UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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

MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS AND STRIKE

Plaintiff, Vicki L. Pinero, submits this memorandum in opposition to the motions to dismiss and strike filed by defendants, Jackson Hewitt Tax Service Inc. ("JHTSI"); Jackson Hewitt Inc. ("JHI"); and, Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service ("CCTSI") (jointly referred to as "Defendants").

I. INTRODUCTION

As tax preparers, Defendants claim that they can throw away tax returns and the most confidential of financial records into a dumpster and have no liability for the actual or potential disclosures of the materials. Defendants are wrong.

Based upon preliminary investigation, plaintiff and her counsel believe the tax return documents at issue here were intentionally thrown in a public dumpster, located behind an apartment complex, by one or more of Defendants' employees. It is undisputed that some of the documents were eventually retrieved and reviewed by numerous individuals. It is also undisputed that the Jefferson Parish Sheriff's Office is investigating the improper disposal of the documents. Yet Defendants argue this is no "big deal" and that, despite their promise and legal duty to maintain the utmost sanctity and security of these highly confidential and private documents, plaintiff and the putative class members she seeks to represent have no claim because they have not suffered any "actual damages." As noted, Defendants are wrong.

Contrary to Defendants' argument, the law protects Defendants' customers, all Louisiana citizens who trust the contractual promises of privacy given by Defendants, from the intentional and reckless disclosures that occurred here.

The Court should dismiss Defendants' motions to dismiss and strike for 6 reasons. ***First***, Defendants are improperly attempting to circumvent plaintiff's Motion for Class Certification. As noted in plaintiff's class certification motion, and as this Court has repeatedly ruled, a motion for class certification should *not* be converted into a motion to

dismiss. The Court should first rule on the class certification motion and then rule on the motions to dismiss.

Second, plaintiff alleges a legally cognizable injury.

Third, contrary to Defendants' argument, plaintiff states a claim under the Louisiana Database Security Breach Notification Law ("LA Security Breach Statute"), La. Rev. Stat. § 51:3071, *et seq.*, by alleging sufficient facts for Defendants to understand the grounds of her entitlement to relief.

Fourth, plaintiff complied with Fed. R. Civ. P. 9(b) by pleading her fraud claim with particularity.

Fifth, plaintiff states an invasion of privacy claim and properly pleads the "publication" element of the tort.

Finally, plaintiff states a claim against Defendants for unauthorized disclosure of tax returns under 26 U.S.C. §§ 6103 and 7431. The statutes apply to Defendants and the documents at issue.

II. PROCEDURAL HISTORY

On May 22, 2008, plaintiff filed her original Class Action Complaint. *See* Docket No. 1. On July 15, 2008, plaintiff filed her Amended Class Action Complaint. *See* Docket No. 9. In her amended complaint, plaintiff asserts 9 Counts. *Id.* Specifically, plaintiff alleges: unauthorized disclosure of tax returns per 26 U.S.C. §§ 6103 and 7431 (Count 1); fraud (Count 2); breach of contract (Count 3); negligence (Count 4); invasion of privacy (Count 5); violation of LA Security Breach Statute (Count 6); declaratory judgment (Count 7); injunction (Count 8); and, violation of Louisiana Unfair Trade

Practices and Consumer Protection Law ("LA Unfair Trade Practices Statute"), La. Rev. Stat. § 51:1401, *et seq.* (Count 9). *Id.* All 9 Counts are asserted on behalf of the class, except Count 9 for unfair trade practices which is asserted by plaintiff only. *Id.*

On July 31, 2008, plaintiff filed her Motion for Class Certification. *See* Docket No. 12.

On August 4, 2008, JHTSI and JHI filed their Motion to Dismiss and Alternative Motion to Strike Class Action Allegations. *See* Docket No. 20.

On August 11, 2008, CCTSI filed its Motion to Dismiss, adopting the arguments made by JHTSI and JHI. *See* Docket No. 18.

All pending motions are set for hearing and oral argument on November 12, 2008, at 10:00 A.M. *See* Docket No. 25.

III. LAW AND ARGUMENT

Fed. R. Civ. P. 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" "Rule 8(a)(2) codifies 'notice pleading[.]'" *Jones v. Phillips & Jordan, Inc.*, 2007 WL 3046172, *2 (E.D. La. 2007). Under Rule 8(a)(2), "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (quotation marks and ellipses omitted); *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v.*

Sorema N. A., 534 U.S. 506, 512 (2002); *see also Kyger v. Lowe's Home Centers, Inc.*, 2005 WL 78944, *2 (E.D. La. 2005).

Given this simplified notice pleading standard, motions to dismiss are "viewed with disfavor and [are] rarely granted." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *see also Shields v. Allstate Ins. Co.*, 2008 WL 3884326, *1 (E.D. La. 2008) ("12(b)(6) motions are disfavored means of disposing of a case[.]"); *Wallace v. Chevron Oronite Co. L.L.C.*, 2007 WL 1747004, *1 (E.D. La. 2007) (same). On a motion to dismiss, "[t]he issue is *not* whether [the] plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely *but that is not the test*." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (emphasis added). Instead, "[t]o survive a Rule 12(b)(6) motion to dismiss, the plaintiff must [only] plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). Said another way, "a claim should *not* be dismissed unless the court determines that it is *beyond doubt* that the plaintiff *cannot* prove a *plausible set of facts* that support the claim and would justify relief." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (emphasis added). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does *not* need detailed factual allegations[.]" *Bell Atlantic*, 127 S.Ct. at 1964 (emphasis added).

