IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DANIEL B. STORM, HOLLY P. WHITE, and DORIS MCMICHAEL, individually and on behalf of all others similarly situated,	:	**Civil Action No.:**14-cv-01138
Plaintiffs,	:	**THE HONORABLE JOHN E. JONES, III**
v.	:	
PAYTIME, INC.,	:	
Defendant.	:	

Defendant Paytime Inc.'s Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' Complaint

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL COURT CASES

STATE COURT CASES

FEDERAL RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

Defendant Paytime Inc. submits this memorandum of law in support of its motion pursuant to Federal Rules of Civil Procedure 12(b)(1) & (6) to dismiss the Complaint against it because Plaintiffs lack standing to sue and have failed to state a claim entitling them to relief.

I. INTRODUCTION

In April of this year, Paytime, a business supplying payroll, human resource management and other commercial services, was the victim of an unidentified intruder who gained access to its computer system. What, if anything, this unknown intruder did with the information in the system, whether he/she examined or understood it, is unknown. To date, no identity theft has been reported related to this incident. Notably, although two class actions[1] have been filed against Paytime, none of the five named plaintiffs have alleged that they have personally experienced identity theft or even attempted identity theft. For reasons more fully stated below, the Plaintiffs lack standing to sue in the absence of such harm. Moreover, the Plaintiffs' substantive claims are barred by the absence actual damages as well as other defenses applicable to negligence and contract claims. Accordingly, Plaintiffs' Complaint must be dismissed.

---

[1] *See Storm v. Paytime, Inc.,* 1:14-cv-01138 (M.D. Pa), Complaint, a copy of which is attached hereto as Ex. A; *Holt v. Paytime Harrisburg, Inc.*, 2:14-cv-03964 (E.D. Pa), Complaint, as copy of which is attached hereto as Ex. B.

II. FACTUAL ALLEGATIONS

For the purposes of this motion only, all well-pleaded facts of the Complaint are treated as true. According to the Complaint, Paytime, Inc. is a national payroll service bureau which provides payroll processing services throughout the United States. Compl. ¶ 6. Plaintiffs are current and former employees of companies who use or used Paytime to supply payroll processing services. Compl. ¶¶ 8-10.

On April 7, 2014 an unnamed, unauthorized person or persons (the "intruder") gained access to Paytime's computer system and stole personal and financial information of Plaintiffs including name, Social Security numbers, bank account data, street address, birth dates, wages, hiring dates, and phone numbers. Compl. ¶¶ 1 , 2 & 5. Paytime discovered the security breach on April 30, 2014 and began notifying potentially affected parties on May 12, 2014. Compl. ¶ 5. According to the Complaint, the breach occurred because Paytime failed to safeguard its computer system and prevent vulnerabilities that could permit an intrusion. Plaintiffs claim that as a result of the theft of their personal information they are "at an increased and imminent risk of becoming victims of identity theft crimes, fraud and abuse." Compl. ¶ 25. In addition, they claim that they "have spent or will need to spend, considerable time and money to protect themselves as a result of Paytime's conduct." Compl. ¶ 26. Plaintiffs claim that they have "suffered actual damages including but not limited to expenses for credit

monitoring, lost work time, anxiety, emotional distress, loss of privacy, and other economic and non-economic harm." Compl. ¶ 46.

While Plaintiffs allege that the intruder stole information, they do not allege that their information has been viewed or used by the intruder. Plaintiffs do not allege that they have experienced actual or even attempted identity theft, or any other identity fraud event.

Plaintiffs seek to represent a proposed national class of all persons whose personal and financial information was stolen from Paytime's computer systems as a result of the data breach. On behalf of themselves and the putative class, Plaintiffs assert claims based on negligence and breach of contract. They seek money damages, injunctive relief consisting of credit monitoring, bank monitoring and credit restoration services as well as identity theft insurance for the next 25 years. Compl. ¶ 55. In addition, they seek attorneys' fees, expenses, costs, pre-and post-judgment interest. Id.

