UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO	CIVIL ACTION NO. 08-3535
VERSUS	JUDGE: VANCE
JACKSON HEWITT TAX SERVICE, ET AL	MAGISTRATE: KNOWLES

MEMORANDUM IN SUPPORT OF DEFENDANTS JACKSON HEWITT TAX SERVICE INC. AND JACKSON HEWITT INC.'S RULE 12(b)(6) MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE CLASS ACTION ALLEGATIONS

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TABLE OF AUTHORITIES

CASES

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[1] All unpublished opinions cited herein are attached hereto, *in globo*, as Exhibit A.

STATUTES

MISCELLANEOUS

Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively "Jackson Hewitt") bring this motion to dismiss the complaint of Plaintiff Vicki Pinero ("Plaintiff") pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative to strike class allegations pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1). For the reasons set forth below, Jackson Hewitt's motion to dismiss should be granted.

PRELIMINARY STATEMENT

Plaintiff Vicki Pinero ("Plaintiff") currently asserts seven causes of action[2] against Jackson Hewitt and against Jackson Hewitt franchisee Crescent City Tax Service, d/b/a Jackson Hewitt Tax Service ("CCTS"). She asserts six of these causes of action on behalf of herself and a vaguely described class arising from the allegedly improper disposal of information she provided to CCTS. Under well-established case law from across the country, including in this Circuit, none of these seven counts state a cause of action, and therefore all Counts in the Complaint should be dismissed in their entirety. In the alternative, the class allegations should be stricken.

First, Plaintiff fails to state a claim for negligence, breach of contract, fraud, or violation of La. Rev. Stat. Ann. §§ 51:3072 and 51:1405 against Jackson Hewitt, because under well-established precedent her alleged emotional distress and speculation as to future harm fail to constitute legally cognizable injuries in fact. Indeed, as recently as last month, Judge Carl Barbier of this District addressed a claim alleging "damages" similar to those alleged here, and dismissed it for failing to allege an injury in fact. *See Melancon v. Louisiana Office of Student Financial Assistance*, No. 07-7712, 07-9158, 2008 WL 2355753 (E.D. La. June 5, 2008); *see also Ponder v. Pfizer*, 522 F. Supp. 2d 793 (M.D. La. 2007). Plaintiff's claims fail to allege any injury in fact and therefore are insufficient as a matter of law.

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[2] Plaintiff's original Complaint asserted 5 causes of action. Prior to the Defendants' responsive pleading, Plaintiff filed an Amended Complaint to include two additional causes of action. All references herein to "Complaint" or "Comp." refer to the Amended Complaint unless otherwise noted. In addition, two purported counts in the Amended Complaint, Declaratory Judgment (Count 7) and Injunctive Relief (Count 8), amount to requests for relief rather than causes of action, and therefore there are only 7 causes of action before the Court.

Second, Plaintiff fails to state a claim under the Louisiana data breach notification statute, because that statute applies only to breaches of "security systems", resulting in the disclosure of "computerized data", not the allegedly improper disposal of paper documents, as Plaintiff alleges here.

Third, even if Plaintiff alleges legally cognizable damages – which she does not – Plaintiff's claims for fraud and violation of privacy fail to allege essential elements of those causes of action, and accordingly fail as a matter of law on this ground as well.

Fourth, Plaintiff fails to state a claim under 26 U.S.C. § 6103 because, as numerous courts have held, that statute applies only to the Internal Revenue Service ("IRS") and specifically enumerated categories of individuals (e.g., government employees) who, without authorization, disclose information they receive directly from the IRS. Here, Plaintiff does not allege that Defendants fall within any of the enumerated categories or that they received Plaintiff's information directly from the IRS.

