IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated, Plaintiff, v. JACKSON HEWITT TAX SERVICE INC.; JACKSON HEWITT INC.; and, CRESCENT CITY TAX SERVICE, INC. d/b/a JACKSON HEWITT TAX SERVICE, Defendants.	**CASE NO.:** 08-3535 **SECTION R** **JUDGE** **SARAH VANCE** **MAGISTRATE JUDGE** **DANIEL E. KNOWLES**

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF VICKI PINERO'S MOTION FOR CLASS CERTIFICATION

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Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively "Jackson Hewitt") hereby submit this memorandum in opposition to the Motion for Class Certification ("Motion"), submitted by Plaintiff Vicki Pinero ("Plaintiff").

I. INTRODUCTION

Plaintiff's Motion for Class Certification and the Complaint[1] on which that Motion exclusively relies focus on media and internet reports on identity theft. *See, e.g.,* Complaint ¶¶ 11-20, Ex. B-N. This focus, however, cannot hide the fact that Plaintiff does not allege that she or any member of the putative class suffered any identity theft as a result of the allegedly improper disposal of documents, nor that Defendants perpetrated any identity theft.

To the contrary, the allegations of her Complaint (that she filed her tax returns with independent franchisee Crescent City Tax Service ("CCTS"), and that later her tax returns were discovered in a public dumpster, accompanied by confidential and proprietary material belonging to CCTS) point to CCTS *being the victim of a theft* of its confidential and proprietary material. *See* Complaint ¶ 9 (indicating that proprietary materials were also found among the disposed of materials); Complaint Ex. P (CCTS's statement clarifying that it was the victim of a theft). As set forth in Jackson Hewitt's pending Motion to Dismiss, Plaintiff's claims of emotional distress caused by the allegedly increased risk of identity theft do not constitute a legally cognizable injury. Indeed, courts in Louisiana and across the country have rejected similar attempts to manufacture a class action suit based on speculation of an increased risk or fear of identity theft. *See, e.g., Melancon v. Louisiana Office of Student Financial Assistance*, No. 07-7712, 07-9158, 2008 WL 2355753 (E.D. La. June 5, 2008); *Ponder v. Pfizer*, 522 F. Supp. 2d 793 (M.D. La. 2007); *Key v. DSW,* 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006).

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[1] Plaintiff filed her Amended Complaint on July 15, 2008. All references to the "Complaint" herein refer to that Amended Complaint.

Now, notwithstanding that pending Motion to Dismiss, the lack of any evidentiary record, and her failure to carry her burden as the moving party, Plaintiff has moved to certify a class vaguely and broadly consisting of "all Louisiana residents who received tax preparation services through Defendants and whose tax return information, tax return, or other personal or financial information was disclosed by Defendants, without consent, during the one year period prior to the filing of the complaint." Plaintiffs cannot meet her burden and her motion should be denied.

As a threshold matter, Plaintiff's motion for class certification is premature. First, and as set forth above, none of her claims, including those she has cherry-picked for purposes of class certification, can survive Jackson Hewitt's pending Motion to Dismiss. Indeed, given the absence of a legally cognizable injury, Plaintiff lacks standing to bring this motion for class certification. Second, she presents no evidence to support her Motion, but instead asks this Court to certify a class based on nothing but the bald allegations of the Complaint and a hodge-podge of printouts from the Internet. These unsupported allegations cannot be credited, and indeed it would constitute error to do so. *See, e.g., Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (cited by Plaintiff in her Memorandum in Support of Class Certification ("Pl. Memo.") at 11).

In addition, even at this stage, it is plain that Plaintiff cannot meet her burden of establishing the prerequisites to class certification under Rule 23. First, as set forth below, Plaintiff is subject to unique defenses. As a result, she is not suited to serve as a class representative, and her claims are not typical of the purported class.

Second, Plaintiff's Complaint and the applicable law make clear that common issues of fact and law will not predominate among Plaintiff and the putative class members. For example,

Plaintiff alleges that particular representations, both oral and written, were made to her by a CCTS employee, and that she relied on those representations as a condition precedent to agreeing to file her taxes through CCTS. Complaint ¶¶ 25-27. Such allegations of highly individualized misrepresentations, and reliance thereon, are the types of claims that typically defy class treatment.