III. PROCEDURAL STATUS

Plaintiffs filed this case on June 17, 2014. By agreement of the parties, Defendants' response to the Complaint is due on August 1, 2014. A similar class action complaint, captioned *Holt v. Paytime Harrisburg,* was filed in the U.S. District Court for the Eastern District of Pennsylvania *after* the Complaint in this action. *See* Exhibits A and B. On August 4, 2014, Paytime will be filing a motion

with the *Holt* court seeking to have that action transferred to this district and will request that it be consolidated with this case. A case management conference in this case is scheduled with this Court on August 29, 2014.

IV. QUESTIONS PRESENTED

Question: Do Plaintiffs whose personal information was allegedly stolen when an intruder accessed a computer network have standing to sue when they have not experienced identity theft or fraud but have only a generalized fear of future harm and costs associated with that fear?

Suggested Answer: No. Article III of the U.S. Constitution requires an injury or harm which is actual or certainly impending. Plaintiffs have averred a possible future injury, not one that is actual or imminent.

Question: Have Plaintiffs stated a claim for negligence?

Suggested Answer: No. Negligence requires proof of actual harm, not speculative, future injury. In addition, Plaintiffs' negligence claim is barred by the ecomonic loss rule.

Question: Have Plaintiffs stated a claim for breach of contract?

Suggested Answer: No. There is no contract between Plaintiffs and Paytime to be breached. In addition, Plaintiffs do not allege damages recoverable for breach of contract. Finally, Plaintiffs are not intended beneficiaries of any contract between Paytime and their employers.

V. ARGUMENT

Plaintiffs' Complaint should be dismissed for two independent reasons. First, Plaintiffs lack standing under Article III of the United States Constitution. Aside from conclusory allegations of actual harm and imminent danger, Plaintiffs do not allege any injury which is "certainly impending," but rather a fear of future harm which is insufficient to confer standing to avail themselves of the Court's jurisdiction. Second, Plaintiffs' negligence and breach of contract claims fail as a matter of law. For both of these reasons, Defendant's motion should be granted.

A. Plaintiffs Lack Article III Standing to Pursue Their Claims

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

Lack of standing is raised by a motion filed under Federal Rule of Civil Procedure 12(b)(1) to dismiss for lack of subject matter jurisdiction. The opposing party has the burden to establish the Court's jurisdiction. *See Kokkonen v. Guardian Life Ins., Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011); *In re: Sony Gaming Networks and Customer Data Security Breach Litigation*, 903 F. Supp. 2d 942, 952 (S.D. Cal. 2012). To have standing under Article III of the U.S. Constitution, Plaintiffs have the burden to show: (1) an injury in fact; (2) a traceable causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision."

U.S. Const. Art. III; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560.

ii. Standing requires an injury-in-fact which is actual or "clearly impending."

To have standing to sue, a plaintiff must have suffered 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, 185 L. Ed. 2d 264 (U.S. 2013); *Lujan*, 504 U.S. at 560; *Reilly v. Ceridian Corp.*, 664 F.3d at 41-42. Plaintiffs may not use conclusory allegations or legal conclusions "masquerading" as factual conclusions to withstand a motion to dismiss. *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993). The Complaint must "clearly and specifically set forth facts sufficient to satisfy Article III." *Reilly,* 664 F.3d, at 41 (*citing Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990)).

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

The U.S. Supreme Court recently examined whether apprehension of future injury is sufficient to confer standing under Article III in *Clapper v. Amnesty Int'l USA*. In *Clapper*, individuals who feared that they would be targeted for surveillance by the Government, filed suit claiming that they suffered a present

injury for 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.* at 1147. In *Clapper*, the Supreme Court held that the claim for "fear of surveillance" was too "attenuated a chain of possibilities" to confer standing. *Id.* Further, the Court found plaintiffs' claims of 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.*

iv. Standing in Data Breach Cases Requires More Then Generalized Fears About Future Identity Theft

As a result of the proliferation of data breach cases filed throughout the country, various federal courts have addressed whether an Article III case or controversy has been pled in the face of allegations such as those made in this case: fear of future identity theft; expenditures of time and money to put identity theft protection in place prophylactically, anxiety and emotional distress over the possibility of future identity theft or fraud. In *Reilly v. Ceridian,* 664 F.3d 38 (3d Cir. 2011), the Third Circuit confronted similar allegations and was called on to determine the issue of standing in a data breach case very similar to the present case.