BACKGROUND

Plaintiff has filed a putative class action suit in this Court, seeking damages, attorneys' fees, declaratory judgment, and injunctive relief against Defendants and alleging that Defendants: (1) committed negligence *per se* through the violation of various federal and state laws and regulations (none of which independently provide a cause of action); (2) violated the Louisiana Database Security Breach Notification Law, La. Rev. Stat. Ann. § 51:3072 ("LDSBNL"), by failing to timely notify their customers that a security breach had occurred; (3) violated the Louisiana Unfair Trade Practices Statute, La. Rev. Stat. Ann. § 51:1405 ("LUTPA"); (4) intentionally breached their agreement with Plaintiff and putative class members by failing to comply with their represented privacy policy and disclosing the class members' tax returns and other confidential, private and financial information; (5) fraudulently and deceptively represented to Plaintiff that Defendants adhered to their Privacy Policy; (6) committed an invasion of privacy by "publicizing" Plaintiff's private information; and (7) violated 26 U.S.C.

§ 6103 by making an unauthorized disclosure of tax returns.[3] Plaintiff also seeks declaratory and injunctive relief regarding the alleged illegality of Defendants conduct and policies. This motion by Defendant Jackson Hewitt follows.

In her Complaint, Plaintiff alleges that she visited the CCTS office, which operates as a Jackson Hewitt franchisee, that is located at 6601 Veterans Blvd., Metairie, LA, to have her 2005 federal and state tax returns prepared and e-filed. Comp. ¶ 21. During her visit, Plaintiff alleges that CCTS gave her a copy of the Privacy Policy and told that her confidential, financial and private information would not be placed in the public domain. *Id.* at ¶¶ 23, 25-26. Plaintiff further alleges that this Privacy Policy was a condition precedent to her hiring Defendants to prepare her tax returns. *Id.* at ¶ 27.

Plaintiff's core allegation is that, based upon "information and belief," Defendants allegedly disposed of Plaintiff's documents improperly. Comp ¶ 28. Plaintiff alleges that, as a result of this act, she suffers from "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. Plaintiff's Complaint, however, does not similarly allege that putative members of the class were "injured" – the Complaint is totally silent in that respect. Plaintiff also seeks special damages related to "credit card monitoring; credit insurance; reimbursement for all out-of-pocket expenses related to identity theft; and other special damages." *Id.* However, Plaintiff does not allege that she (nor any putative class member, for that matter) has actually incurred any such expenses. Nor does Plaintiff allege that she, or any other putative class member, has suffered any type of identity theft as a result of the alleged disposal of documents. Indeed, Plaintiff concedes that her information was returned to her prior to her filing this putative class action. *Id.* at ¶ 30.

As set forth below, Plaintiff's Complaint should be dismissed in its entirety.

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[3] While the Complaint is peppered with references to various other statutes and regulations (Comp. ¶¶ 11-19, 34-39) Plaintiff does not appear to be asserting any of those statutes as causes of action in her Complaint.

ARGUMENT

I. LEGAL STANDARD

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007) (internal citations omitted). Though the Court must accept all factual allegations in the complaint as true, the Court cannot assume that the plaintiff can prove facts that she has not alleged or that Defendants have injured Plaintiff in ways that have not been alleged. *See Associated Gen. Contractors of CA, Inc. v. CA State Council of Carpenters*, 459 U.S. 519, 526 (1983). The Court must hold Plaintiff to her "obligation to provide the grounds of [her] entitlement to relief", which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, supra*, 127 S. Ct. at 1964-5 (internal quotations omitted); *see also Samford v. Staples*, 249 F. App'x 1001 (5th Cir 2007); *Henry v. Allstate Ins. Co.*, No. 07-1738, 2007 WL 2287817 (E.D. La., Aug. 8, 2007). Plaintiff's Complaint also must plead enough facts to state a claim to relief that is plausible on its face. *Twombly*, 127 S. Ct. at 1966. Thus, a Rule 12(b)(6) motion to dismiss should be granted when plaintiff fails to "nudge[] [her] claims across the line from conceivable to plausible." *Id* at 1974. As set forth below, none of the Plaintiff's seven causes of action states a claim under Rule 12(b)(6), and therefore her Complaint must be dismissed.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR NEGLIGENCE, BREACH OF CONTRACT, VIOLATIONS OF LDSBNL AND LUPTA, AND FRAUD BECAUSE SHE FAILS TO ALLEGE A LEGALLY COGNIZABLE INJURY.

