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United States District Court,E.D. Louisiana.
Jason MELANCON, et al
v.
LOUISIANA OFFICE OF STUDENT FINANCIAL ASSISTANCE, et al.
Civil Action Nos. 07-7712, 07-9158.

June 5, 2008.

Background: Plaintiffs filed putative class actions against truck operator to recover damages they allegedly incurred as result of loss of backup electronic media from truck. After actions were consolidated, operator moved for summary judgment.

Holding: The District Court, Carl J. Barbier, J., held that mere possibility that personal information might be at increased risk did not constitute actual injury sufficient to maintain negligence claim.
Motion granted.

West Headnotes

Negligence 272 462

272 Negligence
272XIV Necessity and Existence of Injury
272k462 k. Particular Cases. Most Cited Cases
Under Louisiana law, mere possibility that personal information might be at increased risk as result of loss from truck of electronic data regarding personal information on individuals participating in or considered for participation in programs for financial assistance and scholarship programs of higher education did not constitute actual injury sufficient to maintain negligence claim against truck operator, where no personal data had been compromised, and there was no evidence that any third party had gained access to data.

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

ORDER AND REASONS

CARL J. BARBIER, District Judge.
Before the Court is Defendant Iron Mountain, Incorporated's ("Iron Mountain") **Motion for Summary Judgment (Rec.Doc.40).** This motion, which is opposed, was set for hearing on May 14, 2008 on the briefs. Upon review of the record, the memoranda of counsel, and the applicable***874** law, this Court now finds, for the reasons set forth below, that Iron Mountain's motion should be granted.

Background Facts

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

tion in programs for financial assistance and certain scholarship programs of higher education.

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

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

The Parties' Arguments

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

Plaintiffs herein have alleged state law negligence-based claims. To analyze such claims, Louisiana courts employ the duty/risk analysis. See *Mathieu v. Imperial Toy Corp.*, 646 So.2d 318, 321-22 (La.1994). Specifically, Plaintiffs must prove the following elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard; (3) the defendant's substandard conduct was the cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages. According to Iron Mountain, nowhere in the complaints do Plaintiffs allege any actual injuries. Furthermore, no evidence has been presented to show that the electronic data, although lost, have been misused or compromised.

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

> FN2. See *Melancon* Class Action Complaint.
>
> FN3. See *Melancon* First Amended and Supplemental Class Action Complaint.
>
> FN4. See *Bradley* first Supplemental and Amended Class Action Complaint.

According to Iron Mountain, such concerns do not rise to the level of harm necessary to support any recovery since, generally, under Louisiana law, "if the defendant's conduct is merely negligent and causes only mental disturbance, without accompanying physical injury, illness, or other physical consequences, the defendant is not liable for such emotional disturbance." *Nesom v. Tri Hawk Int'l*, 985 F.2d 208, 211 (5th Cir.1993) (quoting *Moresi v. Dept. of Wildlife & Fisheries*, 567 So.2d 1081, 1095-96 (La.1990)). A limited exception to this rule which permits recovery for emotional distress absent physical ***875** injury exists when there are "special circumstances" which serve as a guarantee that the claim is not spurious. *Moresi*, 567 So.2d at 1096. Consequently, "more than minimal inconvenience and worry must be shown." *Rivera v. United Gas Pipeline Co.*, 697 So.2d 327, 338 (La.App. 5th Cir.1997).

In the context of Louisiana negligence law requiring actual injury, Iron Mountain cites to a recent case involving data loss filed in the Middle District of Louisiana. In that case, Judge Brady determined (on a failure to state a claim basis) that allegations of mere emotional disturbance are insufficient to prevail on a negligence claim. *Ponder v. Pfizer, Inc.*, 522 F.Supp.2d 793 (M.D.La.2007). In *Ponder,*

private data on thousands of Pfizer employees left the confines of a Pfizer hard drive and escaped into an unauthorized domain. *Id.* A class action was filed against Pfizer asserting such damages as "fear and apprehension of fraud, loss of money, and identity theft; the burden and cost of credit monitoring; the burden and the cost of closing compromised credit accounts and opening new accounts; the burden of scrutinizing credit card statements and other statements for unauthorized transactions; damage to credit; loss of privacy and other economic damages." *Id.* at 795. Defendant moved to dismiss the claim, arguing that the alleged damages were "inherently speculative and not recoverable under Louisiana law, which requires that damages be established to a 'legal certainty.' " *Id.* at 797.

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

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

FN6. Judge Brady went on to state that the injury from theft of personal information accrues only when the compromised data are actually used by a third party to steal someone's identity, rather than when the data are exposed, and become obtained by a third party. *Id.* at n. 5.

Iron Mountain goes on to cite several other cases that considered other instances of data loss involving no actual misuse of personal information. Such cases, according to Iron Mountain, support the proposition that lack of misuse of personal data constitutes the absence of actual harm. See *Key v. DSW, Inc.*, 454 F.Supp.2d 684, 691 (S.D.Ohio 2006) (holding that, in the ***876** context of a standing analysis, no claim exists "when the alleged injury is dependent upon the perceived risk of future actions of third parties not before the Court").

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

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

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

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

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

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

Finally, Plaintiffs argue that since the filing of Iron Mountain's motion, "significant factual issues" have arisen that raise ***877** genuine issues of material fact sufficient to preclude summary judgment. These include the fact that evidence has been obtained that Iron Mountain has found the lost container but not the disks themselves and that a named plaintiff (Bradley) informed her attorney that an unauthorized transaction was attempted on one of her credit cards. According to Plaintiffs, who seek relief under Rule 56(f) of the Federal Rules of Civil Procedure, investigation needs to be done to determine the effect of these developments on the instant case.