When deciding a motion to dismiss, "[t]he court 'accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Guidry v. American Public Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007). The court must "resolve all

ambiguities or doubts regarding the sufficiency of the complaint in the plaintiff's favor." *Shields*, 2008 WL 3884326 at *1. "The threshold sufficiency required for a complaint to survive a motion to dismiss is exceedingly low." *Stewart & Stevenson Servs., Inc. v. Starship Cruise Line, Inc.*, 2002 WL 1906922, *1 (E.D. La. 2002); *Levene v. U.S.*, 2002 WL 1468018, *1 (E.D. La. 2002).

A. The Court Should Grant Plaintiff's Motion For Class Certification And Deny Defendants' Motion To Strike Class Allegations

1. Defendants Are Improperly Attempting To Circumvent Plaintiff's Motion For Class Certification

As the Fifth Circuit has ruled, "there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion [for class certification] under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of the plaintiff's claims at this stage of the proceedings. Failure to state a cause of action is entirely distinct from failure to state a class action." *Miller v. Mackey Intern., Inc.*, 452 F.2d 424, 428 (5th Cir. 1971). In light of this long-standing rule, the Court should first rule on plaintiff's pending Motion for Class Certification, without regard to the merits of the case, and then rule on Defendants' pending motions to dismiss. To rule otherwise runs afoul of the prohibition against one-way intervention.[1]

[1] The 1966 amendments to Fed. R. Civ. P. 23 were "designed to prevent 'sideline sitting' and subsequent 'one-way intervention' by the eligible class member." *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 663 (5th Cir. 1976); *see also American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 547 (1974) ("A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility

2. The Commonality Requirement

Defendants argue plaintiff cannot satisfy the commonality requirement of Rule 23(a)(2) because "individual issues relating to nonstandarized presentations to individual customers and their reliance thereon will substantially predominate over common issues." Docket No. 20-2, at p. 14. Defendants are wrong for 3 reasons.

First, as the Fifth Circuit has repeatedly ruled, "[t]he test for commonality is *not* demanding[.]" *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (emphasis added). "All that is required for each class is that there is one common question of law or fact . . . . " *James v. City of Dallas, Tex.*, 254 F.3d 551, 570 (5th Cir. 2001). As noted in plaintiff's class certification motion, the class claims stem from the same alleged conduct, *i.e.*, Defendants' throwing tax return information, tax returns, and other personal and financial information in the trash and the resulting improper disclosure of those materials. The interests and claims of the class members are *identical* and involve the *same* questions of law and fact.

Second, Defendants' conduct was uniform as to all the class members. In exchange for a fee taken pursuant to a contract creating fiduciary obligations, Defendants agreed to prepare and file, in confidence and trust, each class member's tax return. *See* Docket No. 9, at ¶¶ 1-3, 23-27, 55, 60, & 63. An express and implied term of that

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of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called 'one-way intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.").

contract required Defendants to maintain strict confidentiality regarding each class member's financial and private information and handle all related information and documents with due care. *Id.* Indeed, this requirement is set forth in Defendants' own purported "Privacy Policy," which states "[w]e maintain policies and procedures designed to restrict access to nonpublic personal information about you to those persons who need to know that information to fulfill your request for products or services." *Id.* at ¶ 23. This term was a condition precedent to each class member hiring Defendants. *Id.* at ¶¶ 27 & 60. No one would have hired Defendants if he or she had known his or her tax returns would be thrown in a dumpster.

Third, Defendants argue "[p]laintiff's decision to plead [her unfair trade practice claim] as only an individual claim is an acknowledgement that individualized issues . . . will predominate and thus preclude class treatment." Docket No. 20-2, at p. 14, n. 6. Defendants misconstrue the law. Class actions may *not* be brought under the LA Unfair Trade Practices Statute. *See* La. Rev. Stat. § 51:1409(A); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004) ("[T]he Louisiana Unfair Trade Practices Act . . . does not permit individuals to bring class actions."). Plaintiff's decision to pursue her unfair trade practices claim on an individual basis is *not* a sign of any weakness in her class case, but instead, a sign of plaintiff's understanding of the law. If Defendants agreed and the Court permitted, plaintiff would pursue a class unfair trade practice claim. Contrary to Defendants' argument, the commonality requirement is easily met here.

3. The Typicality Requirement

Defendants argue plaintiff cannot satisfy the typicality requirement of Rule 23(a)(3) because "[p]laintiff fails to plead that any other class member has suffered even the speculative and emotional types of damages [p]laintiff allegedly has suffered." Docket No. 20-2, at p. 14. Again, Defendants advance arguments disproven by the pleadings. Plaintiff alleges:

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

Docket No. 9, at ¶ 33. Plaintiff also alleges "[s]he is similarly situated with, and has suffered similar injuries as, the members of the class she seeks to represent." *Id.* at ¶ 44. The typicality requirement is satisfied.

4. The La. Civ. Code Arts. 1953 And 1958 Fraud Claim

Defendants argue "Louisiana cases discussing the substantive law of fraud have consistently held that fraud claims like those here are not amenable to class treatment." Docket No. 20-2, at p. 14. Defendants misinterpret Louisiana law.

