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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 LISA WHITE, et al.,
7 Plaintiffs,

8 v.

9 SOCIAL SECURITY ADMINISTRATION,
10 et al.,

11 Defendants.

Case No. 14-cv-05604-JST

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Re: ECF No. 15

12 Before the Court is a motion to dismiss filed by Defendants the United States of America,
13 the Social Security Administration (“SSA”), and Ryan Luis, ECF No. 15, and Defendants’
14 Request for Judicial Notice, ECF No. 15-1. For the reasons set forth below, the Court will grant
15 the motion to dismiss and the request for judicial notice.

16 **I. BACKGROUND**

17 **A. Factual Allegations**

18 For the purposes of deciding this motion to dismiss, the Court accepts as true the following
19 allegations from Plaintiffs’ complaint. ECF No. 1.

20 On April 5, 2013, Plaintiff Ms. Lisa White went to the SSA office in Walnut Creek,
21 California, to apply for a new social security number for her adopted son, Plaintiff J.W. Compl.
22 ¶ 10. She met with Defendant Ryan Luis, an employee of the Social Security Administration, who
23 made photocopies of Ms. White’s driver’s license and J.W.’s adoption order and reissued birth
24 certificate. Id. ¶¶ 11, 13. Luis also wrote down Ms. White’s social security number and Plaintiff
25 Mr. Jodie White’s social security number and driver’s license number. Id. ¶ 15. He gave Ms.
26 White a receipt of the meeting, and advised her to return to the SSA office in a few days to inquire
27 about the status of her request. Id. ¶ 16.

28 When Ms. White returned to the SSA office on April 8, 2013, an SSA employee informed

1 her that her request for a new social security number for J.W. had not been processed, and that
2 SSA employees are not authorized to make copies of driver's licenses, birth certificates, and other
3 personal documents. Id. ¶¶ 17-18. Although Ms. White attempted to contact Luis by telephone to
4 discuss her application during the days following their April 5, 2013, meeting, he did not respond
5 to her calls. Id. ¶ 19. On April 9, 2013, Mr. White applied for a new social security number for
6 J.W. at the Antioch SSA office. Id. ¶ 20. SSA employees did not copy Plaintiffs' driver's
7 licenses, adoption documents, or birth certificates in order to process Mr. White's request. Id.

8 Within one week of Ms. White's April 5, 2013, visit to the SSA office, a series of
9 fraudulent, unauthorized transactions occurred under Plaintiffs' names, including attempts to open
10 several store accounts and credit cards. Id. ¶¶ 21-22. In or around April or May 2013, an
11 unauthorized party attached a Social Security Disability Status to Ms. White's social security
12 number. Id. ¶ 30. In May and July 2013, the Mount Diablo Unified School District notified Mr.
13 and Ms. White that J.W. had been approved for the free lunch program and registered as a foster
14 child and/or welfare recipient. Id. ¶¶ 31-32. Finally, sometime during 2013, Mr. and Ms. White
15 received notice that an unauthorized additional party had been added as a mortgagee to a rental
16 property they own. Id. ¶ 33.

17 The identifying information used in these transactions is not readily available to the
18 general public. Id. ¶ 23. A professional examination of the Plaintiffs' personal computer
19 indicated that it had not been hacked or otherwise compromised. Id. ¶ 27. Mr. and Ms. White
20 reported the identity theft to the Pittsburg and Walnut Creek Police Departments on or about April
21 20, 2013, and continued to communicate with law enforcement about the problem. Id. ¶¶ 25-26,
22 28-29, 34. During a May 22, 2013, meeting with F.B.I. Special Agent N. Doss and SSA Office of
23 the Inspector General Special Agent Jared Ueda concerning her identity theft issue, Ms. White
24 identified Luis in a photograph, and Doss indicated that Luis had multiple aliases and an alleged
25 criminal background. Id. ¶ 29.