In reply, Iron Mountain argues that Plaintiffs merely mention the alleged misuse of Plaintiff Bradley's credit card and make no effort to link the misuse to the loss of LOSFA data. In fact, Iron Mountain argues that no such link can be made as no credit card information was provided to LOSFA. Therefore, no discovery is needed on this issue. And as to the retrieval of the lost container, Iron

Mountain argues that counsel for Plaintiffs have failed to provide an explanatory affidavit stating what information they hope to obtain through further discovery of this issue. As a result, Plaintiffs have failed to comply with and should not be able to rely upon Rule 56(f).

Discussion

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If that burden has been met, the nonmoving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

As articulated by Iron Mountain and as determined by Judge Brady in *Ponder,* the mere possibility that personal information may be at increased risk does not constitute actual injury sufficient to maintain a claim for negligence under the current state of Louisiana law.

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

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

E.D.La.,2008.
Melancon v. Louisiana Office of Student Financial Assistance
567 F.Supp.2d 873

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United States District Court,D. New Jersey.

Lois GIORDANO, Plaintiff,

v.

WACHOVIA SECURITIES, LLC et al., Defendants.

Civil No. 06-476 (JBS).

July 31, 2006.

Mark R. Cuker, Esq., Alan H. Sklarsky, Esq., Williams, Cuker & Berezofsky, Cherry Hill, NJ, for Plaintiff.

Mark S. Melodia, Esq., Paul J. Bond, Esq., Reed Smith, LLP, Princeton, NJ, for Defendant Wachovia Securities, LLC.

OPINION

SIMANDLE, District Judge.

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

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

I. *BACKGROUND*

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

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

Approximately ten months after Plaintiff opened her account, Wachovia printed a report which contained financial information about Plaintiff and tens of thousands of other Wachovia customers. *(Id.* at ¶ 10, 13.)On March 28, 2005, Wachovia mailed the

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

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

On February 1, 2006, the case was removed from the Superior Court of New Jersey, Law Division, Atlantic County, to this Court. [Docket Item No. 1.] On February 21, 2006, Wachovia and UPS filed separate motions to dismiss Plaintiff's Complaint. [Docket Item Nos. 11 and 14, respectively.] FN3 Plaintiff filed opposition to Wachovia's motion on April 7, 2006 [Docket Item No. 23.] to which Wachovia timely replied on April 14, 2006. [Docket Item No. 23.] The Court heard oral argument on May 26, 2006.

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

II. *DISCUSSION*

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

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

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

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

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

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

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

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

B. *Analysis*

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

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

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

FN4. Plaintiff also argues that New Jersey law recognizes the type of relief Plaintiff is seeking-compensation for credit monitoring services-because the New Jersey Supreme Court recognized compensability of medical monitoring services in *Ayers v. Jackson Township,* 106 N.J. 557 (1987). New Jersey law, according to Plaintiff, has recognized such a cause of action for medical monitoring in the face of the same argument as Wachovia makes here-namely, that the probability that plaintiffs will actually become ill from their exposure to chemicals is too remote to warrant compensation under the principles of tort law. *Id.* at 591.

This Court finds Plaintiff's analogy of medical monitoring to credit monitoring inapt. In order to have a cause of action for medical monitoring even before the advent of any physical symptoms, Plaintiff must allege exposure to a carcinogen, not the *potential* exposure. *See id.* at 599-607;*see also Theer v. Philip Carey Co.,* 133 N.J. 610, 627 (N.J.1993). Here, Plaintiff merely alleges the potential of identity theft, not that her identify was actually stolen and misused.

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

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

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

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

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

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

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

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

that Plaintiff lacks Constitutional standing to bring this action.

III. *CONCLUSION*

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

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

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

FN8. The Third Circuit held that:

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

D.N.J.,2006.
Giordano v. Wachovia Securitites, LLC
Not Reported in F.Supp.2d, 2006 WL 2177036 (D.N.J.)

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United States District Court,D. Minnesota.

Stacy Lawton GUIN, Plaintiff,

v.

BRAZOS HIGHER EDUCATION SERVICE CORPORATION, INC., Defendant.

No. Civ. 05-668 RHK/JSM.

Feb. 7, 2006.

John H. Goolsby and Thomas J. Lyons Jr., Consumer Justice Center, Little Canada, Minnesota; Thomas J. Lyons, Lyons Law Firm, P.A., Little Canada, Minnesota, for Plaintiff.

Courtney M. Rogers Reid and Matthew E. Johnson, Halleland Lewis Nilan & Johnson P.A., Minneapolis, Minnesota, for Defendant.

MEMORANDUM OPINION AND ORDER

KYLE, J.

INTRODUCTION

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

BACKGROUND

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ANALYSIS

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

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

1. Breach of Duty

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

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

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

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

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

16 C.F.R. § 314.4(a)-(c).

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

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

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

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

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

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

2. Injury

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

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

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

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

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

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

3. Causation

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

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

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

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

CONCLUSION

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

LET JUDGMENT BE ENTERED ACCORDINGLY.

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

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United States District Court, E.D. Louisiana.