It is evident that Plaintiff cannot carry her burden to show that class certification is appropriate. The Court should deny the Motion as premature, rule upon the issues presented by Defendant's Motions to Dismiss, and then allow for discovery focused on class issues, to the extent any claims survive, before addressing any motion for class certification.

II. BACKGROUND

In her Complaint, Plaintiff alleges that she visited a CCTS office, which is an independent franchisee of Jackson Hewitt, to have her 2005 tax returns prepared. Complaint ¶ 21. She alleges various representations were made to her at that meeting, including statements regarding the confidentiality and privacy of her tax returns. *Id.* ¶¶ 25, 26. She further alleges that each of these representations was a condition precedent to filing her tax returns with CCTS. *Id.* ¶ 27.

Plaintiff's alleges that "Defendants' practice is to discard the tax returns of their customers in public dumpsters in violation of numerous federal and state laws, regulations, and rules." Complaint ¶ 40. Plaintiff alleges that, as a result of an alleged disposal of a box of documents in a dumpster, she suffers from "fear; panic; anxiety; sleeplessness; nightmares; embarrassment; hassle; anger; loss time; loss of consortium; and other emotional and physical distress, all in an amount to be determined at trial." *Id.* at ¶ 33. Plaintiff's Complaint

conclusorily alleges that other members of the putative class were similarly "injured." *Id.* at ¶ 44.

Plaintiff seeks special damages related to "credit card 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." Complaint ¶ 33. However, Plaintiff does not allege that she (nor any putative class member, for that matter) has actually incurred any such expenses. Nor does Plaintiff allege that she, or any other putative class member, has suffered any type of identity theft as a result of the alleged disposal of documents. Indeed, Plaintiff concedes that her materials were returned to her prior to her filing this putative class action. *Id.* at ¶ 30.

Plaintiff moved to certify this class on July 22, 2008, only 14 days after filing their Amended Complaint, prior to the time for defendant's to answer had expired, and prior to any discovery taking place in this matter.

Plaintiff seeks to certify a class only with respect to a subset of her claims, including that Defendants: (1) committed negligence *per se* through the violation of various federal and state laws and regulations (none of which independently provide a cause of action); (2) intentionally breached contracts with Plaintiff and putative class members by failing to comply with their represented privacy policy and disclosing the class members' tax returns and other confidential, private and financial information; (3) fraudulently and deceptively represented to Plaintiff that Defendants adhered to their privacy policy; (4) committed an invasion of privacy by intentionally "publicizing" Plaintiff's private information; and (5) violated 26 U.S.C. § 6103 by making an unauthorized disclosure of tax returns.[2]

[2] While Plaintiff also refers to her requests for an injunction and declaratory judgment as causes of action, they appear to be merely requests for relief and not independent causes of action.

The class Plaintiff seeks to certify a class includes:

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

On August 4, 2008, Jackson Hewitt filed a Motion to Dismiss Plaintiff's Complaint in its entirety. Co-defendant CCTS filed its Motion to Dismiss on August 11, 2008.

As set forth below, Plaintiff's Motion for Class Certification should be denied in its entirety.

III. ARGUMENT

A. The Standard for Class Certification.

As the party seeking to certify a class under Rule 23(b)(3), Plaintiff bears the burden of establishing the four prerequisites enumerated in Rule 23: (1) that the class is so large that joinder of all members is impracticable (i.e., numerosity); (2) that there are one or more questions of law or fact common to the class (i.e., commonality); (3) that the named parties' claims are typical of the class (i.e., typicality); and (4) that the class representatives will fairly and adequately protect the interests of other members of the class (i.e., adequacy of representation). Fed. R. Civ. P. 23(a). In addition, Plaintiff must establish under Rule 23(b) that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. Rule 23(b)(3).

Under Rule 23(b)(3), the matters pertinent to the findings include:

"(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already

begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23 (b)(3).

When Rule 23 was amended in 2003, changing the phrase "as soon as practicable after the commencement of an action" to "at an early practicable time," the advisory committee noted that discovery will often be required prior to a court assessing the propriety of class certification. *See,* Fed. R. Civ. P. 23, Advisory Committee Notes for 2003 Amendments: Subdivision (c).