26 **B. Procedural History**

27 Plaintiffs filed their complaint against Defendants the United States of America, the Social
28 Security Administration, and Ryan Luis on December 23, 2014. The complaint alleges the

1 following causes of action: (1) negligent retention; (2) negligent supervision; (3) negligent hiring;
2 (4) conversion; (5) fraud; (6) invasion of privacy; (7) negligence; (8) negligent infliction of
3 emotional distress; (9) intentional infliction of emotional distress; and (10) respondeat superior.
4 Id. ¶¶ 35-81. The complaint asserts that this Court has jurisdiction pursuant to the Federal Tort
5 Claims Act (“FTCA”), 28 U.S.C. sections 1346(b), 2671-80. Id. ¶ 1.

6 On April 1, 2015, Defendants filed the instant motion to dismiss the complaint and a
7 request that the Court take judicial notice of certain SSA policy documents available on the SSA
8 website. ECF Nos. 15, 15-1. Defendants also filed a certification pursuant to 28 U.S.C. section
9 2679(d) that Luis was acting within the scope of his employment with the SSA at all times
10 material to the alleged incidents described in the complaint, which is signed by the Chief of the
11 Civil Division of the United States Attorney’s Office for the Northern District of California. ECF
12 No. 15-2. Plaintiffs oppose the motion to dismiss and request for judicial notice, and object to two
13 declarations filed by Defendants in connection with their reply brief. ECF Nos. 19, 20, 23, 24.
14 The Court will first address Defendants’ request for judicial notice and Plaintiffs’ objections to the
15 declarations, before turning to the motion to dismiss.

16 **II. REQUEST FOR JUDICIAL NOTICE**

17 Defendants request that the Court take judicial notice of five SSA policy documents
18 available on the SSA website. ECF No. 15-1. Plaintiffs object that the “unverified website pages”
19 are not proper subjects of judicial notice; that granting Defendants’ request would preclude
20 Plaintiffs from producing evidence contrary to the policies stated on the website; and that these
21 policies are not relevant in any event because the alleged misconduct occurred before their
22 effective dates. ECF No. 20.

23 Pursuant to Rule 201(b) of the Federal Rules of Evidence, “[t]he court may judicially
24 notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the
25 trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources
26 whose accuracy cannot reasonably be questioned.” The Court “must take judicial notice if a party
27 requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

28 The Court concludes that these documents are proper subjects of judicial notice and grants

1 Defendants' request. See Gustavson v. Mars, Inc., No. 13-cv-04537-LHK, 2014 WL 2604774, at
2 *3 n.1 (N.D. Cal. June 10, 2014) (granting request for judicial notice "because these documents
3 are readily available on a government agency website"). The Court notes that this decision does
4 not preclude Plaintiffs from presenting evidence suggesting that the SSA policies outlined in these
5 documents are not followed, that the policies have changed or are in flux, or that additional,
6 contradictory SSA policies exist, including by presenting a "testimonial admission from an SSA
7 employee stating that SSA policies did not permit photocopying and retaining documents with
8 confidential information from members of the general public." See ECF No. 20 at 2. With respect
9 to Plaintiffs' argument that the materials are not relevant because their effective dates postdate the
10 time period at issue, the Court notes that three of the five documents have effective dates earlier
11 than April 2013, see ECF No. 15-1 Exs. B, C, and D, and concludes that policies that postdate the
12 events described in the complaint are still relevant within the meaning of Federal Rule of Evidence
13 401.

14 **III. OBJECTIONS TO DECLARATIONS**

15 Plaintiffs have filed objections to the Declaration of Stacy Shipman in Support of
16 Defendants' Motion to Dismiss and the Declaration of Maria Daghljan in Support of Defendants'
17 Motion to Dismiss. ECF Nos. 23, 24. In these declarations, SSA employees discuss Luis's
18 personnel file and the SSA Office of the Inspector General investigation concerning Plaintiffs'
19 allegations. ECF Nos. 21-1, 21-2. Both declarations were filed with Defendants' Reply Brief. Id.

