Melancon v. Louisiana Office of Student Financial Assistance
E.D.La.,2008.
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United States District Court,E.D. Louisiana.
Jason MELANCON, et al
v.
LOUISIANA OFFICE OF STUDENT FINANCIAL ASSISTANCE, et al.
Civil Action Nos. 07-7712, 07-9158.

June 5, 2008.

Scott R. Bickford, Martzell & Bickford, Charles E. Riley, IV, Daniel J. Caruso, David F. Bienvenu, Robert L. Redfearn, Thomas John Fischer, Simon, Peragine, Smith & Redfearn, LLP, Lawrence J. Centola, III, Neil Franz Nazareth, Martzell & Bickford, Michael G. Crow, Crow Law Firm, LLC, New Orleans, LA, Brett M. Powers, Drew A. Ranier, Ranier, Gayle & Elliot, LLC, Lake Charles, LA, Christopher K. Jones, John Powers Wolff, III, Keogh, Cox & Wilson, Joseph David Andress, Trenton A. Grand, Grand Law Firm, Philip Bohrer, Bohrer Law Firm, Samuel Charles Ward, Jr., Samuel C. Ward, Jr. And Associates, LLC, Scott Brady, Scott E. Brady, Attorney at Law, Baton Rouge, LA, John Randall Whaley, Richard J. Arsenault, Neblett, Beard & Arsenault, Alexandria, LA, Paul G. Moresi, III, The Moresi Firm, LLC, Abbeville, LA, Ben Barnow, Barnow & Associates, PC, Chicago, IL, for Plaintiffs.
W. Luther Wilson, Taylor, Porter, Brooks & Phillips, LLP, Baton Rouge, LA, Sherman Gene Fendler, Don Keller Haycraft, Katie Caswell, Liskow & Lewis, New Orleans, LA, for Defendants.

ORDER AND REASONS

CARL J. BARBIER, District Judge.
***1** Before the Court is Defendant Iron Mountain, Incorporated's ("Iron Mountain") **Motion for Summary Judgment (Rec.Doc.40).** This motion, which is opposed, was set for hearing on May 14, 2008 on the briefs. Upon review of the record, the memoranda of counsel, and the applicable law, this Court now finds, for the reasons set forth below, that Iron Mountain's motion should be granted.

Background Facts

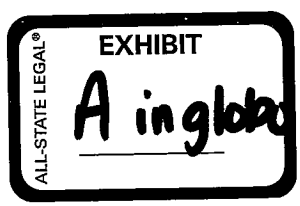
This matter involves purported class action claims that arise out of the loss on September 19, 2007 of backup electronic media belonging to the Louisiana Office of Student Financial Assistance ("LOSFA") from a truck operated by Iron Mountain.[FN1]The lost media includes personal information on individuals participating in or considered for participation in programs for financial assistance and certain scholarship programs of higher education.

The two putative class actions based on this incident (*Melancon* and *Bradley*) have been consolidated by this Court.

The Parties' Arguments

The crux of Iron Mountain's argument is that it is an undisputed fact that Plaintiffs suffered no actual injury resulting from the loss of the electronic data. Therefore, according to Iron Mountain, absent any actual harm to Plaintiffs, Louisiana law compels the conclusion that Iron Mountain is entitled to judgment as a matter of law.

Plaintiffs herein have alleged state law negligence-based claims. To analyze such claims, Louisiana courts employ the duty/risk analysis. See *Mathieu v. Imperial Toy Corp.*, 646 So.2d 318, 321-22 (La.1994). Specifically, Plaintiffs must prove the following elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard; (3) the defendant's substandard conduct was the cause-in-fact of the plaintiff's injuries; (4) the defendant's substand-



ard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages. According to Iron Mountain, nowhere in the complaints do Plaintiffs allege any actual injuries. Furthermore, no evidence has been presented to show that the electronic data, although lost, have been misused or compromised.

Plaintiffs allege injuries in the form of: (1) "invasion of privacy, identity theft, fear of identity theft, harassment, [and] nuisance"; [FN2] (2) "fear, anxiety, emotional distress, [the] need to close bank accounts and register with fraud alert programs"; FN3 and (3) "anxiety, emotional distress, [and] loss of privacy."[FN4]Iron Mountain argues that no invasion of privacy, identity theft, harassment, or nuisance has actually occurred. What remains are claims by Plaintiffs regarding increased risk of future identity theft, fear, anxiety, and emotional distress.

According to Iron Mountain, such concerns do not rise to the level of harm necessary to support any recovery since, generally, under Louisiana law, "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."*Nesom v. Tri Hawk Int'l,* 985 F.2d 208, 211 (5th Cir.1993) (quoting *Moresi v. Dept. of Wildlife & Fisheries,* 567 So.2d 1081, 1095-96 (La.1990)). A limited exception to this rule which permits recovery for emotional distress absent physical injury exists when there are "special circumstances" which serve as a guarantee that the claim is not spurious. *Moresi,* 567 So.2d at 1096. Consequently, "more than minimal inconvenience and worry must be shown."*Rivera v. United Gas Pipeline Co.,* 697 So.2d 327, 338 (La.App. 5th Cir.1997).

***2** In the context of Louisiana negligence law requiring actual injury, Iron Mountain cites to a recent case involving data loss filed in the Middle District of Louisiana. In that case, Judge Brady determined (on a failure to state a claim basis) that allegations of mere emotional disturbance are insufficient to prevail on a negligence claim. *Ponder v. Pfizer, Inc.,* 522 F.Supp.2d 793 (M.D.La.2007). In *Ponder,* private data on thousands of Pfizer employees left the confines of a Pfizer hard drive and escaped into an unauthorized domain. *Id.* A class action was filed against Pfizer asserting such damages as "fear and apprehension of fraud, loss of money, and identity theft; the burden and 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 credit; loss of privacy and other economic damages.*Id.* at 795.Defendant moved to dismiss the claim, arguing that the alleged damages were "inherently speculative and not recoverable under Louisiana law, which requires that damages be established to a 'legal certainty.' "*Id.* at 797.

As this was an issue of first impression in Louisiana, Judge Brady reviewed and found persuasive the reasoning and decisions of other federal and state courts.[FN5]As such, he determined that under Louisiana law, the damages alleged were merely speculative rather than actual damages.[FN6]*Id.*

Iron Mountain goes on to cite several other cases that considered other instances of data loss involving no actual misuse of personal information. Such cases, according to Iron Mountain, support the proposition that lack of misuse of personal data constitutes the absence of actual harm. See *Key v. DSW, Inc.,* 454 F.Supp.2d 684, 691 (S.D.Ohio 2006) (holding that, in the context of a standing analysis, no claim exists "when the alleged injury is dependent upon the perceived risk of future actions of third parties not before the Court").

In opposition, Plaintiffs argue that they have been exposed to the real threat of identity theft and offer the affidavit of Evan Hendricks, a "nationally recognized expert on identity theft and credit monitoring issues," in support.[FN7] Plaintiffs cite to *Arcilla v. Adidas Promotional Retail Operations, Inc.* for the proposition that courts have expressly

recognized the heightened risk of identity theft to be a legally cognizable injury. 488 F.Supp.2d 965, 972 (C.D.Cal.2007).[FN8] Plaintiffs also cite to the factors set forth in *Bourgeois v. A.P. Green Indus., Inc.* having to do with the recovery of medical monitoring damages. 716 So.2d 355 (La.1998). In *Bourgeois,* the court determined that monetary damages for medical monitoring, even in the absence of physical injury, were recoverable. *Id.* Relying on the reasoning in *Bourgeois,* Plaintiffs argue that damages for credit monitoring services are akin to medical monitoring damages and, as such, are recoverable under La. C.C. articles 2315 and 2316. Plaintiffs acknowledge that the Louisiana Legislature amended La. C.C. article 2315 following the *Bourgeois* decision, but state that this amendment was specific to claims for medical monitoring damages only. Plaintiffs also argue that *Ponder* is not controlling, particularly as the court did not consider damages for credit monitoring in the context of *Bourgeois.*

***3** In reply, Iron Mountain argues that *Arcilla* is not relevant to the instant analysis as that case construes the federal Fair and Accurate Credit Transactions Act, not Louisiana law. In this case, no statutory penalty is at issue as Plaintiffs' claims sound in negligence under Louisiana law, where actual harm, not a statutory penalty or fine, remains a legal requirement. Furthermore, Iron Mountain argues that *Bourgeois* has been legislatively overruled and other cases have refused to recognize an analogy between credit monitoring and medical monitoring as credit monitoring does not involve the same issues regarding human health and safety. Even if this analogy worked, Plaintiffs have provided no evidence that their personal information was ever actually "exposed" to any unauthorized party, which is one of the criteria set forth in *Bourgeois.*

Plaintiffs also state in opposition that Iron Mountain cannot prove that it complied with all statutory requirements requiring notice to the persons affected by its negligence under La. R.S. 51:3074. As such, Plaintiffs argue that Iron Mountain is not entitled to judgment as a matter of law. In reply, Iron Mountain argues that it did comply with statutory duties as Iron Mountain's only responsibility was to immediately notify the owner of the data whose security was breached (LOSFA), at which point it becomes the duty of the owner to notify persons that were affected. Iron Mountain promptly notified LOSFA.

Finally, Plaintiffs argue that since the filing of Iron Mountain's motion, "significant factual issues" have arisen that raise genuine issues of material fact sufficient to preclude summary judgment. These include the fact that evidence has been obtained that Iron Mountain has found the lost container but not the disks themselves and that a named plaintiff (Bradley) informed her attorney that an unauthorized transaction was attempted on one of her credit cards. According to Plaintiffs, who seek relief under Rule 56(f) of the Federal Rules of Civil Procedure, investigation needs to be done to determine the effect of these developments on the instant case.

In reply, Iron Mountain argues that Plaintiffs merely mention the alleged misuse of Plaintiff Bradley's credit card and make no effort to link the misuse to the loss of LOSFA data. In fact, Iron Mountain argues that no such link can be made as no credit card information was provided to LOSFA. Therefore, no discovery is needed on this issue. And as to the retrieval of the lost container, Iron Mountain argues that counsel for Plaintiffs have failed to provide an explanatory affidavit stating what information they hope to obtain through further discovery of this issue. As a result, Plaintiffs have failed to comply with and should not be able to rely upon Rule 56(f).

Discussion

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If that burden has been met, the nonmoving party must then come forward and establish the specific material facts in dispute to survive summary judgment.*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

*4 As articulated by Iron Mountain and as determined by Judge Brady in *Ponder,* 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.