> Time may be needed to gather information necessary to make the certification decision . . . discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the class certification decision on an informed basis.

Indeed, the Fifth Circuit has made it abundantly clear that a court must predicate certification on evidentiary findings, and not merely on allegations. *See, e.g., Unger, supra.*

B. Plaintiff's Motion for Class Certification is Premature.

1. Jackson Hewitt's Motion to Dismiss Must Be Resolved Prior to Considering Class Certification.

Before addressing class certification, Defendants' pending motions to dismiss Plaintiff's complaint pursuant to Rule 12(b) must be resolved. *See Floyd v. Bowen,* 833 F.2d 529, 534 (5th Cir. 1987); *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.,* 215 F.R.D. 511, 515 (W.D. La. 2003) (judicial efficiency considerations warrant resolution of threshold issues concerning standing and the existence of a right of action before deciding class certification issues). As a court in this District recently stated, "it is in the interests of justice and judicial economy" to stay all class certification issues **until it is determined whether the plaintiff has survived a motion**

to dismiss. *Ladd v. Equicredit Corp. of America.*, No. 00-2688, 2001 U.S. Dist. LEXIS 2256, *3 (E.D. La. Feb. 21, 2001).

The judicial economy concerns are particularly acute here because of the nature of the Rule 12 motion that is pending. *See Rivera v. Wyeth-Ayerst Laboratories.*, 283 F.3d 315, 319 (5th Cir. 2002) (holding that "standing is an inherent prerequisite to the class certification inquiry") (internal citation omitted). Because of Plaintiff's failure to plead any "actual damages", she lacks constitutional standing to bring her claims in this Court. *See, e.g., Key v. DSW,* 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006) (holding that a claim based on an increased risk of identity theft is not "injury-in-fact" sufficient to establish Article III standing.); *Melancon, supra; Ponder, supra.* Both in Louisiana, and throughout the nation, courts have held that an increased risk or fear of identity theft is simply not a legally cognizable claim for damages. *See, e.g., Kahle v. Litton Loan Servicing LP*, 486 F. Supp. 2d 705 (S.D. Ohio 2007); *Giordano v. Wachovia Sec., LLC*, No. 06-476, 2006 WL 2177036 (D. N.J. July 31, 2006); *Guin v. Brazos Higher Educ. Serv. Corp.*, No. 05-668, 2006 WL 288483 (D. Minn. Feb. 7, 2006).

Accordingly, any ruling on the Motion for Class Certification should be deferred until after the Court has been able to consider and rule upon the Rule 12(b)(6) Motions to Dismiss.

2. The Unsupported Allegations of the Complaint are Not Sufficient for Plaintiff to Sustain her Burden under Rule 23.

Contrary to Plaintiff's assertions, the mere allegations in her Complaint are insufficient to meet her burden under Rule 23. *See, e.g., Gen.l Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (decertifying class after finding it was an error for the district court to presume, based on plaintiff's complaint, that respondent's claims was typical of the class); *Unger v. Amedisys Inc.,* 401 F.3d at 325 (holding that "[c]ourts cannot make an informed decision [on class certification] based on bare allegations, one-sided affidavits, and unexplained Internet printouts",

and reversing a district court's certification of a class action.); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."); *See also, Bell v. Ascendant Solutions, Inc.*, No. 04-11078, 2005 U.S. App. LEXIS 18030 (5th Cir. Aug. 23, 2005). A class action may only be certified if the trial court is satisfied, after a "rigorous analysis" that the Rule 23 prerequisites are satisfied. *See, e.g., Kelley v. Galveston Autoplex*, 196 F.R.D. 471 (S.D. Tex. 2000).[3]

Here, Plaintiff cannot meet the requirements of Rule 23(a). With respect to commonality, Plaintiff presents this Court with no evidence, even regarding the issues of fact and law relating to her own transaction. She merely states, in conclusory fashion, that "[t]he interests and claims of the class members are identical and involve the same questions of law and fact."(Pl. Memo at 18). As one court has observed:

> Plaintiff has merely restated the three causes of action as the common issues. If Courts were to address the commonality issue at this level of generality, the requirement would be met every time. Instead, a Court must look at more particular factual and legal issues.

