IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

APRIL BELL, on Behalf of Herself and All Others Similarly Situated — **PLAINTIFFS**

v. — **CASE NO.: 4: 06-CV-0485 WRW**

ACXIOM CORPORATION — **DEFENDANTS**

ACXIOM CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Several years ago, Defendant Acxiom Corporation ("Acxiom") was the victim of a crime. A hacker gained unauthorized access to an Acxiom computer holding consumer data that belonged to Acxiom's corporate clients, and made copies of the clients' data. Due in no small part to Acxiom's active assistance, the perpetrator was identified, apprehended, tried, and convicted in this Court. He is now in jail.

By this action, Plaintiff April Bell ("Plaintiff" or "Bell") hopes to capitalize on this unfortunate incident. Claiming that some unspecified data concerning her was among that stolen, she contends that she may suffer some injury in the future because of the theft. Specifically, she alleges that the incident has increased the possibility that she will receive unwanted solicitations and/or the possibility that her identity might be stolen. Purporting to act on behalf of all those similarly situated, Bell demands redress from Acxiom for these hypothetical injuries, asserting claims for negligence and invasion of privacy. But Bell's complaint suffers from numerous fatal deficiencies, and must be dismissed.

As an initial matter, Bell lacks standing to pursue her claims. Her claim to be at increased risk of some possible future harm simply does not suffice as the "injury in fact" required to support a "case or controversy" under Article III of the United States Constitution.

While Bell's lack of standing should be dispositive, her substantive legal theories each fail for multiple reasons. Her negligence count cannot stand because, as a matter of law, Acxiom owed her no duty of care. Indeed, nowhere does Bell allege that she had any relationship, or even contact, with Acxiom, and her one sentence legal conclusion that a duty was owed falls far short of meeting basic pleading requirements. Bell's negligence count is also infirm because she has not alleged (and cannot allege) cognizable damages.

Bell's invasion of privacy claim is deficient as the single sentence purporting to constitute her invasion of privacy claim does not even identify a specific privacy tort. Bell certainly has not alleged the requirements of the most likely candidate, a claim for public

disclosure of private facts, because she claims neither intentional misconduct by Acxiom nor dissemination of any private information at all, let alone dissemination to the public at large.

For all of these reasons, Bell's case should go no further.

BACKGROUND

Acxiom is a world leader in customer and information management solutions. *See* Plaintiffs' Class Action Complaint ("complaint" or "Compl"), ¶ 5. Acxiom serves as a repository for the business data of its corporate clients, such as large financial institutions. *Id.* This client data includes information about consumers that clients have collected over time and stored with Acxiom. *Id.*

According to the Complaint, in May 2003, Scott Levine gained unauthorized access to the Acxiom computer on which certain client information was stored and stole a copy of that information for his own use. *Id.* ¶ 8, 10. But as the Court found, Levine's theft was detected by Acxiom and he was arrested and convicted of unauthorized computer access and fraud in August 2005. *See* Ex. 1 (Judgment) to Acxiom's Motion to Dismiss; Ex. 2 (United States Department of Justice Press Release announcing judgment) to Acxiom's Motion to Dismiss.[1]

Plaintiff contends that Levine's theft – the only incident of unauthorized data access identified in the complaint – was attributable to Acxiom's supposed "total disregard for security." Compl., ¶ 8. But Plaintiff's own allegations undermine the charge. As Plaintiff

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[1] Both the judgment against Levine in this Court and the DOJ's official announcement concerning it are public records and proper subjects for judicial notice and properly considered on a motion to dismiss. *See*, Fed. R. Evid. 201(f); *Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir.2003) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss."); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 802 (8th Cir.2002) (When deciding motions to dismiss, courts may rely on matters within the public record.); *Association of Commonwealth Clts. v. Moylan*, 71 F.3d 1398, 1404 fn. 3 (8th Cir. 1995) (Court properly took judicial notice of other closely related cases when considering Motion to Dismiss.); *Auto-Owners Ins. Co. v. Tuggle*, 289 F.Supp.2d 106, 1066 (W.D. Ark. 2003) (stating that it is permissible to take judicial notice of exhibits consisting of motions, orders, docket entries, briefs, and the like, all of which were filed in other state courts and were public records).

makes clear, the client information on Acxiom's computer was password protected. *Id.* ¶ 7-8. Moreover, the file containing the clients' passwords was encrypted. *Id.* And according to the Department of Justice's official release on Levine's conviction, he had to use "sophisticated decryption software to illegally obtain passwords and exceed his authorized access to Acxiom databases. . . ." Ex. 2 to Motion.