Plaintiff does *not* assert "delictual fraud" under La. Civ. Code art. 2315. *See Capdeboscq v. Francis*, 2004 WL 463316, *3 n. 12 (E.D. La. 2004) ("Delictual fraud is also referred to as 'intentional fraudulent misrepresentation' or 'intentional misrepresentation.'"). Instead, pursuant to La. Civ. Code arts. 1953 and 1958, plaintiff

seeks rescission of contract, damages, and attorney's fees for the consent to contract vitiated by Defendants' fraud. *See* Docket No. 9, at ¶¶ 54-58. The difference is important. Plaintiffs alleging delictual fraud must satisfy different elements than plaintiffs asserting claims under La. Civ. Code arts. 1953 and 1958. *See Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1067-68 (5th Cir. 1993) (discussing differences between delictual fraud and La. Civ. Code art. 1958 claims); *Legier and Materne v. Great Plains Software, Inc.*, 2005 WL 1431666, *8 (E.D. La. 2005) (same). Most importantly, plaintiffs asserting delictual fraud are required to show "justifiable reliance," whereas plaintiffs asserting claims under La. Civ. Code arts. 1953 and 1958 are not. *Id.* All of the cases cited by Defendants for the proposition that fraud claims are not amenable to class treatment relate to delictual fraud, *not* claims under La. Civ. Code arts. 1953 and 1958. For this reason alone, the Court should reject Defendants' dismissal request regarding plaintiff's fraud claim under La. Civ. Code arts. 1953 and 1958.

Furthermore, and perhaps most importantly, Defendants cannot deny that they vowed to each class member that they would secure their confidential, financial and private information and documents. Nor can it be credibly disputed that each class member relied upon that belief in hiring Defendants. The fiduciary nature of the contract here, *i.e.*, tax preparation and filing services, requires these findings. Contrary to Defendants' argument, there are no individualized issues regarding "representations" and "reliance."

B. Plaintiff States A Negligence Claim

Defendants argue plaintiff fails to allege a "legally cognizable injury" to support her negligence claim. *See* Docket No. 20-2, at pp. 4-6. Defendants are again incorrect.

In Louisiana, "[u]nder the general rule followed by the great majority of jurisdictions, 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 [generally] not liable for such emotional disturbance." *Moresi v. State Through Dept. of Wildlife and Fisheries*, 567 So.2d 1081, 1095 (La. 1990). However, "*Moresi* created an exception to the general rule that a defendant is generally not liable for negligent acts which cause only mental disturbances." *Touchard v. Slemco Elec. Foundation*, 99-3577 (La. 10/17/00), 769 So.2d 1200, 1205. Under *Moresi*, a plaintiff may recover for mental injuries when the defendant's actions create the "especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious." *Moresi*, 567 So.2d at 1096; *see also Bonnette v. Conoco, Inc.*, 01-2767 (La. 1/28/03), 837 So.2d 1219, 1234; 12 La. Civ. L. Treatise, Tort Law § 28.3.

The limitation set forth in *Moresi* for recovering emotional distress damages, however, does *not* apply to cases involving a breach of contract or special legal duty. *See Moresi*, 567 So.2d at 1095 ("This case does not present a situation in which recovery for mental distress may be based upon a breach of contract or a separate tort such as assault, battery, false imprisonment, trespass to land, nuisance, or invasion of the right to privacy."). Following *Moresi*, the Louisiana Supreme Court held the court "did *not*

intend to modify or interrupt the development of rules or decisions permitting recovery for emotional distress from a tortfeasor who owed the plaintiff a *special, direct duty created by law, contract or special relationship*." *Clomon v. Monroe City School Bd.*, 572 So.2d 571, 575 (La. 1990) (emphasis added); *see also Dufour v. Westlawn Cemeteries, Inc.*, 639 So.2d 843, 847 (La.App. 5th Cir. 1994) ("[T]he court did not intend to modify or interrupt the development of rules which permitted recovery for mental anguish in cases where the tortfeasor owes the plaintiff a special, direct duty."); *Gugliuzza v. K.C.M.C., Inc.*, 606 So.2d 790, 793 (La. 1992) ("*Clomon* permitted the non-traumatically injured plaintiff to recover mental anguish damages from the tortfeasor who owed the plaintiff a 'special, direct duty created by law . . . .'"). In cases involving breach of contract or special legal duty, the courts apply the duty-risk analysis and determine whether the duty owed to the plaintiff included the risk that occurred. *See, e.g.*, *Bordelon v. St. Frances Cabrini Hosp.*, 640 So.2d 476, 478 (La.App. 3d Cir. 1994).

Per *Clomon*, the Defendants owed plaintiff and the class members a "special, direct duty created by law, contract [and] special relationship." *Clomon*, 572 So.2d at 575. Considering this undisputed fact, *Moresi* and its progeny do *not* apply. To determine whether the Defendants are liable for the emotional distress damages alleged, the Court should apply the duty-risk analysis and ask: Do the legal duties imposed upon Defendants to protect their customers' confidential, financial and private information and documents from actual or potential public disclosure include the risk that such disclosure would cause a customer to suffer emotional distress? *See Bordelon*, 640 So.2d at 478.

Until a complete record is developed regarding the scope of Defendants' duties and wrongdoing, the Court should withhold its ruling on emotional distress, *but see Ostrowiecki v. Aggressor Fleet, Ltd.*, 2008 WL 3874609, *23 (E.D. La. 2008) ("The Court further finds that the alleged emotional injuries suffered by [plaintiff] fell within the 'scope of protection' created by [defendant's] duty. The very reason that the law demands that vessel operators and owners exercise reasonable care toward their passengers, particularly those already in fragile emotional condition, is to avoid the kind of severe distress alleged by [plaintiff].") (citation omitted); *see also Knorr v. Dillard's Store Services, Inc.*, 2005 WL 2060905, *3 (E.D. La. 2005) ("The existence of a duty is a question of law, as is the question of whether a specific risk is included within the scope the duty owed. Nevertheless, '[t]here is no 'rule' for determining the scope of the duty.' That inquiry requires consideration of the facts of each case, and summary judgment is therefore proper 'only where no duty exists as a matter of law and no factual or credibility disputes exist.'") (citations omitted).