Five of Plaintiff's seven claims – negligence, violation of LUTPA, violation of LDSBNL, breach of contract, and fraud -- fail to allege a legally cognizable injury and therefore must be dismissed. Courts in this and other jurisdictions repeatedly have dismissed claims alleging, as plaintiff speculates here, that the alleged dissemination of personal information caused her

emotional distress and/or increased risk of identity theft. *See Melancon, supra*; *Ponder, supra*; *accord, e.g., Kahle v. Litton Loan Servicing LP*, 486 F. Supp. 2d 705 (S.D. Ohio 2007); *Guin v. Brazos Higher Educ. Serv. Corp.*, No. 05-668, 2006 WL 288483 (D. Minn. Feb. 7, 2006); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018 (D. Minn. 2006); *Key v. DSW, Inc.*, 454 F. Supp. 2d 684 (D. Ohio 2006); *Giordano v. Wachovia Sec., LLC*, No. 06-476, 2006 WL 2177036 (D.N.J. July 31, 2006); *Bell v. Acxiom Corp.*, No. 4:06CV00485, 2006 WL 2850042 (E.D. Ark. Oct. 3, 2006); *Stollenwerk v. Tri-West Healthcare Alliance*, No. Civ. 03-0185PHXSRB, 2005 WL 2465906 (D. Ariz. Sept. 6, 2005); *Smith v. Chase Manhattan Bank, U.S.A.*, 293 N.Y.S.2d 100 (App. Div. 2002).

Under Louisiana Civil Code, Art. 2316, negligence requires that a person be "... responsible for the damage he occasions ... by his act, but by his negligence, his imprudence, or his want of skill." La Civ. Code Ann. art. 2316. Article 2315 also states in relevant part that "damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless [such costs] are directly related to a manifest physical or mental injury or disease." La Civ. Code Ann. art. 2315. In the context of negligent disclosure of personally identifiable information, mental anguish and precautionary expenses associated with the ***risk*** of identity theft are inherently speculative in nature and not recoverable. *Melancon, supra*; *Ponder, supra*; *accord e.g., Key v. DSW, Inc.*, 454 F. Supp. 2d at 686-91 (holding that the "alleged improper retention and failure to secure" personal information resulting in "increased risk of identity theft" is not "injury-in-fact") .

In *Melancon*, plaintiffs filed a putative class action in this District after defendants lost backup electronic media containing personal information on individuals in financial and scholarship programs. *Melancon, supra*, 2008 WL at *1. Plaintiffs asserted negligence-based claims under Louisiana state law and sought recovery for injuries such as "identity theft, ... fear, anxiety, emotional distress, the need to close bank accounts and register with fraud alert programs, ... and loss of privacy." *Id.* The court held, as a matter of law, that "the mere

possibility that personal information may be at increased risk does not constitute actual injury sufficient to maintain a claim for negligence under the current state of Louisiana law." *Id.* at *4.

Similarly, in the Middle District of Louisiana, in *Ponder*, plaintiffs filed a negligence claim arising from a defendant's loss of personal information on a computer hard drive, alleging that he and the putative class suffered "fear and apprehension of fraud, loss of money, and identity theft; the burden and the cost of credit monitoring; the burden and the cost of closing compromised credit accounts and opening new accounts; the burden of scrutinizing credit card statements and other statements for unauthorized transactions; damage to their credit; loss of privacy and other economic damages." *Ponder,* 522 F. Supp.2d at 795. The court dismissed the negligence claim for failure to allege actual damages, holding that "if the defendant's conduct is merely negligent and causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, the defendant is not liable for such emotional disturbance." *Id* at 797 (internal citations omitted). Furthermore, the court stated that plaintiffs' alleged burden of monitoring their credit, scrutinizing account statements, and closing and opening accounts could not constitute actual damages, because "injury accrues when the compromised data are actually used by a third party to steal someone's identity." *See id* at 798, n.5 (citing *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7th Cir. 2007)).