20 Plaintiffs' primary objection is that "the appropriate standards for determining the Motion
21 to Dismiss are those under Federal Rule of Procedure 12(b)(6) which do not permit extrinsic
22 evidence." ECF Nos. 23, 24. "As a general rule, a district court may not consider any material
23 beyond the pleadings in ruling on a Rule 12(b)(6) motion." Lee v. City of Los Angeles, 250 F.3d
24 668, 688 (9th Cir. 2001) (internal quotation marks omitted). There are two exceptions to this rule,
25 for materials properly submitted as part of the complaint and judicially noticed facts, but these
26 exceptions do not apply here. See id. at 688-89. On the other hand, "when considering a motion
27 to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings,
28 but may review any evidence, such as affidavits and testimony, to resolve factual disputes

1 concerning the existence of jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir.
2 1988). The Court may therefore consider these declarations, but only to the extent they are
3 relevant to resolving the parties’ disputes concerning jurisdiction.¹

4 Plaintiffs also object that statements in these declarations are inadmissible because they are
5 vague and ambiguous, lack foundation, and are inadmissible hearsay. ECF Nos. 23, 24.
6 The Court has not considered these declarations because they are unnecessary to the Court’s
7 resolution of the jurisdictional questions at issue. Also, the Court generally will not consider new
8 evidence presented for the first time in a reply brief. In re Hansen Natural Corp. Sec. Litig., 527
9 F. Supp. 2d 1142, 1150 (C.D. Cal. 2007). Accordingly, the Court does not reach Plaintiffs’
10 objections.

11 **IV. MOTION TO DISMISS**

12 **A. Legal Standard**

13 **1. Federal Rule of Civil Procedure 12(b)(1)**

14 “If the court determines at any time that it lacks subject-matter jurisdiction, the court must
15 dismiss the action.” Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of
16 subject-matter jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12(b)(1). The
17 plaintiff always bears the burden of establishing subject-matter jurisdiction. Kokkonen v.
18 Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). “Once the moving party has converted
19 the motion to dismiss into a factual motion by presenting affidavits or other evidence properly
20 brought before the court, the party opposing the motion must furnish affidavits or other evidence
21 necessary to satisfy its burden of establishing subject matter jurisdiction.” Savage v. Glendale
22 Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

23 **2. Federal Rule of Civil Procedure 12(b)(6)**

24 A complaint must contain “a short and plain statement of the claim showing that the
25 pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and
26

27 ¹ For the same reason, the Court may consider the Declaration of Lisa White in Support of
28 Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, ECF No. 19-1, which was submitted to
the Court with Plaintiffs’ opposition brief, only in determining whether the Court has subject
matter jurisdiction over the claims alleged.

1 the grounds upon which it rests.” Fed R. Civ. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S.
2 544, 555 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual
3 matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal,
4 556 U.S. 662, 678 (2009) (internal quotation marks omitted). “A claim has facial plausibility
5 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
6 the defendant is liable for the misconduct alleged.” Id. The Court must “accept all factual
7 allegations in the complaint as true and construe the pleadings in the light most favorable to the
8 nonmoving party.” Kniewel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

9 **B. Discussion**

10 **1. Claims against the SSA and Ryan Luis**

11 Defendants argue first that Plaintiffs’ claims against the SSA and Luis should be dismissed
12 because the United States is the only proper defendant in an FTCA action. ECF No. 15 at 6.

