UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Richard G. Beck, Beverly Watson, Cheryl Gajadhar, Jeffery Willhite, and Lakreshia R. Jeffery, on behalf of themselves and all others similarly situated, Plaintiffs, vs. Robert A. McDonald,[1] in his official capacity as Secretary of Veterans Affairs, Timothy B. McMurry, in his official capacity as the former Medical Director of William Jennings Bryan Dorn VA Medical Center, Bernard L. Dekoning, M.D., in his official capacity as the Chief of Staff of William Jennings Bryan Dorn VA Medical Center, Ruth Mustard, RN, in her official capacity as the Director for Patient Care/Nursing Services of William Jennings Bryan Dorn VA Medical Center, David L. Omura, in his official capacity as the Associate Director of William Jennings Bryan Dorn VA Medical Center, and Jon Zivony, in his official capacity as the Assistant Director of William Jennings Bryan Dorn VA Medical Center, Defendants.	)	Case No. 3:13-cv-999-TLW

[1] Pursuant to Federal Rule of Civil Procedure 25(d), when a public officer who is a party in an official capacity ceases to hold office, the officer's successor is automatically substituted as a party, and later proceedings should be in the substituted party's name. Accordingly, Erik K. Shinseki, Rebecca Wiley, and Barbara Temeck have been substituted with Robert A. McDonald, Timothy B. McMurry, and Bernard L. DeKoning, respectively.

ORDER

This matter is before the Court for consideration of Plaintiffs' motion for partial summary judgment, filed on June 30, 2014 (Doc. #65); Plaintiffs' motion to certify class, filed on July 21, 2014 (Doc. #70); Defendants' motion to dismiss, filed on August 7, 2014 (Doc. #74); and Defendants' motion to dismiss and, in the alternative, motion for summary judgment, filed on December 16, 2014 (Doc. #97). The Court held a hearing on these motions on January 28, 2015, wherein counsel for Plaintiffs and Defendants presented arguments. (Doc. #106). The Court has carefully considered counsel's arguments and the parties' pleadings, motions, and memoranda, and these motions are now ripe for disposition. For the reasons set forth below, the Court grants Defendants' motion to dismiss and, in the alternative, motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Richard G. Beck, Lakreshia R. Jeffery, Beverly Watson, Cheryl Gajadhar, and Jeffery Willhite are veterans who bring this putative class action on behalf of 7,405 individuals whose personal data was stored on a laptop that was either lost or stolen from a pulmonary testing laboratory in the William Jennings Bryan Dorn Veterans Affairs Medical Center ("Dorn VAMC" or "the VA") on February 11, 2013.[2] Defendants Robert A. McDonald, Timothy B. McMurry, Bernard L. DeKoning, Ruth Mustard, David L. Omura, and Jon Zivony are VA employees sued in their official capacities.

On the morning of February 11, 2013, a pulmonary respiratory therapist at Dorn VAMC noticed that a laptop that should have been connected to a pulmonary function testing device was

[2] The parties dispute whether the laptop was stolen or simply misplaced. In considering Defendants' motions to dismiss and for summary judgment, the Court accepts Plaintiffs' version of the facts and therefore assumes that it was stolen. See Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (per curiam) ("[I]n ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (internal alteration and quotation marks omitted)).

missing. The therapist notified his supervisor, who then notified the VA Office of Information Technology and the VA Police. Rebecca Wiley, the Dorn VAMC medical director at the time, subsequently appointed an administrative board to investigate the laptop's disappearance. The laptop has not been recovered, and its whereabouts are still unknown.

The personal information stored on the laptop likely varied from one patient to the next, but Defendants submit that the following information may have been included: (1) date of testing appointment; (2) patient's name; (3) patient's identification number, which included the first letter of the last name and the last four digits of the social security number; (4) patient's age; (5) patient's height; (6) patient's weight; (7) patient's gender; (8) patient's race; (9) the name of the technician who conducted the pulmonary test; and (10) the treating physician's name. A patient's date of birth may also have been included if two patients shared the same last name and the same last four digits of their social security number. The evidence of record does not show that the laptop contained full social security numbers or any financial account information. Defendants have admitted that one or more Dorn VAMC employees knew that the missing laptop contained unencrypted personal information. (Doc. #100-10 at 1).

Dorn VAMC employees used appointment records to compile a list of every patient tested using the pulmonary device to which the computer was connected. On April 3, 2013, Dorn VAMC sent a letter notifying those patients of the laptop's disappearance. The VA offered one free year of credit monitoring to the 6,507 living patients whose information may have been on the computer.

Plaintiffs filed this action on April 12, 2013 (Doc. #1), and filed an Amended Complaint on July 1, 2013 (Doc. #15). On July 16, 2013, Defendants filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. (Doc. #20). The

Court held a hearing on the motion to dismiss on October 18, 2013. (Doc. #37). On November 19, 2013, the Court entered an Order granting Defendants' motion to dismiss with respect to Plaintiffs' state law negligence claims. (Doc. #38). The Court denied the motion to dismiss with respect to Plaintiffs' Privacy Act and Administrative Procedure Act ("APA") claims. Id. The parties then conducted extensive discovery.

Currently before the Court are Plaintiffs' claims that Defendants violated the Privacy Act by (1) allowing an unauthorized individual to access Plaintiffs' personal information for unauthorized or improper purposes; (2) failing to establish and ensure lawful compliance with appropriate administrative, technical, and physical safeguards requirements; (3) assembling and maintaining Plaintiffs' personal information in a system of records even though the information was not relevant and necessary to accomplish a purpose required by statute or by executive order of the President; and (4) failing to publish a Federal Register notice informing Plaintiffs that a new system of records was created; and Plaintiffs' claim that they are entitled to relief pursuant to the APA because Defendants have unlawfully failed to comply with Privacy Act requirements. Plaintiffs seek statutory and actual damages as well as declaratory and injunctive relief.

Plaintiffs purport to represent individuals "who have suffered emotional trauma, monetary damages, and been placed in fear of identity theft, destruction of credit, and health insurance fraud because of Defendants' willful and intentional actions and reckless disregard for the safeguarding of [Plaintiffs'] personal identifying and medical information." (Doc. #15 at 2). They further assert that Defendants' actions and inactions have "caused Plaintiffs adverse impacts and harm including, but not limited to, embarrassment, inconvenience, unfairness, mental distress, and the threat of current and future substantial harm from identity theft and other misuse of their Personal Information." Id. at 12. They contend that the increased risk of identity

theft and medical insurance abuse "requires continuing affirmative actions by Plaintiffs to recover peace of mind, emotional stability, and personal security including, but not limited to, frequently obtaining and reviewing credit reports, bank statements, health insurance reports, and other similar information, purchasing credit watch services, and shifting financial accounts." Id.