Even if *Moresi* were applicable, however, the "special circumstances" exception would apply here to permit plaintiff and the class members to recover their foreseeable emotional distress damages. *See Nesom v. Tri Hawk Intern.*, 985 F.2d 208, 210 (5th Cir. 1993) ("With respect to infliction of emotional distress absent physical injury or contact, Louisiana law has been capsulized as follows: the evolving view is toward the recognition of a duty imposed on the defendant to refrain from the negligent infliction of serious emotional distress in special circumstances where the mental anguish is the clearly foreseeable result or when a special relationship exists between the plaintiff and

the defendant."); *see also Raney v. Walter O. Moss Regional Hosp.*, 629 So.2d 485, 491 (La. App. 3d Cir. 1993) (same).

1. The Cases Cited By Defendants Are Inapposite

Defendants rely upon *Melancon v. Louisiana Office of Student Financial Assistance*, 2008 WL 2355753 (E.D. La. 2008), and *Ponder v. Pfizer, Inc.*, 522 F.Supp.2d 793 (M.D. La. 2007). Both cases are distinguishable.

In *Melancon*, the plaintiffs, all participants in financial aid programs offered by the Louisiana Office of Student Financial Assistance ("LOSFA"), brought a negligence class action against a document management company (*i.e.*, Iron Mountain). *See Melancon*, 2008 WL 2355753 at *1. The class action related to an accidental loss of backup electronic media belonging to the LOSFA from a truck operated by the defendant document management company. *Id.* The lost media included personal information on individuals participating in or considered for participating in programs for financial assistance and certain scholarship programs of higher education, including plaintiffs' information. *Id.*

Relying upon *Moresi*, the defendant document management company filed a motion for summary judgment, arguing plaintiffs' negligence lawsuit should be dismissed because plaintiffs could not show they suffered any "actual" injury or harm as a result of the data loss. *Id.* The court granted defendant's summary judgment motion, noting "[p]laintiffs have provided no evidence that their personal information was ever actually 'exposed' to any unauthorized party[.]" *Id.* at *3. The court dismissed plaintiffs' lawsuit, stating "the mere possibility that personal information may be at

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

Melancon is distinguishable for at least 3 reasons. First, the *Melancon* Court implicitly ruled the "special circumstances" exception to the "actual" harm or injury rule did not apply. As discussed above, the exception applies here—we are dealing with contractual obligations that include fiduciary, special responsibilities. Second, the loss in *Melancon* was *accidental*, whereas the improper disclosure here was *intentional*. *See* Docket No. 9, at ¶¶ 3, 28, & 60. Third, unlike *Melancon*, the documents and information at issue here were "exposed to" and actually obtained by several "unauthorized parties," including Wilhemina Walker and individuals at WDSU, Channel 6. *Id.* at ¶¶ 29-30. With all of the media attention, what Jackson Hewitt customer in the New Orleans area does not have some reason to worry that their financial information has been disclosed to third parties?

Defendants' reliance on *Ponder* is also misplaced. In *Ponder*, the plaintiff filed a class action against his former employer (*i.e.*, Pfizer), alleging claims under the LA Security Breach Statute. *See Ponder*, 522 F.Supp.2d at 795-98. The class action related to the accidental exposure of employee information over the internet, which resulted from the installation of unauthorized file-sharing software on a company laptop. *Id.* at 794.

The defendant employer filed a motion to dismiss, arguing plaintiff's lawsuit failed to state a claim under the LA Security Breach Statute. *Id.* at 796-98. The court agreed and dismissed plaintiff's lawsuit. *Id.* at 798. The court found "there are two possible inquiries a court can undertake to determine when the injury accrues. The first

suggests that the injury accrues when the data [is] exposed, and becomes obtained by a third party. The other . . . inquiry . . . adopted by [the court today] finds that the injury accrues when the compromised data [is] actually used by a third party to steal someone's identity." *Id.* at 798 n. 5. Finding that the plaintiff did not allege an injury, the court dismissed the plaintiff's security breach claim. *Id.* at 798.

Ponder is also distinguishable for at least 3 reasons. First, the *Ponder* ruling is limited to what type of "injury" must be alleged to have standing under the LA Security Breach Statute. Second, like *Melancon*, the exposure in *Ponder* was *accidental*, whereas the improper disclosure here was *intentional*. Third, as discussed below, the *Ponder* decision improperly limits the scope of the LA Security Breach Statute, a remedial statute that should be interpreted broadly to protect consumers.

The other cases cited by Defendants are equally distinguishable. *Unlike the facts here*, none of the cases cited by Defendants involved *intentional* violations of contractual or legal duties by the defendant. Instead, all of the cases involved alleged damages resulting from intervening third-party criminal acts,[2] or accidental or unintentional acts.[3]

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[2] *See Kahle v. Litton Loan Servicing, LP*, 486 F.Supp.2d 705 (S.D. Ohio 2007) (no cognizable injury resulting from theft of computer equipment containing personal customer information from mortgage loan service provider); *Guin v. Brazos Higher Educ. Service Corp., Inc.*, 2006 WL 288483 (D. Minn. 2006) (no cognizable injury resulting from computer stolen from home of defendant's employee during a burglary); *Forbes v. Wells Fargo Bank, N.A.*, 420 F.Supp.2d 1018 (D. Minn. 2006) (no cognizable injury resulting from theft of computers containing personal customer information from bank); *Bell v. Acxiom Corp.*, 2006 WL 2850042 (E.D. Ark. 2006) (no cognizable injury resulting from exposure of personal information due to computer hacking); *Stollenwerk v. Tri-West Healthcare Alliance*, 2005 WL 2465906 (D. Ariz. 2005) (no cognizable injury resulting from computer hard drives stolen during a burglary).