Kelley v. Galveston Autoplex, 196 F.R.D. 471, 475 (S.D. Tex. 2000).

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[3] The cases Plaintiff cites do not support her argument that this Court may grant class certification based only on the allegations of the Complaint. *See, e.g.,* Pl. Memo at 10-11. For example, Plaintiff relies on cases where the court denied class certification on the basis of discovery and evidence (*see, e.g., In re American Commercial Lines*, 2002 WL 1066743 (E.D. La. 2002) (holding, following depositions and full evidentiary hearing, that class certification was **not** appropriate) or reversed a lower court for granting a certification based on inadequate evidence, (*see, e.g., Unger v. Amedisys Inc.*, 401 F.3d at 325). Similarly, Plaintiff misstates the principle that courts need not conduct trials *on the merits* in order to determine class certification to mean that courts need not evaluate any evidence whatsoever, even as to certification issues. *See, e.g., Miller v. Mackey Intern., Inc.*, 452 F.2d 424 (5th Cir. 1971) (reversing and remanding where the underlying court had already rejected a Rule 12(b) motion, and allowed discovery, but improperly based its denial of class certification on the merits, rather than Rule 23 factors).

Moreover, it is axiomatic that "significant questions, not only of damages but of liability and defense of liability . . . affecting the individuals in different ways . . . are "ordinarily not appropriate" for class treatment." *Amchem Products Inc., v. Windsor*, 52 U.S. 591, 625 (1997) (internal citation omitted). Here, Plaintiff's own complaint highlights the highly individualized issues of fact that underlie her legal claims. For example, she alleges that:

- she received particular representations regarding confidentiality; Complaint ¶ 25, 26;
- she viewed these representations as conditions precedent to her filing her returns with CCTS; Complaint ¶ 27;
- her tax returns were returned to her promptly after discovery of the documents by WDSU; Complaint ¶ 30; and
- she has suffered strong, personal, emotional reactions, including fear, panic, anger, and loss of consortium; Complaint ¶ 33.

Her class definition is not limited to those individuals for whom the same allegations would apply. To the contrary, Plaintiff's class definition would encompass those individuals who, unlike Plaintiff, allegedly never received any alleged representation regarding confidentiality, and whose materials did not include tax return information, and suffered no such similarly strong emotional reactions. *See* Pl. Memo. at 9.

C. Plaintiff Cannot Satisfy the Requirements of Rule 23.

Even absent an evidentiary record, and based only on the Complaint and applicable law, it is clear that Plaintiff cannot meet her burden under Rule 23 of establishing the prerequisites to class certification.

1. Plaintiff Has Not Adequately Defined Her Proposed Class.

A "definiteness" requirement is implicit in Rule 23(a) in delineating the proposed class. *See, DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *Alliance to End Repression v.*

Rochford, 565 F.2d 975 (7th Cir. 1977). The class definition is of critical importance because it identifies the persons: (1) entitled to relief; (2) bound by the judgment for purposes of *res judicata*; and (3) entitled to notice in a Rule 23(b)(3) action. *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 156 (D. Kan. 1996) (citing *Manual for Complex Litigation, Third* § 30.14 (1995); *McHan v. Grandbouche,* 99 F.R.D.260 (D.Kan.1983)). Greater precision is required in defining the class in an action such as this one in which the primary relief sought is compensatory damages rather than injunctive or declaratory relief. *See Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 271 n.1 (3rd Cir.1980); *McHan,* 99 F.R.D. at 260; *Rice v. Philadelphia*, 66 F.R.D. 17, 19 (E.D.Pa.1974). "[A] class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).

Here, through her proposed class definition, Plaintiff improperly seeks to have it both ways. On the one hand, she repeatedly contends that the putative class member's claims, arising out of a single alleged incident, are common and typical, but then proposes a class definition which, on its face, expands far beyond that narrow set of facts to include "[a]ll Louisiana residents ... whose tax return information, tax return[s], or other personal or financial information was disclosed by Defendants, without consent..." Pl. Memo. at 9. *Compare*, Pl. Memo. at 6 with Pl. Memo at 9. In sum, Plaintiff's proposed class is too indefinite to be certified as a matter of law.[4]

[4] Furthermore, from the text of Plaintiff's Motion, it appears clear that she intends to expand the class definition still further as the case proceeds. See, Pl. Memo at 9, 10. This approach to class definition would simply render notice impossible, as she has not set forth any set of people who should be notified prior to a final determination as to whether Plaintiff's unsupported allegations of additional "disclosures" have merit.