In the Matter of AMERICAN COMMERCIAL LINES, LLC, as Owner of the Barge LCD 4907, and American Commercial Barge Line LLC as Charterer and Operator of the Barge LCD 4907, Praying for Exoneration from and/or Limitation of Liability

Nos. Civ.A. 00-252, Civ.A. 00-2967, Civ.A. 00-3147.

May 28, 2002.

MEMORANDUM OPINION DENYING CLASS CERTIFICATION

ENGELHARDT, J.

***1** Before the Court is plaintiffs/claimants motion,FN1 seeking certification of a class described as follows:

> FN1. See Plaintiffs' Motion for Class Certification [Rec. Doc. No. 38].

[A]ll persons and/or entities who suffered injury and/or damage as a result of the subsequent release of toxic and hazardous substances, namely, diesel oil, from a barge in the Mississippi River, near the Orion Dock in St. Charles Parish at or about 9:45 p.m., and continuing for several hours on 7/28/99; FN2 or

> FN2. See Class Action Petition for Damages, at paragraph 2, filed in the matter entitled *Margie Richard, et al, v. American Commercial Lines LLC, et al,* Docket No. 53,756, Twenty-Ninth Judicial District Court for the Parish of St. Charles [USDC/EDLA Dkt.# 00cv2967 "N", Rec. Doc. No. 3].

[A]ll persons and/or other entities residing in the Parish of St. Charles, State of Louisiana, and who reside in geographic proximity to the Mississippi River, and who or which have sustained damages arising from the release and emission(s) of diesel fuel, which was released from the barge LCD 4907 and/or the Orion Refining Corporation's facility, including, specifically, all persons who reside in the Parish of St. Charles, State of Louisiana, who have sustained damages, physical, mental and/or emotional injuries, fright, inconvenience, and interruption of or intrusion into their personal lives as a direct consequence of this spill/release.FN3

> FN3. See Petition for Damages and for Class Action Certification, at paragraph 3, filed in the matter entitled *Aaron Brown, et al. v. Orion Refining Corp., et al,* Docket No. 53,737E, Twenty-Ninth Judicial District Court for the Parish of St. Charles [USDC/EDLA Dkt .# 00cv3147 "N", Rec. Doc. No. 1].

An evidentiary hearing was conducted on April 24, 2002. Having considered the putative class action plaintiffs' complaints, motion for class certification, FN4 the submissions of the parties, the evidence adduced at the oral hearing, the post-hearing briefs,FN5 the record and the applicable law, the Court is confident that the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b)(3) are not met. For the following reasons, the putative class plaintiffs' motion for certification is DENIED.

> FN4. Rec. Doc. No. 38.

> FN5. Plaintiffs' Post-Hearing Memorandum in Support of Class Action Certification [Rec. Doc. No. 197]; and Defendants' Post-Hearing Brief in Opposition to Class Certification [Rec. Doc. No. 196].

I. BACKGROUND

This matter arises out of an incident that occurred on July 28, 1999 at approximately 9:45 p.m., in-

volving a spill of diesel fuel into the Mississippi River near the intake, infrastructure, valves and pipeline for the water system supplying east bank residents of St. Charles Parish, Louisiana.[FN6] Putative class action plaintiffs submit that the quantity of # 2 diesel oil spilled into the Mississippi River was reported as five barrels or 210 gallons, but could have been as much 2,795 gallons of diesel fuel (*i.e.*, the estimated spill quantity reported in the December 28, 1999 Coast Guard penalty report, assessing a $5,000.00 penalty against petitioner-in-limitation, American Commercial Lines, LLC ("ACBL")) .[FN7]

FN6. Testimony of Charles Toth, former director of the St. Charles Water Works.

FN7. See Report of A.J. Englande, Jr. [Plaintiffs' Exhibit Englande "2"].

The plaintiffs originally filed petitions for damages arising out of the spill event in state court pursuant to Louisiana Code of Civil Procedure Article 591, asserting their claims under Louisiana negligence and strict liability law,[FN8] and that they are entitled to maintain their causes as a class action.[FN9] Defendants removed claimants' state court lawsuits,[FN10] asserting the original jurisdiction of the federal court pursuant to the Admiralty Extension Act ("AEA"), 46 U.S.C. § 740, over the class action claims against Orion Refining Corporation ("Orion") and the Parish of St. Charles ("the Parish").[FN11] Putative class plaintiffs' lawsuits arising out of the July 28, 1999 spill at Orion's dock involved ACBL's tanker barge (Barge LCD 4907), and thus were consolidated with ACBL's related limitation action filed pursuant to 46 U.S.C. § 183.

FN8. See Louisiana Civil Code Articles 2315 and 2317.

FN9. See Class Action Petition for Damages [USDC/EDLA Dkt.# 00cv2967 "N", Rec. Doc. No. 3]; and Petition for Damages and Class Action Certification [USDC/EDLA Dkt.# 00cv3147 "N", Rec. Doc. No. 1].

FN10. See Notice of Removal filed in *Aaron Brown, et al. v. Orion Refining Corp., et al,* Docket No. 53,737E, Twenty-Ninth Judicial District Court for the Parish of St. Charles [USDC/EDLA Dkt.# 00cv3147 "N" Rec. Doc. No. 1]; and Notice of Removal filed in *Margie Richard, et al, v. American Commercial Lines LLC, et al,* Docket No. 53,756, Twenty-Ninth Judicial District Court for the Parish of St. Charles [USDC/EDLA Dkt. # 00cv2967 "N", Rec. Doc. No. 3].