13 “The FTCA ‘waives the sovereign immunity of the United States for actions in tort’ and
14 ‘vests the federal district courts with exclusive jurisdiction over suits arising from the negligence
15 of Government employees.’” Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir. 2011)
16 (quoting Jerves v. United States, 966 F.2d 517, 518 (9th Cir. 1992)). The United States is the
17 “sole party which may be sued for personal injuries arising out of the negligence of its employees.
18 Individual agencies of the United States may not be sued.” Allen v. Veterans Admin., 749 F.2d
19 1386, 1388 (9th Cir. 1984) (internal citations omitted); see 28 U.S.C. § 2679(a). The FTCA
20 remedy against the United States is also “exclusive of any other civil action or proceeding for
21 money damages by reason of the same subject matter against the employee whose act or omission
22 gave rise to the claim.” 28 U.S.C. § 2679(b).

23 Upon certification by the Attorney General that the defendant
24 employee was acting within the scope of his office or employment at
25 the time of the incident out of which the claim arose, any civil action
26 or proceeding commenced upon such claim in a United States
district court shall be deemed an action against the United States
under the provisions of this title and all references thereto, and the
United States shall be substituted as the party defendant.

27 28 U.S.C. § 2679(d)(1). “Liability is determined by the tort law of the state where the claim
28 arose.” Gasho v. United States, 39 F.3d 1420, 1427 (9th Cir. 1994); see 28 U.S.C. § 1346(b).

1 Plaintiffs do not argue that their claims against the SSA should not be dismissed. See ECF
2 No. 19 at 9-11. They do, however, contend that Luis is a proper Defendant, because his
3 intentional and fraudulent actions, taken in violation of SSA policies, exceeded the scope of his
4 authority, and the ultra vires exception to sovereign immunity therefore applies. Id. (citing United
5 States v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986)).

6 Plaintiffs correctly argue that the section 2679(d) certification that Luis was acting within
7 the scope of his employment with the SSA at all times material to the alleged incidents described
8 in the complaint, ECF No. 15-2, “does not conclusively establish as correct the substitution of the
9 United States as defendant in place of the employee.” ECF No. 19 at 21 (quoting Gutierrez de
10 Martinez v. Lamagno, 515 U.S. 417, 434 (1995)). But “the party seeking review [of the Attorney
11 General’s certification] bears the burden of presenting evidence and disproving the Attorney
12 General’s decision to grant or deny scope of employment certification by a preponderance of the
13 evidence.” Jackson v. Tate, 648 F.3d 729, 732 (9th Cir. 2011). “When the plaintiff challenges the
14 Attorney General’s scope of employment certification, ‘[t]he United States . . . must remain the
15 federal defendant in the action unless and until the District Court determines that the employee, in
16 fact, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his
17 employment.’” Id. at 732-33 (quoting Osborn v. Haley, 549 U.S. 225, 231 (2007)) (emphasis and
18 alterations in original).

19 Because Plaintiffs have presented no evidence, as opposed to allegations, that might
20 disprove the Attorney General’s certification, at this time the United States “must remain the
21 federal defendant in the action.” Id. at 732; see ECF No. 19 at 10-11. In addition, Court notes that
22 the complaint explicitly alleges that “[a]t all relevant times, Defendant Ryan Luis acted as an agent
23 and employee of the United States of America, specifically the Social Security Administration,
24 and in doing the acts alleged, was acting within the course and scope of such agency and
25 employment.” Compl. ¶ 6. Accordingly, the claims against both the SSA and Luis will be
26 dismissed.²

27 _____
28 ² In their opposition to Defendants’ motion to dismiss, Plaintiffs request that the Court determine
whether Luis was acting within the scope of his employment in engaging in the conduct alleged,

1 **2. Respondeat Superior**

2 Defendants argue that because the FTCA permits suit against the United States for the
3 tortious activities of a federal employee acting within the scope of his office or employment, the
4 Court need not separately address respondeat superior liability and the tenth cause of action in the
5 complaint should therefore be dismissed. ECF No. 15 at 7 n.3. Plaintiffs have presented no
6 argument in opposition. The tenth cause of action is dismissed.

