prospective*. In fact, other injury allegations are entirely dependent on the potential future actions of the unknown thief that committed the underlying crime in this case. *See, e.g.*, *id.* ¶ 18 ("Identity thieves *can use* PI . . . .); *id.* ("[I]dentity thieves *may* commit various types of crime . . . ."); *id.* ¶ 19 ("[I]dentity thieves *may* obtain medical

services . . . .") (all emphases added). Plaintiffs' inability to allege an "injury" without any particularity is fatal to their claims.

ARGUMENT

I. Plaintiffs Lack Article III Standing.

A. Requirements for Standing

To survive a motion to dismiss under Rule 12(b)(1), Plaintiffs bear the burden of proving that this Court has jurisdiction to hear their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Article III of the Constitution limits the power of the federal courts to the resolution of "Cases" and "Controversies." U.S. Const. art. III, § 2. The "threshold requirement of standing" that flows from Article III's case-and-controversy requirement "is 'perhaps the most important condition of justiciability.'" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153 (4th Cir. 2000) (en banc). Every plaintiff that sues in federal court must therefore meet the "irreducible constitutional minimum" of Article III standing, which requires: 1) an injury-in-fact that is concrete, particularized, and actual or imminent; 2) that the injury be fairly traceable to the challenged action; and 3) that the injury can be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560-61; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

The Complaint in this case is a purported class action, which requires each of the named Plaintiffs to allege that he or she personally has been injured. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) (explaining that named plaintiffs cannot rely on injuries suffered by other unidentified members of the class to which the named plaintiffs purport to belong); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a

class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

B. Plaintiffs Lack Standing Because They Do Not Allege a Sufficient Injury-in-Fact.

To constitute a cognizable injury-in-fact, Plaintiffs must allege an injury that is "concrete and particularized, as well as actual or imminent." *Friends of the Earth*, 204 F.3d at 154 (citing *Lujan*, 504 U.S. at 560-61). These requirements serve the purpose, which is at the heart of this motion, of "filter[ing] the truly afflicted from the abstractly distressed." *Id.* at 154.

1. The Supreme Court Recently Reaffirmed That the Threat of Future Injury Is Rarely Sufficient To Constitute an Injury-in-Fact.

According to the clear majority of cases that have dealt with the recent flood of data breach litigation, an analysis of whether Plaintiffs have standing rests largely on one case. In *Clapper v. Amnesty International USA*, a group of attorneys, human rights organizations, and media outlets argued that their work required them to engage in telephone and e-mail communications with individuals whom they believed were "likely targets of surveillance" under a provision of the Foreign Intelligence Surveillance Act ("FISA"). *Clapper*, 133 S. Ct. at 1145. The plaintiffs worried that continuing to correspond with these "targeted" individuals could result in surveillance of their communications, and accordingly the plaintiffs challenged the constitutionality of the FISA provision. The plaintiffs primarily based their standing argument on the belief "that there is an objectively reasonable likelihood that their communications will be acquired" under the challenged FISA provision "at some point in the future, thus causing them injury." *Id.* at 1146.

The Supreme Court, however, rejected this theory of standing because it ignored the Court's "repeated[] reiterat[ion] that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Id.* at 1147

(quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original). The *Clapper* plaintiffs' "theory of *future* injury [wa]s too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." *Id.* at 1143 (emphasis in original) (internal citations omitted). The Court held that the plaintiffs' alleged injuries were not "certainly impending" because they "relie[d] on a highly attenuated chain of possibilities." *Id.* at 1148.