In this case, it is undisputed that no personal data has been compromised and Plaintiffs have failed to offer evidence that any third party has gained access to the data. As such, Plaintiffs allege damages that are purely speculative rather than asserting any actual, cognizable losses. Plaintiffs, therefore, lack the ability to prove an essential element of their negligence claim against Iron Mountain and as a result, Iron Mountain is entitled to summary judgment as a matter of law. Accordingly,

IT IS ORDERED that Iron Mountain's **Motion for Summary Judgment (Rec.Doc.40)** is hereby **GRANTED** and that Plaintiff's claims against Iron Mountain are hereby **DISMISSED.**

FN1. There are two putative class actions involved: (1) *Jason Melancon, et al v. Louisiana Office of Student Financial Assistance, et al,* No. 07-7712; and (2)*Christine M. Bradley, et al v. Iron Mountain Incorporated, et al,* No. 07-9158.

FN2. See *Melancon* Class Action Complaint.

FN3. See *Melancon* First Amended and Supplemental Class Action Complaint.

FN4. See *Bradley* first Supplemental and Amended Class Action Complaint.

FN5. In *Pisciotta v. Old Nat'l Bancorp,* the Seventh Circuit disallowed claims for "compensation for past and future credit monitoring services" and damages for "emotional distress and worry that third parties will use [the plaintiffs'] confidential personal information to cause them economic harm, or sell their confidential information to others who will in turn cause them economic harm." 499 F.3d 629 (7th Cir.2007). In *Hendricks v. DSW Shoe Warehouse, Inc.,* a federal district court in Michigan dismissed a plaintiff's complaint for identity theft because the plaintiff's alleged damages, the cost of a credit monitoring product, "were not actual damages or a cognizable loss." 444 F.Supp.2d 775 (W.D.Mich.2006). In *Forbes v. Wells Fargo Bank, N.A.,* a federal district court in Minnesota rejected the plaintiff's negligence claims, finding that the plaintiffs' "expenditure of time and money" in "monitoring their credit" does not constitute injury or damages because it "was not the result of any present injury, but rather the anticipation of future injury that has not materialized."420 F.Supp.2d 1018 (D.Minn.2006). Finally, in *Kahle v. Litton Loan Servicing, LP,* a federal district court in Ohio held that plaintiff's alleged damages, the cost of a credit monitoring product and the time spent monitoring credit, "were not recoverable as a matter of law because 'no unauthorized use of [Plaintiff's] personal information has occurred' and, thus, 'any injury of Plaintiff is purely speculative.'"486 F.Supp.2d 705 (S.D.Ohio 2007).

FN6. Judge Brady went on to state that the injury from theft of personal information accrues only when the compromised data are actually used by a third party to steal someone's identity, rather than when the data are exposed, and become obtained by

a third party. *Id.* at n. 5.

FN7. Plaintiffs submit Mr. Hendricks as an expert on identity theft and credit monitoring for purposes of summary judgment.

FN8. In *Arcilla,* the plaintiffs alleged that a retailer failed to truncate customers' credit card numbers and to obscure the expiration dates as required by the Fair Credit Transactions Act ("FCRA").488 F.Supp.2d 965. In denying the defendant's motion to dismiss, the court held that although plaintiff's loss was "hard to quantify," plaintiffs properly alleged "actual harm" in the form of heightened risk of identity theft." *Id.* at 967.

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Henry v. Allstate Ins. Co.
E.D.La.,2007.
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United States District Court,E.D. Louisiana.
Irving J. HENRY and Jennifer Henry, III
v.
ALLSTATE INSURANCE COMPANY.
Civil Action No. 07-1738.

Aug. 8, 2007.

Gregory Pius Dileo, Gregory P. Dileo, Attorney at Law, Michael David Meyer, Michael D. Meyer, PLC, Amy Collins Fontenot, Val Patrick Exnicios, Liska, Exnicios & Nungesser, New Orleans, LA, Conrad S.P. Williams, III, Joseph G. Jevic, III, St. Martin, Williams & Bourque, Melanie G. Lagarde, Houma, LA, for Irvin J. Henry, and Jennifer Henry, III.
Judy Y. Barrasso, Bailey H. Smith, Barrasso Usdin Kupperman Freeman & Sarver, LLC, New Orleans, LA, for Allstate Insurance Company.

ORDER AND REASONS

MARTIN L.C. FELDMAN, United States District Judge.
***1** Before the Court is Allstate's motion to strike class allegations, motion to dismiss, and motion for costs and a stay. For the reasons that follow, the motion to strike the class allegations is GRANTED, the motion to dismiss is GRANTED in part and DENIED in part, and the request for costs and a stay is GRANTED in part and DENIED in part.

Background

After Hurricanes Katrina and Rita, Irvin and Jennifer Henry filed a claim with Allstate, their insurer. Allstate inspected the Henrys' property on October 30, 2005, which resulted in payments of $13,550.73 and $4,865.43 on October 30, 2005 and May 15, 2006 for their dwelling, additional living expenses and contents. On August 7, 2006, the Henrys provided Allstate with a proof of loss and engineering report showing that their dwelling suffered wind damage in the amount of $112,743.96.

On December 21, 2006, the Henrys sued Allstate to collect their insurance proceeds, as well as purporting to represent all Allstate insureds in Louisiana that suffered property damage from Hurricanes Katrina and Rita. This first suit, Civil Action Number 06-11217 ("*Henry I*"), was allotted to this Court. However, the Henrys were also named plaintiffs in another suit, Civil Action Number 06-7375, pending in Section L. The Court denied the Henrys' motion to transfer to Section L. After that, Judge Fallon severed the claims of the several dozen named plaintiffs proceeding in Civil Action Number 06-7375 in Section L. The Henrys then voluntarily dismissed *Henry I* (the suit in this Section), and filed an "amended petition," which was randomly assigned to Judge Barbier ("*Henry II*"). Allstate's motion to transfer *Henry II* to this Court as a related case pursuant to Local Rule 3.1.1E was granted over the Henrys' objection.

Accordingly, Henrys' Amended Petition for Damages, filed on April 12, 2007, was transferred to this Court on May 30, 2007. Count I, their individual damage claim, alleges that "Allstate has yet to engage in adequate loss adjustment" and therefore has violated La.R .S. 22:658 and La.R.S. 22:1220. The Henrys allege that Allstate arbitrarily and capriciously breached its duty to promptly and fairly adjust their claims in good faith, and ultimately underpaid their claim.

In Count II, the Henrys propose to represent a class defined as "all holders of homeowner's policies issued by Allstate Insurance Company, or any of its subsidiaries, for property located in the State of Louisiana who suffered damages as a result of Hurricanes Katrina and Rita."The Henrys' proposed class claims allege that when Allstate adjusted the

claims of all members of the proposed class, Allstate used a software package named "IntegriClaim." [FN1]By using the IntegriClaim software,[FN2] Allstate breached their contracts with the class, it is urged, in violation of La.Rev.Stat. § 22:658, in a manner sufficient to demonstrate lack of good faith pursuant to La.Rev.Stat. § 22:1220, and in a manner sufficient to demonstrate fraud pursuant to La. Civ.Code art.1953.

> FN1. According to the Amended Petition, IntegriClaim price list is composed of individual repair actions, broken down into different categories, with each of these repair actions having a unit price that is adjusted quarterly to reflect market conditions and inflation in the area being repaired. The plaintiffs contend that IntegriClaim's prices are actually lower than those prices used in the construction industry or in other estimating programs such as Exactimate pricing software used by other insurance companies.
>
> FN2. Additionally, the plaintiffs charge that Allstate has willfully, arbitrarily and capriciously adjusted IntegriClaim's already reduced prices by *further* reducing the unit prices necessary to adjust the claims of their insureds.

***2** Allstate now moves to strike the class allegation under Fed.R.Civ.P. 23(d)(4), arguing that the plaintiffs' lawsuit necessarily requires a claim-by-claim inquiry for each member of the proposed class to determine "the nature and extent of damage, the timing and adjustment of each class member's claim, the source data used to prepare damage estimates, the precise market conditions at the time each class member's damages were assessed,...."FN3 The plaintiffs assert that Allstate manipulated its claims adjusting software so as to produce artificially depressed claim values with the intent to underpay their insured's claims.

> FN3. Allstate had filed a substantially similar motion to dismiss *Henry I.* However, because the plaintiffs had voluntarily dismissed *Henry I,* they never filed a response to that motion.

Allstate counters that plaintiffs' class allegations fail as a matter of law and must be stricken because individualized inquiries predominate. Allstate also moves to dismiss under Fed.R.Civ.P. 12(b)(1) and/or 12(b)(6), claiming that the plaintiffs' breach of contract claims fail because they failed to identify any specific contract provision that Allstate violated, and that the plaintiffs' bad faith claims under La.Rev.Stat. § 22:658 must likewise fail. Finally, Allstate maintains that the plaintiffs' fraud claims are preempted by the Louisiana breach of contract statutes, and, in the alternative, that the fraud claims fail for lack of sufficient pleading as required by Fed.R.Civ.P. 9(b).

I.

Rule 23(a) sets forth four prerequisites to any class action: (1) a class "so numerous that joinder of all members is impracticable"; (2) the existence of "questions of law or fact common to the class"; (3) class representatives with claims or defenses "typical ... of the class"; and (4) class representatives that "will fairly and adequately protect the interests of the class."Fed.R.Civ.P. 23(a). In addition to these prerequisites, a party seeking class certification under Rule 23(b)(3) must also demonstrate that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy."Fed.R.Civ.P. 23(b)(3).

The plaintiffs bear the burden of showing that all of these Rule 23 criteria are met. *Unger v. Amedisys Inc.,* 401 F.3d 316, 320 (5th Cir.2005). A court may strike class allegations under Rule 23(d)(4) where a complaint fails to plead the minimum facts necessary to establish the existence of a class satisfying

Rule 23's mandate. *See Terrebonne v. Allstate Ins. Co.,* No. 06-4697 (E.D.La. July 31, 2007) (Vance, J.) (citing Fed.R.Civ.P. 23(d)(4) and *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 184 n. 6 (1974) ("Under Rule 23(d)(4), the District Court may in some instances require that pleadings be amended to eliminate class allegations."); *see also Hedgepeth v. Blue Cross & Blue Shield of Miss.,* 2006 WL 141624 (N.D.Miss. Jan. 18, 2006) (citing *Stewart v.. Winter,* 669 F.2d 328, 331 (5th Cir.1982)) and noting that the Fifth Circuit has upheld the power of district courts to dismiss class allegations prior to any extensive class-related discovery).