FN11. The AEA provides in pertinent part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damages or injury be done or consummated on land."46 U.S.C. § 740.

***2** Putative class action plaintiffs' complaints involve allegations of physical and emotional injuries allegedly sustained by various residents of the close-knit community of east bank St. Charles Parish, living in the area known as Norco, Louisiana. Putative class plaintiffs claim physical and mental injuries on account of both inhalation and drinking toxic elements of the spilled diesel, which migrated down river and infiltrated the Parish's east bank waterworks system supplying Norco residents.

Putative class plaintiffs seek certification under Federal Rule of Civil Procedure 23(b)(3), which applies to suits seeking compensatory damages involving common questions of law or fact which predominate over any questions affecting only individual members, such that a class action is the superior method of adjudicating the controversy fairly and efficiently. The predicate to the plaintiffs' claims is that exposure to the vapors and drinking water contaminated by the elements of diesel fuel from the spill caused their personal injuries.

Plaintiffs assert that the exposure that gave rise to their injuries occurred during the twenty-four hour period following the spill on the evening (*i.e.*, 9:45 p.m.) of July 28, 1999. They contend that injury and causation can and should be addressed within this time frame since the universe of injured claimants are confined to those east bank residents of St. Charles Parish, and that the class-action format is the superior method of adjudicating their claims because common issues predominate.

II. CLASS CERTIFICATION STANDARDS

Rule 23 of the Federal Rules of Civil Procedure governs class actions. The rule requires that the court determine, "as soon as practicable" after an action brought on behalf of a class is commenced, whether the suit meets the class certification requirements such that the case should proceed as a class.[FN12] A class action is not maintainable as such simply because the lawsuit designates the cause as a class action. It is not disputed that the class action proposed in this case must satisfy the requirements for certification outlined in Rule 23(a) and (b).

FN12. See Fed.R.Civ.P. 23(c)(1); *Castano v. American Tobacco Company*, 84 F.3d 734, 741 (5th Cir.1996).

In ruling upon a motion for class certification, courts treat the substantive allegations contained in the plaintiffs' complaint as true. The issue is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.[FN13] The court may look past the pleadings to the record and any other completed discovery to make a determination as to the class certification issue.[FN14]

FN13. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2153 (1974); see also *Burrell v. Crown Central Petroleum, Inc.*, 197 F.R.D. 284, 286 (E.D.Tex.2000); and *In re Lease Oil Antitrust Litigation*, 186 F.R.D. 403, 418 (S.D.Tex.1999).

FN14. See *General Telephone Company v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2371-72 (1982)(noting the district court's duty to conduct a "rigorous analysis" before granting class certification and holding that a decision on class certification remains a fact specific determination); *Spence v. Glock*, 227 F.3d 308, 310 (5th Cir.2000); and *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir.1996).

At the outset, Rule 23(a) sets forth four threshold requirements which must be met in every type of class action case.[FN15] Rule 23(a) requires that a class: (1) be so numerous that joinder of all members is impractical [numerosity]; (2) have common questions of fact or law [commonality]; (3) have representative parties with typical claims or defenses [typicality]; and (4) have representative parties that will fairly and adequately protect the interests of the proposed class [adequacy].[FN16] The first two requirements focus on the characteristics of the class; the second two focus instead on the desired characteristics of the class representatives. The rule is designed "to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests."[FN17]

FN15. See *James v. City of Dallas*, 254 F.3d 551, 569 (5th Cir.2001).

FN16. See Fed.R.Civ.P. 23(a); *Spence v. Glock*, 227 F.3d at 310 n. 4; *James v. City of Dallas*, 254 F.3d at 569.

FN17. *In re Lease Oil Antitrust Litigation*, 186 F.R.D. at 419 (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768, 799 (3rd Cir.1995)).

***3** If the Rule 23(a) criteria are satisfied, the plaintiffs must show that class treatment is appropriate under one of three alternative class categories prescribed by Rule 23(b).[FN18] Plaintiffs claim only monetary damages, and explicitly seek certification solely pursuant to Rule 23(b)(3), which sets out two requirements-predominance and superiority. See Fed.R.Civ.P. 23(b)(3). Subsection (b) provides that:

> FN18. See Fed.R.Civ.P. 23(b); *James v. City of Dallas*, 254 F.3d at 568.

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...

(3) the court finds that the *questions of law or fact common to the members of the class predominate* over any questions affecting only individual members, *and* that a *class action is superior* to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[FN19]

> FN19.Fed.R.Civ.P. 23(b)(3) (emphasis supplied).

To pass muster under Rule 23(b)(3), plaintiffs must sufficiently demonstrate both predominance of common class issues and that the class action mechanism is the superior method of adjudicating the case.[FN20] Together, subsection (a) and (b) requirements insure that a proposed class has "sufficient unity so that absent class members can fairly be bound by decisions of the class representatives."[FN21]

> FN20. See *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623-24 (5th Cir.1999)(citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997)).

> FN21. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2246 (1997).

In *Allison v. Citgo Petroleum*,[FN22] the Fifth Circuit explained the different categories of class actions detailed in Rule 23(b), as follows:

> FN22. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.1998).

