UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated,	)	Civil Action No. 08-03535
Plaintiffs,	)	Sec. R JUDGE SARAH S. VANCE
v.	)	Mag. 3 MAGISTRATE JUDGE DANIEL E. KNOWLES, III
JACKSON HEWITT TAX SERVICE INC.; JACKSON HEWITT INC.; and, CRESCENT CITY TAX SERVICE, INC. d/b/a JACKSON HEWITT TAX SERVICE,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

This case presents what will certainly be one of many more cases in the future regarding the mishandling of extremely confidential information and documents in today's "Information Age."

Pursuant to Fed. R. Civ. P. 23(c)(1) and L.R. 23.1(B), plaintiff, Vicki L. Pinero ("Plaintiff"), on behalf of herself and all others similarly situated, submits this memorandum in support of her Motion for Class Certification in this class action against defendants,

Jackson Hewitt Tax Service Inc. ("JHTSI"); Jackson Hewitt Inc. ("JHI"); and, Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service ("CCTSI") (jointly referred to as "Defendants").

I. INTRODUCTION

Identity theft is one of the fastest growing crimes in America and has been described as a "national epidemic." Docket No. 9, at ¶ 11 & Exhibit C. This crime will continue to grow as corporations continue to store, sell, and transfer personally identifiable information about consumers. In 2005, the Louisiana Legislature recognized this problem and made the following findings:

> (1) The privacy and financial security of individuals are increasingly at risk due to the ever more widespread collection of personal information.
>
> (2) Credit card transactions, magazine subscriptions, telephone numbers, real estate records, automobile registrations, consumer surveys, warranty registrations, credit reports, and Internet web sites are all sources of personal information and form the source material of identity theft.
>
> (3) The crime of identity theft is on the rise in the United States. Criminals who steal personal information use the information to open credit card accounts, write bad checks, buy automobiles, and commit other financial crimes using the identity of another person.
>
> (4) Identity theft is costly to the marketplace and to consumers.
>
> (5) Victims of identity theft must act quickly to minimize the damage; therefore, expeditious notification of possible misuse of a person's personal information is imperative.

La. Rev. Stat. § 51:3072.

As Deborah Platt Majoras (Federal Trade Commission Chairman) has noted, "the goal

here is to create a culture of security for sensitive information so that businesses prevent breaches and identity theft." *The Federal Trade Commission: Learning from History as We Confront Today's Consumer Challenges*, 75 UMKC L. Rev. 115, 128 (2006). In order to create this "culture of security," the law must ensure that corporations bear the related costs associated with the improper disclosure and mishandling of sensitive information and documents. Only when corporations are forced to internalize these costs will necessary changes in antiquated practices and procedures regarding the handling and disposal of confidential documents change. This case provides an opportunity to make a step in the right direction.

Defendants are in the business of selling trust. They claim that "protecting your privacy is a core value of our relationship with our customers." Docket No. 9, at ¶ 23 & Exhibit O. This case is about how Defendants violated that trust by throwing original and signed federal and state tax returns and other confidential documents in a public dumpster in Gretna, Louisiana. Pursuant to Fed. R. Civ. P. 23(b)(3), Plaintiff seeks class certification of some of her claims, *i.e.*, Counts 1-5 and 7-8. As explained below, Plaintiff's claims satisfy Rule 23(a)'s requirements of "numerosity," "commonality," "typicality," and "adequacy of representation." Further, Plaintiff's claims satisfy the "predominance" and "superiority" requirements of Rule 23(b)(3). The Court, therefore, should grant Plaintiff's class certification motion and set a hearing to discuss the form and content of the class action notice to the class members.

II. PROCEDURAL HISTORY

On May 22, 2008, Plaintiff filed her original Class Action Complaint against Defendants. *See* Docket No. 1. On July 15, 2008, Plaintiff filed her First Amended Class Action Complaint. *See* Docket No. 9. In her amended complaint, Plaintiff asserts 9 Counts. *Id.* Specifically, Plaintiff alleges: unauthorized disclosure of tax returns per 26 U.S.C. §§ 6103 and 7431 (Count 1); fraud (Count 2); breach of contract (Count 3); negligence (Count 4); invasion of privacy (Count 5); violation of Louisiana Database Security Breach Notification Law ("LA Security Breach Statute"), La. Rev. Stat. § 51:3071, *et seq.* (Count 6); declaratory judgment (Count 7); injunction (Count 8); and, violation of Louisiana Unfair Trade Practices and Consumer Protection Law ("LA Unfair Trade Practices Statute"), La. Rev. Stat. § 51:1401, *et seq.* (Count 9). *Id.* All 9 Counts are asserted on behalf of the class, except Count 9 for unfair trade practices which is asserted by Plaintiff only. *Id.*

Defendants waived formal service. *See* Docket Nos. 5-6. As of this filing, none of the Defendants have answered. Answers are due on August 4, 2008. *See* Docket Nos. 5 & 8.

On June 13, 2008, the Court entered a Stipulated Order to Preserve Evidence. *See* Docket No. 4. Per the order, CCTSI must preserve all relevant documents and evidence. *Id.*

As explained below, for now, Plaintiff seeks class certification of only the following Counts: Count 1 (unauthorized disclosure of tax returns); Count 2 (fraud); Count 3 (breach of contract); Count 4 (negligence); Count 5 (invasion of privacy); Count 7 (declaratory judgment); and, Count 8 (injunction).

III. FACTS

In 2006, Plaintiff visited the Jackson Hewitt office located at 6601 Veterans Boulevard, Metairie, Louisiana 70003 to have her 2005 federal and state tax returns prepared and e-filed. *See* Docket No. 9, at ¶ 21. Upon information and belief, this Jackson Hewitt office is owned and managed by CCTSI. *Id.* During her visit, Plaintiff met with Kimberly Vazquez and provided highly confidential, financial and private information about herself and her family, including, but not limited to, the following: social security number; date of birth; driver's license number; daughter's name, social security number, and date of birth; home address; home phone number; work phone number; annual income; employer name and address; and, occupation. *Id.* at ¶ 22. Plaintiff also provided her W-2s. *Id.* During her visit, Plaintiff was given a copy of Jackson Hewitt's "Privacy Policy." *Id.* at ¶ 23. In pertinent part, the "Privacy Policy" states:

> At Jackson Hewitt®, protecting your privacy is a core value of our relationship with our customers. Please read this policy carefully. It gives you important information about how we* handle your personally identifiable information, which is nonpublic information about you that we obtain, use, or disclose to provide you with our services.
>
> . . . .
>
> Our Approach to Data Security
> We maintain policies and procedures designed to restrict access to nonpublic personal information about you to those persons who need to know that information to fulfill your request for products or services. These policies and procedures include physical, electronic, and procedural safeguards that comply with federal regulations to guard your information.

Id.

The "Privacy Policy" further states:

> This privacy policy is being provided by Jackson Hewitt Tax Service Inc., and its subsidiaries and affiliates, and/or by our independently owned and operated third-party franchisees (collectively referred to as "Jackson Hewitt," "we," "us," or "our"), and applies to our current and former customers.

Id. at ¶ 24.

Defendants represent that confidential, financial and private information learned or obtained during the preparation of an individual's tax return will not be placed in the public domain for access by anyone. *Id.* at ¶ 25. When hiring Defendants to complete her 2005 tax returns, Plaintiff was told by Defendants that her confidential, financial and private information would not be placed in the public domain for access by anyone. *Id.* at ¶ 26. The maintenance of strict confidentiality regarding Plaintiff's financial and private information was a condition precedent to the hiring of Defendants to complete her tax returns. *Id.* at ¶ 27.