Specifically, for the *Clapper* plaintiffs to have been injured, the Court explained that the government first would need to choose to "target communications to which [plaintiffs were] parties"; then proceed under the challenged FISA provision; then obtain court approval for the surveillance; then "succeed in acquiring the communications of [plaintiffs'] foreign contacts"; and, finally, the plaintiffs would need to actually have been a party to the intercepted communications. *Id.* at 1147-50. The Supreme Court emphasized that the speculative nature of this lengthy chain of assumptions imagined by the *Clapper* plaintiffs was compounded by the fact that—as is the case here—it "require[d] guesswork as to how independent decisionmakers will exercise their judgment." *See id*. at 1150 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). The Court concluded that the *Clapper* plaintiffs' "speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending." *Id.*

Clapper's lesson has been recognized by the Fourth Circuit. "The Supreme Court held that 'threatened injury must be *certainly impending* to constitute injury in fact' and '[a]llegations of *possible* future injury are not sufficient." *Liberty Univ. Inc. v. Lew*, 733 F.3d 72, 89 n.5 (4th Cir. 2013) (citing *Clapper*, 133 S. Ct. at 1147) (emphasis and alterations in original). Indeed, as the Fourth Circuit noted even before *Clapper*, Article III's injury-in-fact element requires

plaintiffs to state a "claim to relief [that] is free from excessive abstraction, undue attenuation, and unbridled speculation." *Friends of the Earth*, 204 F.3d at 155; *see also Roy v. Ward Mfg., LLC*, Civ. Action No. RDB-13-3878, 2014 WL 4215614, at *3 (D. Md. Aug. 22, 2014) (noting that plaintiffs lack standing when they must rely on "an extensive chain of unlikely events before establishing any potential injury").

2. *Clapper*'s Application in Data Breach Litigation

Many district courts have applied the Supreme Court's holding in *Clapper* in data breach cases. Of those courts, "most have agreed that the mere loss of data—without any evidence that it has been either viewed or misused—does not constitute an injury sufficient to confer standing." *SAIC*, 45 F. Supp. 3d at 19. Indeed, "since *Clapper* . . . courts have been even more emphatic in rejecting 'increased risk' as a theory of standing in data-breach cases." *Id.* at 28; *see also Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 876 (N.D. Ill. 2014) ("Under *Clapper*, the mere fact that the risk has been increased does not suffice to establish standing.").

A recent case from the U.S. District Court for the District of Columbia is noteworthy for its lucid explanation of why *Clapper* forecloses any claim of cognizable injury in this case. In *SAIC*, the court dismissed, for lack of standing, those plaintiffs who alleged only "[m]ere loss of data" and failed to allege that the data "was accessed or abused." *SAIC*, 45 F. Supp. 3d at 28. Specifically, the court dismissed plaintiffs who "allege[d] only a risk of identity theft," where "the likelihood that any individual [p]laintiff will suffer harm remains entirely speculative." *Id.* at 25. In that case, an unknown thief stole data tapes containing "backup copies of medical data related to over 4 million [health insurance] beneficiaries." *See id.* at 20-21. As is true here, most of the *SAIC* plaintiffs based their theory of standing on a speculative claim that they faced an

increased risk of identity theft. *Id.* at 25 ("Due to the data breach, [plaintiffs] claim that they are 9.5 times more likely than the average person to become victims of identity theft.").

Rejecting this argument, the court drew parallels to *Clapper*'s attenuated chain of speculative possibilities and chronicled the many assumptions required to establish that the *SAIC* plaintiffs might possibly be injured by the theft. *See id.* As in *Clapper*, the chain of speculative possibilities imagined by the *SAIC* plaintiffs depended entirely on the independent and unknowable actions of a third party (*i.e.*, the thief). The chain of events in *SAIC* and here is even more remote than in *Clapper* because the third party's identity was unknown. *See id.* at 25-26 (indicating that the chain of speculative possibilities was "entirely dependent on the actions of an unknown third party—namely, the thief"); *id.* ("At this point, we do not know who she was, how much she knows about computers, or what she has done with the tapes. . . . Unfortunately, there is simply no way to know until either the crook is apprehended or the data is actually used."); *see also Frank Krasner Enterprises, Ltd. v. Montgomery Cnty.*, 401 F.3d 230, 235 (4th Cir. 2005) ("We have previously denied standing because the actions of an independent third party, who was not a party to the lawsuit, stood between the plaintiff and the challenged actions.").

Relying on *Clapper*, the *SAIC* court dismissed the majority of the plaintiffs for lack of standing:

> After all, it is reasonable to fear the worst in the wake of such a theft, and it is understandably frustrating to know that the safety of your most personal information could be in danger. The Supreme Court, however, has held that an 'objectively reasonable likelihood' of harm is not enough to create standing, even if it is enough to engender some anxiety.