Under Rule 23, the different categories of class actions, with their different requirements, represent a balance struck in each case between the need and efficiency of a class action and the interests of class members to pursue their claims separately or not at all. The different types of class actions are categorized according to the nature or effect of the relief being sought. The (b)(1) class action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all claims. The (b)(2) class action, on the other hand, was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary. Finally, the (b)(3) class action was intended to dispose of all other cases in which a class action would be "convenient and desirable," including those involving large-scale, complex litigation for money damages. Limiting the different categories of class actions to specific kinds of relief clearly reflects a concern for how the interests of the class member will vary, depending on the nature of the class injury alleged and the nature of the relief sought.[FN23]

> FN23.*Id.* at 411-12.

***4** A class seeking substantial money damages will

more likely consist of members with divergent interests.[FN24] Recognizing that monetary damages are more often related directly to the disparate merits of individual claims, the drafters of the rule saw fit to provide prospective (b)(3) class members the absolute right to notice, to opt out and not be bound by membership in a class.[FN25] Rule 23(b)(3) applies to cases for which a class action would achieve economies of time, effort, and expense, promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.[FN26] Whether common issues predominate and the class action is superior requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case.[FN27]

FN24. *Id.* at 412.

FN25. *Id.*

FN26. See *Amchem*, 521 U.S. at 615, 117 S.Ct. at 2246.

FN27. See *Berger v. Compaq Computer Corporation*, 257 F.3d 475, 483 (5th Cir.2001)(" '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." ' *Castano*, 84 F.3d at 744.).

In the case at bar the plaintiffs bear the burden of proving that: (1) the proposed class satisfies all of the elements of Rule 23(a); and (2) the proposed class also satisfies both requirements of Rule 23(b)(3).[FN28] Within the confines of Rule 23, a district court maintains substantial discretion in determining whether to certify a class.[FN29] In the absence of proof of all required elements, the court may not certify a class.[FN30] The Court addresses the plaintiffs' proof as to requisite elements of a Rule 23(b)(3) class action serially herein.

FN28. See *Spence v. Glock*, 227 F.3d at 310; *Berger*, 257 F.3d at 479-80; *Mullen*, 186 F.3d at 623; and *Castano*, 84 F.3d at 743-44 (holding that a court cannot rely on assurances of counsel that any problem with predominance or superiority can be overcome).

FN29. See *Smith v. Texaco*, 263 F.3d 394, 403 (5th Cir.2001)(recognizing that the certification inquiry is essentially fact based and thus the Fifth Circuit defers to the district court's inherent power to manage and control pending litigation, reviewing certification decisions only for abuse of discretion).

FN30. See *Berger*, 257 F.3d at 479-80.

III. EVIDENTIARY HEARING

Margie Richard ("Richard"), a retired teacher and student in theology who is active in the community affairs of the residents of Norco, Louisiana, testified that she presently lives on west bank of the river in Destrehan. However, at the time of the incident she lived on 28 Washington Street in Norco, Louisiana, where she had lived most of her life. Ms. Richard, admittedly "*not* a water drinker," testified that she did drink some on the morning of June 29, 1999 when taking her medications, and also used the water bathing. She testified that at night on June 29th, she could smell a diesel odor when she turned on the water. She experienced a throat irritation two days later, headache, stomach ache, nausea and panic. Her symptoms lasted approximately a month.

Richard testified that she is the type of individual that takes care of herself and was fearful of chronic effects, so she saw Dr. Alleman, and was given ampicillin for the irritation of her throat. She further testified that she had previously been a victim and explained in cross-examination that she participated in another class action against Union Carbide for exposure to a steam release allegedly containing methyl ethyl ketone ("MEK"). As to her awareness of any other individuals in the community who exhibited symptoms, Richard testified

that her children had sensitive skin, and were scratching because they had taken a bath in the tainted water. She also testified that they experienced some diarrhea. When asked about her awareness of other residents' problems with respect to the exposure involved in this particular case, Richard simply testified that the incident was the talk of the town without any further explanation. Richard testified that she is a member of the board of the environmental justice department associated with Tulane, Louisiana State University ("LSU"), Rutgers and Xavier University, and that she is involved with community monitoring of environmental issues affiliated with the Environmental Protection Agency Board for the Petroleum Sector.

***5** Gaynell Marie Johnson ("Johnson") testified that at the time of the subject spill, she lived at 123 Diamond Road in Norco, Louisiana. Ms. Johnson also no longer resides in Norco, but has since moved to Laplace, Louisiana. She admittedly suffered from a number of medical conditions at the time of the spill, including arthritis, a heart condition, residuals from a stroke in 1992, and asthma. Johnson testified that both she and her husband are disabled. On the evening of July 28, 1999, Johnson testified that she stayed up late making a gumbo and drank about two glasses of water. Unlike Richard, who simply drank water to take her medications, Johnson testified that she was a "water drinker," *i.e.*, she habitually drank a lot of water every day. Johnson testified that she became very sick that night with nausea and stomach cramps at approximately 1:00 a.m. in the morning. She testified her husband experienced similar symptoms. Her symptoms subsided by noon the next day and her husband's symptoms got better in one to two days.

Johnson also testified that she was a volunteer in the community organization, Concerned Citizens of Norco, which was formed to help protect the community from exposure to chemicals allegedly emanating from the chemical plants in the area. When questioned about any fear she experienced along with her nausea and cramping, Johnson stated matter-of-factly that she is always fearful, explaining that she lived in fear because of the community's situation between two chemical plants. Smith was cross-examined regarding her prior deposition testimony regarding her belief in filing law suits as a form of protest to "teach" the chemical plants "a lesson."