7 **3. Negligent Retention, Negligent Supervision, and Negligent Hiring**

8 Defendants argue that Plaintiffs’ negligent retention, negligent supervision, and negligent
9 hiring claims are barred by the discretionary function exception to the FTCA. ECF No. 15 at 7.
10 This exception “precludes claims against the United States which are ‘based upon the exercise or
11 performance or the failure to exercise or perform a discretionary function or duty on the part of a
12 federal agency or an employee of the Government, whether or not the discretion was abused.’”
13 Nurse v. United States, 226 F.3d 996, 1001 (9th Cir. 2000) (quoting 28 U.S.C. § 2680(a)). “If the
14 asserted liability falls within an exception to the FTCA, then the claims must be dismissed for lack
15 of subject matter jurisdiction.” Bibeau v. Pac. Nw. Research Found., 339 F.3d 942, 945 (9th Cir.
16 2003).

17 To determine whether the discretionary function exception applies, a court must first
18 “determine whether the challenged conduct involves an element of judgment or choice.” Nurse,
19 226 F.3d at 1001 (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)). If the conduct
20 does involve some element of choice, the court must then determine “whether the conduct
21 implements social, economic, or political policy considerations.” Id. (citing Gasho, 39 F.3d at
22 1435). The challenged decision “need not actually be grounded in policy considerations” in order
23 to be protected from suit, as long as it is “by its nature, susceptible to a policy analysis.” Miller v.
24 United States, 163 F.3d 591, 593 (9th Cir. 1998). While the burden of establishing that the

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27 and suggest that the Court authorize limited discovery on this issue and conduct an evidentiary
28 hearing. ECF No. 19 at 21. Because Plaintiffs do not actually allege in their complaint that Luis
sold, transferred, or improperly shared their personal information (as discussed further infra), and
because the Plaintiffs will be given an opportunity to amend their complaint, the Court concludes
that discovery and a hearing are not necessary at this time.

1 discretionary function exception applies falls on the United States, “a plaintiff must advance a
2 claim that is facially outside the discretionary function exception in order to survive a motion to
3 dismiss.” Prescott v. United States, 973 F.2d 696, 702 & n.4 (9th Cir. 1992).

4 The Ninth Circuit has held that “allegedly negligent and reckless employment, supervision
5 and training” of government employees “fall squarely within the discretionary function
6 exception.” Nurse, 226 F.3d at 1001. “[T]he decision of whether and how to retain and supervise
7 an employee, as well as whether to warn about his dangerous proclivities, are the type of
8 discretionary judgments that the exclusion was designed to protect.” Doe v. Holy See, 557 F.3d
9 1066, 1084 (9th Cir. 2009) (applying FTCA case law in interpreting the Foreign Sovereign
10 Immunities Act’s discretionary function exclusion). The complaint does not allege that any SSA
11 policy precluded agency employees from exercising their judgment in hiring, supervising, and
12 retaining Luis, even if, as the complaint alleges, Defendants “knew or should have known that
13 Ryan Luis was unfit for the job, and that his unfitness for the job created a particular risk to
14 others,” presumably because of his “alleged criminal background.” Compl. ¶¶ 29, 43; see Xue Lu
15 v. Powell, 621 F.3d 944, 950 (9th Cir. 2010) (discretionary function exception applies to negligent
16 retention claim where plaintiffs had not identified any mandatory duty to discipline employee who
17 violated agency regulations). Therefore these claims, as alleged, are barred by the discretionary
18 function exception and will be dismissed.

19 **4. Fraud**

20 As Plaintiffs acknowledge, the FTCA contains an exception to the waiver of sovereign
21 immunity for “[a]ny claim arising out of . . . misrepresentation, deceit, or interference with
22 contract rights,” 28 U.S.C. § 2680(h). ECF No. 19 at 14. This exception bars Plaintiffs’ fraud
23 claim against the United States. Plaintiffs argue that the exception “does not preclude an action
24 against Mr. Luis in his individual capacity for acts committed outside the course and scope of
25 employment.” ECF No. 19 at 14. However, because the Court has determined that the United
26 States is the only proper Defendant at this time, this claim must be dismissed.