Ceridian is a payroll processing firm. Like Paytime, it had possession of its customers' employees' personal information such as social security numbers, dates of birth and bank account information. *Id.* at 38. Ceridian suffered a security breach and an unknown hacker gained access to its system. The hacker potentially gained access to the plaintiffs' personal and financial information. *Id.* Like Paytime, Ceridian gave notice and offered credit monitoring and identity theft protection. The *Reilly* plaintiffs alleged increased risk of identity theft, costs to monitor their credit activity, and emotional distress.

Applying the principles of Article III jurisprudence discussed above, the Third Circuit upheld a dismissal for lack of standing, concluding that the *Reilly* plaintiffs' allegations amounted to hypothetical, future injuries insufficient to confer standing. The Court held that "[a]llegations of 'possible future harm' are not sufficient to satisfy Article III." *Id.* at 42 (*citing Whitmore*, 495 U.S. at 158). Relying on Supreme Court precedent, the Third Circuit concluded that the threatened injury must be "*certainly impending*." *Reilly,* 664 F.3d, at 42 (emphasis added). Since, in *Reilly,* there was no evidence that the data had been or would ever be misused, the Court concluded that the claims lacked "actuality" and were merely hypothetical speculation concerning the possibility of future injury. *Id.* at 42. The *Reilly* plaintiffs could not allege, and did not know, what use if any would be made of their private information. To demonstrate the hypothetical nature of

their claim, the Court observed, "*if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information and *if* the hacker does so successfully, only then will [Plaintiffs] have suffered an injury." *Id.*

The Third Circuit's interpretation of the "*certainly impending*" standard to require more than concerns about future harm was reaffirmed in the in the recent *Clapper* decision discussed above. While not a data breach case, the *Clapper* opinion held that speculative future injury does not create a right to sue. *Clapper*, 133 S. Ct. at 1147. The U.S. Supreme Court made clear that "costs … incurred to avoid [injury]" are insufficient to create standing. *Clapper,* 133 S. Ct. at 1152-1153.

Since the Supreme Court's decision in *Clapper*, several courts have concluded that it imposed a tighter "imminence" requirement for plaintiffs seeking to establish standing based on future harm. In particular, in data breach cases, courts have repeatedly concluded, based on earlier Supreme Court precedent and *Clapper*, that increased risk of identity theft is not sufficient to establish the injury-in-fact requirement for standing. *In re Sci. Applications Int'l (SAIC)Backup Tape Data Theft Litig.*, 2014 U.S. Dist. LEXIS 64125 (D.D.C. May 9, 2014); *Strautins v. Trustware Holdings, Inc.*, 2014 U.S. Dist. LEXIS 32118, 2014 WL 960816 (N.D. Ill. Mar. 12, 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 2014 U.S. LEXIS 23798

(S.D. Ohio Feb. 10, 2014); *In re Barnes & Noble Pin Pad Litig.*, 2013 U.S. Dist. LEXIS 125730, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013). The foregoing cases are attached hereto as Exhibits C through F.

In *Moyer v. Michaels Stores*, 2014 U.S. Dist. Lexis 96588, 2014 WL 3511500 (N.D. Ill. July 14, 2014), the court disagreed with the view that *Clapper* calls for a stricter interpretation of "certainly impending" and found Article III standing in a data breach case involving the possible exposure of 2.6 million credit and data card numbers. However, in *Michaels,* the court had before it not simply allegations of an elevated risk of identity theft due to the breach but also the report of actual attempted identity theft which occurred within two weeks of the alleged victim shopping at Michaels. *Moyer v. Michaels* is attached hereto as Exhibit G.