***3** The plaintiffs appear to seek certification of their putative class under Rule 23(b)(3). Even assuming that the plaintiffs have met the four requirements of Rule 23(a), they have not met their burden under Rule 23(b)(3) of proving that common issues of the class predominate over individual issues, and the class certification fails for this reason. *See Maldonado v. Ochsner Clinic Foundation,* No. 06-30573, 2007 WL 2054906 (5th Cir. July 19, 2007).

Rule 23(a)(2) instructs that there be issues of law or fact common to the class. The commonality requirement is satisfied if at least one issue's resolution will affect all or a significant number of class members. *See James v. City of Dallas,* 254 F.3d 551, 570 (5th Cir.2001); *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 625 (5th Cir.1999). A low threshold exists for commonality, and the fact that some plaintiffs have different claims or require individualized analysis does not defeat commonality. *James,* 254 F.3d at 570. But the analysis continues because Rule 23(b)(3) mandates that common questions of law or fact must also "predominate over any questions affecting only individual [class] members."*Unger,* 401 F.3d at 320. This is the test of cohesion, and it is demanding. To predominate, common issues must form a significant part of individual cases. *Mullen,* 186 F.3d at 626. The predominance requirement of Rule 23(b)(3) is "far more demanding" than the commonality requirement of Rule 23(a), because it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."*Unger,* 401 F.3d at 320. Lastly, the cause of action as a whole must satisfy Rule 23(b)(3)'s predominance requirement. *Steering Committee v. Exxon Mobil Corp.,* 461 F.3d 598, 601-02 (5th Cir.2006) ("where individual damages claims cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issues shared by the class").

The plaintiffs allege that Allstate improperly adjusted hurricane property damage claims by utilizing software that undervalued the actual market cost of construction materials.[FN4]This Court has struck similar class allegations against an insurer based on its alleged "corporate scheme and pattern and practice of bad faith and improper claims handling."*See Aguilar v. Allstate Fire and Casualty Ins. Co.,* No. 06-4660, 2007 WL 734809 (E.D.La. March 6, 2007) and *Spiers v. Liberty Mut. Fire Ins. Co.,* C.A. No. 06-4493 (E.D.La. Nov. 21, 2006). A Mississippi federal court likewise declined to certify a class of insured property owners against their insurers, noting:

> FN4. The plaintiffs contend that the quarterly cost estimates used by IntegriClaim software valued each loss below the actual industry cost to complete the repairs, that the IntegriClaim quarterly cost estimates were lower than comparable values used by competitor's claim-adjusting software programs, and that Allstate further reduced the allegedly below-market values of the IntegriClaim cost estimates when they calculated damage settlements for each claim.

Each property owner in Mississippi who had real and personal property damaged in Hurricane Katrina is uniquely situated. No two property owners will have experienced the same losses. The nature and extent of the property damage the owners sustain from the common cause, Hurricane Katrina,

will vary greatly in particulars....
*4 *Comer v. Nationwide Mut. Ins. Co.,* 2006 WL 1066645, at *2 (S.D . Miss. Feb. 23, 2006).

Even more recently, Judge Vance of this Court struck similar class allegations, citing these rulings with approval, noting that "[o]ther district courts have likewise rejected Katrina-related class certifications under Rule 23(b)(3) because of the highly individualized and varied nature of the respective plaintiffs' claims."*Terrebonne v. Allstate Insurance Company,* No. 06-4697 (E.D.La. July 31, 2007). Similarly, Judge Trimble of the Western District of Louisiana recently struck class action allegations where the claims at issue involved the need to examine actual market prices for construction materials compared to the insurer's estimate of the cost of those materials. *See John v. Nat'l Sec. Fire & Cas. Co.,* No. 06-1407, 2006 WL 3228409 (M.D.La. Nov. 3, 2006).[FN5]

> FN5. I n granting the motion to dismiss class allegations, Judge Trimble noted:
>
> > [A]s to Plaintiff's claims for damages for under adjustment of unit prices because of the supply and demand problem after Hurricanes Katrina and Rita struck Louisiana, a factual inquiry would have to be made into each putative class member's claims, such as where and when materials and supplies were being purchased, what was the market price at that time, and when did the price of materials and supplies decrease.
>
> *Id.* at * 4.

The striking similarity of the allegations here compels the same result. Allstate's general internal policies for adjusting claims, including its use or manipulation of software, may arguably be one common issue of fact, but proving a questionable pattern and practice of undervaluing claims will require an intensive review of the individual facts of each class member's damage claim, including the nature and extent of damage, the timing and adjustment of each class member's claim, how much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely. On the face of the pleading, it is clear that those individualized and highly personal issues pertaining to each class member patently overwhelm any arguably common issues, rendering the claims inappropriate for class treatment. *See Pollet v. Travelers Prop. Cas. Ins. Co.,* 2001 WL 1471724 (E.D.La. Nov. 16, 2001) (Clement, C.J.)(holding that class certification was inappropriate in an action alleging that the insurer failed to adequately compensate policyholders because of the need for individualized proof on thousands of separate insurance claims).[FN6]

> FN6. Judge Clement's reasoning in *Pollet* is compelling:
>
> > In the instant case, the need for individualized proof on thousands of separate claims strongly counsels against maintaining a class action. First, every claimant has a different roof, with different hail damage, in a different location. In addition, each of the thousands of allegations that [defendants] acted in bad faith by intentionally failing to pay legitimate claims will require an individual investigation into the damages, the type of insurance policy, and the defendants' actions. Accordingly, the Court finds that maintaining the instant suit as a class action would result in several thousand mini-trials on individual issues, rather than a single comprehensive resolution of issues relevant to the class as a whole. Similarly, the plaintiff's remaining allegations of misrepresentation and deceptive business practices also require fact-specific evidence of the individual policies issued and the promises made to each class member. As a result, a class action trial of these claims would in-

> volve multiple detailed analyses of individual issues rather than the efficient resolution of questions pertinent to the class as a whole. For these reasons, the Court does not find that common issues of law or fact predominate over individual questions.
>
> *Id.* at * 2.

The Henrys concede that the only common questions that unite the putative class is that their property was damaged by Hurricanes Katrina and Rita and that Allstate used software as a claims-adjusting tool. They suggest that these common issues "simply predominate over and eliminate all individual issues except for quantum."This is a gross oversimplification and perverts Rule 23. Their failure to show that these common questions predominate over questions affecting individual class members (such as the nature and extent of the homeowner's damage, the timing and adjustment of the homeowner's claim, the source of data used to prepare the damage estimate, the market conditions in place at the time the damage was assessed, whether Allstate further discounted the amount of the claim, and the amount the homeowner was paid for his claim) confirms that they cannot carry their heavy burden to show that class action treatment is appropriate.

***5** II.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. Such a motion is rarely granted because it is viewed with disfavor. *See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir.1982). The complaint must be liberally construed in the plaintiff's favor and all facts pleaded in the complaint must be taken as true. *See Campbell v. Wells Fargo Bank,* 781 F.2d 440, 442 (5th Cir.1986). This Court cannot dismiss a complaint under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff cannot prove a plausible set of facts in support of his claim which would entitle him to relief. *Bell Atlantic Corp. v. Twombly,* No. 05-1126, slip op. at 7-12 (U.S. May 21, 2007).

The Henrys assert claims against Allstate for underpayment of their insurance claim and breach of its good faith duty, and for fraud; they seek damages for violation of state law penalty statutes under La.Rev.Stat. § 22:1220 and La.Rev.Stat. § 22:658.

A.

The Fifth Circuit requires that, "[t]o state a claim for breach of an insurance contract under Louisiana law, a plaintiff must allege a breach of a specific policy provision."*Louque v. Allstate Insurance Company,* 314 F.3d 776, 782 (5th Cir.2002) (citing *Bergeron v. Pan Am. Assurance Co.,* 731 So.2d 1037, 1045 (La.App.1999). The plaintiffs point to no specific policy provisions in their complaint that would prohibit anything Allstate did in the settlement of their claims. Confusingly, the plaintiffs say that their claim against Allstate is for underpayment of their insurance claim, but they also appear to concede in their opposition papers that they are not urging that Allstate breached its insurance contract. At the same time, the plaintiffs argue that Allstate incorrectly interprets *Bergeron;* but if that is so, then the Fifth Circuit is also misguided in its interpretation of *Bergeron.*The Court, however, agrees with *Bergeron* and the Fifth Circuit. While the plaintiffs' complaint is vaguely and inartfully crafted, this Court must resolve all doubts regarding the sufficiency of their claims in the plaintiffs' favor. Considering the *Lowrey* standard for dismissing a plaintiff's claim, the Court declines to dismiss their individual breach of contract claim, but instead will allow the plaintiffs the opportunity to amend their complaint to correct the *Bergeron* deficiencies, if they can.

B.

Louisiana Revised Statutes 22:658 and 22:1220 an-

nounce statutory penalties that may be imposed on insurance companies for improper handling of first-party property insurance claims. Section B of La. R.S. 22:1220 outlines five causes of action against an insurer: misrepresenting insurance policy provisions relating to coverage, failing to pay a settlement timely after an agreement is reduced to writing, denying coverage or attempting to settle a claim on an altered application without the insured's consent, misleading a claimant as to the prescriptive period, and arbitrarily failing to settle claims timely after receiving satisfactory proof of loss.

*6 Louisiana courts have held that "because R.S. 22:1220 is penal in nature, strict construction of the statute is required and that the five instances specified in section B are exclusive."*Armstrong v. Rabito,* 669 So.2d 512, 514 (La.App.1995)(citing *Hernandez v. Continental Casualty Co.,* 615 So.2d 484 (La.App.1993)); *see also Hart v. Allstate Ins. Co.,* 437 So.2d 823 (La.1983). Louisiana courts have also held that unless one of the prohibited acts specified in 22:1220 is asserted by the plaintiff, then the claims must be dismissed. *Armstrong,* 669 So.2d at 514;*Boatner v. State Farm Mutual,* No. 92-C-1248 (La.App. Sept. 28, 1992).