27 **5. Conversion**

28 To establish conversion, a plaintiff must show “ownership or right to possession of

1 property, wrongful disposition of the property right and damages.” Kremen v. Cohen, 337 F.3d
2 1024, 1029 (9th Cir. 2002). Defendants argue that Plaintiffs have failed to state a claim for
3 conversion both because Plaintiffs’ personal identifying information does not constitute Plaintiffs’
4 “property,” and because the conclusory allegation that Defendants “intentionally and substantially
5 interfered with Plaintiffs’ identities, personal and financial data and creditworthiness by taking
6 possession, using and converting such tangible and intangible personal property and information”
7 does not meet the pleading standards of Federal Rule of Civil Procedure 8. ECF No. 15 at 9-10;
8 see Compl. ¶ 52.

9 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
10 accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678
11 (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads
12 factual content that allows the court to draw the reasonable inference that the defendant is liable
13 for the misconduct alleged.” Id. This plausibility standard “asks for more than a sheer possibility
14 that a defendant acted unlawfully.” Id. “Where a complaint pleads facts that are ‘merely
15 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
16 plausibility of entitlement to relief.’” Id. (quoting Twombly, 550 U.S. at 557).

17 Here, Plaintiffs allege that Luis had access to their personally identifying information, that
18 he took photocopies of personal documents, that within one week of Ms. White’s meeting with
19 Luis, “unauthorized parties” began a series of fraudulent transactions using Plaintiffs’ personally
20 identifying information, and that a professional examination suggested that Plaintiffs’ computer
21 had not been hacked. But the complaint does not state how Defendants took possession, used, or
22 converted Plaintiffs’ personal property. It does not allege, for example, that Luis personally
23 participated in any of the unauthorized transactions, or that he sold or disclosed Plaintiffs’
24 personally identifying information to a third party. The allegation that F.B.I. Special Agent N.
25 Doss “indicated to the parties that Defendant Ryan Luis had multiple aliases and alleged criminal
26 background,” also does not link him to any misuse of Plaintiffs’ identifying information. See
27 Compl. ¶ 29.

28 The complaint does state that, “On information and belief, Defendant Ryan Luis was the

1 only person with access to the full and complete identification of all Plaintiffs at the same time.”
2 Compl. ¶ 24. But Defendants are correct that the allegation that Plaintiffs’ personal information —
3 including social security numbers, driver’s license numbers, dates of birth, and addresses — either
4 does not exist in any other location, such as the internet, public databases, or store, hospital,
5 company, or financial databases, or that those locations are not susceptible to unauthorized access,
6 is implausible. The Court is not “required to accept as true allegations that are merely conclusory,
7 unwarranted deductions of fact, or unreasonable inferences.” Sprewell v. Golden State Warriors,
8 266 F.3d 979, 988 (9th Cir. 2001), opinion amended on other grounds, 275 F.3d 1187 (9th Cir.
9 2001).

10 Because the complaint does not allege sufficient facts to allow the Court to draw the
11 reasonable inference that Defendants were involved in the alleged conversion, this claim will be
12 dismissed. The Court therefore need not address Defendants’ argument that personally identifying
13 information is not “property” for the purpose of stating a claim for conversion.

14 **6. Invasion of Privacy**

15 Plaintiffs allege that “Defendants, by requesting and obtaining personal and confidential
16 information under false pretenses, intentionally intruded into Plaintiffs [sic] private matters,” and
17 that this “was an invasion and intrusion into Plaintiffs’ private life.” Compl. ¶¶ 64-65.