Samuel Price ("Price") testified that he tasted the water at around noon on June 29th, and approximately 15 minutes later, he began experiencing symptoms. Price testified that he and his wife suffered about three days with nausea after the spill. According to Price, that brief illness did not result in any change in his lifestyle.

Alvin Smith ("Smith") testified *via* deposition that the water smelled and tasted "greasy." Two of his daughters vomited, and the rest in his family felt "queasy." Smith further testified that he experienced some nausea, and dizziness or lightheadedness, but that could be attributable to "senility." FN31 Smith did not see a doctor. Smith testified that as soon as he and members of his family noticed the problem with the water on the morning of July 29, 1999, they stopped drinking it. FN32 Their symptoms lasted only a couple of days. FN33 Smith acknowledged that he lived within blocks of Diamond and Washington Streets, emphasizing that the affected community of Norco, Louisiana, is very small, bounded by the Shell Refinery on one side and the Shell chemical plant on the other. FN34

FN31. Deposition of Alvin Smith, at p. 49 [Plaintiffs' Exhibit Smith "1"].

FN32. *Id.* at pp. 45-50.

FN33. *Id.* at p. 46.

FN34. *Id.* at pp. 54, 56 (noting that Diamond was the "Canal Street" of Norco, dividing the community in half).

Shelley Moliere Rainey ("Rainey") testified *via* de-

position that she first noticed the taste and an odor similar to that of "exhaust" on the morning of July 29th, when she took a vitamin.[FN35] Rainey and her son live at home with her parents, brothers and sisters on Ormond Boulevard in Norco, Louisiana. Rainey testified that she was the only one in her household who noticed and commented about the water on the morning after the spill. Rainey proceeded to work that day, and drank about a half of a cup of the water at work in the form of herbal tea on that afternoon of July 29, 2002. She testified that other office workers commented that something was wrong with the water.[FN36] Rainey did not find out that there had been a chemical spill until the afternoon. She experienced symptoms on the evening of July 29th, 1999, consisting of a nauseated feeling and a hoarseness in her throat. She did not miss any work or any activities, and did not see a doctor on account of her symptoms.[FN37] Rainey testified that she did not consult a physician until the early part of 2002, and then only pursuant to her lawyer's recommendation, "to make sure everything was okay."[FN38] Her symptoms lasted only about a day and a half. Rainey's two year old son experienced dry skin problems in the days following the incident. The skin condition was treated with Nizoral[FN39] cream. Rainey could not recall complaints from anyone else in the family. She also did not know if any of her co-workers suffered ill-effects. Other than her own experience with the water on July 29, 2002, Rainey did not know much about the incident, and was unaware of individuals in the community who might have been affected. She could recall no complaints of sickness or injury from anyone and never noticed anyone getting sick, except for her own slow feeling and her son's dry skin patches.[FN40] It is clear from Rainey's deposition testimony that the sum and substance of what she knows about the incident, and the effect, if any, it had on the community, emanates either from her attorney or the workplace "rumor mill."

FN35. Deposition of Shelly Moliere-Rainey, at pp. 13-15 [Plaintiffs' Exhibit Rainey "1"].

FN36. *Id.* at 16.

FN37. *Id.* at 24.

FN38. *Id.* at 25.

FN39. Nizoral cream (ketoconazole) is a broad spectrum antifungal agent which inhibits the *in vitro* growth of common dermatophytes and yeasts by altering the permeability of the cell membrane. *In vitro* studies suggest that ketoconazole impairs the synthesis of ergosteraol (a vital component of the fungal cell membrane). It is indicated for topical use in treatment of skin fungi and yeast infections and in the treatment of sebborrheic dermatitis. Its safety and effectiveness for pediatric use have not been established. See Physician's Desk Reference (PDR), 53rd edition (1999), at p. 1427.

FN40. Deposition of Shelly Moliere-Rainey, at pp. 26-28.

***6** Scouring the fifty service orders [FN41] submitted by St. Charles Parish east bank residents for reports of illness, the Court found only one contemporaneous complaint of illness related by a Norco resident named Joan Vass (*i.e.*, "hurting stomach"). Not one of the other forty-nine service orders report a complaint of any illness experienced by east bank residents of St. Charles Parish. The service orders uniformly report complaints of a bad, strong, or oily smell or bad or chemical taste, or both.[FN42]

FN41. See St. Charles Parish Department of Waterworks' Service Orders dated July 29 and 30, 1999 [Plaintiffs' Exhibit Toth "4" *in globo*].

FN42. Forty-four of the service orders contain notations regarding the bad smell of the water, and only fifteen mention the bad taste, or both bad taste and smell. *Id.*

Dr. Evans testified *via* deposition that he had the

occasion to see only two of the St. Charles residents who complained of ill-effects, which they related to exposure to diesel. The two patients were not evaluated by Dr. Evans until January of 2002, a year and a half after the subject incident.[FN43] Dr. Evans, a general practitioner in the New Orleans area, testified that he had seen no other patients relating symptoms to the July 28, 1999 spill.[FN44] The only other medical records memorializing any complaints of physical, mental or emotional injury suffered by residents of St. Charles Parish are those of Dr. Earl Alleman, regarding Margie Richard's one visit on August 31, 1999, over a month after the spill, relating her complaints of nausea, diarrhea and headaches to her exposure to diesel oil in the water on July 28, 1999. Dr. Alleman's records regarding Gaynell Johnson's August 16, 1999 visit do not relate her symptoms of gastro-enteritis to diesel oil in the water and do not mention the spill of July 28, 1999.[FN45]

FN43. See Deposition of Dr. Henry M. Evans, Jr., at pp. 16-19, 23-24, 85-109 [Plaintiffs' Exhibit Evans "2"].