The plaintiffs rather vacuously characterize their complaint as "nothing more than your typical action for statutory damages."They contend that they are entitled to recover penalties because Allstate failed to pay the full amount of their claim even though they provided Allstate with a proof of loss. Their inartful assertions appear to be an attempt to implicate La. R.S. 22:1220(B)(5). Because the Court will allow the plaintiffs to try to cure their obvious breach of contract pleading deficiencies, the plaintiffs will also have a chance to cure their bad faith claims deficiencies as well.

C.

Allstate also moves to dismiss the plaintiffs' fraud claim. The plaintiffs' amended petition charges that "Allstate's use of IntegriClaim [was] so deceptive and misleading as to constitute fraud sufficient to vitiate the necessary consent of their insureds with regard to the settlement of their claims as set forth in La.C.C. article 1953."

The plaintiffs only reference "fraud" in Count II, which concerns their class allegations and the Court has determined that the plaintiffs' class allegations should be stricken.[FN7]Even if the plaintiff is somehow attempting to state an individual claim for fraud, the claim would be dismissed for failure to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). The plaintiffs' fraud allegations are vague and fail to "plead enough facts to illustrate the 'who, what, when, where, and how' of the alleged fraud."*See Carroll v. Fort James Corp.,* 470 F.3d 1171, 1174 (5th Cir.2006) (citations omitted).

> FN7. The plaintiffs' attempt to certify a fraud class action fails for the well-established reason that "[a] fraud class action cannot be certified where individual reliance will be an issue."*Castano v. American Tobacco Co.,* 84 F.3d 734, 745 (5th Cir.1996) (citation omitted).

III.

Finally, Allstate contends that the Henrys should reimburse Allstate for the costs and attorney's fees incurred in defending *Henry I,* which the Henrys voluntarily dismissed.

Federal Rule of Civil Procedure 41(d) provides:

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The plaintiffs voluntarily dismissed *Henry I* and

commenced this suit, which nevertheless contains the same claims against Allstate. The plaintiffs' voluntary dismissal contains no statement that the Henrys intended to refile their lawsuit, in obvious and somewhat crude disregard of Local Rule 41.1E. An award of costs, including attorney's fees, is warranted.[FN8]As the plaintiffs suggest, any costs assessed will be *minimal,* considering Allstate seems to agree that the pending motion is nearly identical to the one filed in *Henry I.* Any costs or fees incurred in defending *Henry I* that were equally valuable in defending this action must not be included in the award. Once Allstate files a motion to determine fees and costs, the magistrate judge will, by appropriate reference, determine the quantum owed. As to Allstate's request that the action be stayed, the Court declines to grant the request. A stay would not serve the interests of justice or judicial economy and would only delay resolution of this lawsuit.

> FN8. Plaintiffs' counsel might also wish to pay close attention to the mandate of 28 U.S.C. § 1927 in the future.

*7 Accordingly, the defendant's motion to strike class allegations is GRANTED. The defendant's motion to dismiss is GRANTED in part and DENIED in part: The plaintiffs' fraud claim is dismissed. The plaintiffs are granted leave to amend their claim for breach of contract and violation of penalty statutes within fourteen days. The defendant's motion for costs and a stay is GRANTED in part and DENIED in part: An award of costs is appropriate, the amount to be determined by the magistrate judge. However, Allstate's request for a stay is DENIED.

E.D.La.,2007.
Henry v. Allstate Ins. Co.
Slip Copy, 2007 WL 2287817 (E.D.La.)

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C
Guin v. Brazos Higher Educ. Service Corp., Inc.
D.Minn.,2006.
Only the Westlaw citation is currently available.
United States District Court,D. Minnesota.
Stacy Lawton GUIN, Plaintiff,
v.
BRAZOS HIGHER EDUCATION SERVICE CORPORATION, INC., Defendant.
No. Civ. 05-668 RHK/JSM.

Feb. 7, 2006.

John H. Goolsby and Thomas J. Lyons Jr., Consumer Justice Center, Little Canada, Minnesota; Thomas J. Lyons, Lyons Law Firm, P.A., Little Canada, Minnesota, for Plaintiff.
Courtney M. Rogers Reid and Matthew E. Johnson, Halleland Lewis Nilan & Johnson P.A., Minneapolis, Minnesota, for Defendant.

MEMORANDUM OPINION AND ORDER

KYLE, J.

INTRODUCTION

*1 Plaintiff Stacy Guin alleges that Defendant Brazos Higher Education Service Corporation, Inc. ("Brazos") negligently allowed an employee to keep unencrypted nonpublic customer data on a laptop computer that was stolen from the employee's home during a burglary on September 24, 2004. This matter comes before the Court on Brazos's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, the Court will grant the Mo- tion.

BACKGROUND

Brazos, a non-profit corporation with headquarters located in Waco, Texas, originates and services student loans. (Villarrial Aff. ¶ 2.) Brazos has approximately 365 employees, including John Wright, who has worked as a financial analyst for the company since November 2003. (Villarrial Aff. ¶ 2; Wright Aff. ¶ 1.) Wright works from an office in his home in Silver Spring, Maryland. (Wright Aff. ¶ 3.) As a financial analyst for Brazos, Wright analyses loan portfolios for a number of transactions, including purchasing portfolios from other lending organizations and selling bonds financed by student loan interest payments. (Wright Aff. ¶ 6.) Prior to performing each new financial analysis, Wright receives an electronic database from Brazos's Finance Department in Texas. (Wright Aff. ¶ 7.) The type of information needed by Wright to perform his analysis depends on the type of transaction anticipated by Brazos. (Wright Aff. ¶¶ 8-11.) When Wright is performing asset-liability management for Brazos, he requires loan-level details, including customer personal information, to complete his work. (Wright Aff. ¶¶ 11.)

On September 24, 2004, Wright's home was burglarized and a number of items were stolen, including the laptop computer issued to Wright by Brazos. (Wright Aff. ¶ 18.) Wright reported the theft to the local police department, but the police were unable to apprehend the burglar or recover the laptop. (Wright Aff. ¶ 19.) After the police concluded their investigation, Brazos hired a private firm, Global Options, Inc., to further investigate the details the burglary. (Villarrial Aff. ¶ 26.) Global Options was unable to regain possession of the computer. (Villarrial Aff. ¶ 26, Ex. 21.)

With the laptop missing, Brazos sought to determine what customer data might have been stored on the hard drive and whether the data was accessible to a third party. Based on internal records, Brazos determined that Wright had received databases containing borrowers' personal information on seven occasions prior to September 24, 2004. (O'Donnell Dep. Tr. at 31-35.) Upon receiving the databases, Wright typically saved the information to his hard drive, depending on the size of the database and the

likelihood that he would need to review the information again in the future. (Wright Aff. ¶¶ 14-15.) However, Wright did not keep records of which databases were permanently saved on his hard drive and which databases were eventually deleted, so Brazos was not able to determine with any certainty which individual customers had personal information on Wright's laptop when it was stolen. (Wright Aff. ¶ 16.)

***2** Without the ability to ascertain which specific borrowers might be at risk, Brazos considered whether it should give notice of the theft to all of its customers. In addition to contemplating guidelines recommended by the Federal Trade Commission ("FTC"),[FN1] Brazos learned that it was required by California law to give notice to its customers residing in that State. (Villarrial Aff. ¶¶ 20, 24, Ex. 16.) Brazos ultimately decided to send a notification letter (the "Letter") to all of its approximately 550,000 customers. (Villarrial Aff. Ex. 17.) The Letter advised borrowers that "some personal information associated with your student loan, including your name, address, social security number and loan balance, may have been inappropriately accessed by the third party."(Villarrial Aff. Ex. 17.) The Letter also urged borrowers to place "a free 90-day security alert" on their credit bureau files and review consumer assistance materials published by the FTC. (Villarrial Aff. Ex. 17.) In addition, Brazos established a call center to answer further questions from customers and track any reports of identity theft. (Villarrial Aff. ¶ 26.)

> FN1. The Federal Trade Commission guidelines recommend that when "deciding if notification [to customers of an identity theft threat] is warranted, [a company should] consider the nature of the compromise, the type of information taken, the likelihood of misuse, and the potential damage arising from misuse."(Villarrial Aff. Ex. 16.)

Plaintiff Stacy Guin, who acquired a student loan through Brazos in August 2002, received the Letter. (Villarrial Aff. Ex. 2; Guin Dep. Tr. at 9-10.) Shortly thereafter, Guin contacted the Brazos call center to ask followup questions. (Guin.Dep. Tr. 12-15.) Guin also ordered and reviewed copies of his credit reports from the three credit agencies listed in the Letter. (Guin. Dep. Tr. at 24-26 .) Guin did not find any indication that a third party had accessed his personal information and, to this date, has not experienced any instance of identity theft or any other type of fraud involving his personal information. (Guin Dep. Tr. at 24-26, 31.) To Brazos's knowledge, none of its borrowers has experienced any type of fraud as a result of the theft of Wright's laptop. (Villarrial Aff. ¶ 26 .)

On March 2, 2005, Guin commenced this action asserting three claims: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. (Com pl.¶¶ 22-33.) On September 12, 2005, Guin voluntarily dismissed his breach of contract and breach of fiduciary duty claims. Guin brings the remaining negligence claim under Fed.R.Civ.P. 23, on behalf of "all other Brazos customers whose confidential information was inappropriately accessed by a third party...." (Compl.¶ 15.)

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.Fed.R.Civ.P. 56(c). For purposes of summary judgment, a fact is "material" if its resolution will determine the outcome of the case, and an issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *SeeAnderson v. Liberty Lobby Inc.,* 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp,* 475 U.S. 574, 586-87 (1986). Upon a motion for summary judgment, the moving party carries the burden of showing there is no genuine issue of material fact, and all evidence and reasonable inferences must be viewed in a light most favorable to the non-moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

ANALYSIS

***3** In his negligence claim, Guin alleges that "[Brazos] owe[d] him a duty to secure [his] private personal information and not put it in peril of loss, theft, or tampering," and "[Brazos's] delegation or release of [Guin's] personal information to others over whom it lacked adequate control, supervision or authority was a result of [Brazos's] negligence...." (Compl.¶ ¶ 31-32.) As a result of such conduct, Guin allegedly "suffered out-of-pocket loss, emotional distress, fear and anxiety, consequential and incidental damages."(Compl.¶ 33.)