2. Plaintiff Cannot Establish Typicality or Adequacy.

Because, among other things, Plaintiff is subject to unique defenses, Plaintiff cannot establish that her claims are typical of the class or that she is an adequate class representative. Both the typicality and adequacy requirements are intended to ensure that a putative class representative such as Plaintiff is not "preoccupied with a defense which is applicable only to h[er]self." *Kelley v. Galveston Autoplex*, 196 F.R.D. at 476. (citing to *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984)); *see also J. H. Cohn & Co. v. American Appraisal Associates*, 628 F.2d 994, 998-99 (7th Cir. 1980) (upholding district court's denial of class certification because "the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation.").

Plaintiff is subject to exactly these types of unique defenses. For example, Plaintiff alleges that Defendants are liable for creating a risk to her own and the other putative class members' credit histories. Complaint ¶¶ 40, 44. Yet as someone who has filed for bankruptcy not once, but twice, in the last ten years, (most recently last year), her alleged emotional distress over the state of her credit history may very well be attributable to her two bankruptcies, rather than some speculative risk of identity theft.[5]

Furthermore, Plaintiff has failed to offer any evidence of "similarit[ies] between [her] legal and remedial theories and theories of those whom [she] purport[s] to represent" sufficient to render her claims typical. *Kelley v. Galveston Autoplex*, 196 F.R.D. 471, 476. To the

[5] Plaintiff submits that the Court may take judicial notice of these bankruptcy proceedings pursuant to Federal Rule of Evidence 201, and has filed a separate request that the Court take such judicial notice.

contrary, her Complaint simply highlights the unique and individualized facts of her own transaction. *See*, *supra,* Part C.1.

3. Plaintiff Cannot Establish Superiority, Commonality, or Predominance.

Plaintiff also has failed to meet her burden of establishing under Rule 23(b)(3) that the "questions of law or fact common to class members *predominate* over *any questions affecting only individual* members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3); *see also* Rule 23(a)(2). While these requirements are "cousins" to each other, and accordingly interrelated, we will discuss each requirement in turn. *See, e.g., Young v. Ray Brandt Dodge,* 176 F.R.D. 230, 234 (E.D. La. 1997).

a. Class Treatment is Not Superior to Other Methods of Adjudication.

Plaintiff cannot establish that a class action is superior to individual actions, because here individual parties have a demonstrated interest and ability to bring their own actions. *See generally, In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (warning against the practice of certifying a one-size-fits-all class as unfair and inefficient when individual parties have an interest and ability to bring their own actions). In fact, putative class members have filed individual complaints in two separate state court actions related apparently stemming from the same alleged disposal at issue in Plaintiff's claim.[6] *See Zweifel v. Jackson Hewitt Inc., et al.,* No: 661-687 (La., 24th Dist. filed July 3, 2008); *Poree v. Jackson Hewitt Inc., et al.*, No. 664-459 (La., 24th Dist. filed Sept. 15, 2008). Moreover, Plaintiff is also pursuing individual claims

[6] Plaintiff submits that the Court may take judicial notice of these state court proceedings pursuant to Federal Rule of Evidence 201, and has filed a separate request that the Court take such judicial notice.

for relief on her own behalf, and is not seeking class certification on certain counts of the Complaint.