FN44. *Id.* at pp. 23-24.

FN45. See Dr. Earl Alleman's Records dated 8/31/99 and 8/16/99 [Joint Exhibit "3"].

Plaintiffs also called Charles Toth, the director of St. Charles Parish Waterworks at the time of the July 28, 1999 spill, as a witness at the evidentiary hearing. He testified that at around 7:00 a.m. on July 29th, Grant Walsh, a senior technician at the east bank waterworks facility, noticed an odor of diesel in the parking lot upon his arrival for work. When he entered the plant, Walsh noticed a petrol sheen on the surface of the water clarifiers. Plant intake was shut down as a precautionary measure. Flushing was initiated to rid the distribution system of tainted water. Neighborhood complaints were received, however, within a two day period, the Norco residents' complaints ceased. Mr. Toth testified that testing accomplished by certified laboratories on July 29th and 30th indicated the presence of elements of diesel far below the level necessary to produce ill health effects.[FN46]

FN46. See also Expert Report of Dr. William George, Professor of Pharmacology and Director of Toxicology at Tulane University School of Medicine, dated April 11, 1993, which similarly provides that: (1) symptoms such as headache, nausea, dizziness, etc. are unlikely in the case of residents, who did not claim exposure to high concentrations of diesel vapor in the air, but rather claim exposure in the course of bathing in and/or consuming contaminated water; (2) the low concentration of diesel/components in the processed water, which according to tests results, contained less that 1 part per million ("ppm") of diesel (*i.e.*, less than the minimal detection levels; and (3) at such low levels there would be no expected adverse health effects. [Defendant's Exhibit George "3"].

Dr. Henry Evans, plaintiffs' expert witness, who had the occasion to evaluate two patients in January of 2002, long after the incident in question, did not hold himself out as an expert in the field of toxicology.[FN47] Dr. Evans agreed that there was a *de minimus* exposure level of diesel/water concentration, a minimal level below concentration which would not cause any harm to the average human being. However, he expressed no opinion as to what level or range that might be, whether 1 ppm or 50 ppm.[FN48]

FN47. See Deposition of Dr. Henry Evans, at pp.24-31 [Plaintiff's Exhibit Evans "2"].

FN48. *Id.* at 50-52, 56, 57.

***7** Although the merits of the plaintiffs' substantive allegations are not the focus of the Court's inquiry in making a determination with respect to the issue of certification, plaintiffs submitted expert reports and/or deposition testimony of several expert wit-

nesses whose perfunctory opinions pertain to the merits, but are not grounded in the facts of this case at all, and thus provide only superficial analysis. Whereas plaintiffs' experts in the fields of chemistry, environmental engineering, and toxicology,*i.e.*, Dr. Gordon Goldman, A.J. Englande, and Sharee Rusnak, may be experts in their respective fields of study, their opinions as to causation-in-fact and the credibility of complainants' alleged symptomotology lend little, if any, assistance to this Court in making a determination on the issues inherent in the certification analysis. To the extent that such experts' opinions are relevant, they reinforce this Court's opinion that the predominance factor is not met in this case.[FN49]

FN49. See note 78 *infra*, and accompanying discussion at pp. 26-27.

As previously discussed, for purposes of discussion and analysis of the appropriate factors, the Court assumes that diesel from the July 28, 1999 spill at Orion's dock entered the St. Charles Parish waterworks plant on the east bank of the river, that drinking water tainted with elemental components of diesel of an undetermined concentration was distributed to the homes of putative class plaintiffs (residents of Norco, Louisiana), and that some residents suffered injuries on account of the presence of elements of diesel in their drinking water.

IV. DISCUSSION

A. *Rule 23(a) Requirements*

1. Rule 23(a)(1): Numerosity

As to numerosity, a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members.[FN50] Numerically speaking, a class of over one hundred members is sufficient for purposes of numerosity and actual numbers are not determinative of the inquiry.[FN51] In addition to numbers, factors relevant to the numerosity inquiry include the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim.[FN52]

FN50. See *James*, 254 F.3d at 570.

FN51. See *Street v. Diamond Offshore Drilling*, 2001 WL 568111, at 4 (E.D.La. May 25, 2001)(Duval, J.)("Although the number of members in a proposed class is not determinative of whether joinder is impracticable, it has been noted that any class consisting of more than forty members 'should raise a presumption that joinder is impracticable." ')

FN52. See *Mullen*, 186 F.3d at 624.

Plaintiffs presented very little evidence to the Court in satisfaction of the numerosity inquiry. In terms of sheer numbers of physically, mentally and emotionally injured potential class members, direct evidence of such was absent. Moreover, consideration of the concise geographical area to which the exposure was confined, together with the fact that the individuals affected were members of a very close-knit community, militates against a finding of numerosity.