Minnesota courts have defined negligence as the failure to exercise due or reasonable care. *Seim v. Garavalia,* 306 N.W.2d 806, 810 (Minn.1981). In order to prevail on a claim for negligence, a plaintiff must prove four elements: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty was the proximate cause of the injury. *Elder v. Allstate Ins. Co.,* 341 F.Supp.2d 1095, 1099 (D.Minn.2004), citing *Lubbers v. Anderson,* 539 N.W.2d 398, 401 (Minn.1995). In support of its instant Motion, Brazos advances three arguments: (1) Brazos did not breach any duty owed to Guin, (2) Guin did not sustain an injury, and (3) Guin cannot establish proximate cause. (Mem. in Supp. at 8-19.) The Court will address each in turn.

1. Breach of Duty

In order to prove a claim for negligence, Guin must show that Brazos breached a legal duty owed to him under the circumstances alleged in this case. A legal duty is defined as an obligation under the law to conform to a particular standard of conduct towards another. *SeeMinneapolis Employees Ret. Fund v. Allison-Williams Co.,* 519 N.W.2d 176, 182 (Minn.1994). The standard for ordinary negligence is "the traditional standard of the reasonable man of ordinary prudence."*Seim,* 306 N.W.2d at 810. In some negligence cases, however, a duty of care may be established by statute. *Anderson v. State,* 693 N.W.2d 181, 189-90 (Minn.2005). In such cases, violation of a statutory-based duty may constitute negligence *per se.Id.* at 190.

Guin argues that the Gramm-Leach-Bliley Act (the "GLB Act"), 15 U.S.C. § 6801, establishes a statutory-based duty for Brazos "to protect the security and confidentiality of customers' nonpublic personal information."(Mem. in Opp'n at 8.) For the purposes of this Motion only, Brazos concedes that the GLB Act applies to these circumstances and establishes a duty of care. (Mem. in Supp. at 15 n .2.) The GLB Act was created "to protect against unauthorized access to or use of such records which could result in substantial harm or inconvenience to any customer [of a financial institution]."15 U.S .C. § 6801(b)(3). Under the GLB Act, a financial institution must comply with several objectives, including:

Develop, implement, and maintain a comprehensive written information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information at issue;

***4** Identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks; and

Design and implement information safeguards to control the risks you identify through risk assessment, and regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures.

16 C.F.R. § 314.4(a)-(c).

Guin argues that Brazos breached the duty imposed by the GLB Act by (1) "providing Wright with

[personal information] that he did not need for the task at hand," (2) "permitting Wright to continue keeping [personal information] in an unattended, insecure personal residence," and (3) "allowing Wright to keep [personal information] on his laptop unencrypted."(Mem. in Opp'n at 10.) Brazos counters that Guin does not have sufficient evidence to prove that it breached a duty by failing to comply with the GLB Act. (Mem. in Supp. at 16.)

The Court concludes that Guin has not presented sufficient evidence from which a fact finder could determine that Brazos failed to comply with the GLB Act. In September 2004, when Wright's home was burglarized and the laptop was stolen, Brazos had written security policies, current risk assessment reports, and proper safeguards for its customers' personal information as required by the GLB Act. (Villarrial Aff. Exs. 1, 3-8, 11, 12.) Brazos authorized Wright to have access to customers' personal information because Wright needed the information to analyze loan portfolios as part of Brazos's asset-liability management function for other lenders. (Wright Aff. ¶¶ 6, 11.) Thus, his access to the personal information was within "the nature and scope of [Brazos's] activities."*See*16 C.F.R. § 314.4(a). Furthermore, the GLB Act does not prohibit someone from working with sensitive data on a laptop computer in a home office. Despite Guin's persistent argument that any nonpublic personal information stored on a laptop computer should be encrypted, the GLB Act does not contain any such requirement.[FN2]Accordingly, Guin has not presented any evidence showing that Brazos violated the GLB Act requirements.

> FN2. While it appears that the FTC routinely cautions businesses to "[p]rovide for secure data transmission" when collecting customer information by encrypting such information "in transit," there is nothing in the GLB Act about this standard, and the FTC does not provide regulations regarding whether data should be encrypted when stored on the hard drive of a computer. (Mem. in Supp. at 17-18; Johnson Aff. Ex. 8.)

In addition, Guin argues that Brazos failed to comply with the self-imposed reasonable duty of care listed in Brazos's privacy policy-that Brazos will "restrict access to nonpublic personal information to authorized persons who need to know such information."(Mem. in Opp'n at 11.) Brazos concedes that under this policy, it owed Guin a duty of reasonable care, but argues that it acted with reasonable care in handling Guin's personal information. (Mem. in Supp. at 14.) The Court agrees. Brazos had policies in place to protect the personal information, trained Wright concerning those policies, and transmitted and used data in accordance with those policies. (Villarrial Aff. Exs. 1, 9-12.) Wright lived in a relatively "safe" neighborhood and took necessary precautions to secure his house from intruders. (Wright Aff. ¶¶ 21-22.) His inability to foresee and deter the specific burglary in September 2004 was not a breach of Brazos's duty of reasonable care. Because Guin has failed to raise a genuine issue of material fact regarding whether Brazos breached its duty of care, summary judgment is appropriate.

***5** Although Guin's failure to show that Brazos breached its duty of care provides sufficient grounds for granting Brazos's Motion for Summary Judgment, the Court will address Brazos's other two arguments.

2. Injury

In order to prove a claim for negligence, Guin must show that he sustained an injury. *SeeManion v. Nagin,* 394 F.3d 1062, 1067 (8th Cir.2005) (applying Minnesota law). A plaintiff must suffer some actual loss or damage in order to bring an action for negligence. *Carlson v. Rand,* 146 N.W.2d 190, 193 (Minn.1966)."The threat of future harm, not yet realized, will not satisfy the damage requirement."*Reliance Ins. Co. v. Anderson,* 322 N.W.2d 604, 607 (Minn.1982).

Guin argues that he has been injured by identity theft. (Mem. in Opp'n at 13-14.) Under both federal and Minnesota law, identity theft occurs whenever a person "transfers, possesses, or uses" another person's identity "with the intent to commit, aid, or abet any unlawful activity."18 U.S.C. § 1028(a)(7); Minn.Stat. § 609.527(2). Guin argues that the circumstances of this case fulfill the definition of identity theft because "the burglars [in Wright's home in September 2004] had a criminal intention when they broke in and gained possession of [Guin's] identity information."(Mem. in Opp'n at 14.)

In response, Brazos contends that "any finding that a third party accessed [Guin's] personal information [is] sheer speculation."(Mem. in Supp. at 9.) Brazos points out that the evidentiary record is completely devoid of any disputed facts indicating that Guin's personal information was actually on Wright's laptop at the time it was stolen, or that Guin's personal information is now in the possession of the burglar. (Mem. in Supp. at 8.) Therefore, Brazos argues that Guin cannot show that he has been a victim of identity theft.

The facts of this case are closely analogous to *Stollenwerk v. Tri-West Healthcare Alliance,* No. Civ. 03-0185, 2005 WL 2465906 (D.Ariz. Sept. 6, 2005). In *Stollenwerk,* the defendant's corporate office was burglarized and a number of items stolen, including computer hard drives containing the personal information of defendant's customers. 2005 WL 2465906 at *1. After the burglary, several customers brought suit against the company asserting claims for consumer fraud, invasion of privacy and negligence. *Id.* at *2. In support of their negligence claim, two plaintiffs relied on the opinion of an expert who described their injury as "an increased risk of experiencing identity fraud for the next seven years."*Id.* at *5 n. 2. The district court expressly rejected the expert testimony because "the affidavit of plaintiffs' expert conclusorily posits that plaintiff's risk of identity fraud is significantly increased without quantifying the risk."*Stollenwerk,* 2005 WL 2465906 at *5. In granting summary judgment for the defendant on the negligence claim, the district court determined that the two plaintiffs had failed to establish an injury for the purpose of proving negligence: "absent evidence that the data was targeted or actually accessed [by the burglars], there is no basis for a reasonable jury to determine that sensitive personal information was significantly exposed."*Id.* at *5.

***6** Like *Stollenwerk,* in this case Guin has failed to present evidence that his personal data was targeted or accessed by the individuals who burglarized Wright's home in September 2004.[FN3]The record shows that Brazos is uncertain whether Guin's personal information was even on the hard drive of Wright's laptop computer at the time it was stolen in September 2004. (Wright Aff. ¶ 16.) To this date, Guin has experienced no instance of identity theft or any other type of fraud involving his personal information. (Guin Dep. Tr. at 24-26, 31.) In fact, to Brazos's knowledge, none of its borrowers has been the subject of any type of fraud as a result of the theft of Wright's laptop computer. (Villarrial Aff. ¶ 26.) Furthermore, Guin has provided no evidence that his identity has been "transferred, possessed, or used" by a third party with "with the intent to commit, aid, or abet any unlawful activity."*See*18 U.S.C. § 1028(a)(7); Minn.Stat. § 609.527(2). No genuine issue of material fact exists concerning whether Guin has suffered an injury. Accordingly, he cannot sustain a claim for negligence.

> FN3. Also like *Stollenwerk,* this Court rejects the expert affidavit advanced by Guin to support his negligence claim because the expert's opinion is conclusory and is based on generalizations that are not supported by the specific facts of this case. (*See* Hendricks Aff. at 22-26.)

3. Causation

To prevail on his negligence claim, Guin must also show that Brazos's alleged breach of duty was the

proximate cause of his alleged injury. *SeeLubbers,* 539 N.W.2d at 401-02. Proximate cause is defined as "consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act."*Hilligoss v. Cross Cos.,* 228 N.W.2d 585, 586 (Minn.1975). As a general rule, the criminal act of a third party is "an intervening efficient cause sufficient to break the chain of causation," provided that the criminal act was not foreseeable and there was no special relationship between the parties. *Funchness v.. Cecil Newman Corp.,* 632 N.W.2d 666, 674 (Minn.2001)."The question of foreseeability of an intervening act is normally one for the trial court and should be submitted to a jury only where there might be a reasonable difference of opinion."*Hilligoss,* 228 N.W.2d at 586.

Guin contends that the September 2004 theft of Brazos's laptop from Wright's home was reasonably foreseeable because "allowing confidential information to remain unencrypted on unsecured laptop computers increase[s] the risk of theft."(Mem. in Opp'n at 24.) Guin argues that "the test of foreseeability is whether the defendant was aware of facts indicating [that] the plaintiff was being exposed to [an] unreasonable risk of harm."(Mem. in Opp'n at 23.) Guin points to similar laptop thefts in the financial industry and the increasing problem of widespread identity theft. (Mem. in Opp'n at 24.) Based on this, Guin argues that the theft of Wright's laptop was reasonably foreseeable to Brazos because "a reasonable jury could conclude that the risk of information compromise is common knowledge in the financial industry."(Mem. in Opp'n at 25.)