As in *Ponder* and *Melancon*, here Plaintiff has done nothing more than allege emotional distress without physical injury, and speculative risk of identity theft – notwithstanding that her information was returned to her. Such allegations of injury fail to state a negligence claim, and therefore Count 4 should be dismissed.

Similarly, Counts 2, 3, 6, and 9 suffer from the same fatal pleading defect due to Plaintiff's failure to allege a legally cognizable injury:

- The LDSBNL (Count 6) permits recovery only for "... **actual damages** resulting from the failure to disclose in a timely manner to a person that there has been a breach of the security system resulting in the disclosure of a person's personal information." La. Rev. Stat. Ann. § 51:3075 (emphasis added); *Ponder v. Pfizer, supra*, 522. F. Supp. 2d at 796. Accordingly, to state a claim under § 51:3075, Plaintiff must allege that as a result of the failure to disclose the breach in a timely

manner, she suffered identity theft. *See id.* However, no such allegations appear in the complaint.

- The LUTPA (Count 9) provides a right to a private cause of action for "[a]ny person who suffers any **ascertainable loss of money or movable property**, ... as a result of the use or employment by another person of an unfair or deceptive method, act or practice...." La. Rev. Stat. Ann. § 51:1409 (emphasis added). Similar to negligence and the LDSBNL, this cause of action also requires that a Plaintiff suffer actual damages caused by an unfair or deceptive practice. *See Bobby and Ray Williams P'ship, L.L.P. v. The Shreveport Louisiana Hayride Co., L.L.C.*, 873 So. 2d 739 (La. App. 2 Cir., 2004), *cert. denied*, 883 So. 2d 1022 (La. 2004); *accord, e.g., Smith v. Chase Manhattan Bank, U.S.A.*, 741 N.Y.S.2d 100 (App. Div. 2002) (dismissing a claim under New York's statute barring deceptive business practices and holding that "plaintiffs have not alleged, and cannot prove, any 'actual injury' as is necessary.") Inherently speculative nonpecuniary damages, like those alleged here, are not recoverable under the statute. *Bobby and Ray Williams P'ship, L.L.P.*, 873 So. 2d at 746 (dismissing a claim under LUTPA due to Plaintiff's failure to plead "ascertainable loss of money or property"); *accord, e.g., Thompson v. Home Depot, Inc.*, No. 07cv1058, 2007 WL 2746603 (S.D. Cal. Sept. 18, 2007) (dismissing a claim under California's unfair trade practices statute due to a lack of actual damages).

- Plaintiff's claim for breach of contract (Count 3) similarly fails due to Plaintiff's failure to allege actual damages. A party cannot recover for nonpecuniary (emotional) damages under a contract without adequately alleging that the agreement carried a significant nonpecuniary interest. *Young v. Ford Motor Co., Inc.*, 595 So. 2d 1123, 1129 (La. 1992) (holding that the buyer in a commercial transaction could not recover for emotional distress under breach of contract claim since seller did not intend to gratify both pecuniary and nonpecuniary interests); *Jackson v. Lare*, 779 So. 2d 808, 813 (La. App. 2000); *accord, e.g., Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d at 1021 (dismissing a purported class action alleging breach of contract and negligence due to increased risk of identity theft for a lack of actual damages); Article 1998 provides a cause of action for nonpecuniary loss only "when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding ... the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss." *See* La. Civ. Code Ann. art. 1998; *Young, supra*, at 1130. Plaintiff has not pled, and cannot plead, that the contract with Defendants to have her 2005 tax returns prepared was one with a nonpecuniary component.