[3] *See Key v. DSW, Inc.*, 454 F.Supp.2d 684 (S.D. Ohio 2006) (no cognizable injury resulting from accidental or unintentional exposure of personal information); *Giordano v. Wachovia Securitites, LLC*, 2006 WL 2177036 (D. N.J. 2006) (no cognizable injury resulting from possible accidental or unintentional exposure of personal information).

In summary, the cases cited by Defendants involve different public policy concerns not at issue here. This case concerns whether the law permits Defendants to violate their contractual and fiduciary obligations and legal duties by intentionally disclosing their customers' tax returns and information. The Court should not create any unnecessary or artificial exceptions to prohibit or limit recovery here. *See Clomon*, 572 So.2d at 573-74 ("Although it is true that some exceptions have been made to the general principle that a person is liable for all damage caused by his fault, it is clear that in the absence of a statutory provision declaring an exception, or a compelling need for one to preserve the public interest, no such exception should be recognized by the courts.").

C. Plaintiff States A Claim Under The LA Unfair Trade Practices Statute

Defendants argue plaintiff fails to allege a "legally cognizable injury" under the LA Unfair Trade Practices Statute. *See* Docket No. 20-2, at pp. 6-7. Defendants' interpretation of the statute is misguided.

First, plaintiff alleges she suffered damages. *See* Docket No. 9, at ¶¶ 33 & 86. In light of this allegation, Defendants' motion to dismiss should be denied.

Second, "[t]he [LA Unfair Trade Practices Statute] protects consumers and business competitors." *Schenck v. Living Centers-East, Inc.*, 917 F.Supp. 432, 438 (E.D. La. 1996). Per the statute, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . declared unlawful." La. Rev. Stat. § 51:1405(A). "A trade practice is unfair under the statute only when it offends established public policy and is immoral, unethical, oppressive or unscrupulous." *Schenck*, 917 F.Supp. at 439. "A business practice is 'deceptive' for purposes of [the

statute] when it amounts to fraud, deceit or misrepresentation." *Surgical Care Center of Hammond, L.C. v. Hospital Service Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 843 (5th Cir. 2002). "[The statute] does *not* require an *intent* to obtain an advantage or to cause a loss[.]" *Industrias Magromer Cueros y Pieles S.A. v. Louisiana Bayou Furs Inc.*, 293 F.3d 912, 922 (5th Cir. 2002) (emphasis added). "Louisiana has left the determination of what is an 'unfair [or deceptive] trade practice' largely to the courts to decide on a case-by-case basis." *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993); *see also Mayer v. Lamarque Ford, Inc.*, 2001 WL 175232, *3 (E.D. La. 2001) ("The statutory language delineating what is unfair or deceptive is very broad, and, as a result, Louisiana courts determine what constitutes a violation on a case-by-case basis.").

"The [LA Unfair Trade Practices Statute] provides a private cause of action for any person who suffers damage as a result of such unfair [or deceptive] methods or practices." *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1391 (5th Cir. 1991). The statute provides, "[a]ny person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice . . . may bring an action individually but not in a representative capacity to recover *actual damages*." La. Rev. Stat. § 51:1409(A) (emphasis added). "[R]ecovery of general damages is available under the Unfair Trade Practices and Consumer Protection Law, as La. R.S. 51:1409(A) permits the recovery of 'actual damages.'" *Slayton v. Davis*, 2004-1652 (La.App. 3d Cir. 2005), 901 So.2d 1246, 1255. "[A]ctual damages . . . include[s] damages for mental anguish and humiliation." *Laurents v. Louisiana Mobile*

Homes, Inc., 689 So.2d 536, 542 (La.App. 3d Cir. 1997); *see also Vercher v. Ford Motor Co.*, 527 So.2d 995, 1000 (La.App. 3d Cir. 1988) ("The Unfair Trade Law provides for the recovery of actual damages, which . . . includes mental anguish and humiliation."); *Bank of New Orleans and Trust Co. v. Phillips*, 415 So.2d 973, 976 (La.App. 4th Cir. 1982).

In an attempt to induce plaintiff to use Jackson Hewitt, Defendants fraudulently represented to her that they would maintain the confidentiality of her tax returns and financial and private information. *See* Docket No. 9, at ¶ 84. Further, Defendants fraudulently advertised and represented that they would comply with their "Privacy Policy." *Id.* Defendants' misrepresentations were "unfair" and "deceptive." Based upon Defendants' misrepresentations, plaintiff paid Defendants to prepare and file her state and federal tax returns. *Id.* at ¶¶ 25-27. By paying Defendants, plaintiff, a consumer, suffered an "ascertainable loss of money." Per the LA Unfair Trade Practices Statute, plaintiff is entitled to recover the damages she has sustained as a result of Defendants' unfair trade practices, including damages for mental anguish and humiliation. Contrary to Defendants' argument, plaintiff has stated a claim under the LA Unfair Trade Practices Statute.

D. Plaintiff States A Claim Under The LA Security Breach Statute

Defendants also argue plaintiff fails to allege a "legally cognizable injury" under the LA Security Breach Statute. *See* Docket No. 20-2, at pp. 6-7. Defendants are again wrong.

There are 2 related issues regarding plaintiff's injuries under this law. The first issue is whether plaintiff has asserted an "injury" sufficient to have standing under the LA Security Breach Statute. The second issue is whether plaintiff has asserted the elements of a security breach claim.