Notwithstanding their representations regarding their "Privacy Policy," upon information and belief, sometime in the early part of 2008, Defendants threw Plaintiff's original and signed 2005 federal and state tax returns and other confidential documents in a public dumpster located in Gretna, Louisiana. *Id.* at ¶ 28. The tax returns were in original, readable form and were *not* burned, shredded, or pulverized, as required by federal and state law. *Id.* The documents were found by Wilhemina Walker. *Id.* at ¶ 29. In addition to Plaintiff's documents, Ms. Walker also found in the same dumpster the tax returns of over 100 other individuals, with some tax returns dating back to 2003, and numerous other Jackson Hewitt materials, including banners, brochures, office supplies, and employee instruction books. *Id.*

After discovering the documents, Ms. Walker contacted WDSU, Channel 6, which contacted Plaintiff and others to advise of the discovery. *Id.* at ¶ 30. Richard Angelico, of WDSU 6 on Your Side, returned to Plaintiff her 2005 tax returns found in the Gretna dumpster. *Id.* In May 2008, a report aired on Channel 6 regarding the discovery of the confidential tax returns. *Id.* In response to the Channel 6 report, CCTSI issued a public statement. *Id.* at ¶ 31 & Exhibit P.

As a result of Defendants' unlawful actions or inactions, Plaintiff has suffered, and will continue to suffer, damages, including: fear; panic; anxiety; sleeplessness; nightmares; embarrassment; hassle; anger; loss time; loss of consortium; and other emotional and physical distress, all in an amount to be determined at trial. *Id.* at ¶ 33. In addition to all general damages, Plaintiff seeks and is entitled to special damages related to: credit monitoring; credit insurance; reimbursement for all out-of-pocket expenses related to notifying creditors of the improper disclosure; reimbursement for all out-of-pocket expenses related to identity theft; and other special damages. *Id.*

IV. LAW AND ARGUMENT SUMMARY

"Class certification is governed by Fed. R. Civ. P. 23, the provisions of which are designed to promote the efficient and economical conduct of litigation." *McWaters v. Federal Emergency Management Agency*, 237 F.R.D. 155, 160 (E.D. La. 2006). Pursuant to Fed. R. Civ. P. 23(c)(1)(A), "[a]t an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class

action." By Local Rule, "[w]ithin 90 days after the filing of a [class action] complaint," a plaintiff in a class action must move for class certification under Rule 23(c)(1). *See* L.R. 23.1(B). "A class action is not maintainable as such simply because the lawsuit designates the cause as a class action." *In re American Commercial Lines, LLC*, 2002 WL 1066743, *2 (E.D. La. 2002). "An order that certifies a class action *must* define the class and the class claims . . . and must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B) (emphasis added).

A. The Class Definition

"One of the unwritten requirements of Rule 23 is that the class to be certified must be 'adequately defined and clearly ascertainable.'" *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 611 (E.D. La. 2006); *see also DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) ("It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."). "A precise class definition is necessary to identify properly 'those entitled to relief, those bound by the judgment, and those entitled to notice.'" *In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004). "Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief. Such a definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of the litigation on the merits before class members may be ascertained, and does not require the court to engage in

an impermissible consideration of the merits of the claims in connection with its class certification determination." *Jones v. National Sec. Fire & Cas. Co.*, 2006 WL 3228409, *4 (W.D. La. 2006) (*quoting* 2 Newberg on Class Actions § 6:14 (4th ed.)). "Basically, a carefully pleaded class definition, in an action for damages, should describe: [1] a common transactional fact or status predicated on the cause of action, such as purchasers, stockholders, or franchisees; [2] the time span appropriate to the cause of action; [and] [3] any appropriate geographical scope." 2 Newberg on Class Actions § 6:17 (4th ed.).

For now, plaintiff seeks certification of the following class:

> All Louisiana residents who received tax preparation services through Defendants and whose tax return information, tax return, or other personal or financial information was disclosed by Defendants, without consent, during the one year period prior to the filing of the complaint.

The proposed class definition adequately defines the class. *See DeBremaecker*, 433 F.2d at 734. The definition describes "a common transactional fact . . . predicated on the cause[s] of action"—that being the Defendants' improper disclosure of the class members' tax return information, tax returns, and other personal and financial information. 2 Newberg on Class Actions § 6:17 (4th ed.). The definition also identifies an appropriate time span—during the 1 year period prior to the filing of the original complaint, *i.e.*, May 22, 2007 to May 22, 2008. *Id.* Finally, the definition contains an appropriate geographical scope—Louisiana residents. *Id.*

Upon completion of further investigation and discovery, Plaintiff may seek to expand the scope of the class by revising the class definition. Such a practice is common and

permitted per Rule 23(c)(1)(C). *See* 2 Newberg on Class Actions § 6:28 (4th ed.) ("A plaintiff representing a class may seek to enlarge it after the initial certification ruling[.]"); Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). As this Court has noted, the "class definition is a process of 'ongoing refinement and give-and-take[.]'" *Turner*, 234 F.R.D. at 611; *see also In re Monumental*, 365 F.3d at 414 ("[H]olding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition."). "A court is *not* bound by the class definition proposed in the complaint[.]" *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993) (emphasis added). Instead, the Court should ensure the class definition is clear and broad enough for the case to proceed as efficiently as possible. *See*, *e.g.*, *McWaters*, 237 F.R.D. at 163 ("Because district courts retain substantial discretion in managing their cases, the Court may take necessary measures, such as redefining the class and creating sub-classes, in order to properly manage [the] litigation."); *Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.3d 290, 296 (5th Cir. 2001) ("But the district court may choose one possible class definition over another in order to ensure that the requirements of Rule 23 are best satisfied.").

B. The Class Claims

As noted, "[a]n order that certifies a class action must define . . . the class claims[.]" Fed. R. Civ. P. 23(c)(1)(B). Further, "[i]n ruling upon a motion for class certification, courts

treat the substantive allegations contained in the [plaintiff's] complaint as true. The issue is not whether the [plaintiff] [has] stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *In re American Commercial Lines*, 2002 WL 1066743 at *2. "Class certification hearings should *not* be mini-trials on the merits of the class or individual claims." *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) (emphasis added). Judge Wisdom summarized the rule as follows:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.
>
> The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action.
>
> Rule 23 delineates the scope of inquiry to be exercised by a district judge in passing on a class action motion. Nothing in that Rule indicates the necessity or the propriety of an inquiry into the merits. Indeed, there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of the plaintiff's claims at this stage of the proceedings. Failure to state a cause of action is entirely distinct from failure to state a class action.

Miller v. Mackey Intern., Inc., 452 F.2d 424, 427-28 (5th Cir. 1971) (citations omitted); *see also Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *Huff v. N. D. Cass Co. of Ala.*, 485 F.2d 710, 712 (5th Cir. 1973) ("As to the right of [plaintiff] to maintain the class action, this court is committed to the principle that the

standard for determining whether a plaintiff may maintain a class action is not whether he will ultimately prevail on his claim.").