Plaintiffs filed a motion for partial summary judgment on June 30, 2014. (Doc. #65). They seek an order from the Court holding that "Defendants' liability under the Administrative Procedure Act is clear and irrefutable" and that "Defendants failed to provide any adequate safeguards in violation of the Privacy Act." Id. at 1. Defendants filed a response in opposition on July 15, 2014 (Doc. #69), to which Plaintiffs replied on July 22, 2014 (Doc. #71). Plaintiffs filed a supplemental reply, which included a table of purportedly undisputed material facts that support their motion for partial summary judgment, on November 20, 2014. (Doc. #90). Defendants replied on December 16, 2014. (Doc. #98).

Plaintiffs filed a motion to certify the proposed class on July 21, 2014, seeking to certify a class consisting of "[a]ll individuals who have provided, and will in the future be required to provide, their Personally Identifiable Information (PII) as that term is defined in VA Directive 6502 to Dorn VAMC in order to obtain medical services from the Department of Veterans Affairs."[3] (Doc. #70 at 1). Proposed Subclass A includes those whose information was not stored on the laptop, and proposed Subclass B includes those whose information may have been. Id. at 2. Defendants filed a response in opposition on August 7, 2014 (Doc. #73), and Plaintiffs replied on August 15, 2014 (Doc. #75).

[3] VA Directive 6502 defines "Personally Identifiable Information" as "any information about an individual that can reasonably be used to identify that individual that is maintained by VA, including but not limited to, education, financial transactions, medical history, and criminal or employment history and information which can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, telephone number, driver's license number, credit card number," etc. (Doc. #71-8 at 4).

Defendants filed a motion to dismiss for lack of subject matter jurisdiction on August 7, 2014. (Doc. #74). They assert that Plaintiffs cannot establish Article III standing because they cannot demonstrate that they suffered an injury in fact arising from the computer theft. (Doc. #74-1 at 2). Plaintiffs filed a response in opposition on August 18, 2014 (Doc. #76), to which Defendants replied on August 26, 2014 (Doc. #78). Plaintiffs filed a sur-reply on October 2, 2014. (Doc. #85).

On December 16, 2014, Defendants filed a renewed motion to dismiss and, in the alternative, motion for summary judgment. (Doc. #97). Defendants again assert that Plaintiffs lack Article III standing. They alternatively contend that they are entitled to summary judgment on the merits of Plaintiffs' Privacy Act and APA claims. Plaintiffs filed a response in opposition on December 31, 2014 (Doc. #100), and Defendants replied on January 12, 2015 (Doc. #103).

STANDARD OF REVIEW

I. Rule 12(b)(1) – Subject Matter Jurisdiction

Pursuant to Federal Rule of Civil Procedure 12(b)(1), dismissal is appropriate when a district court lacks subject matter jurisdiction over a claim for relief. A defendant may challenge the existence of subject matter jurisdiction in either of two ways: by contending "that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based" (a "facial challenge"); or by contending "that the jurisdictional allegations of the complaint were not true" (a "factual challenge"). Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). In a facial challenge, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." Id. In a factual challenge, a court may "go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional

allegations." Id. Defendants bring facial and factual challenges to the existence of subject matter jurisdiction in this case, contending that Plaintiffs have failed to satisfy Article III's standing requirements.

II. Rule 56 – Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56, a party is entitled to summary judgment if he "shows that there is no genuine dispute as to any material fact" and that he "is entitled to judgment as a matter of law." A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "A fact is material if it might affect the outcome of the suit under the governing law." Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir. 2013) (internal quotation marks omitted). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant must identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Id. (internal quotation marks omitted). The nonmoving party must then produce specific facts showing that there is a genuine issue for trial. Anderson, 477 U.S. at 250. Where, as here, both parties move for summary judgment, courts should "rule upon each party's motion separately and determine whether summary judgment is appropriate as to each under the Rule 56 standard." Monumental Paving & Excavating, Inc. v. Pa. Mfrs. Ass'n Ins. Co., 176 F.3d 794, 797 (4th Cir. 1999). In considering each motion for summary judgment, the Court construes all facts and reasonable inferences arising therefrom in the light most favorable to the nonmoving party. Judd, 718 F.3d at 312-13.

ANALYSIS

I. Article III Standing

Article III of the Constitution limits the jurisdiction of the federal courts to the adjudication of "cases" and "controversies." U.S. Const. art. III, § 2. "To state a case or controversy under Article III, a plaintiff must establish standing." Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011). Standing is a necessary predicate to any exercise of federal jurisdiction; if it is lacking, the dispute is not a proper case or controversy under Article III, and a federal court has no subject matter jurisdiction to decide the matter. Dominguez v. UAL Corp., 666 F.3d 1359, 1361 (D.C. Cir. 2012). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006). Standing is "perhaps the most important" condition of justiciability, Allen v. Wright, 468 U.S. 737, 750 (1984), and the Supreme Court has "always insisted on strict compliance with this jurisdictional . . . requirement," Raines v. Byrd, 521 U.S. 811, 819 (1997).

"The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render its judicial resolution appropriate." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153 (4th Cir. 2000) (en banc). To meet the minimum constitutional requirements for standing, a plaintiff must establish three elements: (1) that he has sustained an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's actions; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). In a class

action, all named plaintiffs "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 (1975).

A plaintiff bears the burden of establishing standing to the same degree as any other element of his case. Defenders of Wildlife, 504 U.S. at 561. However, the extent of the plaintiff's burden varies according to the procedural stage of the action. Id. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to demonstrate standing, "for on a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim." Id. (internal alteration and quotation marks omitted). However, in response to a summary judgment motion, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." Id. (internal citation omitted). In assessing standing, the Court assumes Plaintiffs will prevail on the merits of their claims. NB ex rel. Peacock v. District of Columbia, 682 F.3d 77, 82 (D.C. Cir. 2012).

Defendants challenge only Plaintiffs' satisfaction of the injury-in-fact element of standing, thus the Court's analysis focuses on that issue. The Court first addresses Plaintiffs' standing to seek statutory and actual damages under the Privacy Act before considering their standing to seek declaratory and injunctive relief pursuant to the APA.

A. Standing to Bring Privacy Act Claims

Plaintiffs assert that they have suffered an injury in fact sufficient to confer standing to bring their Privacy Act claims because they are at an increased risk of having their identities stolen and they have been forced to bear the cost of measures designed to help mitigate that risk

as a result of the computer theft.[4] Plaintiffs have introduced no evidence that any Plaintiff has been victimized by identity theft, that any Plaintiff's personal information has been misused, or that there has been any attempt to steal a Plaintiff's identity or misuse a Plaintiff's personal information. Their theory of standing rests solely on the increased risk of such harm occurring in the future and on the costs incurred in an attempt to mitigate that risk. The Court first considers whether an increased risk of identity theft can serve to satisfy the injury-in-fact element of standing before determining whether mitigation expenses can satisfy the same.