- Plaintiff's fraud claim (Count 2), like her negligence claims, also requires actual damages as an element, and the failure to allege such actual damage mandates

dismissal.[4] Under Louisiana law, a fraud claim has three specific elements: "(1) a misrepresentation of material fact, (2) made with the intent to deceive, (3) causing justifiable reliance **with resultant injury**." *Becnel v. Grodner*, 982 So. 2d 891 (La. App. 2008) (*citing Newport Ltd. v. Sears Roebuck & Co.*, 6 F.3d 1058, 1068 (5th Cir. 1993)) (emphasis added). Although Plaintiff alleges that she relied on the representations concerning the maintenance of confidentiality (Comp. ¶ 27), she fails to allege that such reliance resulted in any legally cognizable injury. *See supra* p. 5.

III. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION UNDER LDSBNL BECAUSE THE COMPLAINT ALLEGES NEITHER THAT COMPUTERIZED DATA WAS ACCESSED, NOR THAT A DELAY IN NOTIFYING PLAINTIFF OCCURRED.

A. LDSBNL only applies to computerized data.

Apart from the failure to allege legally cognizable damages, *see supra*, Plaintiff's LDSBNL claim must be dismissed because it fails to allege that "computerized data" was breached, or that Defendants delayed in notifying Plaintiff. A "Breach of the Security System" under LDSBNL "means the compromise of the security, confidentiality, or integrity of **computerized data**." La. Rev. Stat. Ann. § 51:3073 (emphasis added). Plaintiff's complaint does not allege that Defendants suffered a security breach of their computerized data, nor does it allege that Plaintiff's documents constituted "computerized data". To the contrary, Plaintiff alleges only an improper disposal of paper documents. Comp. ¶ 52.

B. LDSBNL only applies to delays in notification.

Even if Plaintiff had alleged legally cognizable damages, and even if Plaintiff had alleged a breach of "computerized data", her LDSBNL claim would still fail as a matter of law. LDSBNL permits recovery only for "... actual damages **resulting from the failure to disclose in a timely manner** to a person that there has been a breach of the security system resulting in the disclosure of a person's personal information." La. Rev. Stat. Ann. § 51:3075; *Ponder v. Pfizer*, *supra*, 522. F. Supp. 2d at 796. Plaintiff's LDSBNL claim therefore fails, as she alleges

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[4] The fraud count suffers from a number of other flaws, each of which independently mandates dismissal. See Section IV., infra.

neither a delay in notification nor even that her speculative damages were caused by a delay. *See* Comp. ¶¶ 74-77.

For these two additional independent grounds, Plaintiff's LDSBNL claim fails as a matter of law.

IV. PLAINTIFF'S FRAUD CLAIM FAILS AS A MATTER OF LAW.

As established above, Plaintiff's fraud claim must be dismissed because she fails to allege a legally cognizable injury. *Supra*, II. However, even if Plaintiff sufficiently pled a legally cognizable injury – which she has not – her fraud claim still must be dismissed on the independent ground that she has failed to comply with Federal Rule of Civil Procedure 9(b).

Fraud claims such as Plaintiff's are subject to the heightened pleading standards of Rule 9(b), and these standards are not satisfied when a plaintiff "base[s] claims of fraud on speculation and conclusory allegations." *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 385 (5th Cir. 2003); *see also Vinewood Capital, L.L.C. v. Dar al-Maal al-Islami Trust*, slip op. 2007 WL 2791876 (N.D. Tex. Sept. 26, 2007) (holding that a mere failure to fulfill a promise is not sufficient to support an allegation of fraud under Rule 9(b)).

Here, Plaintiff fails to allege an essential element of her claim, that Defendant made the alleged misrepresentations to Plaintiff or putative class members with the intent to obtain an unjust advantage or to cause damage or loss. *United States ex rel. Willard*, 336 F.3d at 386; *Fenner v. DeSalvo*, 826 So. 2d 39, 44 (La. App. 2002) (internal citations omitted). Intent to defraud is an essential element of the claim, and cannot be imputed through inference just because a promise made is subsequently not performed. See *United States ex rel. Willard,* 336 F.3d at 386. Here, Plaintiff has alleged no facts that allege, or even suggest, that Defendants intended to defraud Plaintiff into entering into the underlying tax preparation agreement. Indeed, it is undisputed that Defendant fulfilled the agreement by filing Plaintiff's taxes.