1. Standing

As to standing, Defendants rely upon *Ponder*, where the Middle District of Louisiana dismissed the plaintiff's security breach claim after finding "the injury accrues [under the statute] when the compromised data [is] actually used by a third party to steal someone's identity." *Ponder*, 522 F.Supp.2d at 798 n. 5. The *Ponder* decision should *not* be followed for at least 5 reasons. First, the Court is not bound by the Middle District's *Ponder* decision.

Second, the *Ponder* decision fails to recognize that the LA Security Breach Statute is a remedial statute, which *must* be interpreted broadly to protect consumer rights. *See, e.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1351 (5th Cir. 1980) ("[R]emedial legislation . . . must be construed broadly and liberally so as to effectuate fully the legislature's remedial purpose.").

Third, in reaching its decision, the *Ponder* Court improperly relied on cases interpreting the common law. *See Ponder*, 522 F.Supp.2d at 797-98.

Fourth, the facts in *Ponder* are distinguishable. In *Ponder*, the defendant sent a warning letter to each of the individuals affected by the security breach within 9 weeks after the breach. *Id.* at 794-96. Defendants here have *not* sent any warning letter, or otherwise advised any of the consumers of the security breach. The defendant in *Ponder*

undertook steps to protect the individuals affected by the security breach.[4] Defendants here have done nothing to ensure the consumers affected by the breach are protected.

Finally, *and most importantly*, the *Ponder* Court's interpretation of the LA Security Breach Statute does *not* further the purpose of the statute, which is to ensure that consumers are notified of security breaches expeditiously, so that they can minimize their damage. *See* La. Rev. Stat. § 51:3072(5) ("Victims of identity theft must act quickly to minimize the damage; therefore, expeditious notification of possible misuse of a person's personal information is imperative."). Per the *Ponder* ruling, a consumer cannot assert a claim under § 3075, *until the consumer actually incurs out-of-pocket expenses because of the security breach*. *See Ponder*, 522 F.Supp.2d at 798 n. 5. If a consumer cannot assert a claim until she has suffered out-of-pocket expenses, how can the purpose of the statute—"to minimize the damage"—be furthered? It cannot—the damage is already done. The Court should reject an interpretation of the LA Security Breach Statute that undermines the purpose of the statute. *See* La. Civ. Code art. 10 ("When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."); *Savoie v. Rubin*, 01-3275 (La. 6/21/02), 820 So.2d 486, 488 ("The function of the court is to interpret the laws so as to give them the meaning which the lawmakers obviously intended them to have and not to construe them so as to give them absurd or ridiculous meanings.").

[4] The defendant in *Ponder*: (1) provided the affected individuals with one year of free credit monitoring; (2) purchased a credit monitoring product designed to identify and notify the affected individuals of key changes in the 3 national credit reports that may indicate fraudulent activity; (3) purchased $25,000 of identity theft insurance; (4) notified the attorney general office in each state where an affected individual resided about the incident; and, (5) contacted the 3 major U.S. credit agencies to inform them of the incident. *Id.* at 795.

The Court should adopt the alternative approach mentioned in *Ponder*, *i.e.*, that "the injury accrues when the data [is] exposed . . . and becomes obtained by a third party." *Ponder*, 522 F.Supp.2d at 798 n. 5. In addition to proving "exposure" and that the information was "obtained by a third party," plaintiffs asserting claims under the statute would also be required to prove that notice of the breach was not "timely made" per § 3075. For those businesses providing prompt notice, there will be no liability. By interpreting the statute in this manner, the Court would encourage businesses to notify consumers of security breaches soon after they occur and *before* a consumer suffers out-of-pocket expenses, while at the same time limit monetary recovery to individuals truly deserving.

2. The Elements

The LA Security Breach Statute provides that "[a]ny person that conducts business in the state . . . *shall*, following discovery of a breach in the security of the system containing such data, notify any resident of the state whose personal information was, or is reasonably believed to have been, acquired by an unauthorized person." La. Rev. Stat. § 51:3074(A) (emphasis added). "The notification required [by the statute] [must] be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, . . . or any measures necessary to determine the scope of the breach, prevent further disclosures, and restore the reasonable integrity of the data system." La. Rev. Stat. § 51:3074(C). The statute permits notification to be made by several methods, including by letter or electronic means. *See* La. Rev. Stat. § 51:3074(E).

A business is not required to provide notice "if after a reasonable investigation the . . . business determines that there is no reasonable likelihood of harm to [its affected] customers." La. Rev. Stat. § 51:3074(G). Pursuant to a rule promulgated by the Louisiana Attorney General, if notice is required to be provided per § 3074, then the business must also provide notice of the security breach to the Attorney General's Office. *See* 33:3 La. Reg. 466, § 701. The LA Security Breach Statute states that "[a] civil action may be instituted to recover *actual damages* resulting from the failure to disclose in a timely manner to a person that there has been a breach of the security system resulting in the disclosure of a person's personal information." La. Rev. Stat. § 51:3075 (emphasis added).

i. "Actual Damages"

Like the LA Security Breach Statute, many federal consumer protection statutes permit recovery of "actual damages," including the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692k; Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681(n) and (o); and Fair Housing Act ("FHA"), 42 U.S.C. § 3613(c). Under these laws, "actual damages" has been interpreted as including emotional distress and mental anguish. *See, e.g., Tallon v. Lloyd & McDaniel*, 497 F.Supp.2d 847, 850 (W.D. Ky. 2007) ("'Actual damages' [under the FDCPA] can include damages for emotional distress as well as out-of-pocket expenses."); *Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) ("Actual damages [under the FCRA] include humiliation or mental distress, even if the consumer has suffered no out-of-pocket losses."); *Banai v. Secretary, U.S. Dept. of Housing and Urban Development on Behalf of Times*, 102 F.3d 1203,

1207 (11th Cir. 1997) ("Victims of discrimination in violation of the FHA are entitled to 'actual damages.' Although the statute provides little guidance beyond this statement, anger, embarrassment, and emotional distress are clearly compensable injuries under this standard.").