1. The Increased Risk of Identity Theft

Plaintiffs allege that they are at an increased risk of having their identities stolen as a result of the laptop theft. Defendants contend that pursuant to the Supreme Court's holding in Clapper v. Amnesty International USA, an increased risk of identity theft is a speculative injury that does not suffice to confer standing. See 133 S. Ct. 1138 (2013). Plaintiffs respond that Clapper is fundamentally different from the case at bar and thus does not control the standing inquiry currently before the Court. Instead, they urge the Court to follow the Ninth Circuit's decision in Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010), and the Seventh Circuit's decision in Pisciotta v. Old National Bancorp, 499 F.3d 629 (7th Cir. 2007), which hold that the

[4] As previously mentioned, the Amended Complaint broadly alleges that Defendants' actions and inactions have "caused Plaintiffs adverse impacts and harm including, but not limited to, embarrassment, inconvenience, unfairness, mental distress, and the threat of current and future substantial harm from identity theft and other misuse of their Personal Information," and that the increased risk of future harm "requires continuing affirmative actions by Plaintiffs . . . including, but not limited to, frequently obtaining and reviewing credit reports, bank statements, health insurance reports, and other similar information, purchasing credit watch services, and shifting financial accounts." (Doc. #15 at 12). Plaintiffs' counsel conceded at the Court's October 18, 2013 hearing on Defendants' initial motion to dismiss that the Supreme Court's decision in FAA v. Cooper bars recovery for mental or emotional harm under the Privacy Act. See 132 S. Ct. 1441, 1456 (2012). For ease of reference, the Court places each of the remaining alleged injuries into one of two categories: the increased risk of identity theft and the cost of mitigative measures, such as the purchase of credit monitoring services.

increased risk of identity theft is sufficient to constitute an injury in fact. They also assert that a line of Fourth Circuit environmental cases demonstrates that an increased risk of harm constitutes an injury in fact in this jurisdiction. The Court concludes that Defendants have the better argument.

In Clapper, plaintiffs challenged the constitutionality of a provision of the Foreign Intelligence Surveillance Act that permits the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside of the United States. 133 S. Ct. at 1142. They alleged that their work required them "to engage in sensitive international communications with individuals who they believe[d] [we]re likely targets of surveillance" under the Act. Id. The plaintiffs asserted two separate theories of Article III standing. First, they claimed that they suffered injury in fact because there was an "objectively reasonable likelihood" that their communications would be acquired at some point in the future. Id. at 1143. Second, they contended that they suffered present injury because the risk of surveillance had "forced them to take costly and burdensome measures to protect the confidentiality of their international communications." Id.

The Supreme Court explained that to establish Article III standing, a plaintiff must show that the alleged injury is "concrete, particularized, and actual or imminent." Id. at 1147. The Court continued:

> Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.

Id. (internal alteration, citation, and quotation marks omitted). Applying this standard to the facts before it, the Court first found that the plaintiffs' fear that their communications would be intercepted at some point in the future was too speculative to constitute an injury in fact sufficient to confer standing. Id.

The plaintiffs' argument rested on the "highly speculative fear" that: (1) the government would decide to target communications involving their clients; (2) in doing so, the government would choose to invoke its authority under the challenged provision rather than utilizing another method of surveillance; (3) the Article III judges on the Foreign Intelligence Surveillance Court would allow the government's proposed surveillance procedures; (4) the government would successfully intercept the communications; and (5) the plaintiffs would be involved in the intercepted communications. Id. at 1148. Of particular import was the fact that even if the plaintiffs could show that the government would seek to intercept their clients' communications by invoking the challenged provision, the plaintiffs could "only speculate" as to whether the Foreign Intelligence Surveillance Court would authorize the surveillance. Id. at 1149-50. The Court explained that "[i]n the past, [it has] been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." Id. at 1150 (citing Whitmore v. Arkansas, 495 U.S. 149, 159-60 (1990)). The Court "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors" and concluded that the plaintiffs' "speculative chain of possibilities does not establish that an injury based on potential future surveillance is certainly impending . . . ." Id.

The Court then held that the plaintiffs' theory of present injury also failed because plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical

future harm that is not certainly impending." Id. at 1143. To hold otherwise, the Court explained, would allow "an enterprising plaintiff . . . to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." Id. at 1151. Allowing the plaintiffs to bring an action "based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of [their] first failed theory of standing." Id. Because the plaintiffs did not face "a threat of certainly impending interception" of their communications, "the costs that they . . . incurred to avoid surveillance [we]re simply the product of their fear of surveillance, and . . . such a fear is insufficient to create standing." Id. at 1152.

In sum, Clapper held that an injury must be either present or certainly impending to suffice to confer standing, that an attenuated chain of possibilities does not confer standing, and that plaintiffs cannot create standing by taking steps to avoid an otherwise speculative harm. See In re Science Applications Int'l Corp. (SAIC) Backup Data Theft Litig., No. 12-347, 2014 WL 1858458, at *10-11 (D.D.C. May 9, 2014). Thus, the threshold for establishing standing based on injuries that have yet to occur is high.

The Court acknowledges, as it did in its Order denying Defendants' initial motion to dismiss with respect to Plaintiffs' Privacy Act and APA claims, that Clapper is factually distinguishable from the instant case, and it implicated national security concerns not at play here. (See Doc. #38 at 9). But that does not end or control the analysis. The crux of the standing issue in both cases is whether the potential unauthorized disclosure or use of sensitive personal information is an injury in fact. Clapper emphatically reiterates the "certainly impending" standard for assessing whether a threatened injury is an injury in fact—a standard the Supreme Court has "repeatedly" used in a variety of contexts. See, e.g., Whitmore, 495 U.S.

at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be "certainly impending" to constitute injury in fact."); Defenders of Wildlife, 504 U.S. at 565 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'"); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006) ("Under such circumstances, we have no assurance that the asserted injury is 'imminent'—that it is 'certainly impending.'"); Laidlaw, 528 U.S. at 167 ("[I]t is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury is certainly impending." (internal alteration and quotation marks omitted)); Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."). Clapper does not suggest that the "certainly impending" standard is limited to the national security context or that it does not apply generally to the standing analysis.

In fact, Clapper's "certainly impending" standard has been widely adopted in data-breach cases. See, e.g., Galaria v. Nationwide Mut. Ins. Co., 998 F. Supp. 2d 646, 654 (S.D. Ohio 2014) (holding that "an increased risk of identity theft, identity fraud, medical fraud or phishing is not itself an injury-in-fact because Named Plaintiffs did not allege—or offer facts to make plausible—an allegation that such harm is 'certainly impending'"); Strautins v. Trustwave Holdings, Inc., 27 F. Supp. 3d 871, 875 (N.D. Ill. 2014) (holding that under Clapper, to the extent the plaintiff's alleged injuries "are premised on the mere possibility that her [personal identifying information] was stolen and compromised, and a concomitant increase in the risk that

she will become a victim of identity theft, [the plaintiff]'s claim is too speculative to confer Article III standing"); In re SAIC, 2014 WL 1858458, at *9 (holding that under Clapper, "increased risk of harm alone does not constitute an injury in fact. Nor do measures taken to prevent a future, speculative harm"); In re Barnes & Noble Pin Pad Litig., No. 12-cv-8617, 2013 WL 4759588, at *5 (N.D. Ill. Sept. 3, 2013) (holding that under Clapper, the plaintiffs' "claim of actual injury in the form of increased risk of identity theft is insufficient to establish standing" because "speculation of future harm does not constitute actual injury"). Plaintiffs' contention that Clapper's holding is circumstance-specific is further belied by the fact that circuit and district courts have applied the "certainly impending" standard in many other contexts. See, e.g., Organic Seed Growers & Trade Ass'n v. Monsanto Co., 718 F.3d 1350, 1360 (Fed. Cir. 2013) (holding that declaratory judgment plaintiffs have no standing under Clapper where "the future harm they allege—that they will grow greater than trace amounts of modified seed, and therefore be sued for infringement by [the defendant]—is too speculative to justify their present actions"); Local No. 773 of the Int'l Ass'n of Firefighters v. City of Bristol, No. 3:11cv1657, 2013 WL 1442453, at *3-4 (D. Conn. Apr. 9, 2013) (holding that plaintiffs lack standing under Clapper where their "only colorable claim of standing is that they will suffer harm in the future in the form of adverse tax consequences").