In the present case, the Plaintiffs have not alleged that they have been the victims of identity theft, or even attempted identity theft. While a hacker obtained entry into the Paytime system, Plaintiffs have not, cannot, allege what the unidentified intruder read, copied or understood. As in *Reilly*, Plaintiffs' allegations of harm are demonstrably speculative: "*if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information and *if* the hacker does so successfully, only then will the Paytime Plaintiffs have suffered an injury. Plaintiffs' allegations of "possible" future harm do not create a case or controversy concerning injuries that are "certainly

impending." Plaintiffs' claims must be dismissed based on Article III of the U.S. Constitution.

B. Plaintiffs Fail To State A Valid Claim For Relief

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move for dismissal of a plaintiff's claims for failure to state a claim upon which relief can be granted. In considering Rule 12(b)(6) motions to dismiss, the Court accepts the allegations in a plaintiff's complaint as true, and, reading those allegations in the light most favorable to the plaintiff, determines whether a reasonable reading of those allegations indicates that the plaintiff has asserted a viable claim. *Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). "Factual allegations must be enough to raise a right of relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007). Only a complaint that states a plausible claim for relief survives on a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 674, 129 S. Ct. 1937 (2009). Dismissal is appropriate if no relief could be granted under any set of facts consistent with the allegations in the Complaint. *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir. 1998). Indeed, a plaintiff may plead himself out of court by alleging facts that show there is no viable claim for relief. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385, n. 1 (3d Cir. 1994).

i. Plaintiffs do not adequately state a negligence claim.

To state a claim for negligence under Pennsylvania law, Plaintiffs must allege that Defendant owed a duty to Plaintiffs, Defendant breached that duty, and Plaintiffs were injured as a result. *Ferry v. Fisher,* 709 A.2d 399, 402 (Pa. Super. Ct. 1998).

a. Plaintiffs cannot allege an actual injury

To be viable under Pennsylvania law, a negligence claim must allege an actual injury and resulting damages. *Estate of Swift by Swift v. Northeastern Hosp.*, 456 Pa. Super. 330, 690 A.2d 719, 722 (1997). Thus, where a pleading fails to allege "actual loss," but asserts only speculative harm or the threat of future harm, there is no viable claim. *Stacey v. City of Hermitage*, 2008 U.S. Dist. LEXIS 29359, 2008 WL 941642, *6 (W.D. Pa. Apr. 7, 2008). Attached hereto as Exhibit H. In other words, a plaintiff's claim for damages cannot arise out of sheer speculation. *See Magnum v. Archdiocese of Philadelphia*, 253 Fed. Appx 224, 228-29 (3d Cir. Nov. 6, 2007).). Attached hereto as Exhibit I. *See also Ware v. Rodale Press, Inc.,* 322 F.3d 218, 226 (3d Cir. 2003) (conjectural damages); *Busfield v. A.C. & S., Inc.*, 434 Pa. Super. 424, 643 A.2d 1095, 1096 (1994); *Pashak v. Barish*, 303 Pa. Super. 559, 450 A.2d 67, 68 (Pa. Super. Ct. 1982) (speculative damages).

Plaintiffs do not allege that there is any ongoing, present harm, such as a fraudulent bank account or non-reimbursed fraudulent charges. Instead, Plaintiffs' alleged injuries are entirely speculative and relate to the risk of future harm. *See, e.g.*, Compl. ¶ 46 (alleging economic harm associated with, *inter alia*, credit monitoring services). Federal courts assessing claims for damages in data breach cases have consistently held that the mere "danger of future harm, unaccompanied by present damage, will not support a negligence action." *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"); *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 as the result of a data breach incident had not been reimbursed). As the *Michaels* court observed, "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." *Michaels*, 2014 U.S. Dist. LEXIS 96588 at *18 (*quoting Williams v. Manchester*, 888 N.E. 2d 1, 13 (Ill. 2008)).

In the present case, Plaintiffs have not alleged a present, actual injury, only an increased risk of harm in the future. No actual misuse of the Plaintiffs' information has been identified or any identity theft or fraud. Costs incurred for

credit monitoring, which are pled in only the broadest sense by the Plaintiffs, have been rejected in this Circuit and elsewhere as not constituting a "present injury." They are, instead, amounts expensed to "ease the fears of future third-party criminality," not the result of any "actual injury." *See Reilly*, 664 F.3d, at 46.