Id. at 26 (citing *Clapper*, 133 S. Ct. at 1147-48); *see also Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007) (dismissing complaint where plaintiffs did not allege that thief intended to access their specific information or that their information had actually been

accessed since the theft, and where plaintiffs could therefore allege only "mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft"); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (dismissing plaintiffs for lack of standing because their future injuries "rel[ied] on speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of [plaintiffs] by making unauthorized transactions in [plaintiffs'] names").

Other courts have consistently found that plaintiffs in data breach cases lack standing where there has been "no misuse of the [stolen] information." *Id.* The recent increase in high-profile cyberattacks has spawned a cottage industry of data breach litigation. The conclusion in most of these cases, however, is the same: plaintiffs lack standing when their data has not been misused. *See, e.g.*, *In re Zappos.com, Inc.*, No. 3:12-cv-325, 2015 WL 3466943, at *8 (D. Nev. June 1, 2015) ("The Court . . . finds that the increased threat of identity theft and fraud stemming from the Zappos's security breach does not constitute an injury-in-fact sufficient to confer standing. The years that have passed without plaintiffs making a single allegation of theft or fraud demonstrate that the risk is not immediate."); *In re Horizon Healthcare Services, Inc. Data Breach Litig.*, No. 13-7418, 2015 WL 1472483, at *6 (D.N.J. Mar. 31, 2015) ("Plaintiffs' future injuries stem from the conjectural conduct of a third party bandit and are therefore inadequate to confer standing."); *Green v. eBay Inc.*, No. 14-1688, 2015 WL 2066531, at *5 (E.D. La. May 4, 2015) ("The mere fact that Plaintiff's information was accessed during the Data Breach is insufficient to establish injury-in-fact. Thus, the potential threat of identity theft or identity fraud, to the extent any exists in this case, does not confer standing on Plaintiff to pursue this action in federal court."); *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. Consequently, courts have held that plaintiffs do not have standing, or have granted summary judgment for failure to establish damages in cases . . . brought in response to a third party theft or unlawful access to financial information from a financial institution.").

The Seventh Circuit's recent decision in *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), is not to the contrary. *Neiman Marcus* involved a cyberattack on a department store that resulted in "potential[] expos[ure]" of 350,000 credit cards, of which 9,200 "were known to have been used fraudulently." *Id.* at 690. The Seventh Circuit held, among other things, that "[a]t this stage in the litigation [*i.e.*, on a motion to dismiss], it is plausible to infer that the plaintiffs have shown a substantial risk of harm" resulting from the cyberattack. *Id.* at 693. Assuming that *Neiman Marcus* was correctly decided, it is nonetheless reconcilable with the Supreme Court's standing doctrine, and it is distinguishable from this case. At least 9,200 customers in *Neiman Marcus*, including two of the four named plaintiffs, experienced fraudulent credit card charges. Those customers therefore suffered a recognized and cognizable Article III injury. Given the actual incurred fraudulent charges, and that the hackers attacked a major retailer during the holiday shopping season in order to steal *credit card* information, *id*. at 690, it was arguably plausible that the other named class representatives might themselves suffer a concrete injury in the near future. *See id.* at 693-94.

Plaintiffs in this case cannot make similar showings. First, none of the named Plaintiffs in this case have alleged a cognizable injury (such as, in *Neiman Marcus*, fraudulent credit card charges) that are fairly traceable to the breach. Second, they cannot, as in *Neiman Marcus*, attempt to show the reasonableness of their alleged heightened risk by pointing to other CareFirst

customers who have been injured. Finally, given the data that was stolen from CareFirst, Plaintiffs must stretch to come up with any story about how they *might*, at some point in the future, be concretely injured. Unlike *Niemen Marcus*, which appeared to involve an attack whose purpose was to commit identity theft, Plaintiffs cannot allege that data easily used to commit identity theft was in fact stolen in this case.