This is not to say that courts have uniformly denied standing based on an increased risk of identity theft in data-breach cases. Before the Supreme Court issued its opinion in Clapper, courts were split on the issue. Compare Krottner, 628 F.3d 1139 (holding that increased risk of identity theft was an injury in fact sufficient to confer standing), Pisciotta, 499 F.3d 639 (same), Ruiz v. Gap, Inc., 540 F. Supp. 2d 1121 (N.D. Cal. 2008) (same), and McLoughlin v. People's United Bank, Inc., No. 3:08-cv-00944, 2009 WL 2843269 (D. Conn. Aug. 31, 2009) (same),

with Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1 (D.D.C. 2007) (holding that increased risk of identity theft was not an injury in fact sufficient to confer standing), and Key v. DSW, Inc., 454 F. Supp. 2d 684 (S.D. Ohio 2006) (same). Plaintiffs rely heavily on Krottner and Pisciotta to support their contention that the increased risk of identity theft is sufficient to constitute an injury in fact.

In Krottner, Starbucks employees whose unencrypted names, addresses, and social security numbers were stored on a laptop stolen from a Starbucks store filed an action against the company for failing to protect their personal information. 628 F.3d at 1140. Starbucks had no indication that any of the private information had been misused, and it offered to provide one year of credit monitoring services to those whose information may have been compromised. Id. at 1140-41. The plaintiffs alleged that they had been vigilant in monitoring their accounts to guard against future identity theft because of the breach, but they did not allege that any identity theft had actually occurred. Id. at 1142. One plaintiff claimed that someone tried to open a bank account in his name, but the bank closed the account before he suffered any loss. Id. Citing to environmental and medical monitoring cases, the Ninth Circuit held that "[i]f a plaintiff faces 'a credible threat of harm,' and that harm is 'both real and immediate, not conjectural or hypothetical,' the plaintiff has met the injury-in-fact requirement for standing under Article III." Id. at 1142-43 (internal citations omitted) (citing Cent. Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002); Pritikin v. Dep't of Energy, 254 F.3d 791, 796-97 (9th Cir. 2001)). The Circuit Court found that the plaintiffs had standing because they had "alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data." Id. at 1143.

In Pisciotta, bank customers whose names, addresses, social security numbers, driver's license numbers, dates of birth, mothers' maiden names, and credit card or other financial account numbers were compromised as the result of a "sophisticated, intentional and malicious" data intrusion sued the bank and the hosting facility that maintained its website. 499 F.3d at 631-32. The plaintiffs alleged that they had "incurred expenses in order to prevent their confidential personal information from being used and [would] continue to incur expenses in the future." Id. at 632. They did not allege any direct financial loss, nor did they claim that any plaintiff or member of the putative class had been the victim of identity theft as a result of the breach. Id. Providing scant legal analysis, the Seventh Circuit announced that it disagreed with cases holding that plaintiffs whose personal information has been compromised, but not yet misused, have not suffered an injury in fact. Id. at 634. Like the Ninth Circuit in Krottner, the Seventh Circuit cited to environmental and medical monitoring cases and held that "the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions." Id. (citing Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 574-75 (6th Cir. 2005); Cent. Delta Water Agency, 306 F.3d at 947-48). The Circuit Court therefore found that the plaintiffs had standing based on an increased risk of identity theft.[5] Id.

Although Krottner and Pisciotta support Plaintiffs' contention that an increased risk of identity theft constitutes an injury in fact sufficient to confer standing, several considerations counsel against adopting their holdings in this case. Krottner and Pisciotta were decided at the motion to dismiss stage, and the factual allegations in both cases suggested that the plaintiffs' personal information was taken with the intent to misuse it. Krottner, 628 F.3d at 1141;

[5] The Court ultimately dismissed the action, holding that the plaintiffs did not suffer a compensable injury under state law. Pisciotta, 499 F.3d at 640.

Pisciotta, 499 F.3d at 632. In Krottner, one plaintiff alleged that someone attempted to open a bank account in his name after the laptop theft, 628 F.3d at 1142, and in Pisciotta, the Court indicated that the data intrusion was "sophisticated, intentional and malicious," 499 F.3d at 632. This case, by contrast, is being decided at the summary judgment stage—after the close of extensive discovery—and Plaintiffs have provided no evidence showing an intent or an attempt to misuse their personal information. Perhaps most importantly, Krottner and Pisciotta were decided before the Supreme Court issued its opinion in Clapper, and neither case mentions the requirement that a threat of future harm be "imminent" or "certainly impending"—standards that Clapper repeatedly reemphasized but did not invent. See Clapper, 133 S. Ct. at 1147 ("Thus, we have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact . . . ."). In the wake of the Supreme Court's emphatic reiteration of the "certainly impending" standard, this Court declines to hold that a "credible threat of harm" is an injury in fact sufficient to confer standing. See Krottner, 628 F.3d at 1143; accord Pisciotta, 499 F.3d at 634 ("[T]he injury-in-fact requirement can be satisfied by a threat of future harm . . . .").

Like the Krottner and Pisciotta courts, Plaintiffs also cite to environmental cases to support their contention that an increased risk of harm constitutes an injury in fact. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, the Supreme Court held that plaintiffs had standing to sue where the defendant's "continuous and pervasive illegal discharges of pollutants" affected their use of standing waters near the defendant's facility. 528 U.S. at 184-85. The Court explained that the plaintiffs' "reasonable concerns about the effects of those discharges[] directly affected [their] recreational, aesthetic, and economic interests." Id. at 183-84. In Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., the Fourth Circuit held that a plaintiff's "reasonable concern" that the defendant had polluted water that the plaintiff used

constituted an injury in fact. 629 F.3d 387, 397 (4th Cir. 2011). In American Canoe Assoc. v. Murphy Farms, Inc., the Circuit Court reached the same conclusion. 326 F.3d 505, 520 (4th Cir. 2003) (finding evidence was sufficient to prove injury in fact where plaintiffs "expressed concerns regarding the quality of water" due to the defendant's discharges and stated that those concerns "affected their aesthetic, recreational, and, in some cases, economic interests in the waters"). Similarly, in 1000 Friends of Maryland v. Browner, the Fourth Circuit held that a plaintiff's concern about an increased level of emissions pollution was sufficient to confer standing. 265 F.3d 216 (4th Cir. 2001).