As these individual cases and claims demonstrate, potential members of the class (including Plaintiff herself) have an interest in individually controlling their separate claims, and class members are capable of handling their claims on an individual, rather than class, basis. It further shows that the claims being asserted individually by Plaintiffs Pinero, Zweifel and Poree will be addressed and resolved, regardless of whether this Court certifies a class here. Indeed, given the atypical nature of Plaintiff's factual allegations and legal claims, as well as her demonstrated inadequacy to serve as class representative, Zweifel and Poree may well object to Plaintiff purporting to represent their interests on these issues. *See, e.g., Robertson v. Monsanto Co.*, No. 07-30577, 2008 U.S. App. LEXIS 15468, *21-23 (5th Cir. July 28, 2008) (holding that a class action which was originally brought as a number of individual claims demonstrated the lack of superiority under Rule 23(b)(3)); *Nagel v. ADM Investor Servs.*, 217 F.3d 436, 443 (7th Cir. 2000) (holding that where class members have the ability to litigate individually on their own, class certification is not appropriate); *see also Ancar v. Murphy Oil, U.S.A., Inc.*, No. 06-3246, 2008 U.S. Dist. LEXIS 68490, *28 (E.D. La. July 25, 2008) (where, as here, emotional damages are alleged, the class action trial "would still require mini-trials to resolve issues such as specific causation and damages, and would not be superior" to allowing such claims to proceed individually.)

b. Plaintiff has Failed to Establish that Common Questions of Law and Fact Exist and Predominate With Respect To Each of Her Claims For Which She Seeks Certification.

For a class to be certified under Rule 23(b)(3), common issues must predominate over issues affecting only individual members. As set forth below, Plaintiff has failed to offer any

evidence that common questions of law and fact predominate with respect to each of the claims for which she seeks certification. In fact, Plaintiff cites to no cases that ultimately hold in favor of certifying a class notwithstanding the absence of any record evidence, or with this number of predominating individual issues.[7] As set forth below, class certification would require numerous mini-trials on issues as disparate as reliance, existence of a contract, materiality, causation, and damages. For example:

COUNT I (26 U.S.C. § 6103 Claim)

To prevail, Plaintiff must establish that each class members' allegedly disclosed documents constitute "tax return information." under Section 6103.[8] However, not only has Plaintiff failed to offer any evidence that tax return information of each putative class member was disclosed, but her allegations and proposed class definition are to the contrary. *Compare, e.g.,* Comp. ¶ 41 (broadly alleging that the documents disclosed included "tax return information, tax return[s], or other personal or financial information") *with Cryer v. U.S.*, 554 F. Supp. 2d 642 (W.D. La. 2008) (holding that

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[7] See Pl. Memo at 23-24. In *Amchem Products* and *Sandwich Chef of Texas*, both courts ultimately decertified the class on predominance grounds. *Amchem Products Inc., v. Windsor*, 52 U.S. 591 (1997) (decertifying class based on findings that class failed to meet predominance standard); *Sandwich Chef of Texas, Inc., v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003) (holding that the district court had overlooked individual issues that predominated the class and precluded class certification). Furthermore, in *Recinos-Recinos v. Express Forestry, Inc.,* no individual actions had been brought and thus making it easily distinguishable from the facts present here. *Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472 (E.D. La. 2006). Similarly, in *Jenkins* and *Chandler*, the court dealt with the certification of only discrete issues to add in the resolution of individual actions. See *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302 (N.D. Ill. 1995).

[8] Jackson Hewitt has moved to dismiss this cause of action on the grounds that Jackson Hewitt and CCTS are not within the enumerated group of defendants contemplated by the statute and thus Plaintiffs cannot assert it as a grounds to recover against Defendants. Jackson Hewitt further contends that the materials at issue in this litigation are not subject to § 6103"tax return information, tax return[s], or other personal or financial information". *See*, Memorandum in Support of Motion to Dismiss at 11-13.

copies of checks and letters discussing financial information clearly did not fit within § 6103's definition of "return information" and therefore the plaintiff had failed to state a claim for unlawful disclosure of return information.)

COUNTS II AND III (FRAUD AND BREACH OF CONTRACT)

Plaintiff has failed to establish that common issues would predominate over individualized issues such as damages, content and uniformity of the representations, materiality, and reliance. As set forth in Jackson Hewitt's pending Motion to Dismiss, Louisiana law requires individual proof of actual damages in order to establish liability under either a fraud or negligence claim. *See, e.g., Key, supra*; *Melancon, supra; Ponder, supra.* Further, Plaintiff's breach of contract and fraud claims require individual analysis to show what, if any, representations where made to each putative class member, whether each class member relied on such representations, and whether the deviation from such representations constituted a material breach of contract.[9] This issue alone is fatal to Plaintiff's attempt to certify these claims. *See Simon v. Merrill Lynch*, 482 F.2d 880, 883 (5th Cir. 1973) (holding that written representations, if given in varying forms or with varying regularity, create individual issues of misrepresentations and thus class certification was inappropriate); *Banks v. New York Life Ins. Co.*, 737 So. 2d 1275, 1283 (La. 1999) (holding that individual facts concerning misrepresentation and reliance make class treatment of fraud claims unmanageable); *Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230, 234 (E.D. La. 1997) (holding that class action was not superior to other methods of adjudication because questions of reliance where "wholly