3. Plaintiffs Lack a Sufficient Injury-in-Fact.

Plaintiffs do not allege that their personal information has been used or misused by the data thief, and they therefore do not approach alleging a concrete, actual, or imminent injury-in-fact. Plaintiffs' alleged injuries rely instead on a highly attenuated chain of possibilities that "rest[s] on speculation about the decisions of independent actors." *See Clapper*, 133 S. Ct. at 1148-50. To borrow from the Third Circuit, the Plaintiffs "cannot . . . describe how [they] will be injured in this case without beginning [their] explanation with the word 'if': *if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information, and *if* he does so successfully, only then will [plaintiffs] have suffered an injury." *See Reilly*, 664 F.3d at 43. This failure cannot be corrected and dooms their Complaint.

a. Plaintiffs' Alleged Increased Risk of Harm Does Not Create Standing.

Plaintiffs allege that they "were harmed by having their personal information compromised" and that they "face the imminent and certainly impending threat of future additional harm from the increased threat of identity theft and fraud." Compl. ¶ 24. Merely reciting *Clapper*'s standard for future injury is not sufficient to actually allege a cognizable injury. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). These allegations of increased risk of harm are therefore not sufficient to meet Article III's standing threshold. *See*

Clapper, 133 S. Ct. at 1150; *Whitmore*, 495 U.S. at 158 ("[W]e have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute an injury in fact.") (internal quotation marks omitted).

Moreover, more than a year passed between the time of the theft and the date Plaintiffs filed their Complaint, yet neither Plaintiff can allege that their data was misused. *See In re Zappos.com*, 2015 WL 3466943, at *8 ("The more time that passes without the alleged future harm actually occurring undermines any argument that the threat of that harm is immediate, impending, or otherwise substantial."). This passage of time reinforces the likelihood that the chain of speculative possibilities imagined by Plaintiffs will never materialize. The Constitution precludes the Court from hearing Plaintiffs' claims because there is no "Case" or "Controversy."

b. The Alleged Purchase of Credit Monitoring Services and Other Future Mitigation Costs Does Not Create Standing.

Plaintiffs have not purchased credit monitoring services but merely suggest that they may do so at some unknown point in the future.[3] *See* Compl. ¶ 73 ("Maryland Plaintiff and the Maryland Class members will incur economic damages related to the expenses for credit monitoring and the loss associated with paying for health services they believed were purchased through secure transactions."). As an initial matter, these allegations do nothing to support Plaintiffs' injury claim, because Plaintiffs do not allege that they have actually incurred any costs. Moreover, even if Plaintiffs had done so, such costs incurred to prevent speculative future harm are themselves entirely speculative and cannot alone create standing. *SAIC*, 45 F. Supp. 3d at 24; *see also Clapper*, 133 S. Ct. at 1151 (holding that plaintiffs "cannot manufacture

[3] The Plaintiffs' Complaint fails to mention that, after learning of the breach, CareFirst offered to pay for the cost of credit monitoring for its insureds for two years.

standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending") (internal citations omitted).

Regardless, the purchase of credit monitoring services following a data breach does not, without more, create standing. *See, e.g.*, *SAIC*, 45 F. Supp. 3d at 26 (plaintiffs could not use the "cost of credit monitoring and other preventive measures [to] create standing") (citing *Clapper*, 133 S. Ct. at 1151). To find otherwise, "even when such efforts are sensible," would allow unharmed plaintiffs to improperly create standing for themselves where it did not otherwise exist "by taking steps to avoid an otherwise speculative harm." *Id.* at 24-26; *see also Reilly*, 664 F.3d at 46 ("Appellants' alleged time and money expenditures to monitor their financial information do not establish standing."); *Randolph*, 486 F. Supp. 2d at 8 (holding that the "argument that the time and money spent monitoring a plaintiff's credit suffices to establish an injury overlook[s] the fact that their expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized") (internal citation and quotations omitted).

c. Plaintiffs' Other Alleged Injuries Do Not Establish an Injury-in-Fact.