The Court concludes that the September 2004 theft of Wright's laptop from his home was not reasonably foreseeable to Brazos. In *Hilligoss,* the Minnesota Supreme Court observed that a high crime rate and the commission of similar crimes in a particular area can establish foreseeability of a subsequent criminal attack. 228 N.W.2d at 548. In this case, however, Wright lived in a relatively "safe" neighborhood and took necessary precautions to secure his house from intruders. (Wright Aff. ¶¶ 21-22.) Wright was unaware of any previous burglaries on his block or in his immediate neighborhood. (Wright Aff. ¶ 22.) There is no indication that Wright or Brazos could have possibly foreseen the burglary which took place on September 24, 2004. A reasonable jury could not infer that the burglary caused Guin any alleged injury; such a conclusion would be the result of speculation and conjecture, not a reasonable inference. *SeeStollenwerk,* 2005 WL 2465906 at *7. Guin cannot establish proximate cause in this case and therefore, his negligence claim fails.

CONCLUSION

*7 Based on the foregoing, and all of the files, records and proceedings herein, it is ORDERED that Defendant's Motion for Summary Judgment (Doc. No. 20) is GRANTED, and the Complaint (Doc. No. 1) is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

D.Minn.,2006.
Guin v. Brazos Higher Educ. Service Corp., Inc.
Not Reported in F.Supp.2d, 2006 WL 288483 (D.Minn.)

END OF DOCUMENT

Giordano v. Wachovia Securitites, LLC
D.N.J.,2006.
Only the Westlaw citation is currently available.
United States District Court,D. New Jersey.
Lois GIORDANO, Plaintiff,
v.
WACHOVIA SECURITIES, LLC et al., Defendants.
Civil No. 06-476 (JBS).

July 31, 2006.

Mark R. Cuker, Esq., Alan H. Sklarsky, Esq., Williams, Cuker & Berezofsky, Cherry Hill, NJ, for Plaintiff.
Mark S. Melodia, Esq., Paul J. Bond, Esq., Reed Smith, LLP, Princeton, NJ, for Defendant Wachovia Securities, LLC.

OPINION

SIMANDLE, District Judge.
***1** This case presents the interesting issue of whether a case, having been removed from State court to Federal court, in which the plaintiff lacks Article III standing to pursue her claim, should be dismissed in Federal court or remanded to State court. This matter, which was removed by Defendant from the Superior Court of New Jersey to this Court, is before the Court upon a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed on behalf of Defendant Wachovia Securities, LLC ("Wachovia"). This motion relates to Plaintiff Lois Giordano's four-count complaint (the "Complaint") alleging (1) negligence, (2) invasion of privacy, (3) breach of the duty of confidentiality, and (4) conversion stemming from the loss of Plaintiff's personal and financial information. In short, the Court finds, as alleged by Defendant itself, that Plaintiff has failed to allege that she suffered an injury-in-fact and therefore has not met the Constitutional requirements for standing in Federal court under Article III.[FN1]Having determined that Plaintiff did not fulfill the minimal constitutional requirements for Federal court standing, this Court lacks subject matter jurisdiction and cannot address the merits and, under 28 U.S.C. § 1447(c), this Court shall (1) deny Wachovia's motion to dismiss and (2) remand the case back to State court.

FN1. In finding that Plaintiff lacks standing to bring any claim against Wachovia, this Court need not address the other arguments raised by Wachovia in its motion to dismiss.

I. *BACKGROUND*

Plaintiff is Lois Giordano, a customer of Wachovia Securities, LLC. (Complaint at ¶¶ 1-2.) As part of opening an individual retirement account with Wachovia in June of 2004, Plaintiff signed a New Account Application which stated that she agreed that the account would be governed by Wachovia's "Customer Agreement." [FN2]In connection with her account, Plaintiff provided Wachovia with certain information about her-including her name, address, and Social Security Number. (Compl. at ¶ 1.) In connection with the maintenance of Plaintiff's account, Wachovia generated an account number for Plaintiff's funds and kept track of her account balance. (*Id.*)

FN2. The Customer Agreement includes, among other things, a choice of law provision selecting Virginia's substantive law, a limitation of liability for acts of simple negligence by Defendant, and an exemption from liability for extraordinary events such as failure of the mails or theft. (Certification of Mark S. Melodia ¶ 2, Ex. A.)

Approximately ten months after Plaintiff opened her account, Wachovia printed a report which contained financial information about Plaintiff and tens of thousands of other Wachovia customers. (*Id.* at ¶

10, 13.)On March 28, 2005, Wachovia mailed the report, via the United Parcel Service ("UPS"), to Wachovia's New Jersey branch office. *(Id.)* The package was never received.(*Id.*) In response to the loss of this package, Wachovia sent Plaintiff (and others) a letter informing her of the loss of her information and stating that Wachovia and UPS have "conduct[ed] a thorough and extensive investigation to locate the package, including interviewing all individuals who may have handled the missing packages and carefully reviewing the carrier's procedures and internal reports."(Melodia Cert. ¶ 4, Ex. C.) The letter continued, stating that Wachovia "believe[s] the package was damaged during shipment and, pursuant to the carrier's procedures, was destroyed ... [and that] [t]here is no evidence of theft of the report or your information ... [or] that the report has been obtained by a third party."*(Id.)* In the same letter, Wachovia offered to pay for a year of credit monitoring services, which Plaintiff accepted. *(Id.)*

*2 With Plaintiff's year of free credit monitoring services ending in July of 2006, Plaintiff filed a putative class action suit against Wachovia and UPS in New Jersey Superior Court (Atlantic County) on December 16, 2005. [Docket Item No. 1.] The Complaint alleges claims of negligence (Count I), invasion of privacy (Count II), breach of the duty of confidentiality (Count III) and conversion (Count IV). (Compl.¶ 18-36.) The Complaint seeks, among other remedies, that this Court order Wachovia to establish a credit monitoring program, at Wachovia's expense, "to ensure timely detection of any and all persons who attempt to use Plaintiff's information as a result of the carelessness and reckless conduct of [Wachovia]" or that Wachovia reimburse Plaintiff for such services. (Compl. at 9.)

On February 1, 2006, the case was removed from the Superior Court of New Jersey, Law Division, Atlantic County, to this Court. [Docket Item No. 1.] On February 21, 2006, Wachovia and UPS filed separate motions to dismiss Plaintiff's Complaint. [Docket Item Nos. 11 and 14, respectively.] [FN3]

Plaintiff filed opposition to Wachovia's motion on April 7, 2006 [Docket Item No. 23.] to which Wachovia timely replied on April 14, 2006. [Docket Item No. 23.] The Court heard oral argument on May 26, 2006.

> FN3. On May 24, 2006, Plaintiff and UPS entered into and filed a Stipulation of Dismissal in which Plaintiff agreed to voluntarily dismiss all claims against UPS, rendering the UPS dismissal motion moot. [Docket Item No. 24.]

II. *DISCUSSION*

Wachovia makes three main arguments in support of its motion to dismiss. First, Wachovia argues that Plaintiff lacks the constitutional standing to bring this action and therefore, the action must be dismissed under Fed.R.Civ.P. 12(b)(1). Second, Wachovia argues that Plaintiff is precluded from these claims under the limitation of liability provision of the Customer Agreement. Finally, Wachovia argues that Plaintiff's claims of negligence, invasion of privacy, breach of confidentiality and conversion all fail because each claim lacks at least one essential element of the cause of action.

Because every litigant in the federal courts must have standing to bring a claim sufficient to satisfy the "case or controversy" requirement within the meaning of Article III of the Constitution of the United States, this Court will first address the issue of Plaintiff's standing. A conclusion that Plaintiff lacks standing moots the other arguments raised by Wachovia and requires this Court to deny Wachovia's motion to dismiss and remand this case back to the state court from which it was removed.

A. *Standard of Review under Fed R. Civ. P. 12(b)(1)*

A motion to dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(1) seeks dismissal due to the lack of subject matter jurisdiction. *See*Fed.R.Civ.P. 12(b)(1). Before a federal court

can consider the merits of a legal claim, "the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."*Whitmore v. Arkansas,* 495 U.S. 149, 154 (1990); *see also Petroleos Mexicanos Refinancion v. M/T KING, A (Ex-Tbilisi),* 377 F.3d 329, 224 (3d Cir.2004) ("standing is a question of subject matter jurisdiction.") Article III of the Constitution limits the judicial power of federal courts to "cases or controversies" between parties.U.S. CONST. art. III, § 2. To satisfy Article III's standing requirements, a plaintiff must allege:

*3 (1) [an] injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) [that] it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 290-91 (3d Cir.2005) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). To establish an "injury in fact," a plaintiff must show that he has "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983) (citations and internal quotation marks omitted); *see also Danvers Motor Co.,* 432 F.3d at 291.

The plaintiff bears the burden of establishing standing. *See Storino v. Borough of Point Pleasant Beach,* 322 F.3d 293, 296 (3d Cir.2003). The plaintiff must "clearly and specifically set forth facts sufficient to satisfy these Article III standing requirements" in the Complaint, insofar as a federal court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing."*Whitmore,* 495 U.S. at 155-56. In determining standing, the Court must consider "the specific ... constitutional claims that a party presents" and examine "a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."*International Primate Prot. League v. Administrators of the Tulane Ed. Fund,* 500 U.S. 72, 77 (1991).

B. ***Analysis***

Wachovia argues that Plaintiff does not allege any actual or imminent injury-in-fact. Rather, Plaintiff merely claims that she "will incur financial loss including the costs of obtaining credit and identity theft protection services in order to prevent" identity theft. (Compl.¶ 1.) Wachovia argues that Plaintiff can only recoup money she voluntarily chooses to spend to prevent identity theft in the event that the threat of identity theft is "so imminent as to be 'certainly impending.' " *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.,* 123 F.3d 111, 122 (3d Cir.1997). According to Wachovia, because (1) there is no evidence that Plaintiff's confidential financial information had been stolen or that (2) a third-party intends to make unauthorized use of such information, theft of her identity (and thus, Plaintiff's injury) is not "certainly impending." (Def .'s Br. at 9-10.)