Read generously, Plaintiff seems to allege that unspecified information concerning her was among that stolen by Levine. Compl., ¶ 17. While Plaintiff alleges that Levine sold part of the information he stole to a direct marketer, she does not allege that her information was ever used for direct marketing purposes or that she ever received marketing solicitations as a result. *Id.* ¶ 8. Indeed, Plaintiff does not even allege her information was included within that which the thief allegedly sold. *Id.* Likewise, Plaintiff does not allege that she has been the victim of identity theft as a result of Levine's crime or otherwise.[2] In fact, although three years have passed since Levine's theft, Plaintiff has failed to identify any actual harm that she or anyone else has suffered as a result.[3] Apparently as a substitute for allegations of actual harm, Plaintiff claims that Acxiom's supposed lack of security has made it possible for her to receive unwanted solicitations in the future and that she might some day have her identity stolen. Compl., ¶¶ 7, 12-13.

Based on the foregoing, Plaintiff asserts a wholly conclusory claim for negligence, in which she recites as if by rote that: Acxiom owed her a duty of care, breached the duty of care and proximately caused her damage. *Id.* ¶¶ 22-24. Plaintiff's second claim for relief, labeled "Invasion of Privacy," is beyond spartan. It consists of a single sentence: "Acxiom's lack of

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[2] As the Department of Justice noted in its official release concerning Levine's conviction in August 2005: "There is no evidence to date that any of the data stolen by Levine or others associated with this investigation has been used in identity theft or credit card fraud schemes." Ex. 2 to Motion.

[3] Plaintiff somewhat ironically claims that "expeditious" notice of the long-ago theft is "imperative" to prevent identity theft. Compl., ¶ 12.

appropriate security measures caused an unreasonable intrusion on the privacy of the plaintiff and the Class, and proximately caused them all damage." *Id.* ¶ 26. Plaintiff demands compensatory and punitive damages as well as sweeping injunctive relief on behalf of herself and others supposedly similarly situated. *Id.* ¶ 28.

ARGUMENT

I. LEGAL STANDARDS FOR ACXIOM'S MOTION

Acxiom seeks dismissal of Plaintiff's complaint under rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. A complaint should be dismissed under Rule 12(b)(1) if the Court lacks subject matter jurisdiction over the case. Fed. R. Civ. P. 12(b)(1). Where a plaintiff lacks standing to pursue alleged claims, subject matter jurisdiction is lacking, and dismissal under Rule 12(b)(1) is appropriate. *Faibisch v. University of Minn.*, 304 F.3d 797, 800-01 (2002) (citing *Friedmann v. Sheldon Cmty. Sch. Dist.*, 995 F.2d 802, 804 (8th Cir. 1993)).

A court should dismiss a complaint under Rule 12(b)(6) if, assuming the specific facts alleged to be true and giving the plaintiff the benefit of all reasonable inferences, the complaint does not state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6); *Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006); *Gilmore v. County of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005); *In re Staffmark, Inc. Sec. Litig.*, 123 F. Supp. 2d 1160, 1162-63 (E.D. Ark. 2000). Although pleading standards are liberal, "[e]ven the liberal standards of notice pleading require some factual allegations that state a cause of action and put a party on notice of the claim against it." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 699 (8th Cir. 2003). Moreover, courts give no effect to "legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002); *see Parkhill v. Minn. Mut. Life Ins.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002) ("well-pleaded facts alleged in the complaint, not the legal theories of recovery or legal conclusions identified therein, must be viewed to determine whether the

pleading party provided the necessary notice and thereby stated a claim in the manner contemplated by the federal rules"); *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998) ("complaint . . . must not be merely conclusory in its allegations").

II. PLAINTIFF LACKS STANDING TO PURSUE HER CLAIMS BECAUSE SHE HAS NOT ALLEGED AN INJURY IN FACT

To demonstrate the standing required to pursue a case or controversy under Article III of the United States Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff has the burden of establishing each of these three requirements. *Shain v. Veneman*, 376 F.3d 815, 817 (8th Cir. 2004), *cert. denied*, 543 U.S. 1090 (2005).