Similarly, many state consumer protection statutes permit recovery of "actual damages," including (as noted above) the LA Unfair Trade Practices Statute, La. Rev. Stat. § 51:1409(A). When ruling "actual damages" included emotional distress and mental anguish, the *Bank of New Orleans and Trust* court reasoned as follows:

> Defendant argues that "actual" damages does not include humiliation and mental anguish. We do not agree. Humiliation and mental anguish are "real," "genuine," "existing in fact," a part of "reality" and "exist in the present," as opposed to the future. Accordingly, we find that the trial judge acted properly in awarding damages to the plaintiffs.

Bank of New Orleans and Trust, 415 So.2d at 976.

The Court should interpret the term "actual damages" under the LA Security Breach Statute the same as that term is interpreted under federal and state consumer protection statutes. In other words, the term "actual damages" under the LA Security Breach Statute includes recovery for emotional distress and mental anguish. Plaintiff has asserted "actual damages" under the statute, including emotional distress and mental anguish damages. *See* Docket No. 9, at ¶ 33, 44, & 77. Plaintiff has stated a claim under the statute.

ii. Notice Of The Security Breach

Defendants argue plaintiff has not alleged a "breach of the security system." Docket No. 20-2, at p. 8. Defendants also argue plaintiff has not alleged "a delay in

notification [of the alleged security breach.]" Docket No. 20-2, at pp. 8-9. Defendants are wrong on both points.

First, the statute provides the following definition of "breach of the security system":

> "Breach of the security of system" means the compromise of the security, confidentiality, or integrity of computerized data that results in, or there is a reasonable basis to conclude has resulted in, the unauthorized acquisition of and access to personal information maintained by [a business]. *Good faith acquisition of personal information by an employee . . . for the purposes of the [business] is not a breach of the security of the system, provided that the personal information is not used for, or is subject to, unauthorized disclosure*.

La. Rev. Stat. § 51:3073(2) (emphasis added).

As noted, upon information and belief, one or more of Defendants' employees was responsible for the improper disclosures that occurred. At this point, the details are still unknown, but it is undisputed that the information contained on many of the recovered documents was stored in Defendants' system as computerized data. Discovery is necessary to "flesh out" the details of how the improper disclosures occurred and the extent of the disclosures.

Second, it is also undisputed that Defendants *have not provided any notice to any of the individuals affected by the security breach*. In light of this undisputed fact, Defendants' argument that plaintiff's security breach claim should be dismissed for failure to allege a "delay in notification" is disingenuous.

Third, detailed "fact pleading" is unnecessary. Defendants understand the nature of plaintiff's security breach claim. To the extent the Court finds an amendment

appropriate, however, plaintiff will amend her complaint to allege additional facts to support her claim.

E. Plaintiff States Claims For La. Civ. Code Arts. 1953 And 1958 Fraud And Breach Of Contract

Defendants argue plaintiff fails to state claims for fraud and breach of contract because she fails to allege "actual damages." *See* Docket No. 20-2, at pp. 7-8. Defendants are again wrong. Contrary to Defendants' argument, Defendants cannot induce their customers with false promises of security and then keep the fees they received based upon those false promises when their treachery is uncovered.

As noted, plaintiff does not assert "delictual fraud" under La. Civ. Code art. 2315. Instead, pursuant to La. Civ. Code arts. 1953 and 1958, plaintiff seeks rescission of contract, damages, and attorney's fees for the consent to contract vitiated by Defendants' fraud. *See* Docket No. 9, at ¶¶ 54-58. Alternatively, plaintiff asserts breach of contract. *Id.* at ¶¶ 59-63.

1. La. Civ. Code Arts. 1953 And 1958 Fraud Claim

As discussed in detail in plaintiff's class certification motion, "[fraud], when established, destroys the contract *ab initio*[.]" *Yaeger Milling Co. v. Lawler*, 2 So. 398, 399 (La. 1887). The parties are to be restored to their respective positions as if the contract had never been entered. *Id.*; *see also Simmons v. Pure Oil Co.*, 129 So.2d 786, 790 (La. 1961). In addition to rescission, the plaintiff may seek damages and attorneys' fees against the offending party. *See* La. Civ. Code art. 1958 ("The party against whom rescission is granted because of fraud is liable for damages and attorney fees."). As to

"damages," the plaintiff need only show the "strong possibility" of damages, or damages are "probable." *See, e.g.*, *Golden Rule Ins. Co. v. Strauss*, 1997 WL 119854, *3 (5th Cir. 1997) ("actual loss or damage or a strong possibility thereof"); *Newport*, 6 F.3d at 1067 ("actual or probable damages"); *Blanchard & Co., Inc. v. Contursi*, 1999 WL 955363, *1 (E.D. La. 1999) (same). Damages for "emotional distress" or "mental anguish" may be awarded per Article 1958. *See*, *e.g.*, *Montet v. Lyles*, 638 So.2d 727 (La.App. 1st Cir. 1994).