18 To establish a claim under the California Constitutional right to privacy, a plaintiff must
19 demonstrate: “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy
20 under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of
21 the protected privacy interest.” Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1024 (N.D. Cal.
22 2012) (citing Hill v. Nat’l Collegiate Athletic Ass’n, 7 Cal. 4th 1, 35-37 (1994). “Actionable
23 invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential
24 impact to constitute an egregious breach of the social norms underlying the privacy right.” Hill, 7
25 Cal. 4th at 37. To state a common law invasion of privacy tort claim, a plaintiff must allege
26 “(1) intrusion into a private place, conversation or matter (2) in a manner highly offensive to a
27 reasonable person.” Low, 900 F. Supp. 2d at 1025 (citing Shulman v. Group W Prods., Inc., 18
28 Cal. 4th 200, 231 (1998). Both the “California Constitution and the common law set a high bar for

1 an invasion of privacy claim. Even disclosure of personal information, including social security
2 numbers, does not constitute an ‘egregious breach of social norms’ to establish an invasion of
3 privacy claim.” Id. (collecting cases).

4 Here, Plaintiffs have alleged only that Luis requested and obtained personal information
5 from Ms. White, and that he photocopied Plaintiffs’ identity documents even though, according to
6 another SSA employee, he was not authorized to do so.³ Plaintiffs’ opposition states that Plaintiffs
7 “have alleged actual identity theft,” and that “Mr. Luis, while acting in the scope of his
8 employment, obtained and distributed personal information about Plaintiffs, for his own gain
9 and/or the gain of others.” ECF No. 19 at 16. But these allegations do not appear in the
10 complaint. The allegation that Luis made unauthorized photocopies of identity documents,
11 without any allegation that he sold, distributed, or otherwise improperly used the information,
12 does not rise to the level of a “highly offensive disclosure of information or a ‘serious invasion’ of
13 a privacy interest.” Low, 900 F. Supp. 2d at 1025; see also In re iPhone Application Litig., 844 F.
14 Supp. 2d 1040, 1063 (N.D. Cal. 2012) (disclosure to third parties of “unique device identifier
15 number, personal data, and geolocation information from Plaintiffs’ iDevices . . . does not
16 constitute an egregious breach of social norms”); Ruiz v. Gap, Inc., 540 F. Supp. 2d 1121, 1127-
17 28 (N.D. Cal. 2008), aff’d 380 Fed. App’x 689 (9th Cir. 2010) (allegation that Defendant had
18 created an increased risk of identity theft where retail store’s laptop containing personal
19 information, including the social security numbers, of job applicants was stolen did not constitute
20 an egregious breach of privacy and therefore was not sufficient to state a claim for the California
21 Constitutional right to privacy); Kinsey v. Macur, 107 Cal. App. 3d 265, 270 (1980) (except in
22 cases involving physical intrusion, the common law invasion of privacy tort “must be
23 accompanied by publicity in the sense of communication to the public in general or to a large
24 number of persons as distinguished from one individual or a few”).

25

26 ³ This allegation is undermined by the SSA “Policy for returning documents submitted for an SSN
27 card,” effective February 14, 2012, which states that SSA employees processing social security
28 card applications should “make clear photocopies of the [evidence] documents to keep with the
pending [social security number] application” when documents must be verified by the issuing
agency. ECF No. 15-1 Ex. C.

1 Because Plaintiffs have not alleged facts sufficient to state a claim for invasion of privacy,
2 this claim will also be dismissed.

3 **7. General Negligence**

4 The elements of a cause of action for negligence in California are: (1) a legal duty to use
5 due care; (2) a breach of that legal duty; and (3) the breach was the proximate or legal cause of the
6 resulting injury.” Ladd v. Cnty. of San Mateo, 12 Cal. 4th 913, 917-18 (1996). Defendants argue
7 that Plaintiffs’ negligence claim must be dismissed because they have not adequately alleged a
8 duty, a breach, or proximate cause. ECF No. 15 at 12-14. Because the Court concludes that
9 Plaintiffs have not adequately alleged causation, it need not address the elements of duty or
10 breach.