To adequately allege the required injury in fact, a plaintiff must plead an injury that is "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)). Critically, "[a]llegations of possible future injur[ies] do not satisfy the requirements of Art[icle] III." *Id.* at 157; *see also Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994) ("Assertions of potential future injury do not satisfy the injury-in-fact test."). In other words, a plaintiff's alleged harm cannot be hypothetical or speculative. *Shain*, 376 F.3d at 818. In this case, Plaintiff's allegations of supposed injury reveal only the type of hypothetical and speculative harm that fails to satisfy the injury in fact requirement.

Plaintiff identifies two supposed injuries that she contends arise from Acxiom's failure to adequately safeguard its client's information. She alleges that she has been exposed to the possibility of receiving unwanted marketing solicitations, and that she now faces a risk of identity theft. Compl., ¶¶ 7, 12-13. Thus, Plaintiff speculates that she might somehow, some day in the future, suffer some form of harm. But as case after case makes clear, allegations of

such theoretical future injuries do not satisfy the injury in fact requirement of Article III, and do not vest a party with standing to pursue a lawsuit. *Whitmore*, 495 U.S. at 157 (theories of possible future injury do not satisfy constitutional standing requirements); *Diamond v. Charles*, 476 U.S. 54, 66 (1986) (complaint regarding injury constituted nothing but "unadorned speculation") (internal quotations and citations omitted); *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (rejecting as inadequate allegations of future injury made on contingent basis); *Shain*, 376 F.3d 815 (area of speculation and conjecture is beyond bounds of court's jurisdiction; allegation that building of a sewage treatment plant increased risk that plaintiffs would be damaged by flood, insufficient to satisfy injury in fact requirement because charge of harm was "speculative and unpredictable" not "imminent"); *Sierra Club*, 28 F.3d at 758 (claims of possible future injury insufficient). The Court's analysis should go no further. Because Plaintiff has not pled facts sufficient to establish standing under Article III, the case must be dismissed for lack of subject matter jurisdiction.

III. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR NEGLIGENCE.

Even if Plaintiff could somehow demonstrate standing, her negligence claim cannot survive a motion to dismiss. To establish a *prima facie* claim of negligence, a plaintiff must plead and prove that the defendant was negligent (*i.e.* failed to exercise proper care in the performance of a duty owed to plaintiff), that the plaintiff suffered damages, and that the negligence was a proximate cause of those damages. *Key v. Coryel*, 185 S.W.3d 98, 106 (Ark. App. 2004). In this case, Plaintiff cannot establish that Acxiom owed her any duty at all, and has failed to allege that she suffered cognizable harm.

A. PLAINTIFF CANNOT ESTABLISH THAT ACXIOM OWED HER THE REQUISITE DUTY.

The question of whether a defendant owed a duty of care to a plaintiff alleging negligence is one of law. *Mans v. Peoples Bank of Imboden*, 10 S.W.3d 885 (Ark. 2000). Accordingly, a court can dismiss a negligence claim at the pleading stage where it concludes that

no duty is owed. *First Commercial Trust Co., N.A. v. Colt's Mfg. Co.*, 77 F.3d 1081, 1082 (8th Cir. 1996) (plaintiff did not state negligence cause of action against defendant under Arkansas law since defendant owed no legal duty to plaintiff); *Mans*, 10 S.W.3d 885. Similarly, no duty exists here and the outcome should be the same.

Plaintiff's complaint does not make the slightest attempt to plead facts establishing the existence of a duty owed by Acxiom to Plaintiff. Rather, in a single sentence, Plaintiff simply offers the bare conclusion that Acxiom owed Plaintiff some unidentified and undefined duty. Compl., ¶ 22. Plaintiff's legal conclusion is manifestly insufficient to support her claim. *See American Underwriters Ins. Co. v. Shook*, 449 S.W.2d 402, 404 (Ark. 1970) ("Mere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be pleaded distinctly, definitely, and clearly."); *Wiles*, 280 F.3d at 870; *see Parkhill*, 286 F.3d at 1057-58 ("well-pleaded facts alleged in the complaint, not the legal theories of recovery or legal conclusions identified therein, must be viewed to determine whether the pleading party provided the necessary notice and thereby stated a claim in the manner contemplated by the federal rules").