Relying on these cases, Plaintiffs assert that "[t]he controlling precedent *in this jurisdiction* recognizes that a reasonable threat from or fear of increased risk of future harm is sufficient to convey standing on plaintiffs seeking relief from that harm . . . ." (Doc. #100 at 10). Specifically, Plaintiffs contend that they have the same "reasonable concerns about the effects" of Defendants' failure to protect their personal information as the Laidlaw plaintiffs had regarding the pollution of their waterway. (Doc. #100 at 12). They assert that "had the Laidlaw plaintiffs been subject to a 1 in 3 risk of physical harm there surely would be little debate regarding the reasonableness of concern." Id. Therefore, they argue that "a 1 in 3 likelihood of harm is more than enough to raise a 'reasonable concern' here, as well."[6] Id.

Although these environmental cases do hold that plaintiffs can establish standing based on "reasonable concerns" of harm, they are factually and legally distinguishable from the standing analysis at hand. Courts broadly confer standing on environmental plaintiffs "when they aver that they use the affected area and are persons for whom the aesthetic and recreational

[6] Plaintiffs' assertion that there is a "1 in 3 likelihood of harm" is based on an email from Dorn VAMC's Information Security Officer, which states that "33% Percent [sic] of health-related data breaches . . . result in identity theft." (See Doc. #100-2 at 2). Plaintiffs' arguments related to whether the laptop disappearance increased their risk of identity theft are discussed *infra*.

values of the area will be lessened by the challenged activity." Laidlaw, 528 U.S. at 183 (internal quotation marks omitted). "In the environmental litigation context, the standing requirements are not onerous." Am. Canoe, 326 F.3d at 517. For example, Laidlaw, Gaston Copper, and American Canoe were brought pursuant to the Clean Water Act, which liberally provides standing to any citizen "having an interest which is or may be adversely affected" by the defendant's actions. See 33 U.S.C. § 1365(g). A reasonable concern of future harm may satisfy the less onerous standing requirements at play in environmental cases, but Clapper requires more. Clapper specifically rejected the idea that an "objectively reasonable likelihood" of future harm establishes that the harm is certainly impending. 133 S. Ct. at 1147. Accordingly, the environmental cases holding that "reasonable concerns" of harm suffice to confer standing do not control the standing inquiry currently before this Court.

The Court instead concludes that Clapper provides the appropriate standard for determining whether Plaintiffs' increased risk of identity theft is an injury in fact sufficient to confer Article III standing. Applying Clapper's holding to the instant case, the Court finds that Plaintiffs have failed to show that the risk of identity theft is "certainly impending." They rely on three key pieces of evidence to prove that the computer theft has increased the risk that their identities will be stolen. The first is a report provided by their expert, Evan Hendricks, which states *inter alia* that those whose personal information is compromised in a data breach are 9.5 times more likely than the average person to become victims of identity theft. (Doc. #100 at 14-16). The second is an email from Dorn VAMC's Information Security Officer, which states that "33% Percent [sic] of health-related data breaches . . . result in identity theft," and that "[e]very single piece of personally identifiable information represents a Veteran," which, "[i]f stolen . . . can be used to inflict significant financial damage on him or her." (Doc. #100-2 at 2).

The third is the VA Secretary's decision to provide Plaintiffs one year of credit monitoring services after the laptop disappearance, which Plaintiffs claim establishes that there is a "reasonable risk" of the potential misuse of their personal information. (Doc. #100 at 20). Defendants assert that this evidence does not establish that Plaintiffs are at a greater risk of identity theft.[7]

Accepting all of Plaintiffs' evidence as true and drawing all reasonable inferences in their favor, the Court assumes that Plaintiffs have proven that they are at an increased risk of identity theft as a result of the computer disappearance. However, they have failed to show that this increased risk suffices to confer standing. "The degree by which the risk of harm has increased is irrelevant—instead, the question is whether the harm is certainly impending." In re SAIC, 2014 WL 1858458, at *6. "A factual allegation as to how much *more likely* [Plaintiffs] are to become victims than the general public is not the same as a factual allegation showing how likely they are to become victims." Galaria, 998 F. Supp. 2d at 654. At this time—over two years since the computer disappeared and after abundant discovery—the record reflects no misuse of any information stored on the computer. Despite Plaintiffs' increased risk of harm, whether any individual Plaintiff will become a victim of identity theft remains entirely speculative.

For a Plaintiff to suffer an injury, one must first assume that the computer was, in fact, stolen and that the thief took the computer with the intent to misuse the personal information stored on it, not simply to pilfer the hardware. Whether an injury arises is then fully contingent on what, if anything, the thief does or did with the computer and the information on it. As the thief has done nothing with the information, there is no injury at this time. The thief would have

[7] Defendants have retained their own expert, Fred H. Cate, who reported that the missing laptop has created "no meaningful additional risk of identity theft for the affected individuals." (Doc. #74-3 at 17).

to attempt to use a Plaintiff's personal information to commit identity theft or sell the information to others who then do so. The thief or the purchaser would then have to use the personal information stored on the computer—which did not include full social security numbers or any financial information—to successfully steal a Plaintiff's identity.

Contrary to Plaintiffs' assertion, the injury did not "occur[] as soon as Defendants lost control of the missing laptop . . . ." (Doc. #100 at 19). The harm they fear is "contingent on a chain of attenuated hypothetical events and actions by third parties independent of the defendant[s]." See Strautins, 27 F. Supp. 3d at 876 (citing Clapper, 133 S. Ct. at 1148). Because the future injury Plaintiffs fear rests on speculation about the decisions of independent actors, Plaintiffs have failed to establish standing. See Clapper, 133 S. Ct. at 1150 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

In conclusion, Clapper requires plaintiffs alleging that the risk of a future injury satisfies the injury-in-fact element of standing to prove that the feared injury is "certainly impending." 133 S. Ct. at 1155. Plaintiffs have not submitted evidence sufficient to create a genuine issue of material fact as to whether they face a "certainly impending" risk of identity theft. The evidence of record shows no intent or attempt to misuse any Plaintiff's personal information, and whether their feared injury comes to pass depends entirely on the criminal actions of independent decisionmakers. The Court therefore finds that Plaintiffs have failed to establish that the increased risk of identity theft is an injury in fact sufficient to confer Article III standing to bring their Privacy Act claims.