With this backdrop, Plaintiff requests class certification of the following Counts: Count 1 (unauthorized disclosure of tax returns); Count 2 (fraud); Count 3 (breach of contract); Count 4 (negligence); Count 5 (invasion of privacy); Count 7 (declaratory judgment); and, Count 8 (injunction). At this time, Plaintiff does *not* seek class certification of Count 6 (violation of LA Security Breach Statute) or Count 9 (violation of LA Unfair Trade Practices Statute).

C. Bifurcation

Fed. R. Civ. P. 23(c)(4) provides, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." "[T]he theory of [this] Rule . . . is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis may be secured even though other issues in the case may need to be litigated separately by each class member." Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure, 7AA Fed. Prac. & Proc. Civ.3d § 1790 (gathering authorities); *see also Bing v. Roadway Exp., Inc.*, 485 F.2d 441, 448 (5th Cir. 1973). Under the Rule, the Court has "ample powers . . . to treat common things in common and to distinguish the distinguishable." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 35 (5th Cir. 1968).

"Rule 23 allows district courts to devise imaginative solutions to problems created by

the presence in a class action litigation of individual damages issues. Those solutions include '(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.'" *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *see also In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 141 (2d Cir. 2001) (gathering authorities); Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure, 7AA Fed. Prac. & Proc. Civ.3d § 1784 ("[W]hen confronting the issue of the maintainability of the class action and, in particular, whether common questions predominate, differences among class members as to their damages have not typically led the courts to conclude that representative treatment is inappropriate. Thus, cases have held that separate issues concerning damages among the class members do not prevent the common issue of liability from being adjudicated on a class basis. Rule 23 provides the courts with enough flexibility and room for judicial innovation so that the question of damages can be determined through individual trials on that issue pursuant to 'equitable procedures' devised by the court.") (gathering authorities).

"The Fifth Circuit has repeatedly upheld the decisions of district courts to bifurcate class action trials into liability and damages phases." *Turner*, 234 F.R.D. at 606; *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 628 (5th Cir. 1999) (citing approved

bifurcated class actions). Indeed, "[t]he court's ability to sever the damages portion of a class action suit from the liability portion is the principal reason why variations among class members in the amount of damages suffered frequently does not defeat predominance." *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 307 n. 16 (5th Cir. 2003); *see also Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (finding no abuse in the district court's certification of a bifurcated class action arising from an oil refinery explosion where liability and punitive damages would be resolved commonly and injury, causation, and actual damages would be resolved individually); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986) (finding no abuse of discretion in the district court's certification of a bifurcated class action where asbestos producers' "state of the art defense" as well as product identification, product defectiveness, negligence, and punitive damages would be resolved commonly and causation, actual damages, and comparative fault would tried individually).

Based upon the foregoing, and in the interest of judicial efficiency and management, Plaintiff requests the Court bifurcate the trial into liability and damages phases. Such bifurcation will ensure that this case runs "smoothly." As the case progresses, the Court can further evaluate other options for handling the damages phase.

D. The Rule 23 Requirements Are Satisfied

"Rule 23 requires the claims of a proposed class to meet several requirements before the class can be certified." *Unger*, 401 F.3d at 320. "To obtain class certification, [the plaintiff] must satisfy Rule 23(a)'s four threshold requirements, as well as the requirements

of Rule 23(b)(1), (2), or (3)." *Maldonado v. Ochsner Clinic Foundation*, 493 F.3d 521, 523 (5th Cir. 2007). Plaintiff has met her burden.

1. The Rule 23(a) Requirements Are Satisfied

"Rule 23(a) provides four prerequisites to a class action: (1) a class 'so numerous that joinder of all members is impracticable' [*i.e.*, numerosity]; (2) 'questions of law or fact common to the class' [*i.e.*, commonality]; (3) named [party's] claims or defenses 'typical . . . of the class' [*i.e.*, typicality]; and (4) representatives that 'will fairly and adequately protect the interests of the class' [*i.e.*, adequacy of representation]." *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006); *see also Feder v. Electronic Data Systems Corp.*, 429 F.3d 125, 129 (5th Cir. 2005). This lawsuit satisfies the Rule 23(a) prerequisites. Each factor is considered in turn below.

a. Numerosity

Fed. R. Civ. P. 23(a)(1) requires the class be "so numerous that joinder of all members is impracticable." "In determining whether a proposed class of plaintiffs meets the numerosity requirement, a court will first consider the size of the class in question[.]" *Rose v. Tennessee Gas Transmission Co.*, 2006 WL 1581358, *2 (E.D. La. 2006). "While there is no magic number, a class of more than 100 members generally satisfies the numerosity requirement." *Broussard v. Foti*, 2001 WL 699525, *2 (E.D. La. 2001). The Fifth Circuit has suggested that any class consisting of more than 40 class members satisfies the numerosity requirement. *See Mullen*, 186 F.3d at 624; *Bywaters v. U.S.*, 196 F.R.D. 458,

465 (E.D. Tex. 2000) ("In support of [its] conclusion [in *Mullen*], the Court cited a treatise on class actions suggesting that any class consisting of more than forty members should raise a presumption that joinder is impracticable."); *see also* 1 Newberg on Class Actions § 3:5 (4th ed.) ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone."). Numerosity may be established through production of "some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981); *see also Pederson v. Louisiana State University*, 213 F.3d 858, 868 (5th Cir. 2000).

However, "the number of members in a proposed class is *not* determinative of whether joinder is impracticable[.]" *Mullen*, 186 F.3d at 624 (emphasis added). "[A] number of facts other than the actual or estimated number of purported class members may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Zeidman*, 651 F.2d at 1038 (citations omitted).

Although the exact number of class members is unknown at this time, there are at least 100 to 200 class members. This estimate is based upon the number of Jackson Hewitt tax returns recovered from the public dumpster in Gretna, Louisiana, in the early part of 2008. The class size is within the range to warrant class certification. *See*, *e.g.*, *Broussard*, 2001

WL 699525 at *2.

Further, other factors militate in favor of finding numerosity here. For example, plaintiff's claims for declaratory and injunctive relief (*i.e.*, Counts 7 and 8 respectively) compel a numerosity finding. *See, e.g.*, 1 Newberg on Class Actions § 3:7 (4th ed.) ("A special consideration applies to actions seeking declaratory or injunctive relief against conduct that is likely to cause future injuries similar to those suffered at the time of suit. In these cases, persons who might be injured in the future may be included in the class and are sometimes held to make joinder impracticable without regard to the number of persons already injured."); *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) ("Smaller classes are less objectionable where, as in the case before us, the plaintiff is seeking injunctive relief on behalf of future class members as well as past and present members."); *Murillo v. Musegades*, 809 F.Supp. 487, 502 (W.D. Tex. 1992) ("In addition to the present putative class members, the fact Plaintiffs seek declaratory and injunctive relief on behalf of future members increases the size of the proposed class."). The numerosity requirement is met.

b. Commonality

Fed. R. Civ. P. 23(a)(2) requires "questions of law or fact common to the class." "To demonstrate commonality, [the plaintiff] must allege that there exist[s] 'questions of law or fact common to the class.'" *James v. City of Dallas, Tex.*, 254 F.3d 551, 570 (5th Cir. 2001). "The test for commonality is *not* demanding[.]" *Mullen*, 186 F.3d at 625 (emphasis added); *see also Jenkins*, 782 F.2d at 472 ("The threshold of 'commonality' is not high."). "All that

is required for each class is that there is one common question of law or fact[.]" *James*, 254 F.3d at 570. In other words, the commonality requirement "does *not* require complete identity of legal claims among the class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982) (emphasis added). "The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is 'at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993). "Therefore, the fact that some of the [putative class members] may have different claims, or claims that may require some individualized analysis, is not fatal to commonality." *James*, 254 F.3d at 570; *see also Welch v. Atlas Roofing Corp.*, 2007 WL 3245444, *2 (E.D. La. 2007) ("The necessity for resolving somewhat complex individual issues does not supply a basis for concluding that plaintiff has not met the commonality requirement.").