Moreover, Plaintiff's attempt to hide behind a single conclusory assertion is no accident. Arkansas law follows the Restatement which makes clear that a duty to safeguard information arises only by virtue of a special relationship between the parties. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); s*ee also Henry v. Goodwin*, 583 S.W.2d 29, 31 (Ark. 1979) (confidential relationships exist in Arkansas "when one has gained the confidence of the other and purports to act or advise with the other's interest in mind."); *Carson v. Adgar*, 486 S.E.2d 3 (S.C. 1997) ("affirmative duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance") (citations omitted).[4] Here, Plaintiff does not (and

[4] At one point in the Complaint, plaintiff contends that when Acxiom's clients' information was stolen, Acxiom was (or should be) obligated to directly notify the consumers from whom Acxiom's clients had collected information. No such legal obligation has ever existed. Indeed, while Arkansas enacted a data security notification statute years after the

cannot) allege that she had any relationship whatsoever with Acxiom, much less the type of special relationship giving rise to a duty to safeguard information. Indeed, Plaintiff does not (and cannot) allege that she had any contact of any kind with Acxiom. In short, Plaintiff does not (and cannot) allege facts showing that Acxiom owed her a duty of care. For this reason alone, her negligence claim must fail.

B. PLAINTIFF HAS FAILED TO ALLEGE COGNIZABLE DAMAGES.

Plaintiff's negligence claim also fails for reasons similar to those that undermine standing – Plaintiff has not alleged that she has suffered actual damages from Acxiom's supposedly inadequate security. Rather, as noted above, at most Plaintiff alleges that she is at greater risk of receiving unwanted marketing solicitations and/or having her identity stolen at some unspecified point in the future because Acxiom was victimized. Nowhere does Plaintiff allege that, in the *more than three years* since Acxiom's client information was stolen, the theft has caused her to receive even a single unwelcome solicitation or that it has compromised her identity in any way. Plaintiff's allegation that she may yet be harmed some day is thus not only impermissibly speculative, it is belied by the passage of time. As a matter of law, Plaintiff's allegations of hypothetical future harm fail to satisfy the requirement that Plaintiff plead actual damages to support her negligence claim. *See Guin v. Brazos Higher Educ. Serv. Corp.*, No. Civ. 05-668 RHK/JSM, 2006 WL 288483, at *6 (D. Minn. Feb. 7, 2006) (plaintiff's claim for negligence arising from theft of defendant's laptop containing his personal information failed as a matter of law because plaintiff "had experienced no instance of identity theft or any other type of fraud

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incident in question, even under this new statute, in the event its clients' data is stolen, Acxiom's only obligation is to notify its clients of the incident. *See, e.g.*, Ark. Code Ann. § 4-110-105 (2005). The Arkansas legislature chose not to impose upon Acxiom a duty to notify consumers directly. *Id.* Plaintiff certainly should not be permitted to invent a duty for which there is no authority and which the Arkansas legislature has, at least impliedly, rejected. *See Arthur v. Zearley*, 895 S.W.2d 928 (Ark. 1995) (invoking canon of *expressio unius est exclusio alterius* for the proposition that where a statute imposes clear requirements, that which is not expressly included must be excluded).

involving his personal information"); *American Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 351 F. Supp. 2d 79, 100 (S.D.N.Y. 2004) (dismissing negligence claim for failing to specify actual damages); *U.S. Fax Law Ctr., Inc. v. Ihire, Inc.,* 374 F.Supp.2d 924, 927-28 (D. Colo. 2004) (dismissing negligence claim because plaintiff "has not alleged and cannot prove that it . . . suffered an active loss or injury as the result of actions about which plaintiff complains").[5]

IV. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR INVASION OF PRIVACY.