[9] Notably, Plaintiff's Complaint fails to allege that Plaintiff interacted with Jackson Hewitt personnel, and does not acknowledge that CCTS is forbidden from contracting on Jackson Hewitt's behalf. *See* Complaint, Ex. Q, Jackson Hewitt's Franchise Agreement, ¶ 28.12.

individual" and subjective circumstances surrounded each plaintiff's decision to make the purchase were predominate).

COUNT IV (NEGLIGENCE)

Moreover, Plaintiff has failed to establish that common issues predominate over such individualized issues such as causation and damages. As set forth in Jackson Hewitt's pending Motion to Dismiss, Plaintiff must establish a legally cognizable injury for each member of the class. And the Fifth Circuit has recently held that, even if the existence and breach of a duty could be established, "causation and damages are highly individualized, and thus would not be well-served by a class action." *Robertson v. Monsanto Co.*, No. 07-30577 2008 U.S. App. LEXIS 15468, at *20-21 (5th Cir., July 18, 2008) (noting that emotional damages, in particular, are not amenable to class treatment).[10]

COUNT V (INVASION OF PRIVACY)

Plaintiff's invasion of privacy claim (Count 5) inherently involves individualized issues regarding whether (1) an unreasonable public disclosure of private facts has occurred and (2) whether the information in the alleged documents would be of the sort that publication of it could be considered "offensive to the reasonable person." As noted in our discussion of Count 1, the

[10] Plaintiff's references to the doctrine of r*es ipsa loquitor* ("the thing speaks for itself") are curious and inapposite. Plaintiff provides no explanation for why the circumstances alleged by her Complaint will defy the capacity for direct evidence, or "are so unusual that, in the absence of other pertinent evidence, there is an inference of negligence." *See,* Pl. Memo at 38. Indeed, even the cases cited by Plaintiff make clear that the doctrine only "applies in cases involving circumstantial evidence, rather than direct evidence." *See, Linnear v. CenterPoint Energy Entex/Reliant Energy*, 966 So. 2d 36, 45 (La. 2007); *see also, Broussard v. Voorhies*, 2006-2306, 970 So.2d 1038, 1043 (La. App. 1st Cir. 2007) (holding that the doctrine applies only "when direct evidence is not available"). At this stage of proceedings, with no discovery or factual record, it is unclear how Plaintiff can be so sure that there will be no direct evidence of what occurred, and that the parties will be forced to rely on circumstantial evidence. Furthermore, it is unclear that this whatever evidence the parties do uncover will point to something "so unusual" as to allow for an inference of negligence.

Plaintiff's proposed class definition would encompass a variety of documents, each with different types of information contained therein. Accordingly, highly individualized inquiries would need to occur with regard to the nature of the allegedly disclosed document, whether the information contained therein would be considered offensive to the reasonable person, and whether that document was ever "communicat[ed] to the public at large" so as to constitute "publicity" under applicable law. Restatement (Second) of Torts, § 652D (1977) (as adopted by *Spellman v. Discount Zone Gas Station*, 975 So. 2d 44, 47 (La. App. 2007)). Plaintiff cites to no authority that supports his blanket assertions that these individual issues can be overlooked for class certification. As such, the claim is inherently unsuitable for class treatment.

c. Bifurcation Does Not Remedy Plaintiff's Failure to Satisfy the Rule 23(b)(3) Elements.