Plaintiffs also seek recovery for emotional distress. Under Pennsylvania law, a plaintiff may not recover for emotional distress in the absence of physical injury except under very limited circumstances not applicable here. *Angus v. Shiley Inc.*, 989 F.2d 142, 147 (3d Cir. 1993). Where the plaintiff fails to allege some physical injury, "he may not recover for that alleged distress whether it was intentionally or negligently inflicted." *Rolla v. Westmoreland Health System*, 438 Pa. Super. 33, 651 A.2d 160,163 (1994). Not only have Plaintiffs not experienced a physical injury, they have not experienced any actual injury. Plaintiffs' allegation of anxiety and emotional distress do not convert apprehension about future harm into present, actual injury. Plaintiffs have failed to state a claim for relief in their negligence count because they cannot plead an essential element of a negligence claim: actual injury.

b. Plaintiffs' negligence claim is barred by the economic loss doctrine.

Even if Plaintiffs could allege all the elements of a negligence claim, their negligence claim must fail under Pennsylvania law because it is barred by the economic loss doctrine. Plaintiffs allege various economic damages arising from

Defendant's alleged negligence. *See* Compl. ¶ 46. Under the "economic loss doctrine," economic damages can only support a claim for negligence when accompanied by some form of physical harm, such as personal injury or property damage. *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175 (3d Cir. 2008). *See also Adams v. Cooper Beach Townhome Communities, L.P.*, 816 A.2d 301, 305 (Pa. Super. Ct. 2003) ("the Economic Loss Doctrine provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage.")

In *Sovereign Bank*, the Third Circuit dismissed a negligence claim in the data breach context on the basis of the economic loss doctrine due to a lack of physical harm. There, BJ's experienced a breach of security in its computer cardholder system that resulted in the theft of customer credit card information from its file. *Id.* at 166. The stolen information was thereafter misused in regards to numerous Sovereign Bank customers. *Id.* Following this event, Sovereign Bank filed a negligence action against BJ's seeking to recover costs associated with the replacement of some of its customers' cards and amounts paid to reimburse customers with fraudulent purchases. *Id.* at 166-167. The Third Circuit affirmed the Middle District's dismissal of the negligence claim on the basis of the economic loss doctrine. *Id.* at 178.

Here, Paytime suffered a data breach incident as the result of a third party hacking attack. The Plaintiffs do not allege that they have experienced any property damage or personal injury as a result of this incident. Therefore, their claims cannot succeed under a negligence theory because it is barred by the economic loss rule.

ii. Plaintiffs Cannot State a Claim For Breach of Contract.

a. Plaintiffs do not have a contract with Paytime.

Plaintiffs do not have a claim for breach of contract against Paytime as a matter of law. "Pennsylvania law requires that a plaintiff seeking to proceed with a breach of contract action must establish (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (*citing CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). To show the existence of a contract, plaintiffs must plead facts demonstrating an offer, acceptance, and consideration or mutual meeting of the minds. *Pittsburgh Constr. Co. v. Griffith*, 834 A.2d 572, 580 (Pa. Super. Ct. 2003). Legal consideration to support the formation of a contract must consist of "a useful service of a character that is usually paid for." *Martin v. Little, Brown & Co.*, 304 Pa. Super. 424, 450 A.2d 984, 987 (1981). Here, Plaintiffs do not plead the essential terms of a purported contract between Paytime and the Plaintiffs. Further, Plaintiffs do not

allege that any consideration was exchanged between the Plaintiffs and Paytime. Plaintiffs allege only that they were employed by companies who were clients of Paytime. Paytime respectfully submits that this count must fail as no contract was ever formed between these parties.

b. Plaintiffs have no damages recoverable for breach of contract.

As outlined in more detail previously, Plaintiffs additionally fail to plead any legally cognizable damages. Allegations of remote and speculative damages are insufficient under Pennsylvania law to sustain a claim for breach of contract. *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 68 (1989). Plaintiffs allege only in their cause of action under breach of contract that they have "suffered damages." *See* Compl. ¶ 54.

c. Plaintiffs Are Not Third Party Beneficiaries of Any Purported Contract between Paytime and their employers.