Bell's claim for invasion of privacy, consisting of a single sentence, is frivolous. Arkansas follows the Restatement's approach to the invasion of privacy. *See Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 875 (8th Cir. 2000); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 742 (8th Cir. 1999); *Dodrill v. Ark. Democrat Co.*, 590 S.W.2d 840, 844-45 (Ark. 1979). According to the Restatement, invasion of privacy consists of four distinct torts: intrusion upon seclusion, appropriation of name or likeness, public disclosure of private facts, and false light. RESTATEMENT (SECOND) of Torts § 652A (1977). Here, Plaintiff has not even identified which of the four torts she wishes to pursue. The Arkansas Supreme Court has held that such failure, by itself, constitutes grounds for entry of summary judgment. *See Milam v.*

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[5] It is worth noting that even in cases where plaintiffs have actually received unwanted marketing solicitations because of improper disclosures of information, courts have held that such petty annoyances do not give rise to cognizable damages. In *Smith v. Chase Manhattan Bank,* the defendant bank, in violation of promises made to its customers, intentionally disclosed consumer information of the same type allegedly at issue here. 293 A.D.2d 598, 598-99 (N.Y. App. 2002). When the plaintiff received unwanted marketing solicitations, he sued claiming the solicitations had damaged him. In rejecting plaintiff's claim as a matter of law, the court concluded that plaintiff had not alleged cognizable harm. *Id.* Rather, as the court explained, the plaintiff (and the class he hoped to represent) were merely offered products and services that they were free to decline. *Id.; see also Lamont v. Comm'r of Motor Vehicles*, 269 F.Supp. 880, 883 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968) (court held that receiving unwanted mail was not invasion of privacy under Constitution); *see also Shibley v. Time, Inc.*, 45 Ohio App. 2d 69, 73 (1975) ("right to privacy does not extend to the mailbox. . ."). If a plaintiff who actually receives unwanted marketing solicitations cannot base a damages claim upon them, certainly the theoretical risk that a plaintiff might receive unwanted solicitations in the future does not suffice.

Bank of Cabot, 937 S.W.2d 653, 657 (Ark. 1997). More importantly for present purposes, Plaintiff's one sentence claim for relief falls far short of apprising Acxiom of the nature of her grievance as required by Rule 8 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 8(a)(2) (plaintiff must allege sufficient facts to show "the pleader is entitled to relief"); *Nwakpuda v. Falley's, Inc.*, 14 F. Supp. 2d 1213 (D. Kan. 1998) (plaintiff must make minimal factual allegations on those material elements that must be proved to recover on each claim; court may not assume that plaintiff can prove facts that it has not alleged or that defendant has violated laws in ways that plaintiff has not alleged); *Davis v. Passman*, 442 U.S. 228, 238 n.15 (1979) ("It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery.") (quoting 2A J. Moore, *Federal Practice*, ¶ 8.13, at 1704-5 (2d ed. 1975)).

A. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR PUBLIC DISCLOSURE OF PRIVATE FACTS.

In light of Plaintiff's meager pleading, Acxiom is left to guess at the privacy tort with which it is charged. Given Plaintiff's background allegations, one might assume she wishes to bring a claim for "public disclosure of private facts." But her allegations fail in every way to state such a claim.

First, a claim for public disclosure of private facts requires an allegation that a defendant engaged in intentional misconduct. *Doe 2 v. Associated Press,* 331 F.3d 417, 421 (4th Cir. 2003) ("To face liability for wrongful publicizing of private affairs, a defendant must have *intentionally* committed public disclosure of private facts about the plaintiff--facts in which there is no legitimate public interest.") (emphasis added) (internal quotations and citations omitted); *see also Lineberry v. State Farm Fire & Cas. Co.*, 885 F. Supp. 1095, 1098 (M.D. Tenn. 1995) ("This tort is intentional, as it requires that the publisher know that: (1) the matter being revealed is of the kind that would be highly offensive to the reasonable person; and (2) that the information

revealed is not of legitimate public concern."). There is no such allegation here; indeed Plaintiff herself alleges Acxiom was merely negligent.

Second, a claim for public disclosure of *private* facts requires an allegation that information allegedly disclosed was actually *private*. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) ("[T]here is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth, the fact of his marriage, his military record. . . ."); *see also Bussue v. Paradise Motors, Inc.*, Civ. No. 1991-155, 1994 WL 223046, at *2 (D.V.I. Jan. 10, 1994) (holding home addresses, names, and social security numbers are not private facts); *Hechler v. Casey*, 333 S.E.2d 799, 811-12 (W. Va. 1985) (holding names and addresses are public, not private, facts). Remarkably, Plaintiff never alleges that any information of hers at issue in this case was actually private, nor could she given that the information was shared with one of Acxiom's clients in the first instance.