Plaintiff contends that Wachovia's argument overlooks important considerations and construes the injury-in-fact requirement under Article III too narrowly. (Pl.'s Opp. Br. at 5.) Indirect economic injury, according to Plaintiff, is "clearly a sufficient basis for standing."*San Diego County Gun Rights Comm'n v. Reno,* 98 F.3d 1121, 1130 (9th Cir.2005); *The Pitt News v. Fisher,* 215 F.3d 354 (3d Cir.2000) (student newspaper has standing to challenge a statute prohibiting businesses from running liquor ads in educational publication resulting in alleged loss of revenue to the newspaper). Second, Plaintiff argues that a plaintiff need only plead that she has suffered "some concrete form of harm" to overcome a motion to dismiss. (Pl.'s Opp. Br. at 5.) Specifically, "[a]t the pleading stage, general factual allegations of injury resulting from de-

fendant's conduct may suffice...."*(Id.* citing *Lujan,* 504 U.S. at 561.) Indeed, according to Plaintiff, the alleged harm need not be substantial, as a "trifle" of injury will suffice to satisfy the requirement of an injury-in-fact. *See Danvers Motor Co.,* 432 F.3d at 294. Against this background, Plaintiff contends, she has alleged sufficient facts to meet the injury-in-fact requirement. According to Plaintiff, her injury-the likelihood that she will become a victim of identity theft-is concrete and economic *(i.e.,* the cost to protect against the long-term risks of harm created by Wachovia's conduct in permitting her personal identity and account information to be disbursed in an unsecured setting) and not speculative or abstract.[FN4]*(Id.)*

> FN4. Plaintiff also argues that New Jersey law recognizes the type of relief Plaintiff is seeking-compensation for credit monitoring services-because the New Jersey Supreme Court recognized compensability of medical monitoring services in *Ayers v. Jackson Township,* 106 N.J. 557 (1987). New Jersey law, according to Plaintiff, has recognized such a cause of action for medical monitoring in the face of the same argument as Wachovia makes here-namely, that the probability that plaintiffs will actually become ill from their exposure to chemicals is too remote to warrant compensation under the principles of tort law. *Id.* at 591.
>
> This Court finds Plaintiff's analogy of medical monitoring to credit monitoring inapt. In order to have a cause of action for medical monitoring even before the advent of any physical symptoms, Plaintiff must allege exposure to a carcinogen, not the *potential* exposure. *See id.* at 599-607;*see also Theer v. Philip Carey Co.,* 133 N.J. 610, 627 (N.J.1993). Here, Plaintiff merely alleges the potential of identity theft, not that her identify was actually stolen and misused.

***4** The Court concludes that Plaintiff lacks Constitutional standing to bring this action because Plaintiff has failed to allege that she suffered an injury-in-fact that was either "actual or imminent." Plaintiff's allegations that, as a result of Wachovia's actions, she will incur costs associated with obtaining credit monitoring services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury. Plaintiff's claims, at best, are speculative and hypothetical future injuries. A complaint alleging the mere potential for an injury does not satisfy Plaintiff's burden to prove standing. Instead, a plaintiff must allege an actual injury or that an injury is "so imminent as to be 'certainly impending.' " *Magnesium Elektron, Inc.,* 132 F.3d at 122 ("The imminence requirement ensures that courts do not entertain suits based on speculative or hypothetical harms.") Plaintiff has failed to do so here.

The mere possibility of future harm fails to satisfy the standing requirements of the Supreme Court and Third Circuit Court of Appeals. For example, in *O'Shea v. Littleton,* 414 U.S. 488, 493-97 (1974) the plaintiffs alleged a pattern and practice by local officials of racial discrimination through higher bonds and harsher sentences for minorities and sought injunctive relief against the continuation of such practices. The Supreme Court held that, although the plaintiffs belonged to the discriminated-against class, "[n]one of the named plaintiffs [was] identified as himself having suffered any injury in the manner specified."*Id.* at 495.The Court held that the possibility that county officials would act illegally in the future, and the further possibility that the named plaintiffs would be among the victims of such illegal action, were simply not enough to grant the plaintiffs Constitutional standing. *See id.* at 497.Like the plaintiffs in *O'Shea,* Plaintiff's allegations here, if true, create only the *possibility* that Plaintiff will be harmed at some future date by the loss of Plaintiff's information or through identity theft.

In addition, in *City of Los Angeles v. Lyons,* 461

U.S. 95, 97 (1983), the plaintiff sought injunctive relief after claiming to have been stopped by city police officers for a traffic violation, put in a chokehold and injured. The *Lyons* plaintiff alleged that he "justifiably feared that any future contact he might have with police officers might again result in his being choked without provocation" and asked the court to bar the use of such tactics by the city's police. *Id.* The Supreme Court, overturning the injunction granted by the lower court, held that the plaintiff had no standing to sue and that the Court could not agree that the "odds" that the plaintiff will be subjected to a chokehold without provocation are sufficient to make out a federal case for equitable relief. *Id.* at 108.In the present case, Plaintiff's claims, like those of the plaintiff in *Lyons* are based on nothing more than the chance-or "odds"-that she will be the victim of wrongdoing at some unidentified point in the indefinite future.

***5** Finally, in *Luis v. Dennis,* 751 F.2d 604, 608 (3d Cir.1984), the Third Circuit held that federal courts had no subject-matter jurisdiction to exercise judicial review based on the mere possibility that a challenged law would make (as-yet hypothetical) executive appointments more difficult. In such cases, the "requisite immediacy and reality are lacking...."*Id.*There are numerous parallels between the plaintiff's case in *Luis* and Plaintiff's case hereas Plaintiff only alleges a potential injury (identity theft) that is contingent on (1) Plaintiff's information falling into the hands of an unauthorized person and (2) that person using such information for unlawful purposes to Plaintiff's detriment. As in *Luis,* the indefinite and conjectural nature of Plaintiff's alleged injury precludes this Court from finding Article III standing.

The Court's decision is also in line with three recent district court decisions involving claims of negligence and breach of confidentiality brought in response to a third-party stealing or unlawfully accessing personal or financial information from a financial institution. *See Forbes v. Wells Fargo Bank, N.A.,* 420 F.Supp.2d 1018 (D.Minn.2006); *Guin v. Brazos Higher Educ. Serv. Corp., Inc.,* 2006 WL 288483 (D.Minn. Feb. 7, 2006); *Stollenwerk v. Tri-West Healthcare Alliance,* 2005 WL 2465906 (D.Ariz. Sept. 6, 2005). In all three cases, the district courts rejected a plaintiff's argument that he or she was entitled to reimbursement for credit monitoring services or for the time and money he or she spent monitoring his credit. *Id.* In all three cases, the district courts has held that, because the plaintiff's injuries were solely the result of a perceived risk of future injury, plaintiff had failed to show a present injury or reasonably certain future injury to support damages for any alleged increased risk of harm.[FN5]*Id.*

> FN5. In *Forbes,* the court held that a plaintiff could not recover for loss of time spent monitoring his credit (in order to prevent damage from identity theft), but only lost earning capacity and wages because the plaintiffs' "expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized."420 F.Supp.2d at 1021. Thus, "plaintiffs' injuries [lost time and wages] are solely the result of a perceived risk of future harm ... [and] hav[ing] shown no present injury or reasonably certain future injury to support damages for any alleged increased risk of harm ... plaintiffs have failed to establish the essential element of damages."*Id.*

In this case, the risk is even more hypothetical than those of the plaintiffs in *Forbes, Guin* or *Stollenwerk.*Here Plaintiff failed to allege even that her financial information was stolen or ended up in the possession of someone who might potentially misuse it. (Compl.¶¶ 13-14.) Instead, Plaintiff's Complaint merely alleges that a version of her personal financial information was lost and conceded at oral argument that there is no evidence that the information was stolen. (Transcript of Oral Argument, dated 5/26/06 at 16.) As such, this Court will follow these recent district court decisions in holding

that Plaintiff lacks Constitutional standing to bring this action.

III. *CONCLUSION*

Having found that Plaintiff has failed to prove that she suffered an injury-in-fact, this Court concludes that Plaintiff lacks Constitutional standing to bring a claim against Wachovia.[FN6]This Court's conclusion that Plaintiff lacks Constitutional standing does not require the Court to dismiss the case, however, "for a determination that there is no standing 'does not extinguish a removed state court case.' " *Wheeler v. Travelers Ins. Co.,* 22 F.3d 534, 540 (3d Cir.1994) (quoting *Bradgate Assocs., Inc. v. Fellows, Reed & Assocs., Inc.,* 999 F.2d 745, 751 (3d Cir.1993)). Rather, having found lack of standing-and thus lack of subject matter jurisdiction-this Court must remand this case to state court .[FN7]*See Wheeler,* 22 F.3d at 537 ("If a district court finds that a Plaintiff in a removed case does not have standing, it will remand the case to the state court.") Ordering a remand in this case is not a discretionary decision on the part of this Court but is mandatory under 28 U.S.C. § 1447(c) even if remanding the case to state court may be futile.[FN8]*See Bromwell v. Michigan Mutual Ins. Co.,* 115 F.3d 208, 213 (3d Cir.1997) (citing 28 U.S.C. § 1447(c).) The accompanying Order for Remand will be entered.

FN6. In finding that Plaintiff lacks standing to bring any claim against Wachovia, this Court need not discuss the other arguments raised by Wachovia in its motion to dismiss. These issues are now moot.

FN7. In *Racher v. GMAC Mortgage Corp. of Pa.,* 1996 U.S. Dist. LEXIS 7187, * 11 (D.N.J. May 9, 1996), our sister court in the District of New Jersey, addressing a very similar set of facts and procedural posture, noted that "[i]t is somewhat ironic that defendant, having removed this case in the first instance, now argues that plaintiff lacks standing."

FN8. The Third Circuit held that:

> Upon a determination that a federal court lacks subject matter jurisdiction over a particular action, the plain language of 28 U.S.C. § 1447(c) mandates that the matter be remanded to the state court from which it was removed....Section 1447(c) states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."The language of this section is mandatory-once the federal court determines that it lacks jurisdiction, it must remand the case back to the appropriate state court.
>
> *Bromwell,* 115 F.3d at 213 (citing *International Primate Protection League v. Administrators of Tulane Educ. Fund,* 500 U.S. 72, 87 (1991); *Maine Assoc. of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Srvs.,* 876 F.2d 1051, 1054 (1st Cir.1989) (Breyer, J.))

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Not Reported in F.Supp.2d, 2006 WL 2177036 (D.N.J.)