There is, however, an alternative argument that merits the Court's attention. The Supreme Court noted in Clapper that it has, in some instances, "found standing based on a

'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." 133 S. Ct. at 1150 n.5. To the extent that this "substantial risk" standard is relevant and differs from the "clearly impending" requirement, the Court finds that Plaintiffs fail to satisfy even the lesser standard. Plaintiffs allege that 33% of those whose information was on the laptop will have their identities stolen and that as victims of a data breach, they are all 9.5 times more likely than the average person to experience identity theft. These calculations do not suffice to show a substantial risk of identity theft, as they are based on a degree of speculation, and by Plaintiffs' own estimation, injury is not likely impending for 67% of those whose information may have been compromised. Moreover, as noted above, "[a] factual allegation as to how much *more likely* [Plaintiffs] are to become victims than the general public is not the same as a factual allegation showing how likely they are to become victims." See Galaria, 998 F. Supp. 2d at 654. Plaintiffs also fail to meet the "substantial risk" standard "in light of the attenuated chain of inferences necessary to find harm here." See Clapper, 133 S. Ct. at 1150 n.5. Taking all reasonable inferences in the light most favorable to Plaintiffs, the Court finds that they have failed to show that there is a "substantial risk" of future harm.

2. The Cost of Mitigative Measures

Plaintiffs also contend that they have suffered an injury in fact sufficient to confer standing because they have been or will be forced to bear the cost of mitigative measures taken in an effort to guard against identity theft, such as the purchase of credit monitoring services.[8]

[8] Defendants argue that Plaintiffs have not proven that they incurred the cost of credit monitoring services as "the result of" the alleged Privacy Act violations because those who allege being currently enrolled in credit monitoring services were all enrolled before the laptop theft. (Doc. #97-1 at 20). Again, in considering Defendants' motion to dismiss for lack of subject matter jurisdiction, the Court accepts Plaintiffs' version of the facts and assumes that Plaintiffs have incurred the cost of credit monitoring services because of the laptop theft. See Adams, 697 F.2d at 1219.

This argument fares no better than the first. The Supreme Court held in Clapper that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 133 S. Ct. at 1151. Just as in Clapper, "allowing [Plaintiffs] to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of [Plaintiffs'] first failed theory of standing." See id. "[T]he Supreme Court has determined that proactive measures based on fears of future harm that is not certainly impending do not create an injury in fact, even where such fears are not unfounded." SAIC, 2014 WL 1858458, at *7 (internal alteration and quotation marks omitted) (quoting Clapper, 133 S. Ct. at 1151). Because Plaintiffs have not shown that the threat of identity theft is certainly impending, they cannot create standing by choosing to purchase credit monitoring services or taking any other steps designed to mitigate the speculative harm of future identity theft.

In conclusion, the Court finds that Plaintiffs' claim that they have suffered an injury in fact in the form of an increased risk of identity theft fails because they have not shown that the feared injury is certainly impending. Plaintiffs' assertion that they have suffered an injury in fact by purchasing credit monitoring services also fails because they cannot manufacture standing by taking proactive measures in an effort to mitigate a speculative future harm. Because neither the increased risk of identity theft nor the cost of mitigative measures, such as the purchase of credit monitoring services, constitutes an injury in fact sufficient to confer Article III standing for Plaintiffs to bring their Privacy Act claims, those claims must be dismissed.[9]

[9] Defendants assert that Plaintiffs Beck and Jeffery were not tested using the pulmonary device connected to the laptop, thus Dorn VAMC did not identify them as persons whose information may have been compromised. (See Doc. #97-8 at 2-3). They both learned about the missing laptop from news reports. (Doc. #97-3 at 10-11; #97-4 at 10-11). Because Plaintiffs Beck and Jeffery have introduced no evidence that their personal information was stored on the computer,

B. Standing to Bring APA Claims

Plaintiffs assert that they have standing to pursue injunctive relief under the APA based "not just on past injuries and Defendants' repeated failures to act, but on Defendants' habitual and intentional failures to comply with agency action related to the safeguarding of veterans' [personal information]." (Doc. #100 at 21). Defendants contend that Plaintiffs lack standing because they have failed to prove "that, absent entry of injunctive relief by the Court, they will suffer substantial and immediate irreparable injury . . . ." (Doc. #74-1 at 3). The Court agrees with Defendants.

To enjoin a defendant's future conduct, a plaintiff must prove that he "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (internal quotation marks omitted). "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects," id. at 102 (internal alterations omitted) (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)), and "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court," Allen, 468 U.S. at 754.

In City of Los Angeles v. Lyons, the Supreme Court addressed the standing of a plaintiff who sought a preliminary injunction preventing the Los Angeles Police Department from using chokeholds after his larynx was injured when an officer placed him in a chokehold. 461 U.S. at 97-98. The Court explained that "Lyons' standing to seek the injunction requested depended on

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they fail to show that they have suffered an injury in fact as a result of the computer theft. Thus, even if the other Plaintiffs have standing based on the increased risk of identity theft or the cost of mitigative measures, Plaintiffs Beck and Jeffery have not established standing to bring their Privacy Act claims.

whether he was *likely to suffer future injury* from the use of the chokeholds by police officers." Id. at 105 (emphasis added). The record showed that at least fifteen people had died as a result of officers' use of chokeholds, and the Court acknowledged that "among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim." Id. at 100, 108.

Despite clear evidence of continued chokehold-related deaths and injuries, the Court concluded that Lyons' injury did not give him standing to seek an injunction because it did "nothing to establish a real and immediate threat that he would again be stopped . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." Id. at 105. The Court reasoned that to establish an actual controversy, Lyons needed to allege both that he would have another encounter with the police and either, "(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or, (2) that the City ordered or authorized police officers to act in such a manner." Id. at 105-06. Because Lyons made no showing that he was "realistically threatened by a repetition" of the earlier incident, he failed to meet the standing requirements for seeking an injunction in federal court. Id. at 109.

Applying this precedent to the facts of the case *sub judice*, the Court concludes that Plaintiffs have failed to prove that they are "immediately in danger of sustaining some direct injury as the result of the challenged official conduct . . . ." See id. at 101-02 (internal quotation marks omitted). Plaintiffs rely heavily on Defendants' admissions that certain Dorn VAMC employees have failed to comply with data security policies in the past. (See Doc. #71 at 6). They further point out that the VA lost several boxes of pathology reports containing veterans'

personal information in July 2014, and that there have been at least seventeen data breaches at Dorn VAMC during the course of this litigation. These incidents are undoubtedly concerning, but past Privacy Act violations are insufficient to establish Plaintiffs' standing to seek injunctive relief.[10]

Plaintiffs have made no showing that failure to award the requested injunctive relief would put them in real and immediate danger of sustaining a direct injury as the result of some official conduct. Although Dorn VA has again lost files containing personal identifying information, and despite the fact that certain employees may continue to violate the VA's privacy policies, it is no more than speculation for Plaintiffs to assert that their personal information will again be compromised by a future Privacy Act violation *and* that they will be injured as a result. Plaintiffs' plea for injunctive relief hinges on the VA's previous Privacy Act violations, but their past exposure to illegal conduct is insufficient to show that a present case or controversy exists. See Lyons, 461 U.S. at 102. Moreover, their asserted right to have Defendants comply with the Privacy Act does not suffice to confer standing. See Allen, 468 U.S. at 754. The Court therefore concludes that Plaintiffs do not have standing to seek injunctive relief pursuant to the APA, and this claim must be dismissed.