For these independent grounds, Plaintiff's fraud claim fails as a matter of law.

V. PLAINTIFF FAILS TO PLEAD A "PUBLICATION" OF PERSONAL INFORMATION UNDER THE INVASION OF PRIVACY STATUTE, AND THEREFORE HER CLAIM MUST BE DISMISSED.

Plaintiff's invasion of privacy claim fails because Plaintiff fails to allege an unreasonable public disclosure of private facts. *See generally Spellman v. Discount Zone Gas Station*, 975 So. 2d 44, 47 (La. App. 2007); (citing Restatement (Second) of Torts, § 652D (1977)). Under Louisiana law, this form of invasion of privacy only provides a right of recovery if a person "giv[es] publicity to a matter concerning the private life of another, when the publicized would be highly offensive to a reasonable person and is not of legitimate concern to the public. *Id.* "Publicity" is defined as:

> "[Making] public, by **communicating it to the public at large**, or to **so many persons that the matter must be regarded as substantially certain to become one of public knowledge**. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public."

Restatement (Second) of Torts, § 652D, comment a (emphasis added).

Here, Plaintiff fails to allege that her personal information was given "publicity" to any degree. Cases discussing "publication" under Louisiana law address actual publication or dissemination of information, not the mere ***possibility*** that someone could have obtained information. *See, e.g., Hamilton v. Lumbermens Mut. Cas. Co,* 82 So. 2d 61 (La. App. 1955). Plaintiff does not allege that Jackson Hewitt communicated her information to a single person or through some form of publication. Neither does Plaintiff allege that her personal information is "certain to become public knowledge" – to the contrary, she acknowledges that her tax returns have already been returned. Instead, Plaintiff only alleges that her information was improperly disposed of, and speculates that people ***potentially*** could have accessed it if they were inclined to enter the dumpster. Comp. ¶ 72. This is not "publicity" under any meaning of the word, let alone under the elements of an invasion of privacy action. This cause of action should be dismissed as a matter of law.

VI. PLAINTIFF'S CLAIM UNDER 26 U.S.C. §§ 6103 AND 7431 MUST BE DISMISSED BECAUSE DEFENDANTS ARE NOT PROPER DEFENDANTS UNDER §7431 AND § 6103 DOES NOT APPLY TO THE INFORMATION ALLEGEDLY DISCLOSED.

Plaintiff also fails to state a cause of action under 26 U.S.C. §§6103 and 7431 (Count 1) because neither Jackson Hewitt nor the information allegedly disclosed falls within the scope of these statutory provisions. As these statutory provisions plainly state, they only apply to the IRS, other government employees, or certain narrow categories of ***recipients*** of IRS data.[5] Congress enacted §§ 7431 and 6103 to prevent the IRS from being used as the "lending library" of other federal agencies that frequently turned to the IRS to gain access to the material gathered and recorded for tax purposes. *See Baskin v. United States*, 135 F.3d 338, 340 (5th Cir. 1998) (discussing the purpose of §§ 7431 and 6103); *Stokwitz v. United States*, 831 F.2d 893, 895 (9th Cir. 1987) (holding that "Section 6103 establishes a comprehensive scheme for controlling the release ***by the IRS*** of information received from taxpayers.") (emphasis added); *Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1233 (7th Cir. 1993) (stating that "all [§ 6103] prevents is the IRS's sharing tax returns with other government agencies."). Nowhere in either section does it state, or even imply, that §§ 6103 and 7431 create a private right of