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Bell v. Acxiom Corp.
E.D.Ark.,2006.
Only the Westlaw citation is currently available.
United States District Court,E.D. Arkansas,Western Division.
April BELL, on behalf of herself and others similarly situated, Plaintiff
v.
ACXIOM CORPORATION, Defendant.
No. 4:06CV00485-WRW.

Oct. 3, 2006.

George L. McWilliams, James Clark Wyly, Sean Fletcher Rommel, Jack Thomas Patterson, II, Patton, Roberts, McWilliams & Capshaw, Little Rock, AR, John G. Emerson, Houston, TX, Scott E. Poynter, Emerson Poynter LLP, Little Rock, AR, for Plaintiff.
Amy Lee Stewart, Rose Law Firm, Little Rock, AR, David Kramer, Douglas J. Clark, Gerard Stegmaier, Wilson, Sonsini, Goodrich & Rosati, Reston, VA, for Defendant.

ORDER

WM. R. WILSON, JR., District Judge.
***1** Defendant Acxiom Corporation ("Acxiom") stores personal, financial, and other company data for its corporate clients. In 2003, Acxiom's computer bank was hacked and client files were compromised. Plaintiff filed this class action seeking damages and injunctive relief alleging that Acxiom's lax security jeopardized her privacy and left her at a risk of receiving junk mail and of becoming a victim of identify theft. Defendant moved for dismissal (Doc. No. 5). Plaintiff has responded (Doc. No. 16). For the reasons stated below, Defendant's Motion to Dismiss is GRANTED.

I. History

Acxiom is a data bank that stores marketing information about its clients' customers. Acxiom takes this information and "match[es] names with lifestyles and demographic information from other sources ... [to] give ... [its] client a clear picture of the people buying its products and services."[FN1]

FN1.*Acxiom Corp. v. Axiom, Inc.*, 27 F.Supp.2d 478, 482 (D.Del .1998).

In order for its clients to reach their information, Acxiom maintains a File Transfer Protocol ("FTP") site. To access this site, the client must have a username and password, assigned by Acxiom. Between November 2001 and the summer of 2003, Scott Levine, an Acxiom client, exploited a hole in Acxiom's security system, accessed the Acxiom FTP server, and downloaded other client's databases. Levine sold some of the information to a marketing company in Georgia, who then used the names and addresses to advertise via direct mail. Levine has since been convicted for these illegal activities.[FN2]

FN2.*United States v. Scott Levine*, 4:04CR00175 (E.D.Ark.2006).

After Levine's conviction, the Plaintiff, April Bell, filed suit against Acxiom on behalf of herself and all others similarly situated. She alleged that Acxiom failed to protect its clients' data. Plaintiff also alleged that she is at a higher risk of receiving junk mail and of being an identity theft victim.

II. Standard of Review

The standard for a motion to dismiss under Fed. R. Civ. P 12(b)(1) and 12(b)(6) is that the court must construe the facts alleged in the complaint in the most favorable light towards the plaintiffs.[FN3]The court should not dismiss the complaint unless it appears that there are no set of facts which would entitle the plaintiffs to relief.[FN4]The court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations."[FN5]Fi-

nally, on a motion to dismiss (as opposed to a motion for summary judgment) the court should assume that general factual allegations embrace the specific facts necessary to support the plaintiff's claim.[FN6]

FN3.*In re Stafmark, Inc. Securities Litigation,* 123 F.Supp.2d 1160, 1162-1163 (E.D.Ark.2000).

FN4.*Id.*

FN5.*Wiles v. Capitol Indemnity Corp.,* 280 F.3d 868, 870 (8th Cir.2002).

FN6.*Lujan v. National Wildlife Federation,* 497 U.S. 871, 889 (1990)(*citing U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669 (1973)).

III. Analysis

In its motion to dismiss, Acxiom contends that Plaintiff does not have standing, and in the alternative, that she has not stated a claim upon which relief can be granted. In order to have standing, a plaintiff must meet three requirements.[FN7]First, a plaintiff must demonstrate that she has suffered an injury in fact which is actual, concrete, and particularized.[FN8] Second, the plaintiff must show a causal connection between the conduct complained of and the injury.[FN9]Third, the plaintiff must establish that the injury will be redressed by a favorable decision.[FN10]The plaintiff has the burden of establishing each of these three requirements.[FN11]

FN7.*Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992).

FN8.*Id. See also, O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); *Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983); *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)(city residents did not have standing to sue USDA over construction of two sewage ponds in the 100 year flood plain, because although there was a possibility that the flood would occur while the residents owned or occupied land in proximity to the ponds, it was a matter of 'sheer speculation' that there would be a flood and that if a flood happened, it would damage the plaintiffs' properties.).

FN9.*Id. See also, Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976).

FN10.*Id.*

FN11.*Shain v. Veneman,* 376 F.3d 815, 817 (8th Cir.2004), *cert denied,*543 U.S. 1090 (2005).

***2** The burden to show standing is not a mere pleading requirement, but "an indispensable part of the plaintiff's case."[FN12]"Each and every element of the standing requirements 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.' " [FN13] Strict compliance with this jurisdictional standing requirement is mandated.[FN14]Assertions of potential future injury do not satisfy the injury-in-fact test.. "A threatened injury must be certainly impending to constitute injury in fact." [FN15]

FN12.*Delorme v. U.S.,* 354 F.3d 810, 815 (8th Cir.2004) (*quoting Lujan,* 504 U.S. at 561).

FN13.*Id.*

FN14.*Johnson v. Missouri,* 142 F.3d 1087, 1088 (8th Cir.1998) (internal citation omitted).

FN15.*Sierra Club v. Robertson,* 28 F.3d 753, 758 (8th Cir.1994)("assertions of potential future injury do not satisfy the 'injury-in-fact' test"); *see also Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990).

In *Lujan,* environmental groups challenged governmental regulations concerning the Endangered Species Act.[FN16]The groups contended that they had traveled abroad to view endangered species in the past and intended to do so in the future, and that the regulations would negatively affect their ability to do so.[FN17]Reasoning that the groups did not show that one or more of their members would be directly affected by the regulations and that intentions to view endangered species at some "indefinite future time" did not demonstrate an imminent injury, the Supreme Court ruled that the groups failed to show an injury in fact, and thus did not have standing to contest the regulations.[FN18]

FN16.*Lujan,* 504 U.S. at 563-64.

FN17.*Id.*

FN18.*Id.* at 556.

In this case, Plaintiff alleged that she suffered an increased risk of both receiving unsolicited mailing advertisements and of identity theft. In response, Defendant argues that both Plaintiff's alleged injuries are speculative-Plaintiff has not plead that she has received a single marketing mailer or had her identity stolen. Moreover, several courts have held that the receipt of unsolicited and unwanted mail does not constitute actual harm.[FN19] Additionally, while there have been several lawsuits alleging an increased risk of identity theft, no court has considered the risk itself to be damage.[FN20]Only where the plaintiff has actually suffered identity theft has the court found that there were damages.FN21

FN19.*Smith v. Chase Manhattan Bank,* 293 A.D.2d 598, 599-600 (N.Y.App.2002)(finding that where bank had sold names, addresses and financial data to marketing company, the receipt of unwanted marketing solicitations was not an actual harm); *Shibley v. Time, Inc.,* 341 N.E.2d 337, 339-40 (Ohio App.1975)(finding that the "right of privacy does not extend to the mailbox" and finding that under Ohio law, sale of 'personality profiles' does not constitute an invasion of privacy); *Lamont v. Commissioner of Motor Vehicles,* 269 F.Supp. 880, 883 (S.D.N.Y.1967)("The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned.").

FN20.*Walters v. DHL Express,* 2006 WL 1314132 at 5 (C.D.Ill. May 12, 2006)(dismissing claim for damages of increased risk of identity theft under 49 U.S.C. § 14706*et seq.* The court reasoned that damages for risk of identity theft would be based on speculation, as opposed to actual loss.); *Guin v. Brazos Higher Education Service Corp., Inc.,* 2006 WL 288483 at 5 (D.Minn. Feb. 7, 2006)(rejecting that an increased risk of identity theft constituted damages where a laptop containing sensitive data was stolen and there was no evidence that any party whose information could have been on the laptop had experienced identity theft as a result.); *Stollenwerk v. Tri-West Healthcare Alliance,* 2005 WL 2465906 at 4 (D.Ariz. Sept. 6, 2005)(dismissing case where hard drives containing personal information were stolen from defendant's facility, reasoning that plaintiffs must, at a minimum, establish "1) significant exposure of sensitive personal information, 2) a significantly increased risk of identity fraud as a result of that exposure and 3) the necessity and effectiveness of credit monitoring in detecting, treating and/or preventing identity fraud.").

FN21.*Remsburg v. Docusearch, Inc.,* 816 A.2d 100, 1007-8 (N.H.2003)(holding an private investigatory firm liable where they had sold information, including the social security number and work address of plaintiff's daughter, to a man who had been stalking and then killed plaintiff's daughter. The court reasoned that a private investigator owed a duty to exercise reasonable care to not subject a third party to an increased risk of criminal misconduct, including stalking and identity theft.).

Furthermore, Plaintiff does not know whether her name and information were contained within the databases stolen by Levine. More than three years after the theft, Plaintiff has not alleged that she has suffered anything greater than an increased risk of identity theft.[FN22]Because Plaintiff has not alleged that she has suffered any concrete damages, she does not have standing under the case-or-controversy requirement.

FN22. 76% of all identity theft is discovered before 24 months after the theft. Only 12 % is discovered more than 48 months after the theft. *Federal Trade Commission Identity Theft Victim Complaint Data 2005,* p. 11, http://www.consumer.gov/idtheft/pdf/clearinghouse_2005.pdf.

Alternatively, Plaintiff argues that she satisfies the 'identifiable trifle' doctrine found in *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP).*[FN23] In this case, the Court held that SCRAP had standing because their use of area parks and nature areas would be affected. The Court held, "[t]he basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."[FN24]However, the 'identifiable trifles' that the Court was referring to were, respectively, a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax.[FN25]In this case, the plaintiff is not trying to protect something as concrete as her political right to be free of fines and taxes-she is asking for protection against a harm that is speculative. Because "assertions of potential future injury do not satisfy the injury-in-fact test,"FN26 Plaintiff's claims must be dismissed for lack of standing.

FN23.412 U.S. 669, 690 n. 14 (1973).

FN24.*Id.*

FN25.*Id.*

FN26.*Sierra Club,* 28 F.3d at 758.

IV. Conclusion

***3** For the above reasons Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED this 3rd day of October, 2006.

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