Apparently conceding that individualized inquiries into damages preclude a finding of superiority and predominance under Rule 23(b)(3), Plaintiff requests that this court bifurcate resolution of liability and damages. Pl. Memo. at 12. However, this would not remedy the inherent flaws in Plaintiff's request for class treatment. Plaintiff's claims of Fraud (Count 2) and Negligence (Count 4) require proof of a cognizable injury under the law, *for each putative class member*, in order to establish liability under those claims. *See, e.g., Ponder v. Pfizer*, 522 F. Supp. 2d at 797 (dismissing the negligence claim for failure to allege actual damages); *Becnel v. Grodner*, 982 So. 2d 891 (La. App. 2008) (*citing Newport Ltd. v. Sears Roebuck & Co.*, 6 F.3d 1058, 1068 (5th Cir. 1993)) (emphasis added) (holding fraud requires showing of "resultant injury").

Accordingly, in order to establish standing, Plaintiff must ultimately present evidence on behalf of herself and all putative class members that some legally recognized and recoverable injury has occurred, or otherwise her claims are fatally infirm. *Cf., State of Alabama v. Blue Bird*

Body Co., 573 F.2d 309, 317-318 (5th Cir. 1978) (holding that, in an antitrust action requiring evidence of damages, even if a class action is bifurcated, plaintiffs would need to show the "fact of damage" in the liability portion of the proceedings). Plaintiff would have to show both some "actual damages," and that Jackson Hewitt caused those damages, for *each and every* class member at the liability phase of this case. *See, Castano v. American Tobacco Co.*,84 F.3d at 750, 751 (holding that, where bifurcation would result in having two different juries consider the same issue, bifurcation in the class action context violates the Seventh Amendment to the U.S. Constitution). Accordingly, bifurcation fails to remedy the infirmities under Rule 23(b)(3) that Plaintiff concedes are inherent to her claims.

Plaintiff cites to no authority which would support her argument that bifurcation between damages and liability is allowable in a negligence action where plaintiffs have not yet proven the existence of a cognizable injury. In fact, Plaintiff relies on authority which explicitly supports the proposition that liability and damages cannot be bifurcated such a case. *See* Pl. Memo. at 14 (citing to *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003) (denying class certification upon finding that individual issues of damage would predominate a class action suit)).[11]

[11] The cases on which Plaintiff relies in arguing for bifurcation do not support her position. First, in *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D. La. 2006), the court upheld a grant of class certification on a negligence claim because plaintiffs "presented evidence that certain elements of their alleged damages may be assessed on a class-wide basis." *Id.* at 607 n. 5. Other of these cases allowed a bifurcated trial where the class action issues did not require an individualized proof of actual damages. *See, e.g., Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (allowing class action to go forward on punitive damages and defenses only). Other cases were suitable for class action because liability could easily be established on a class-wide basis without the need for an individualized inquiry. *See, e.g., Bing v. Roadway Exp., Inc.*, 485 F.2d 441 (5th Cir. 1973); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), and *Mullen v. Treasure Chest Casino*, 186 F.3d 620 (5th Cir. 1999), are both inapposite because in each of those cases, the court was not required to find "actual damages" on an individual basis to establish liability.

Plaintiff does not and can not allege that the existence of damages can be assessed on a class-wide basis, but rather concedes that individual trials as to damages will required, and so her request for class certification must be denied.

IV. CONCLUSION

Based upon the foregoing, the Court should deny Plaintiff's Motion for Class Certification, or in the alternative, stay the Motion for Class Certification pending ruling on the Motion to Dismiss and class discovery.

DATED: November 4, 2008	/s/Gina D. Banks Glenn M. Farnet (#20185) Gina D. Banks (#27440) KEAN, MILLER, HAWTHORNE, ARMOND, McCOWAN & JARMAN, L.L.P. One American Place, 18th Floor Post Office Box 3513 (70821) Baton Rouge, Louisiana 70825 Telephone: (225) 387-0999 AND KELLEY DRYE & WARREN LLP Donna L. Wilson (*pro hac vice*) Andrew S. Wein (*pro hac vice*) Veronica D. Gray (*pro hac vice* motion pending) 3050 K Street, NW, Suite 400 Washington, DC 20007 Telephone: (202) 342-8400 Attorneys for Jackson Hewitt Tax Service Inc., and Jackson Hewitt Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th of November, 2008, a copy of the above and foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system and U.S. Mail to all counsel of record.

/s/ Gina D. Banks