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[5] Under § 6103(3), in addition to government employees, a narrow list of other individuals are potentially subject to liability for violating § 6103 if they obtained access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (12), (16), (19), or (20) of subsection (l), paragraph (2) or (4)(B) of subsection (m) or subsection (n). For example, liability can be extended to persons who have obtained access to tax return information from its disclosure to: a Federal, state, or local child support enforcement agency to establish child support obligations (§ 6103(l)(6)); Commissioner of Social Security to verify employment status of Medicare beneficiary and spouse of Medicare beneficiary (§ 6103(l)(12)); administrators of the District of Columbia Retirement Protection Act of 1997 ("DCRPA") for the purposes of determining the appropriate benefits under the DCRPA(§ 6103(l)(16)); or educational institutions or educational lending institutions for purposes of collecting defaulted student loans (§ 6103(m)(4B)). Subsection (n), cited by Plaintiff, only encompasses contractors providing technical services to the IRS in connection with tax administration. *Compare* Comp. at 49 and 26 U.S.C. § 6103(n); *see* 26 C.F.R. § 301.6103(n)-1(a) (2007) (discussing subsection (n) authorizing the IRS's sharing of tax return information with its own contractors). Plaintiff has not alleged, nor could she contend, that Defendants are included within these narrow categories.

action against any person who discloses tax-related information. *See Hrubec v. Nat'l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995) ("Congress set out to limit disclosure by persons who get tax returns in the course of public business--employees of the IRS, state employees to whom the IRS makes authorized disclosures, and private persons who obtain return information from the IRS with strings attached. The statute does not forbid disclosure when information comes from other sources.")

Nonetheless, Plaintiff seeks to transform § 7431 into a private cause of action against any person who discloses tax return information. This is flawed on two fronts. First, § 7431, the sole source of a private right of action for violations of § 6103, applies only to suits against government-related employees, not against non-government parties like Defendants. Contrary to Plaintiff's allegations, § 7431 is not intended to provide plaintiffs with a private cause of action against an unlimited class of private actors. *Compare* Comp. at 50 (incorrectly alleging that putative class members have a private cause of action against any person who discloses tax return information). Plaintiff has no right to sue any persons other than government employees or enumerated persons for violations of § 6103 who release tax information that they obtained from the IRS. *See* U.S.C. §§ 6103(a)(3) and 7431(a)(2); *see also, supra,* footnote 3.

Therefore, only a person fitting into one of the enumerated categories of § 6103, who receives information from the IRS and thereafter discloses it can be held liable under § 7431. *See, e.g., Stokwitz v. United States*, 831 F.2d at 896 (holding that "there is no indication in either the language of § 6103 or its legislative history that Congress intended to enact a general prohibition against public disclosure of tax information."). Here, Plaintiff does not even attempt to fit Defendants into this class of proper defendants.

Second, and contrary to Plaintiff's suggestions in her Complaint, to constitute a violation of § 6103 the direct source of the disclosed information must be the IRS. *See* 26 U.S.C. § 6103(b)(2); *see also Baskin v. United States*, 135 F.3d 338 (5th Cir. 1998) (citing *Stokwitz v. United States*, *supra*), holding that a prerequisite of a § 6103 violation is that the disclosed information must have originated with the IRS). "Return information" is defined in § 6103 as certain personal information and data "received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury]"). *Id.* As interpreted by *Baskin* and *Stokwitz*, a prerequisite to a violation of § 6103 is that the information in question have been in the possession of the IRS, passed to a third party contemplated by the statute, and then be disclosed to the public or an authorized source. Here, Plaintiff has not, and cannot, allege such facts.

Accordingly, for the above reasons Plaintiff's claims under §§ 6103 and 7431 fail as a matter of law.

VII. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE THE CLASS ALLEGATIONS UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(F) AND 23(D)(1).

As established above, Plaintiff's claims should be dismissed in their entirety. In the alternative, all class claims should be dismissed on the pleadings under Federal Rules of Civil Procedure 12(f) and 23(d)(1). Where it is clear on the face of the complaint that class treatment would be improper, a court may properly strike class allegations at the outset of the litigation. *See Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). "A court may strike class allegations under [Rule 23(d)(1)] where a complaint fails to plead the minimum *facts* necessary to establish the existence of a class satisfying Rule 23's mandate." *See Henry v. Allstate Ins. Co. of Am.*, 2007 WL 2287817, No. 07-01738 (E.D. La., Aug. 8, 2007) (emphasis added) (citing *Terrebonne v. Allstate Ins. Co.*, No. 06-4697, --- F.R.D. ----, 2007 WL 5298458 (E.D. La., July 31, 2007).