The class claims stem from the same alleged conduct, *i.e.*, Defendants' improper disclosure of the class members' tax return information, tax returns, and other personal and financial information. The interests and claims of the class members are identical and involve the same questions of law and fact. The commonality requirement is easily met here.

c. Typicality

Fed. R. Civ. P. 23(a)(3) requires "the claims . . . of the representative parties [be] typical of the claims . . . of the class." "The test for typicality, like commonality, is *not* demanding[.]" *Forbush*, 994 F.2d at 1106 (emphasis added). "The 'typicality' requirement

focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims." *Jenkins*, 782 F.2d at 472. "Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James*, 254 F.3d at 571 (quotation marks omitted). "The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

Again, the class claims stem from the same alleged conduct, *i.e.*, Defendants' improper disclosure of the class members' tax return information, tax returns, and other personal and financial information. Plaintiff's claims are legally and factually identical to the class members' claims. The typicality requirement is also easily met here.

d. Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) requires the representative parties "fairly and adequately protect the interests of the class." "The 'adequacy' requirement looks at both the class representatives and their counsel." *Jenkins*, 782 F.2d at 472. The requirement "mandates an

inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees[.]" *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). "The adequacy inquiry also 'serves to uncover conflicts of interest between the named [plaintiff] and the class [she] seek[s] to represent.'" *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479-80 (5th Cir. 2001). "Differences between [a] named [plaintiff] and class members render the named [plaintiff] [an] inadequate [representative] *only if* those differences create conflicts between the named [plaintiff's] interests and the class members' interests." *Mullen*, 186 F.3d at 626 (emphasis added). Said another way, "[t]here can be differences between the position of [the class representative] and other class members so long as these differences do not 'create conflicts between the named [plaintiff's] interests and the class members' interests.'" *Turner*, 234 F.R.D. at 605. "A sufficient alignment of interests exists when 'all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class .'" *White v. Imperial Adjustment Corp.*, 2002 WL 1809084, *12 (E.D. La. 2002).

Plaintiff understands the obligations of a class representative, has adequately represented the interests of the class members, and has retained experienced counsel, as indicated by Exhibit A (Affidavit of Plaintiff's Counsel), which sets forth the qualifications of Plaintiff's counsel. Plaintiff has no antagonistic or conflicting interests with the class

members.[1] Both Plaintiff and the class members seek money damages and injunctive and declaratory relief for Defendants' unlawful actions. Considering the identity of claims, there is no potential for conflicting interests. The adequacy of representation requirement is met here. *See, e.g.*, *Henderson v. Eaton*, 2002 WL 10464, *3 (E.D. La. 2002) ("In this case, because there are no apparent conflicts between the plaintiff and the putative class members, the Court finds that the interests of the named plaintiff are aligned with the unnamed class members. Additionally, plaintiff has submitted affidavits of her counsel detailing her counsel's experience in handling class action suits, which the Court finds to be satisfactory.") (citations omitted); *White*, 2002 WL 1809084 at *13 ("Considering counsel's performance in this case, their past experience and qualifications, the Court finds the adequacy of representation met as to putative class counsel prong of the analysis."). As proven above,

[1] On September 12, 2007, Plaintiff filed a Voluntary Petition for Bankruptcy under Chapter 13 in the United States Bankruptcy Court, Eastern District of Louisiana, Case No. 07-11727. On December 7, 2007, the proposed Chapter 13 Plan was confirmed. Plaintiff's bankruptcy does *not* affect Plaintiff's standing to bring the claims asserted. *See, e.g.*, *Smith v. Rockett*, 522 F.3d 1080, 1081 (10th Cir. 2008) ("Chapter 13 debtors have standing to bring claims in their own name[.]") (gathering authorities); *Crosby v. Monroe County*, 394 F.3d 1328, 1331 (11th Cir. 2004) (same); *In re Mosley*, 260 B.R. 590, 595 (Bkrtcy. S.D. Ga. 2000) ("In Chapter 13 cases where the debtor is the party plaintiff, courts recognize that the Chapter 13 debtor may sue and be sued, and that the debtor controls the litigation as well as the terms of the settlement.") (class action); *In re James*, 210 B.R. 276, 277-78 (S.D. Miss. 1997) (same); *Stangel v. Fetterly & Gordon, P.A.*, 2001 WL 671466, *6-7 (N.D. Tex. 2001) (same). Indeed, her claims are *not* even part of the bankruptcy estate because they arose or accrued *after* the bankruptcy was filed and the Chapter 13 Plan was confirmed. *See* 11 U.S.C. §§ 541(a)(1), 1306(a), and 1327(b); *In re Brown*, 260 B.R. 311 (Bkrtcy. M.D. Ga. 2001) (claim for personal injury from automobile accident in which debtor was involved following confirmation of his Chapter 13 plan was not property of the estate); *Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333 (11th Cir. 2000) ("We therefore echo the conclusion of the Seventh Circuit and 'read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan.'"); *Matter of Heath*, 115 F.3d 521 (7th Cir. 1997).

Plaintiff has satisfied the Rule 23(a) requirements.

2. The Rule 23(b)(3) Requirements Are Satisfied

As noted, "[i]n addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Again, Plaintiff seeks certification of Counts 1-5 and 7-8 under Rule 23(b)(3).

In order to certify a Rule 23(b)(3) class, the Court must find that "the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). Stated another way, "[t]o receive (b)(3) certification, a plaintiff must . . . show that the common issues predominate, and that class treatment is the superior way of resolving the dispute." *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419-20 (5th Cir. 2001); *see also Perrin v. Expert Oil and Gas, LLC*, 2008 WL 339684, *2 (E.D. La. 2008) ("Rule 23(b)(3) demands that the class satisfy pivotal predominance and superiority.").

Certification of the class is appropriate under Rule 23(b)(3). The predominance and superiority factors are addressed below.

a. Predominance

"To satisfy the predominance requirement, [a] [plaintiff] must demonstrate that 'questions of law or fact common to the members of the class predominate over any

questions affecting only individual members.'" *Cole v. General Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007). "This requirement, although reminiscent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Unger*, 401 F.3d at 320; *see also Amchem Products*, 521 U.S. at 623.

"To decide whether common issues predominate, the district court must consider how a trial on the merits would be conducted if a class were certified." *Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003). "This [process] entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Although this inquiry does not resolve the case on its merits, it requires that the court look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law.'" *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003); *see also Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 421 (5th Cir. 2004) ("In evaluating the predominance requirement, [courts] take care to inquire into the substance and structure of the underlying claims without passing judgment on their merits."). In other words, "[i]n order to delineate the common issues from the individual issues, the court must examine the claims of the parties and the law regarding those claims." *Fulford v. Transport Service Co.*, 2004 WL 1208513, *3 (E.D. La. 2004).

"Predominance does *not* require all questions of law or fact to be common[.]"