Plaintiffs' passing suggestion that they were injured by allegedly delayed notification of the data breach is also insufficient to confer standing. *See, e.g.*, Compl. ¶ 72 ("CareFirst also unreasonably delayed informing the Maryland Plaintiff and Maryland Class members . . . after CareFirst knew the data breach had occurred."); *In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588, at *3 (N.D. Ill. Sept. 3, 2013) (finding the purported untimely or inadequate notification of a data breach to be insufficient to establish plaintiffs' actual injury for purposes of Article III standing). Similarly, allegations that Plaintiffs "paid for, but never received, the security protections to which they were entitled" are insufficient to establish Article

III standing. *See* Compl. ¶¶ 52, 58; *SAIC*, 45 F. Supp. 3d at 30 ("To the extent that Plaintiffs claim that some indeterminate part of their premiums went toward paying for security measures, such a claim is too flimsy to support standing."); *Willey v. J.P. Morgan Chase, N.A.*, No. 09 Civ. 1397, 2009 WL 1938987, at *9 (S.D.N.Y. July 7, 2009).

II. Plaintiffs' Claims Fail As a Matter of Law.

Even if Plaintiffs had standing, they still fail to state claims upon which relief may be granted. For the same reasons that Plaintiffs lack standing—failure to allege any damages—their negligence claim (Count I) cannot stand. Plaintiffs' negligence claim is also precluded by the economic loss doctrine. Next, Plaintiffs' breach of implied contract claim (Count II) fails to actually allege the existence of an implied contract. Plaintiffs' unjust enrichment claim (Count III) fails because an express contract existed between the parties. Plaintiffs' attempt at declaratory relief (Count IV) should be dismissed because it relies on the Declaratory Judgment Act, which is merely a procedural tool, not an independent cause of action. Lastly, Plaintiffs' claim under the MPIPA (Count V) fails because Defendants, as insurers, are exempt from its enforcement provisions. Furthermore, Plaintiffs fail to allege they suffered an objectively identifiable injury as required under the MPIPA.

A. Plaintiffs' Negligence Claim Fails as a Matter of Law.

1. Plaintiffs Do Not Allege Actual Damages.

Count I of the Complaint, alleging negligence, must be dismissed for failure to plead damages. Under Maryland law, "for a plaintiff to state a prima facie claim in negligence, he or she must allege facts demonstrating . . . that the plaintiff suffered actual injury or loss." *Remsburg v. Montgomery*, 831 A.2d 18, 26 (Md. 2003). As discussed extensively above, Plaintiffs' Complaint stops well short of alleging that Plaintiffs have "suffered actual loss or

injury," as opposed to some unknown future injury. On this basis alone, Count I must be dismissed for failure to state a claim.

2. The Economic Loss Doctrine Precludes Plaintiffs' Negligence Claim.

Maryland follows the "economic loss rule," pursuant to which "[t]ort liability is limited to situations in which the negligence causes physical harm to person or property . . . . Generally, plaintiffs cannot recover in tort for . . . purely economic losses. Such losses are often the result of some breach of contract and ordinarily should be recovered in contract actions." *Pulte Home Corp. v. Parex, Inc.*, 923 A.2d 971, 1002 (Md. 2007) (internal quotation marks and citations omitted); *see also Lawyers Title Ins. Corp. v. Rex Title Corp.*, 282 F.3d 292, 293 (4th Cir. 2002) ("In general . . . Maryland does not recognize a cause of action for negligence arising solely from a contractual relationship between two parties.").

Although Plaintiffs' failure to allege any actual injury makes it difficult to identify what alleged damages they seek to recover, Plaintiffs' purported future injuries are, at their core, economic. Plaintiffs claim, for example, that they allegedly "face the imminent and certainly impending threat of future harm from the increased threat of identity theft and fraud due to their personal information potentially being sold on the Internet black market and/or misused by criminals." Comp. ¶ 24. Elsewhere, Plaintiffs suggest that their personal information has "value." *Id.* ¶ 17. These claims are barred by the economic loss rule because they seek largely to recover economic losses.