Plaintiff bears the burden to meet this standard, but Plaintiff fails to adequately allege any facts to suggest that the class, as defined by Plaintiff in ¶ 41, shares common issues of fact and law alleged by Plaintiff as an individual to satisfy Fed. R. Civ. P. 23(a)(2), or that Plaintiff's claims are typical of the claims of the class to satisfy Fed. R. Civ. P. 23(a)(3). Instead, Plaintiff relies on conclusory language about the general prevalence of identity theft, the allegedly common practice of dumpster diving, and that "the putative class members have been injured and will continue to be injured by Defendants' conduct until this lawful practice is stopped." Comp. ¶ 40. Most importantly, Plaintiff fails to plead that any other class member has suffered even the speculative and emotional types of damages Plaintiff allegedly has suffered.

Furthermore, class treatment is improper where individual issues relating to nonstandardized presentations to individual customers and their reliance thereon will substantially predominate over common issues. *Keyes v. Guardian Life Ins. Co.*, 194 F.R.D. 253 (S.D. Miss. 2000). Here, Plaintiff alleges various causes of action, including fraud, negligence, and breach of contract[6], based on Defendants' alleged false representations, made to Plaintiff individually, regarding the companies' privacy policy and practices and policies regarding privacy and maintaining the confidentiality of sensitive information and documents. Comp. ¶¶ 22-24, 55. Plaintiff also alleges that these representations were personally made through an employee of Defendants who made explicit statements regarding these alleged representations. (*Id* at 22-26.). Accordingly, the specific nature of the representations alleged would predominate over class issues.

Louisiana cases discussing the substantive law of fraud have consistently held that fraud claims like those here are not amenable to class treatment. See *e.g.*, *Banks v. New York Life Ins.*, 737 So. 2d 1275 (La. 1999); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996);

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[6] Notably, Plaintiff only brings her claim under LUTPA (Count 9) in an individual capacity. Comp. ¶ 82. While the LUTPA claim fails as a matter of law, *see supra,* Plaintiff's decision to plead LUTPA as only an individual claim is an acknowledgment that individualized issues, as to what representations were made, who made them, whether they were relied upon by the purported class plaintiffs, and whether any damages accrued, will predominate and thus preclude class treatment.

Kirkham v. Am. Liberty Life Ins. Co., 30, 830, 717 So. 2d 1226 (La. App. 1998) (quoting *Simon v. Merrill Lynch*, 482 F.2d 880, 882 (5th Cir. 1973)) (holding that, if there is any material variation in the representation made or in the degree of reliance thereupon, a fraud case may be unsuited for treatment as a class action). Because there are both issues of individualized representations and issues of individual reliance, at a minimum Plaintiff has failed to meet the pleading requirements of Fed. R. Civ. P. 23 and the class allegations should be struck from the pleadings.

CONCLUSION

All of Plaintiff's causes of action fail as a matter of law.[7] For the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice.

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[7] As Plaintiff has not pled any "injury-in-fact", nor any statutory violation, nor any continuing contractual relationship which requires clarification, there is simply no standing under Article III for this Court to entertain the request for a declaratory judgment or injunctive relief. *See, e.g., Key v. DSW, Inc.*, 454 F. Supp. 2d at 690 (holding that a plaintiff in a purported class action for increased risk of identify theft lacked Article III standing due to the lack of actual injury); *Bell v. Axiom Corp.* 2006 WL 2850042 at *2 (holding that "assertions of potential future injury do not satisfy the injury-in-fact test" and dismissing the case for lack of Article III standing). As these requests for relief were pled as causes of action, Plaintiff respectfully requests that they be dismissed as well.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of August, 2008, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system and U.S. Mail to counsel of record for Plaintiffs. A copy of this filing will also be sent via electronic mail and U.S. mail to counsel for Crescent City Tax Service, Inc.

/s/Glenn M. Farnet