11 The complaint contains conclusory allegations that “Defendants negligently represented,
12 handled, stored, divulged, obtained, disclosed, used, or otherwise revealed Plaintiffs’ personal
13 information to others, as identified in this Complaint,” and that “[a]s a proximate result of
14 Defendants’ negligent conduct, Plaintiffs have been damaged in an amount to be determined at
15 trial.” Compl. ¶¶ 68, 70. But, as discussed above, the factual allegations in the complaint state
16 only that Luis took photocopies of personal documents and that an unnamed SSA employee stated
17 that taking such photocopies is contrary to SSA policy. It does not allege that Luis engaged in any
18 unauthorized transactions using Plaintiffs’ information or that he shared the information with
19 others. Because the complaint makes no causal connection between Luis’s alleged actions and
20 Plaintiffs’ injuries as victims of identity theft, the negligence claim must be dismissed, even
21 assuming that Plaintiffs have adequately alleged duty and breach. See Iqbal, 556 U.S. at 678 (the
22 plausibility standard “asks for more than a sheer possibility that a defendant has acted
23 unlawfully”).

24 **8. Negligent Infliction of Emotional Distress**

25 In California, “there is no independent tort of negligent infliction of emotional distress.”
26 Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 984 (1993). “The tort is negligence.” Id.
27 Accordingly, this claim is dismissed with prejudice as duplicative of Plaintiffs’ negligence claim.
28

1 **9. Intentional Infliction of Emotional Distress**

2 The elements of a prima facie case for the tort of intentional infliction of emotional
3 distress in California are: (1) outrageous conduct by the defendant; (2) the defendant’s intention of
4 causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff’s
5 suffering severe or extreme emotional distress; and (4) actual and proximate causation of the
6 emotional distress by the defendant’s outrageous conduct. Fletcher v. W. Nat’l Life Ins. Co., 10
7 Cal. App. 3d 376, 394 (1970). To be “outrageous,” conduct “must be so extreme as to exceed all
8 bounds of that usually tolerated in a civilized society.” Trerice v. Blue Cross of California, 209
9 Cal. App. 3d 878, 883 (1989). It must be “of a nature that is especially calculated to cause mental
10 distress of a very serious kind.” Ess v. Eskaton Props., 97 Cal. App. 4th 120, 130 (2002).
11 “Liability has been found only where the conduct has been so outrageous in character, and so
12 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
13 atrocious, and utterly intolerable in a civilized community.” Cochran v. Cochran, 65 Cal. App. 4th
14 488, 496 (1998).

15 The Court concludes that the alleged conduct is not sufficiently outrageous to state a claim
16 for intentional infliction of emotional distress, and that this claim should be dismissed. See
17 Cochran, 65 Cal. App. 4th at 494. The complaint contains the conclusory allegation that
18 “Defendants’ conduct alleged herein was outrageous.” Compl. ¶ 75. But allegations that Luis
19 made photocopies of identity documents and failed to return phone calls do not rise to the requisite
20 level. Plaintiffs contend that the complaint alleges that Mr. Luis “either directly or indirectly[]
21 perpetrated identity theft against Plaintiffs” and “acted purposefully to abuse his employment with
22 the SSA and distribute information that he received as an employee for purposes of committing
23 the crime of identity theft.” ECF No. 19 at 19-20. But these allegations do not appear in the
24 complaint.

25 Because Plaintiffs do not allege outrageous conduct by Defendants, this claim is dismissed.

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1 **CONCLUSION**

2 For the foregoing reasons, the motion to dismiss is granted, and the complaint is dismissed
3 with leave to amend, except for Plaintiffs' negligent infliction of emotional distress claim, which
4 is dismissed with prejudice. Plaintiffs may file an amended complaint by July 8, 2015.

5 IT IS SO ORDERED.

6 Dated: June 23, 2015

7 
8 _____
9 JON S. TIGAR
United States District Judge