Recinos-Recinos v. Express Forestry, Inc., 233 F.R.D. 472, 481 (E.D. La. 2006) (emphasis added). "[C]omplete or perfect identity of claims is not required for predominance to exist." *In re Train Derailment Near Amite Louisiana*, 2006 WL 1561470, *17 (E.D. La. 2006). Instead, "[i]n order to 'predominate,' common issues must constitute a significant part of the individual cases." *Jenkins*, 782 F.2d at 472. "When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure, 7AA Fed. Prac. & Proc. Civ.3d § 1778. "The predominance requirement is generally satisfied where a 'common nucleus of operative fact' exists among all class members for which the law provides a remedy." *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 310 (N.D. Ill. 1995).

As discussed below, common issues predominate each of the class claims. Indeed, each class claim arises out of a "common nucleus of operative fact" and the questions of law presented by the claims are identical for all class members. Each class claim is considered below:

i. Count 1—Unauthorized Disclosure of Tax Returns

In Count 1, Plaintiff alleges violations of 26 U.S.C. §§ 6103 and 7431. *See* Docket No. 9, at ¶¶ 47-53.

Section 6103 prohibits unauthorized "disclosures"[2] of "returns"[3] and "return information."[4] *See* 26 U.S.C. § 6103(a); *Huckaby v. U.S. Dept. of Treasury, I.R.S.*, 794 F.2d 1041, 1046 (5th Cir. 1986). Specifically, the statute provides:

> (a) General rule.—Returns and return information shall be confidential, and except as authorized by this title—
>
> . . . .
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under . . . subsection (n) . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. § 6103(a)(3). Subsection (n) of 26 U.S.C. § 6103 relates to tax return preparers and provides:

> (n) Certain other persons.—Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person, including any person described in section 7513(a), to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration.

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[2] "The term 'disclosure' means the making known to any person in any manner whatever a return or return information." 26 U.S.C. § 6103(b)(8).

[3] "The term 'return' means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed." 26 U.S.C. § 6103(b)(1).

[4] The term "return information" is broadly defined and includes "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments[.]" 26 U.S.C. § 6103(b)(2)(A).

26 U.S.C. § 6103(n).

A civil action may be brought for violations of § 6103 per 26 U.S.C. § 7431, which provides:

> If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.

26 U.S.C. § 7431(a)(2). "Once liability attaches, a court must make a determination of damages consonant with Code § 7431(c)[.]" *Barrett v. U.S.*, 100 F.3d 35, 38 (5th Cir. 1996). In shortest summary, "[i]f liability is established under 26 U.S.C.A. § 7431(a), a taxpayer is entitled to recover the greater of $1,000 for each unauthorized inspection or disclosure *or* the sum of actual damages sustained as a result of the unauthorized disclosure *plus* punitive damages in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence. In addition, a taxpayer who establishe[s] the [defendants'] liability under § 7431(a) is entitled to recover the costs of the action, and provision is made for the recovery of [attorneys'] fees." 154 A.L.R. Fed. 537 (emphasis added); *see also* 26 U.S.C. § 7431(c).

In an action involving unauthorized disclosure of returns or return information, "[t]he law provides that liquidated damages are to be awarded if the [plaintiff] did not sustain actual damages exceeding one thousand dollars." *Jones v. U.S.*, 9 F.Supp.2d 1119, 1137 (D. Neb. 1998). "The $1,000 statutory damage award specified in I.R.C. § 7431(c)(1)(A) is included

for the benefit of taxpayers. Actual damages for the invasion of privacy that occurs when tax returns are wrongfully disclosed can be hard to quantify. In order to encourage taxpayers to act as 'private attorneys general' and pursue suits against [defendants] for violations of I.R.C. § 6103, Congress enacted the statutory damages provision to ensure that in meritorious cases of wrongful release a taxpayer would not walk away from the courthouse empty-handed for failure of proving damages." *Scrimgeour v. Internal Revenue*, 149 F.3d 318, 327 n. 11 (4th Cir. 1998).

In order to recover "actual damages" under § 7431, "the common law elements of causation must be proven[.]" *Jones*, 9 F.Supp.2d at 1137; *see also Barrett*, 100 F.3d at 40 ("Code § 7431(c)(1)(B)(i) limits actual damages to those 'sustained . . . as a result of [an] unauthorized disclosure.") (*quoting* 26 U.S.C. § 7431(c)(1)(B)(i)). "In general, common law causation has two elements. First, the plaintiff must prove that the wrongful act in fact caused the harm; that is, the plaintiff must prove that 'but for' the wrongful act, the harm would not have occurred. Secondly, the plaintiff must prove that the harm was a 'reasonable and probable foreseeable consequence' of the wrongful act; that is, the plaintiff must prove that, considering other potential causes, it is sensible to impose liability upon the defendant[s]." *Jones*, 9 F.Supp.2d at 1137-38 (citations omitted) (quotation marks and brackets omitted).

"Actual damages" include "economic losses" and other "out-of-pocket expenses." *See*, *e.g.*, *Barrett*, 100 F.3d 35; *Jones*, 9 F.Supp.2d 1119; *see also Rorex v. Traynor*, 771 F.2d

383, 387 (8th Cir. 1985) (applying 26 U.S.C. § 7217, the predecessor to § 7431, the court ruled "[i]t is clear that if the taxpayers had suffered some out-of-pocket costs as a result of the disclosure in this case, such losses would be included in their 'actual damages' under section 7217."). Several courts have also ruled that "actual damages" includes mental or emotional distress. *See, e.g., Hrubec v. National R.R. Passenger Corp.*, 829 F.Supp. 1502, 1506 (N.D. Ill. 1993); *Ward v. U.S.*, 973 F.Supp. 996, 1001-02 (D. Colo. 1997); *Jones*, 9 F.Supp.2d at 1149 ("[T]he word 'actual' [i]s [not] intended to mean only 'out-of-pocket' damage."); *Schipper v. U.S.*, 1998 WL 786451 (E.D. N.Y. 1998).

In *Hrubec*, the defendant argued the plaintiffs were not entitled to recover damages for mental or emotional distress. *See Hrubec*, 829 F.Supp. at 1504. The court disagreed, noting "[t]he legislative history of § 6103 indicates that Congress intended to protect taxpayers' right to privacy." *Id.* The court also noted, "[i]n general, courts award damages for emotional and/or mental distress to plaintiffs whose privacy has been invaded" and "the Supreme Court [has] recognized that the primary damage in 'right to privacy' cases is mental distress." *Id.* at 1505.

In finding that mental or emotional distress damages are recoverable as "actual damages" under § 7431, the *Hrubec* court relied upon the Fifth Circuit's decision in *Johnson v. Department of Treasury, I.R.S.*, 700 F.2d 971 (5th Cir. 1983). In *Johnson*, the Fifth Circuit ruled that emotional distress damages are recoverable as "actual damages" under the Privacy Act, 5 U.S.C. § 552a. *See Johnson*, 700 F.2d at 972. The *Johnson* court found "[a] federal

act affording special protection to the right of privacy can hardly accomplish its purpose of protecting a personal and fundamental constitutional right if the primary damage resulting from an invasion of privacy is not recoverable under the major remedy of 'actual damages' that has been provided by Congress." *Id.* at 977. Applying the Fifth Circuit's logic, the *Hrubec* court ruled:

> Inherent in [§§ 6103 and 7431] is a taxpayer's right to privacy in his filings. As with the right to privacy generally, when violated, the outstanding damage is mental and/or emotional distress. In order to further Congress' purpose, then, mental and emotional distress logically should be included in the "actual damages" provided for in § 7431(c). We therefore deny [defendant's] motion to dismiss paragraph 18 of plaintiffs' complaint [seeking such damages].