Plaintiffs' vague allegations that they have suffered some abstract non-economic damage do not change this conclusion. *See, e.g., id.* ¶ 24 ("Plaintiffs were harmed by having their personal information compromised . . . ."). Assuming that these offhand suggestions of non-economic harm are even enough to clear *Iqbal* and *Twombly*'s pleading threshold, the Court

should not permit Plaintiffs to evade the economic loss rule by simply tacking on conclusory suggestions of non-economic damages. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See, e.g.*, *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (concluding that the economic loss rule barred tort-based recovery for a poorly-constructed house, even where plaintiff "sought to recover 'repair costs, loss of use, inconvenience, emotional distress, and mental pain and suffering'"); *Davis v. Wells Fargo Home Mortg.*, No. 34136-1-II, 2007 WL 2039077, at *6-7 (Wash. Ct. App., July 17, 2007) (holding that the economic loss rule barred negligence-based claims for emotional distress in a case concerning a mortgage contract "because the parties' relationship is governed by their mortgage contract . . . from which their emotional distress and negligence claims originate"). The economic loss rule serves no purpose if Plaintiffs could so easily plead their way around it by vaguely stating they have suffered some non-economic loss.

The Maryland Court of Appeals has "approved a few narrow exceptions" to the economic loss rule, "one of which permits negligence claims arising from a contractual relationship in circumstances involving a vulnerable party." *Lawyers Title Ins.*, 282 F.3d at 294. However, this is not an absolute rule; "[a]bsent special circumstances, the court is reluctant to 'transform an ordinary contractual relationship . . . into a fiduciary relationship or to impose any duties'" not found in the underlying contract. *See Spaulding v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 614, 620 (D. Md. 2012) (quoting *Parker v. Columbia Bank*, 604 A.2d 521, 532 (Md. Ct. App. 1992)). The express contract in this case does not create the sort of relationship between Plaintiffs and Defendants that would allow Plaintiffs to bring a negligence-based cause of action for conduct arising from their contractual relationship with Defendants, and Plaintiffs do not allege otherwise.

For either of the reasons stated above, Plaintiffs' negligence claim (Count I) fails.

B. Plaintiffs Fail To Allege the Existence of an Implied Contract.

Count II of the Complaint purports to state a cause of action for breach of an implied contract. Count II must be dismissed, however, because Plaintiffs' one-sentence allegation as to the existence of an implied contract is insufficient to state a claim under *Iqbal* and *Twombly*.

An implied contract is "an agreement which legitimately can be inferred from intention of the parties as evidenced by the circumstances and the ordinary course of dealing and the common understanding of men." *Cnty. Comm'rs of Caroline Cnty. v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 606 (Md. 2000) (internal quotation marks omitted). In other words, Plaintiffs must allege "some act or conduct of the party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other." *Mogavero v. Silverstein*, 790 A.2d 43, 53 (Md. Ct. Spec. App. 2002); *see also Mass Transit Admin. v. Granite Const. Co.*, 471 A.2d 1121, 1125 (Md. Ct. Spec. App. 1984) ("The term [implied in fact contract] only means that the parties had a contract that can be seen in their conduct rather than in an explicit set of words. In other words, the [implied in fact] contract is proved by circumstantial evidence.") (quoting 1 Palmer, *The Law of Restitution*, § 4.2).

The *sole* allegation Plaintiffs put forward to satisfy this standard is that "Plaintiffs . . . relied upon CareFirst's representations regarding privacy and security before purchasing health services and products." Compl. ¶ 49. On its own, this allegation is entirely conclusory and is therefore not entitled to the presumption of truth. *See Iqbal*, 556 U.S. at 679 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the presumption of truth.").

However, even if this allegation is presumed to be true, it is still not sufficient to allege "the circumstances and the ordinary course of dealing and the common understanding" of the parties. *See J. Roland Dashiell & Sons, Inc.*, 747 A.2d at 606. The operative allegations in Count II are unsupported by any allegations in the body of the Complaint. Likewise, the handful of allegations offered to bolster Count II (*see* Compl. ¶¶ 49-53) recalls the bygone era of pleading ended by the Supreme Court's decisions in *Iqbal* and *Twombly*. In a post-*Iqbal* and *Twombly* world, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" under Rule 8. *Iqbal*, 556 U.S. at 678; *id.* at 679 ("Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