II. The Merits of Plaintiffs' Privacy Act Claims

Assuming that Plaintiffs do have standing to bring their Privacy Act claims, the Court finds that Defendants are entitled to summary judgment on those claims because Plaintiffs have not suffered "actual damages" as required to recover under the Act. The Privacy Act of 1974 "contains a comprehensive and detailed set of requirements for the management of confidential

[10] Defendants contest Plaintiffs' assertion that the VA has violated the Privacy Act by losing or mishandling personal information. However, in assessing standing, courts are to assume that plaintiffs will prevail on the merits of their claims. Peacock, 682 F.3d at 82. For purposes of analysis, the Court assumes without deciding that Defendants' conduct violated the Privacy Act.

records held by Executive Branch agencies," including the VA. Cooper, 132 S. Ct. at 1446; see 5 U.S.C. § 552a. The Act authorizes individuals to bring a civil action against an agency that fails to comply with those requirements "in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D). If the agency's violation is found to be "intentional or willful," the United States is liable for "actual damages sustained by the individual . . . ." § 552a(g)(4)(A). "[I]n no case shall a person entitled to recovery receive less than the sum of $1,000." Id.

Notably, Plaintiffs must prove "actual damages" to qualify for a statutory award under the Privacy Act. Doe v. Chao, 540 U.S. 614, 616 (2004). In Doe, a plaintiff who provided his social security number on an application for benefits under the Black Lung Benefits Act sued the Department of Labor for disclosing his social security number in violation of the Privacy Act. Id. at 616-17. The plaintiff alleged that he was "torn all to pieces" and "greatly concerned and worried" about the disclosure of his social security number and its potentially "devastating" consequences. Id. at 617-18 (internal alteration and quotation marks omitted). The plaintiff asserted that the Act's remedial provision entitles anyone adversely affected by an intentional or willful violation of the Act to the $1,000 minimum award based on proof of nothing more than a statutory violation. Id. at 620. The Supreme Court disagreed, holding that "the minimum guarantee goes only to victims who prove some actual damages." Id. The Court left for another day the question of how to define "actual damages." Id. at 627 n.12.

In FAA v. Cooper, the Supreme Court held that the term "actual damages" is "limited to proven pecuniary or economic harm," and it does not include damages for mental or emotional distress. 132 S. Ct. at 1453, 1456. The plaintiff in Cooper sued several government agencies, alleging that the interagency exchange of his confidential medical information during the course

of a joint criminal investigation violated the Privacy Act. Id. at 1447. He claimed that the unlawful disclosure of his information caused him "humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress." Id. Analogizing to the common-law torts of libel *per quod* and slander, the Court held that Privacy Act victims "are barred from any recovery unless they can first show actual—that is, pecuniary or material—harm." Id. at 1451. Finding that "the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress," the Court concluded that the Act does not waive the government's sovereign immunity from liability for such claims. Id. at 1456. In the wake of Doe and Cooper, the opportunity to recover is thus limited to cases in which a plaintiff can prove that he suffered "proven pecuniary or economic harm" because of an agency's intentional or willful violation of the Privacy Act. Id. at 1453.

Plaintiffs allege that Defendants have violated the Privacy Act in four respects: (1) by allowing an unauthorized individual to access Plaintiffs' personal information on the laptop for unauthorized or improper purposes, in violation of 5 U.S.C. § 552a(b); (2) by failing to establish and ensure lawful compliance with appropriate administrative, technical, and physical safeguards requirements, in violation of 5 U.S.C. §§ 552a(e)(9)-(10); (3) by assembling and maintaining Plaintiffs' personal information in a system of records even though the information was not relevant and necessary to accomplish a purpose required by statute or by executive order of the President, in violation of 5 U.S.C. § 552a(e)(1); and (4) by failing to publish a Federal Register notice informing Plaintiffs that a new system of records was created, in violation of 5 U.S.C. § 552a(e)(4). (Doc. #15). As previously discussed, Plaintiffs claim that because of these violations, they have suffered an increased risk of identity theft and have been forced to bear the cost of mitigative measures. Defendants contend that they are entitled to summary judgment on

Plaintiffs' claims because Plaintiffs have not suffered "actual damages" as a result of a Privacy Act violation, and the Court agrees.

Plaintiffs have failed to show that they have suffered any "proven pecuniary or economic harm." See Cooper, 132 S. Ct. at 1453. Each Plaintiff testified at deposition that he or she has suffered no monetary loss as a result of the laptop theft (Doc. #97-3 at 9; #97-4 at 12; #97-5 at 8-9, 12-14, 17; #97-6 at 6; #97-7 at 7-8), and Plaintiffs have introduced no evidence showing that any Plaintiff has incurred any out-of-pocket expenses as a result of the alleged Privacy Act violations. Plaintiff Gajadhar submitted three letters from Wells Fargo which relate to the bank's investigation of three unauthorized charges to her account and purport to show that she has suffered financial damages since the laptop theft. (Doc. #93-1; #93-2; #93-3). However, these letters do not establish that Plaintiff Gajadhar has suffered "proven pecuniary or economic harm" as a result of the theft. First, Plaintiff Gajadhar has failed to show any connection between the laptop theft and the fraudulent charges. There is no evidence that any financial information was stored on the computer, so it is unclear how the thief could have used the data he acquired to access Plaintiff Gajadhar's bank account. Moreover, Plaintiff Gajadhar testified during her deposition that her personal information was compromised in previous data breaches. (Doc. #97-5 at 8-10). Second, even if the fraudulent charges were somehow connected to the laptop theft, Plaintiff Gajadhar testified that she was fully reimbursed and that it cost her no money to challenge the charges—thus she has suffered no "actual damages." Id. at 14-15. Like the other Plaintiffs, Plaintiff Gajadhar has failed to point to evidence sufficient to create a genuine issue of material fact as to whether she has suffered the type of "proven pecuniary or economic harm"

required to recover statutory damages under the Privacy Act. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' Privacy Act claims.[11]

III. The Merits of Plaintiffs' APA Claim

Assuming that Plaintiffs do have standing to pursue injunctive relief, Defendants are entitled to summary judgment on Plaintiffs' APA claim because the APA does not provide for the broad judicial oversight that Plaintiffs seek. The APA authorizes suit by individuals "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. Section 551(13) of the Act defines "agency action" as all or part of "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*." 5 U.S.C. § 551(13) (emphasis added). The term "failure to act" is "properly understood as a failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents) previously defined in § 551(13)." Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs, 714 F.3d 186, 195 (4th Cir. 2013) (quoting Norton v. S. Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 62 (2004)).