Hrubec, 829 F.Supp. at 1506. Many courts have followed the logic of *Hrubec* and *Johnson* when interpreting other federal statutes and ruling emotional distress damages are recoverable as "actual damages." *See, e.g.*, *Johnstone v. Bank of America, N.A.*, 173 F.Supp.2d 809 (N.D. Ill. 2001).

"Code § 7431(c)(1)(B)(ii) [also] authorizes a punitive damage award only if the disclosures are willful or grossly negligent. Willful conduct is 'that which was done without ground for believing that it was lawful or conduct marked by a careless disregard of whether one has a right to act in such a manner.' Conduct that is grossly negligent is that which is either willful or marked by 'wanton or reckless disregard of the rights of another.'" *Barrett*, 100 F.3d at 40; *see also Marre v. U.S.*, 38 F.3d 823, 826-27 (5th Cir. 1994). "To establish gross negligence, [the plaintiff] need[s] to present evidence demonstrating that [defendants] blatantly disregarded the rules governing disclosure." *Miller v. U.S.*, 66 F.3d 220, 224 (9th

Cir. 1995).

Some courts have construed § 7431(c)(1)(B) to preclude an award of punitive damages in the absence of entitlement to "actual damages." *See, e.g.*, *Siddiqui v. U.S.*, 359 F.3d 1200, 1204 (9th Cir. 2004) ("We hold that § 7431(c)(1)(B) precludes punitive damages against the United States absent proof of actual damages."). Other courts have found no such restriction in the statutory language. *See*, *e.g.*, *Mallas v. U.S.*, 993 F.2d 1111, 1126 (4th Cir. 1993) ("This statute does preclude the award of *both* punitive damages under subsection (1)(B)(ii) *and* the statutorily prescribed damages under subsection (1)(A). It does not, however, prevent the award of punitive damages *instead of* subsection (1)(A) damages. That is, a taxpayer may recover punitive damages, even where his actual damages are zero, provided those damages exceed the amount of the subsection (1)(A) damages.") (emphasis in original). On 2 occasions, the Fifth Circuit has declined to decide whether § 7431 permits an award of punitive damages in the absence of "actual damages" because the court found the absence of any evidence establishing "willfulness," or "gross negligence." *See Barrett*, 100 F.3d at 40 ("We do not today resolve this statutory interpretation question because we are persuaded that the factual evidence is insufficient to support an award of punitive damages, even if the statute would so allow."); *Marre*, 38 F.3d at 826 (same).

Plaintiff alleges Defendants violated § 6103 by throwing her and the class members' tax returns in the dumpster and thereby improperly disclosing said returns and the information contained therein to the public. *See* Docket No. 9, at ¶ 52. Pursuant to § 7431,

Plaintiff and the class members have a civil cause of action against Defendants for the wrongful disclosure. *Id.* Pursuant to § 7431, Plaintiff, on behalf of the putative class, seeks statutory damages, actual damages, punitive damages, costs, and attorneys' fees, all in an amount to be determined at trial, for Defendants' improper, unauthorized disclosure of her and the class members' tax returns. *Id.* at ¶ 53.

As proven above, common factual and legal questions dominate Plaintiff's class claim for unauthorized disclosure of tax returns. The common factual questions relate to the disclosure of the tax return documents and whether such disclosure was intentional, willful, or the result of gross negligence; the common legal questions relate to the extent of recovery, including whether "actual damages" must be proven in order to recover punitive damages. Count 1 is appropriate for class certification.

ii. Count 2—Fraud

In Count 2, Plaintiff avers fraud. *Id.* at ¶¶ 54-58.

"A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished." La. Civ. Code art. 1906. "Four elements are required for a valid contract: (1) the parties must possess the capacity to contract; (2) the parties' mutual *consent* must be freely given; (3) there must be a certain object for the contract; and (4) the contract must have a lawful purpose [or cause]." *Wallace v. Shreve Memorial Library*, 79 F.3d 427, 430 n. 4 (5th Cir. 1996) (emphasis added); *see also Endotech USA v. Biocompatibles Intern. PLC*, 2000 WL 1594086, *8 (E.D. La. 2000); La. Civ. Code arts. 1918 (capacity), 1927

(consent), 1966-67 (object/cause), and 1971 (lawful object/cause).

"Consent may be vitiated by error, *fraud*, or duress." La. Civ. Code art. 1948 (emphasis added). "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." La. Civ. Code art. 1953.

"To recover under article 1953, [Plaintiff] must demonstrate the existence of a contract." *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1067 (5th Cir. 1993). Further, Plaintiff must establish the "three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract." *Shelton v. Standard/700 Associates*, 2001-0587, 798 So.2d 60, 64 (La. 2001); *see also Jumonville v. Federal Home Loan Mortg. Corp.*, 2005 WL 1431505, *6 (E.D. La. 2005) (same). "In order to establish the intent prong, [P]laintiff must proffer evidence that suggests [D]efendants at least had knowledge of the [underlying] problem." *Jumonville*, 2005 WL 1431505 at *6. "[I]t [is] an unjust advantage to obtain a sale by misrepresentation." *Aetna Ins. Co. v. General Elec. Co.*, 362 So.2d 1186, 1187 (La.App. 4th Cir. 1978).

"Fraud need only be proved by a preponderance of the evidence and may be

established by circumstantial evidence." La. Civ. Code art. 1957. "Thus, 'highly suspicious facts and circumstances surrounding a transaction may be considered in determining whether a fraud has been committed.'" *Ducote Jax Holdings, L.L.C. v. Bradley*, 2007 WL 2008505, *9 (E.D. La. 2007). "[Fraud], when established, destroys the contract *ab initio*[.]" *Yaeger Milling Co. v. Lawler*, 2 So. 398, 399 (La. 1887). In other words, the parties are to be restored to their respective positions as if the contract had never been entered. *Id.*; *see also Simmons v. Pure Oil Co.*, 129 So.2d 786, 790 (La. 1961) ("Fraud of this sort renders the agreement null, *ab initio*, because of the lack of consent of one of the contracting parties. Since consent is one of the requisites necessary to the formation of a contract, the agreement is subject to nullity when fraud is present even though there be no actual damage sustained by the party seeking dissolution."). In addition to rescission, the plaintiff may seek damages and attorneys' fees against the offending party. *See* La. Civ. Code art. 1958 ("The party against whom rescission is granted because of fraud is liable for damages and attorney fees."). As to "damages," the plaintiff need only show the "strong possibility" of damages, or damages are "probable." *See, e.g., Golden Rule Ins. Co. v. Strauss*, 1997 WL 119854, *3 (5th Cir. 1997) ("actual loss or damage or a strong possibility thereof"); *Newport*, 6 F.3d at 1067 ("actual or probable damages"); *Blanchard & Co., Inc. v. Contursi*, 1999 WL 955363, *1 (E.D. La. 1999) (same). Damages for "emotional distress" or "mental anguish" may be awarded per Article 1958. *See, e.g., Montet v. Lyles*, 638 So.2d 727 (La.App. 1st Cir. 1994).