Third, a public disclosure claim requires allegations that private information was actually publicized, meaning that it was so widely disseminated that it is "substantially certain to become public knowledge." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550 (Minn. 2003) (dismissing invasion of privacy claim for want of publicity when information disclosed to 16 managers in six states); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) (defining publicity as "a communication that reaches, or is sure to reach, the public"); *Wood v. Nat'l Computer Sys., Inc.*, 814 F.2d 544, 545 (8th Cir. 1987) (applying Arkansas law in dismissing public disclosure claim because disclosure of information to one person was not disclosure to the public). Again, Plaintiff does not even attempt to satisfy the pleading requirement.

For all of these reasons, no claim for public disclosure of private facts has been or could be pled given the circumstances from which this case arises.

B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR INTRUSION INTO SECLUSION.

The only other privacy tort that Plaintiff could even plausibly have had in mind is a claim for "intrusion into seclusion." But again, she comes nowhere close to stating such a claim.

An intrusion into seclusion claim requires a plaintiff to plead and prove that a defendant intentionally intruded on her private affairs in a manner that would be highly offensive to a reasonable person. *See Fletcher*, 220 F.3d at 875; *Alexander*, 189 F.3d at 742; RESTATEMENT (SECOND) OF TORTS § 652B (1977). Thus, Plaintiff must first allege that *Acxiom* engaged in some form of intrusion. *See Fletcher*, 220 F.3d at 875-76 (requiring "actions on the defendant's part in the nature of prying or intrusion which is offensive or objectionable to a reasonable person"). Plaintiff's single sentence supporting the cause of action has nothing resembling the required allegation.

Even if this basic hurdle could be overcome, Plaintiff would then have to plead and prove that Acxiom committed an invasion with the *intention* of intruding upon the privacy of another. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977) (requiring defendant to have "intentionally intrude[d]"); *Alexander*, 189 F.3d at 742 (requiring "intentional" interference); *see also Fletcher*, 220 F.3d at 876 (requiring defendant to have believed or been substantially certain that he lacked permission to commit intrusive act). Here, there are no allegations that Acxiom did anything at all with an intention of intruding on Plaintiff's privacy. Indeed, as noted, Plaintiff alleges Acxiom actually took steps to protect its clients' data and that Acxiom was victimized by a third party's theft. For this reason as well, Plaintiff has not and cannot state a claim for intrusion into seclusion.

Finally, the intrusion into seclusion tort also requires a showing that a defendant's "intentional intrusion" be highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652B (1977); *see Fletcher*, 220 F.3d at 875; *Alexander*, 189 F.3d at 742. The Eighth Circuit has established a very high threshold for the types of intrusions that can qualify as highly offensive. *See Phillips v. Grendahl,* 312 F.3d 357, 372 (8th Cir. 2002) (finding no invasion of

privacy where prospective mother-in-law investigated boyfriend and improperly obtained report containing address, birth date, social security number, child support order, and credit information); *Fletcher*, 220 F.3d at 876 (finding no invasion of privacy where plaintiff employee's manager used false pretenses to gain information about plaintiff's medical condition); *Alexander*, 189 F.3d at 742 (finding no invasion of privacy where residential facility tape recorded conversations between mother and resident son). The facts of this case are not at all like the extreme cases where courts have found highly offensive conduct. *See Ruzicka Elec. and Sons, Inc. v. Int'l Bhd. of Elec. Workers*, 427 F.3d 511, 524 (8th Cir. 2005) (trespassing on private property to record when resident sleeps and awakes inside his home is highly offensive); *Peoples Bank and Trust Co. of Mountain Home v. Globe Int'l Publ'g, Inc.*, 978 F.2d 1065, 1068 (8th Cir. 1992) (printing ninety-seven-year-old newspaper carrier's photograph along with false story and headline about being pregnant is highly offensive). For this reason as well, Plaintiff's invasion of privacy count must be dismissed.

CONCLUSION

For the foregoing reasons, defendant Acxiom Corporation respectfully requests that the Court dismiss Plaintiff's complaint with prejudice.

Dated: June 6, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2006 a copy of the foregoing Brief in Support of Its Motion to Dismiss was served electronically on the following attorneys by filing a copy using the Court's CM/ECF system:

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