Plaintiffs do not allege, for example, what "representations" Defendants made regarding privacy and security; Plaintiffs do not allege that they actually read such representations; and they do not allege that they actually relied on such representations. Courts have dismissed implied contract claims in data breach cases that were based on far more than Plaintiffs' allegation in this case. *See, e.g.*, *Willingham v. Global Payments, Inc.*, No. 12-CV-01157-RWS, 2013 WL 440702, at *21 (N.D. Ga. Feb. 5, 2013) (dismissing implied contract claim in a data breach case because the complaint did not "plead that Plaintiffs were aware of, much less relied upon, Defendant's statements about its services prior to submitting their data to a merchant," and collecting a number of privacy cases in support). In short, Count II contains no factual allegations supporting the statement that Plaintiffs allegedly relied on Defendants' "representations regarding privacy and security before purchasing health services and products."

Compl. ¶ 49. Rule 8 "do[es] not require courts to credit a complaint's conclusory statements without reference to its factual context." *Iqbal*, 556 U.S. at 686.

Because Plaintiffs do not adequately plead "the circumstances and the ordinary course of dealing and the common understanding" of the parties as required to allege this cause of action, it must be dismissed. *See J. Roland Dashiell & Sons, Inc.*, 747 A.2d at 606.

C. The Existence of a Contract Precludes Plaintiffs' Unjust Enrichment Claim.

The existence of a contractual relationship between Plaintiffs and Defendants precludes Plaintiffs from bringing a claim for unjust enrichment (Count III). As the Maryland Court of Appeals has held, "generally, quasi-contract claims such as . . . unjust enrichment cannot be asserted when an express contract defining the rights and remedies of the parties exist." *J. Roland Dashiell & Sons, Inc.*, 747 A.2d at 610. While the Court of Appeals used the word "generally," this Court has treated it as a limited qualifier: "a plaintiff may plead in the alternative by asserting claims for unjust enrichment and breach of express contract," but "when doing so the plaintiff's claim for unjust enrichment *must* include an allegation of fraud or bad faith in the formation of the contract." *J.E. Dunn Const. Co. v. S.R.P. Dev't Ltd. P'ship*, 2015 WL 4365318, at *12 (D. Md. July 13, 2015) (internal quotation marks omitted, emphasis in original); *see also J. Roland Dashiell & Sons*, 747 A.2d at 608-09 ("Generally, courts . . . allow unjust enrichment claims only when there is evidence of fraud or bad faith, there has been a breach of contract or a mutual recission of the contract, when recission is warranted, or when the express contract does not fully address a subject matter."). Plaintiffs have not alleged (nor could they) issues surrounding the formation of their contract with Defendants.

Although Plaintiffs appear to have gone out of their way to avoid pleading the existence of a contract between them and Defendants, it is inescapable that the parties' relationship is

contractual. *See, e.g.*, Compl. ¶¶ 23-23 (alleging that each named Plaintiff "was insured by CareFirst"); *id.* ¶ 49 (alleging that Plaintiffs "relied upon CareFirst's representations regarding privacy and security *before purchasing health services and products*") (emphasis added). On its own, this is sufficient to dismiss Plaintiffs' unjust enrichment claim. Plaintiffs cannot allege, despite the existence of a contract between them and Defendants, that they require a remedy—unjust enrichment—which "the law creates in absence of any agreement." *J. Roland Dashiell & Sons, Inc.*, 747 A.2d at 606 (internal quotation marks omitted).

D. Plaintiffs May Not Bring a Separate Cause of Action for a Declaratory Judgment.

In Count IV, Plaintiffs assert a separate cause of action for a declaratory judgment, which appears to be Plaintiffs' basis for requesting a laundry list of affirmative injunctive relief. *See* Compl. ¶ 69. This claim should be dismissed because the Declaratory Judgment Act, 28 U.S.C. § 2201, does not provide an independent cause of action. Rather, its purpose is "procedural only," *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (internal quotation marks omitted), and its availability "presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). If Plaintiffs have otherwise stated a claim as to one of their other causes of action, they may separately seek declaratory relief. They may not, however, bring a claim solely for a declaratory judgment.