Plaintiffs allege that the "Plaintiffs and the proposed Class members were either direct or third-party beneficiaries of the contract between Paytime and their former or current employers." *See* Compl. at ¶ 51. Defendants are unaware of a concept of "direct" beneficiaries that would apply to the present case aside from Pennsylvania's law of third-party beneficiaries. Plaintiffs are not third party beneficiaries of any contract between Paytime and their employers under the applicable law.

Pennsylvania adopted the Restatement 2d Contracts definition of third-party beneficiaries in *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744, 751 (1983). The Restatement divides persons benefitted by a contract into intended and incidental beneficiaries. Incidental beneficiaries have no right to enforce the agreement. Restat. (2d) Contracts § 315. An intended beneficiary who has rights under the agreement must meet this test:

> "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Restat. (2d) Contracts § 302. Paytime provided payroll assistance to the employers and former employers of Plaintiffs. Paytime did not undertake to pay a debt owed to the Plaintiffs, per Restatement (2d) of Contracts §302(1)(a), and that is not the type of promise that the Plaintiffs seek to enforce. While receipt of a paycheck would have benefitted the Plaintiffs, the actual "promised performance," in the words of § 302(1)(b), was enterprise payroll management, not a service Plaintiffs would be seeking and not a benefit that their suit seeks to enforce. The

Plaintiffs' claims do not fit the definition of an enforceable third-party beneficiary claim.

Moreover, under Pennsylvania law, for a third-party beneficiary to have standing to recover on a contract, both parties (promisor and promisee) must express an intention in the contract itself that the third party be a beneficiary to whom the promisor's obligation runs. *Spires v. Hanover Fire Insurance Co.*, 364 Pa. 52, 70 A.2d 828 (1950). While *Guy* suggests that it overrules the *Spires* requirement that the intent to benefit the beneficiary be expressed, the 1992 Pennsylvania Supreme Court case of *Scarpitti v. Weborg*, clarifies Pennsylvania law stating that *Guy* represents the exception and the general rule remains that the intention to benefit must be express. *See Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147, 149 (1992). If the parties' intent to benefit a third party is not express in the contract, there must be "circumstances that are so compelling" before we recognize a third party beneficiary as an intended one. *Id.*at 150. Whether parties intend to benefit a third person must be "within the contemplation of the promisor and the promisee at the time of contracting." *Id.* at 151. Here, Plaintiffs have not presented any allegations to show that they are intended third-party beneficiaries. Specifically, they fail to allege that Paytime and their employer expressed an intention to benefit Plaintiffs through any purported contract between them. Thus,

they have no standing to pursue a claim under breach of contract as a purported third-party beneficiary and these claims should be dismissed.

VI. CONCLUSION

Plaintiffs have no actual or "certainly impending" injury. They report no identity theft, attempted identity theft or other criminal activity caused by the intrusion into Paytime's system. Apprehension of future injury, costs incurred to protect against future injury, emotional distress associated with concerns about the future are not sufficiently concrete to give rise to a case or controversy under Article III of the U.S. Constitution or to support a cause of action for negligence or breach of contract under Pennsylvania law. In addition, the economic loss rule bars Plaintiffs' negligence claim. Plaintiffs' lack of privity with Paytime forecloses a breach of contract action. The lack of privity cannot be overcome where there is no express intention to benefit Plaintiffs in the agreement between Paytime and the employers.

For all of the foregoing reasons, Paytime respectfully requests that the Plaintiffs' complaint be dismissed with prejudice.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

BY: /s/Claudia D. McCarron

CLAUDIA D. McCARRON, ESQUIRE
1055 Westlakes Drive, Suite 300
Berwyn, PA 19312
Phone: (215) 977-4100
Fax: (215) 977-4101
claudia.mccarron@lewisbrisbois.com
Attorney for Defendant, Paytime, Inc.

Dated: August 1, 2014

General Information

Court	United States District Court for the Middle District of Pennsylvania; United States District Court for the Middle District of Pennsylvania
Nature of Suit	Contract - Other[190]
Docket Number	1:14-cv-01138