As required by Fed. R. Civ. P. 9(b), plaintiff has alleged her La. Civ. Code arts. 1953 and 1958 fraud claim with detailed particularity. Plaintiff alleges Defendants induced her and the class members to enter into a contract for tax preparation services based upon false representations. Despite advertised and contractually summarized promises, Defendants failed to follow their practices and policies regarding privacy and maintain the confidentiality of sensitive information and documents. *See* Docket No. 9, at ¶ 55. Considering Defendants' fraudulent inducement, plaintiff and the class members are entitled to return of all monies paid to Defendants, plus damages to be proven at trial and attorneys' fees. *Id.* at ¶ 58. Plaintiff's complaint alleges sufficient facts for Defendants to identify the "who, what, when, where, and how" of the alleged fraud. *See U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). Moreover, considering the facts relating to the fraud are peculiarly within Defendants' knowledge, the pleading requirements of Rule 9(b) are relaxed here. *Id.*

2. Breach Of Contract Claim

Again as discussed in detail in plaintiff's class certification motion, "[a]n obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance." La. Civ. Code art. 1994. "Damages are measured by the *loss sustained* by the obligee *and* the *profit of which he has been deprived*." La. Civ. Code art. 1995 (emphasis added); *Vaulting & Cash Services v. Diebold*, 1999 WL 1068257, *3 (5th Cir. 1999) (noting two-part analysis). "[A loss] may be anything given by the obligee in anticipatory reciprocation for the obligor's failed performance." 6 La. Civ. L. Treatise, Law of Obligations § 4.4.

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

F. Plaintiff States an Invasion of Privacy Claim

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

Defendants do *not* dispute, nor could they dispute, that (a) the tax return documents are private; (b) the disclosure of these documents is highly offensive to a reasonable person; and, (c) the disclosure of these documents is not of legitimate public concern. *See* Restatement (Second) of Torts, § 652D, cmt. b (1977) ("[I]f the record is one *not* open to public inspection, *as in the case of income tax returns*, it is *not* public, and *there is an invasion of privacy when it is made so*.") (emphasis added). Instead, Defendants argue that plaintiff fails to state an invasion of privacy claim because she does not allege the documents were "publicized" or given any "publicity." Docket No. 20-2, at p. 10. Again, defendants misstate applicable law.

First, at this stage of the proceedings, plaintiff has met her burden by pleading Defendants invaded her privacy and the privacy of the class members through an unreasonable public disclosure of private facts. *See* Docket No. 9, at ¶ 72.

Second, it is undisputed that the related documents were made "public" and received a great deal of "publicity." The documents were reviewed by many individuals,

including but obviously not limited to: Wilhemina Walker; Richard Angelico; employees of WDSU, Channel 6; Christy Green (FBI Cyber Crimes Supervisor); and, members of the Jefferson Parish Sheriff's Office. Plaintiff has stated an invasion of privacy claim.

G. Plaintiff States A Claim Under 26 U.S.C. §§ 6103 And 7431

Defendants contend plaintiff "fails to state a cause of action under 26 U.S.C. §§ 6103 and 7431 . . . because neither Jackson Hewitt nor the information allegedly disclosed falls within the scope of these statutory provisions." Docket No. 20-2, at p. 11. Defendants argue "these statutory provisions plainly state . . . [that] they only apply to the IRS, other government employees, or certain narrow categories of recipients of IRS data." *Id.* This is what the statutes actually say:

> Section 6103 provides:
>
> (a) General rule.—Returns and return information shall be confidential, and except as authorized by this title—
>
> . . . .
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under . . . *subsection (n) [quoted below]* . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. § 6103(a)(3) (emphasis added). Subsection (n) provides:

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

> *testing, and procurement of equipment, and the providing of other services, for purposes of tax administration*.

26 U.S.C. § 6103(n) (emphasis added).

Section 7431 provides:

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

26 U.S.C. § 7431(a)(2).

Contrary to Defendants' argument, these statutes broadly protect consumers from unlawful disclosures of tax returns and tax return information by discrete persons, including persons responsible for "processing" or "transmi[tting]" tax returns. 26 U.S.C. § 6103(n). As tax return preparers and IRS approved e-filers, Defendants are covered entities. Further, and again contrary to Defendants' position, the documents and information disclosed here are covered by the statutes. *See* 26 U.S.C. § 6103(b)(1) (defining "return");[5] 26 U.S.C. § 6103(b)(2)(A) (defining "return information").[6]

Defendants maintain "[p]laintiff seeks to transform § 7431 into a private cause of action against any person who discloses tax return information." Docket No. 20-2, at p. 12. This is false. Plaintiff agrees that the private cause of action set forth in § 7431 cannot be

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

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

brought against any entity. The claim must be brought against a covered entity, such as Defendants; a private cause of action cannot be brought against a non-covered entity, such as an employer. Defendants are ignoring the unambiguous words of the statutes and using "scare" tactics of mass lawsuits for innocent disclosures by non-tax preparers.

To the extent the Court agrees with Defendants, however, and finds that §§ 6103 and 7431 only apply to "recipients of IRS data," plaintiff still states a claim for unauthorized disclosure of tax returns. Since it appears that entire files were discarded, many of the disclosed documents contain information *received from the IRS*. Upon e-filing the tax returns, the IRS notifies the Defendants of receipt of the tax return, which information was marked on many of the improperly disclosed documents.

IV. CONCLUSION

The Court should deny Defendants' motions to dismiss and strike. Plaintiff has plead the necessary facts to support her claims.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record ✓ by ECF; __ by email; __ by hand; __ by fax; __ by FedEx; __ by placing a copy of same in the U.S. Mail, postage prepaid this 21st day of October 2008.

/s/ Bryan C. Shartle
Bryan C. Shartle

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