"Where fraud is alleged as a basis of the [plaintiff's] right to relief, all persons who

participated in the alleged fraud and those who are its beneficiaries are proper parties to the suit." *Board of Com'rs of Orleans Levee Dist. v. Shushan*, 2 So.2d 35, 41 (La. 1941). In summary, "[i]t is a rule too well known to cite authority to support it, that fraud vitiates all contracts and dealings between men, and the beneficiaries thereof should not be allowed to escape with their ill-gotten gains if the strong arm of the courts can prevent it." *Brown Shoe Co. v. Unter*, 173 So. 579, 583 (La.App. 2d Cir. 1937).

As alleged in the amended complaint, Defendants induced Plaintiff and the class members to enter into a contract for tax preparation services based upon false representations regarding the companies' "Privacy Policy." *See* Docket No. 9, at ¶ 55. As result of Defendants' fraudulent inducement, Plaintiff and the class members are entitled to return of all monies paid to Defendants, plus damages in an amount to be proven at trial and attorneys' fees. *Id.* at ¶ 58.

Common factual and legal questions dominate Plaintiff's class claim for fraud. The common factual questions relate to the misrepresentations made by Defendants regarding their "Privacy Policy"; the common mixed questions of law and fact relate to whether consent was vitiated due to the misrepresentations. Count 2 is appropriate for class certification.

iii. Count 3—Breach of Contract

In Count 3, Plaintiff alternatively alleges a breach of contract claim. *Id.* at ¶¶ 59-63.

"An obligor is liable for the damages caused by his failure to perform a conventional

obligation. A failure to perform results from nonperformance, defective performance, or delay in performance." La. Civ. Code art. 1994. "Damages are measured by the *loss sustained* by the obligee *and* the *profit of which he has been deprived*." La. Civ. Code art. 1995 (emphasis added); *Vaulting & Cash Services v. Diebold*, 1999 WL 1068257, *3 (5th Cir. 1999) (noting two-part analysis). "[A loss] may be anything given by the obligee in anticipatory reciprocation for the obligor's failed performance." 6 La. Civ. L. Treatise, Law of Obligations § 4.4. "An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made." La. Civ. Code art. 1996. In contrast, "[a]n obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." La. Civ. Code art. 1997; *see also Newport Ltd. v. Sears, Roebuck & Co.*, 1995 WL 688799, *2 (E.D. La. 1995). Further, Article 1998 sets forth when damages for nonpecuniary losses are recoverable for breach of contract:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.
>
> Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

La. Civ. Code art. 1998.

"When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages." La. Civ. Code art. 1999;

see also 6 La. Civ. L. Treatise, Law of Obligations § 4.12 ("[W]hen there is a legal right to recover damages, but the amount cannot be exactly estimated, the courts have reasonable discretion to assess damages based upon all the facts and circumstances of a particular case.").

Plaintiff alleges Defendants made representations regarding their "Privacy Policy" and that, based upon these representations, she and the class members obtained tax preparation services through Jackson Hewitt. *See* Docket No. 9, at ¶ 60. Defendants intentionally breached their agreements to Plaintiff and the class members by failing to comply with their represented "Privacy Policy" and disclosing Plaintiff and the class members' tax returns and other confidential, private, and financial information. *Id.* As a result of Defendants' bad faith contract breaches, Plaintiff and the class members have suffered, and will continue to suffer, damages in an amount to be determined at trial. *Id.* at ¶ 63. Such damages include, but are not limited to, return of all fees paid to Defendants for their services and other compensatory damages. *Id.*

Common factual and legal questions also dominate Plaintiff's class claim for breach of contract. The common factual and legal questions relate to the terms of the contract and the breach of the contract. Count 3 is appropriate for class certification.

iv. Count 4—Negligence

In Count 4, Plaintiff asserts negligence. *Id.* at ¶¶ 64-69.

"In order to determine whether a plaintiff should prevail on a claim in negligence,

Louisiana courts employ a duty-risk analysis." *Long v. State ex rel. Dept. of Transp. and Development*, 2004-0485, 916 So.2d 87, 101 (La. 2005). "Generally, this analysis involves five separate elements: 1) proof that the defendant had a duty to conform its conduct to a specific standard (the duty element); 2) proof that the defendant's conduct failed to conform to that standard (the breach element); 3) proof that the defendant's conduct was cause-in-fact of plaintiff's injuries (the cause-in-fact element); 4) proof that the defendant's conduct was legal cause of plaintiff's injuries (the scope of liability element); and 5) proof of actual damages (the damages element)." *Turner*, 234 F.R.D. at 607 (citation omitted); *see also* La. Civ. Code arts. 2315-2317; *Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp.2d 676, 691 (E.D. La. 2006). "Statutes, however, may evidence a standard of care. And statutory requirements may provide guidelines for civil liability." *Kadlec Medical Center v. Lakeview Anesthesia Associates*, 2006 WL 1328872, *2 (E.D. La. 2006) (citations omitted); *see also Westbrook v. Germann*, 2004 WL 2423839, *2 (E.D. La. 2004) ("A statute generally imposes a duty; and if violation of that duty results in the harm the statute was designed to prevent, then there is liability.") (quotation marks omitted); *Galloway v. State Through Dept. of Transp. and Development*, 654 So.2d 1345, 1347 (La. 1995).

"*Res ipsa loquitur* is . . . an evidentiary doctrine under which a tort claim may be proved by circumstantial evidence. The doctrine permits the inference of negligence from the surrounding circumstances, and merely assists the plaintiff in presenting a prima facie case of negligence when direct evidence is not available." *Broussard v. Voorhies*, 2006-

2306, 970 So.2d 1038, 1043 (La.App. 1st Cir. 2007). "Although the fact that an accident has occurred does not alone raise a *presumption* of the [defendants'] negligence, the doctrine of *res ipsa loquitur* (the thing speaks for itself) permits the *inference* of negligence on the part of the defendant[s] from the circumstances surrounding the injury." *Cangelosi v. Our Lady of the Lake Regional Medical Center*, 564 So.2d 654, 665 (La. 1989) (emphasis in original); *see also Linnear v. CenterPoint Energy Entex/Reliant Energy*, 2006-3030, 966 So.2d 36, 45 (La. 2007). Said another way, "[t]he doctrine permits, but does not require, the trier of fact to infer negligence from the circumstances of the event." *Cangelosi*, 564 So.2d at 665. "Generally, the doctrine of *res ipsa loquitur* applies only where three requirements are met: 1) the circumstances surrounding the accident are so unusual that, in the absence of other pertinent evidence, there is an inference of negligence on the part of the defendant[s]; 2) the defendant[s] had exclusive control over the thing causing injury; and 3) the circumstances are such that the only reasonable and fair conclusion is that the accident was due to a breach of duty on [defendants'] part." *Loughlin ex rel. Loughlin v. USAA Cas. Ins. Co.*, 2008 WL 687187, *7-8 (E.D. La. 2008); *see also Linnear*, 966 So.2d at 43-44.

Defendants violated numerous federal and state laws, regulations, and rules by disclosing (or permitting to be disclosed) Plaintiff and the class members' confidential, financial and private information and documents. *See* Docket No. 9, at ¶ 66. These laws, regulations, and rules set the standard of care Defendants owed Plaintiff and the class members. *Id.* at ¶ 67. Defendants' violations constitute negligence *per se*. *Id.* Further, Defendants'

negligence should be inferred per the doctrine of *res ipsa loquitur*. *Id.* Defendants knew or should have known that the improper disclosure of Plaintiff and the class members' tax returns would cause Plaintiff and the class members to suffer severe emotional distress. *Id.* at ¶ 68. As a result of Defendants' willful and wanton miscondunct, or gross negligence, Plaintiff and the class members have sufferred, and will continue to suffer, damages in an amount to be determined at trial. *Id.* at ¶ 69.