E. Plaintiffs' Claim Under the Maryland Personal Information Protection Act Must Be Dismissed for Two Independent Reasons.

Plaintiffs' final cause of action alleges that Defendants violated provisions of the MPIPA. This claim must be dismissed for two independent reasons.

First, as an insurance company, Defendants are exempt from the Maryland Consumer Protection Act ("MCPA"), the statute from which the MPIPA's enforcement provisions are

drawn. The MPIPA states that a violation of its provisions "[i]s subject to the enforcement and penalty provisions contained in" the MCPA. Md. Code § 14-3508(2). The MCPA, however, specifically states that it does not apply to "(1) the professional services of … [an] insurance company." Md. Code § 13-104(1). Plaintiffs allege that Defendants were acting in their capacity as insurers when they allegedly violated the MCPA.[4] *See, e.g.*, Compl. ¶ 10 ("CareFirst is a large for-profit managed health care conglomerate offering health insurance products principally in the States of Maryland and Virginia, and the District of Columbia metropolitan area."). Accordingly, Defendants cannot be subject to "the enforcement and penalty provisions contained in" the MCPA. Md. Code § 14-3508(2). Plaintiffs therefore have no claim against Defendants under the MPIPA.

Second, even if Defendants were subject to liability under the MPIPA by way of the MCPA, Plaintiffs have still failed to allege that they suffered an actual injury or loss as required under the statute. The Maryland Court of Appeals has interpreted the language and purpose of the MCPA (and thus the MPIPA) to "require[] that actual 'injury or loss' be sustained by a consumer before recovery of damages is permitted in a private cause of action." *Citaramanis v. Hallowell*, 613 A.2d 964, 969 (Md. 1992). This injury "must be objectively identifiable." *Lloyd v. General Motors Corp.*, 916 A.2d 257, 277 (Md. 2007). To state a claim under the MCPA, Plaintiffs must therefore allege that they "have suffered an identifiable loss, measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers' misrepresentations." *Id.*

[4] Courts apply this exemption "even when the plaintiff has alleged the defendant acted in some way other than his professional capacity." *Puffinberger v. Commercion, LLC*, No. SAG-13-1237, 2014 WL 120596, at *9 (D. Md. Jan. 10, 2014) (quoting *Butler v. Wells Fargo Bank, N.A.*, No. MJG 12-2705, 2013 WL 145886, at *3 (D. Md. Jan. 11, 2013)); *see also Lembach v. Bierman*, 528 F. App'x 297, 304 (4th Cir. 2013) ("Maryland courts have applied the exemption broadly.").

Plaintiffs fall well short of this standard. As discussed extensively above, Plaintiffs have not alleged any cognizable injury, much less one that is "objectively identifiable." *Id.* Indeed, Plaintiffs admit as much in their MPIPA cause of action: they allege that they "*will* incur economic damages" by way of the data breach. Compl. ¶ 73. Future damages, however, necessarily cannot be "actual 'injury or loss'" under the MCPA, which must "be sustained by a consumer *before* recovery of damages is permitted in a private cause of action." *Citaramanis,* 613 A.2d at 969 (emphasis added). Count V must therefore be dismissed.

CONCLUSION

The Court lacks subject matter jurisdiction over this case because Plaintiffs lack standing. The Court should therefore dismiss the case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Plaintiffs also fail to state any claims upon which relief may be granted and the Complaint should be dismissed in its entirety pursuant to Rule 12(b)(6).

Dated: September 24, 2015

Respectfully submitted,

/s/ G. Brendan Ballard

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[*] Admission to the bar of the United States District Court for the District of Maryland forthcoming at admission ceremony on October 7, 2015.

[**] *Pro hac vice* application forthcoming.

CERTIFICATE OF SERVICE

I, G. Brendan Ballard, certify that on September 24, 2015, I served the foregoing **Memorandum in Support of Defendants' Motion To Dismiss the Complaint**, together with the accompanying **Motion To Dismiss the Complaint**, on counsel of record via the Court's CM/ECF system.

Dated: September 24, 2015 /s/ G. Brendan Ballard