The APA provides relief for an agency's failure to act in § 706(1): "The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[T]he APA's use of the term 'agency action' in § 706(1) limits judicial review to discrete determinations of rights and obligations." Vill. of Bald Head Island, 714 F.3d at 195. Thus, "a

[11] In Plaintiffs' motion for partial summary judgment, they seek a ruling that Defendants violated the Privacy Act by failing to implement any administrative, technical, and physical safeguards to ensure the security and confidentiality of patients' personal information. (Doc. #65). However, in Doe, the Supreme Court held that plaintiffs must prove some "actual damages" to qualify for a statutory award under the Privacy Act. 540 U.S. at 616. Because Plaintiffs have failed to establish that they have suffered actual damages as a result of the alleged Privacy Act violations, they are not entitled to recover under the Act, and the Court need not address the merits of their claim. Plaintiffs' motion for partial summary judgment is therefore denied with respect to Defendants' liability under the Privacy Act.

claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." SUWA, 542 U.S. at 64. This limitation precludes the kind of broad programmatic attacks that the Supreme Court rejected in Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. at 64, and in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

In SUWA, the plaintiff sought declaratory and injunctive relief under § 706(1), claiming that the Bureau of Land Management ("BLM") failed to act to protect public lands in Utah from damage caused by off-road vehicles. 542 U.S. at 60. It argued that because a federal statute mandated that BLM manage wilderness study areas, "a federal court could simply enter a general order compelling compliance with that mandate . . . ." Id. at 66. The Court, however, held that "[g]eneral deficiencies in compliance, unlike the failure to issue a ruling . . . lack the specificity requisite for agency action." Id. The Court explained that § 706(1) limits the involvement of federal courts to situations in which an agency fails to take a required discrete action in order to:

> protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

542 U.S. at 66-67. The Court held that "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA." Id. at 67.

In National Wildlife Federation, the Supreme Court considered a challenge to BLM's land withdrawal review program, which the plaintiff alleged was an unlawful "agency action"

under § 706(2).[12] 497 U.S. at 875. The Court first found that the program was not an "agency action" within the meaning of the APA because the term "land withdrawal review program" "does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." Id. at 890. Instead, the program encompassed "1250 or so individual classification terminations and withdrawal revocations." Id. The plaintiff was challenging "the continuing (and thus constantly changing) operations of the BLM"—not a particular agency action. Id. The Court then held that the plaintiff could not "seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, [the plaintiff] must direct its attack against some particular 'agency action' that causes it harm." Id. at 891. In SUWA, the Supreme Court noted that the plaintiff in National Wildlife Federation would have fared no better if it had characterized BLM's alleged failures in terms of "agency action unlawfully withheld" under § 706(1), rather than as unlawful agency action under § 706(2). 542 U.S. at 65 (internal citation omitted).

Plaintiffs allege that Defendants have unlawfully withheld and unreasonably delayed required agency actions "long ago *determined by VA* to be necessary for adequate implementation of the Privacy Act . . . ." (Doc. #100 at 24). For example, Plaintiffs assert that Defendants did not follow established policies and procedures for utilizing a nonencrypted laptop to store patient information. Id. at 25. They also claim that Defendants violated the VA's privacy policies by issuing employees master keys instead of keys with properly limited access; failing to obtain the technical information needed to support a waiver from laptop encryption

[12] Section 706(2) states that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions" in certain circumstances. 5 U.S.C. § 706(2).

requirements; and failing to control or determine what computers were introduced to and used in the Dorn VAMC facility. Id. at 27.

Plaintiffs seek broad injunctive relief "in the form of court ordered [sic] oversight of compliance with VA policies, procedures, directives, regulations, and rules relating to the safeguarding of veterans' protected health information at Dorn [VAMC] . . . ." (Doc. #100 at 20-21). Specifically, Plaintiffs request:

> That this Court enjoin Defendants . . . and those acting for and with them, to account for all Privacy Act and HIPPA records in the possession of the Department's Columbia Regional Office and Dorn VAMC or under their control, including all copies, whether authorized or unauthorized, on Department and personal computers, and on any data storage medium and to cause to be recovered or permanently destroyed any records or Personal Information derived from those records that is found in any unauthorized or improper location or maintained contrary to applicable standards for information security and safeguards, the Court to retain jurisdiction until such accounting is favorably reviewed by a panel of acknowledged experts in information security independent of Defendants and approved by the Court;[13] [and]
>
> That this Court enjoin Defendants . . . and those acting for and with them from transferring agency Privacy Act or HIPPA records or any information compilation derived or based on Privacy Act or HIPPA records from Department computer systems to any portable device capable of storing, containing, or transferring any record or system of records, including, but not limited to, laptop computers, CDs, DVDs, portable hard drives, memory sticks or similar devices, and "iPods" and similar devices, from property under Defendants' supervision and control until and unless Defendants demonstrate to the Court that adequate information security has been established pursuant to the applicable federal standards . . . .

(Doc. #15 at 22-23).

Defendants contend that Plaintiffs' APA claim fails as a matter of law because (1) the Privacy Act precludes Plaintiffs' request for injunctive relief under the APA; (2) the Privacy Act provides an adequate remedy, thus the APA does not apply; and (3) Plaintiffs' requested broad

[13] At the motions hearing, Plaintiffs' counsel stated that they are not asking the Court to monitor compliance; he averred that they only request that the Court order Defendants to establish a policy that would comply with the Privacy Act's requirements. This assertion does not change the Court's analysis of Plaintiffs' APA claim.

programmatic relief is unavailable under the APA. The Court agrees that the requested relief is unavailable under the APA and therefore need not reach the merits of Defendants' first two arguments.

Plaintiffs have failed to identify a *discrete, non-discretionary action* that Defendants were required to take, such as enacting a regulation or making a mandated decision by a statutory deadline. See SUWA, 542 U.S. at 64 ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."). Rather, they request broad judicial oversight of the VA's entire privacy program. Plaintiffs seek exactly the type of "pervasive oversight" that the Supreme Court has made clear "is not contemplated by the APA." Id. at 67. They cannot pursue wholesale improvement of the VA's privacy program through "court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." National Wildlife Federation, 497 U.S. at 891. The APA does not authorize federal courts to enter a general order compelling compliance with broad statutory mandates, SUWA, 542 U.S. at 67, thus the requested injunctive relief cannot be awarded. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' APA claim.[14]

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss this action for lack of subject matter jurisdiction and, in the alternative, motion for summary judgment is **GRANTED**. (Doc. #97). Plaintiffs' motion for partial summary judgment is **DENIED**. (Doc. #65). Plaintiffs'

[14] In Plaintiffs' motion for partial summary judgment, they seek a ruling that Defendants' liability under the APA is "clear and irrefutable" because Defendants have failed to comply with the legal duties created by the Privacy Act. (Doc. #65). Because the APA does not allow for the broad programmatic relief that Plaintiffs seek, the Court need not reach the merits of this claim. Plaintiffs' motion for partial summary judgment is therefore denied with respect to Defendants' liability under the APA.

motion to certify class (Doc. #70), Defendants' motion to dismiss for lack of jurisdiction (Doc. #74), and Defendants' motion in limine (Doc. #96) are **DISMISSED** as **MOOT**.

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
Chief United States District Judge

March 31, 2015
Columbia, South Carolina