Common factual and legal questions dominate Plaintiff's class claim for negligence. The common factual questions relate to Defendants' conduct; the common legal questions relate to the scope of Defendants' duty, the causation elements, and the application of negligence *per se* and *res ipsa loquitur*. Count 4 is appropriate for class certification.

v. Count 5—Invasion of Privacy

In Count 5, Plaintiff asserts invasion of privacy. *Id.* at ¶¶ 70-73.

"In Louisiana jurisprudence, the right to privacy has been variously defined as 'the right to be let alone' and 'the right to an inviolate personality.'" *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386, 1388 (La. 1979). "The four categories of the invasion of privacy tort recognized by Louisiana include: 1) misappropriation of a person's name or likeness; 2) intrusion upon physical solitude or seclusion; 3) placing a person in a false light before the public; and 4) *unreasonable public disclosure of private facts*." *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 751-52 (5th Cir. 2002) (emphasis added); *see also Jaubert*, 375 So.2d at 1388. "Even where the right to privacy is found to exist, Louisiana

courts have distinguished between invasions of that right which are actionable and those which are not." *Aucoin v. Kennedy*, 355 F.Supp.2d 830, 847 (E.D. La. 2004) (quotation marks omitted). "A privacy violation is actionable in Louisiana only when [the] [defendants'] conduct is unreasonable and seriously interferes with [the] plaintiff's privacy interest. Reasonableness is determined after balancing the plaintiff's privacy interest against the [defendants'] interest in pursuing [their] course of conduct." *Sapia*, 276 F.3d at 752 (citation omitted); *see also Parish Nat. Bank v. Lane*, 397 So.2d 1282, 1286 (La. 1981).

In order to recover for "unreasonable public disclosure of public facts," "[the] plaintiff must prove that 1) the defendant[s] publicized information concerning the plaintiff's private life, 2) the publicized matter would be highly offensive to the reasonable person, and 3) the information is not of legitimate public concern. Whether a matter is of public concern is a question of law for the court." *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (citations omitted); *see also Roshto v. Hebert*, 439 So.2d 428, 430 (La. 1983) ("One of the ways in which a person may subject himself to liability for damages for invasion of privacy is by giving publicity to a matter concerning the private life of another, when the publicized matter would be highly offensive to a reasonable person and is not of legitimate concern to the public.").

Defendants invaded the privacy of Plaintiff and the class members through an unreasonable public disclosure of private facts. *See* Docket No. 9, at ¶ 72. Defendants' conduct was unreasonable and seriously interfered with Plaintiff and the class members'

privacy interest. *Id.* Defendants publicized information concerning Plaintiff and the class members' private lives by disposing of their confidential tax returns and other related documents in a public dumpster, with free access to any citizen. *Id.* Such improper disclosure is highly offensive to the reasonable person and the improperly disclosed documents are not of legitimate public concern. *Id.* As a result of Defendants' unlawful and tortious conduct, Plaintiff and the class members have sufferred, and will continue to suffer, damages in an amount to be determined at trial. *Id.* at ¶ 73.

Common factual and legal questions dominate Plaintiff's claim for invasion of privacy. As with the negligence claim, the common factual questions relate to Defendants' conduct; the mixed questions of fact and law relate to the reasonableness of Defendants' conduct and the various interests and stake. Count 4 is appropriate for class certification.

vi. Count 7—Declaratory Judgment

In Count 7, Plaintiff seeks a declaratory judgment. *Id.* at ¶¶ 78-79.

Pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, Plaintiff and the class members seek a declaratory judgment that Defendants' improper disposal of their tax returns violated federal and state law. *Id.* at ¶ 79. By definition, common factual and legal questions dominate the declaratory judgment request. Count 7 is appropriate for class certification.

vii. Count 8—Injunction

In Count 8, Plaintiff seeks an injunction. *Id.* at ¶¶ 80-81.

Pursuant to Fed. R. Civ. P. 65, Plaintiff and the class members seek an injunction,

ordering Defendants to cease making unauthorized disclosures of their tax returns and confidential, financial and private information, and to comply with all federal and state laws, regulations, and rules regarding the proper disposal of such documents. *Id.* at ¶ 81. Again, by definition, common factual and legal questions dominate the injunction request. Count 8 is appropriate for class certification.

b. Superiority

The final requirement that must be met in order to certify a class under Rule 23(b)(3) is "superiority." *See* Fed. R. Civ. P. 23(b)(3). "The key inquiry is whether the class action format 'is superior to other methods of *adjudication.*'" *Welch*, 2007 WL 3245444 at *8 (emphasis in original). "Under Rule 23(b)(3), a district court must evaluate four factors to determine whether the class action format is superior to other methods of adjudication: the class members' interest in individually controlling their separate actions, the extent and nature of existing litigation by class members concerning the same claims, the desirability of concentrating the litigation in the particular forum, and the likely difficulties in class management." *Turner*, 234 F.R.D. at 610; *see also* Fed. R. Civ. P. 23(b)(3)(A)-(D).

All 4 of the "superiority" factors weigh in favor of class certification. First, there is no "special interest" that would dictate a finding that individual lawsuits are the preferable procedure.

Second, upon information and belief, there are no other existing lawsuits against Defendants related to the conduct at issue here.

Third, concentration of the litigation in this Court is proper because Plaintiff and the class members' federal tax returns were thrown in a public dumpster in this Court's jurisdiction. Further, the case involves multiple Defendants and concentration of the litigation here will provide economies of scale and time.

Fourth, "the dismissal of a class action for management reasons is disfavored . . . and dismissal for such reasons 'should be the exception rather than the rule.'" *In re South Central States Bakery Products Antitrust Litigation*, 86 F.R.D. 407, 423 (M.D. La. 1980) (*quoting* Manual for Complex Litigation); *see also In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d at 140 ("Nevertheless, failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'"). "[F]or a court to refuse to certify a class on the basis of speculation as to the merits of the cause or because of vaguely-perceived management problems is counter to the policy which originally led to the rule, and more especially, to its thoughtful revision, and also to discount too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise." *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972). Considering the relatively small size of the class here, it is unlikely that there will be any serious management problems in this case. The "superiority" requirement is, therefore, satisfied.

V. CONCLUSION

Based upon the foregoing, the Court should grant Plaintiff's Motion for Class Certification and certify the requested class claims per Fed. R. Civ. P. 23(b)(3). The Court should also set a hearing to discuss the form and content of the class action notice to the class members.

Respectfully Submitted,

/s/ Bryan C. Shartle
David Israel (LSBA No. 7174) (T.A.)
Bryan C. Shartle (LSBA No. 27640)
Harold A. Aucoin (LSBA No. 02601)
Justin H. Homes (LSBA No. 24460)
SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.
3850 N. Causeway Blvd.
Lakeway II, Suite 200
Metairie, Louisiana 70002
Telephone: (504) 828-3700
Facsimile: (504) 828-3737

Attorneys for Plaintiff,
Vicki L. Pinero

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record ✓ by email; ___ by hand; ___ by fax; ✓ by FedEx; ___ by placing a copy of same in the U.S. Mail, postage prepaid this 22nd day of July 2008.

/s/ Bryan C. Shartle
Bryan C. Shartle

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