The fact remains that class members may not have much incentive to bring individual actions because of the amount of perceived damages. Assuming that injuries were sustained on account of the spill, it appears from the evidence adduced at the evidentiary hearing that only in the rare case (*i.e.*, the case of the two or three of the named putative class plaintiffs) did such illness or injury either warrant any contemporaneous complaint of illness to Parish officials, a local doctor, or even to a lawyer. Whether due to the admitted short period of exposure to the elements of diesel fuel from the spill, or other factors, evidence adduced at the evidentiary hearing and discernible from the record are insuffi-

cient to allow the Court to presume, for the purposes of the pending motion, that the class would contain a sufficiently large number of members *whose joinder would be impracticable.*

***8** In sum, the named representative plaintiffs' own accounts admit that the Norco community affected in any manner or means by the July 28, 1999 spill is indeed a succinct, easily identifiable group of people, all residing in close proximity. Parish waterworks records reflect some 50 complaints of bad taste, bad odor, or both, within a day or two following the incident, with only one complaint of illness. The resident physician, Dr. Earl Alleman, apparently treated only two patients, one of whom related her illness to the spill incident, and then only after a full month elapsed. Putative class plaintiffs produced no evidence to the effect that area hospitals, health care providers, and/or physicians had more than the usual numbers of patients in general, or that area businesses were adversely affected or even mildly interrupted by a twenty-four hour water quality problem experienced on account of the spill. Rather, the evidence suggests that less than ten Norco residents related symptoms of nausea, diarrhea, or headaches to a health care professional within the days or weeks following the incident.

On the other hand, assuming without deciding that the 1600 sworn statements of Norco residents/claimants in the limitation proceeding (*i.e.*, relating one or more illnesses to their exposure to diesel on account of the July 28, 1999 spill) suffice for purposes of Rule 23(a)(1)'s "numerosity" requirement, the Court will proceed with its analysis of the certification issues.

2. Rule 23(a)(2): Commonality

The test of commonality is not demanding.[FN53] The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members.[FN54] The fact that some of the plaintiffs may have different claims, or claims that may require individualized analysis, will not defeat commonality.[FN55]

FN53. See *Mullen*, 186 F.3d at 625.

FN54. *James*, 254 F.3d at 570(citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir.1993)(quoting *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir.1982)).

FN55.*Id.*

In this case, the potential members of the plaintiffs' class share a common factual circumstance of allegedly suffering some degree of physical and/or emotional injuries from having their drinking water tainted with elements of diesel fuel spilled into the Mississippi River at or near Orion's dock and upstream from St. Charles Parish Waterworks Department's intake pipe in the Mississippi River. Potential class members also share a common legal theory-*i.e.*, that the conduct of the defendants is actionable under Louisiana law of negligence, pursuant to Article 2315 of the Louisiana Civil Code. One or the other is sufficient to meet the requirement of commonality.

Defendants to not dispute that the plaintiffs met their burden of proof with respect to Rule 23(a)(2)'s commonality requirement. Thus the Court need only consider the issue of commonality in the context of Rule 23(b)(3)'s more rigorous "predominance" test.[FN56]

FN56.7A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1763, at 227 (2d ed 1986)(noting the partial redundancy of (a)(2)'s commonality requirement, since the existence of a common question can be viewed as an essential element of (b)(3)'s requirement that common questions predominate over individual issues).

3. Rule 23(a)(3): Typicality

Rule 23(a)'s typicality requirement does not require

a complete identity of claims. It focuses on the similarities between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.[FN57]

FN57. *James,* 254 F.3d at 571.

***9** [T]he critical inquiry is whether the class representatives' claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.[FN58]

FN58.*Id.* (citations omitted).

Like commonality, the test of typicality is not demanding.[FN59]However, to satisfy Rule 23(a)'s typicality requirement, a class representative must be a part of the class and possess the same interest and suffer the same injury as class members.[FN60]In the case at bar, the named plaintiffs allege the same legal theories of recovery arising out the same incident, an oil spill on the Mississippi River. The putative class plaintiffs all seek the same remedies, *i.e.*, compensatory damages for physical, mental and emotional injuries and fright.

FN59.*Id.;* see also *Mullen,* 186 F.3d at 625 (typicality satisfied when plaintiff employees alleged theories of liability for defective air ventilation aboard casino boat under Jones Act and doctrine of unseaworthiness, despite the defendant's argument that each class member's alleged resulting "respiratory illness" may differ).

FN60. See *General Telephone Co. of Southwest v Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 2370 (1982).

Defendants do not dispute that the typicality requirement is satisfied in this case, and that the claims asserted by Margie Richard, Samuel Price and other named representatives are based on the same theories of liability as potential class members.[FN61]

FN61. See Defendants' Post-Hearing Memorandum in Opposition to Class Certification, at p. 7.

4. Rule 23(a)(4): Adequacy

The fourth and final requirement of Rule 23(a) is that the district court must find that the representative parties will fairly and adequately protect the interests of the class.[FN62]Rule 23(a)'s adequacy requirement encompasses consideration of the class representatives, their counsel, and the relationship between the two. Adequacy of the representation of the class cannot be presumed.[FN63]The adequacy requirement contemplates the absence of antagonistic or conflicting interests, and a sharing of interests between class representatives and absentees. As it should, this Court has assumed for the purposes of this motion for class certification that the injuries alleged by putative class plaintiffs could have and did indeed occur.

FN62.Fed.R.Civ.P. 23(a)(4).

FN63. See *Berger,* 257 F.3d at 479-80.

The Fifth Circuit in *Berger* emphasized that the party seeking certification bears the burden of establishing that *all* requirements of Rule 23(a) have been satisfied, and that it is error to presume the adequacy of the putative representatives in the absence of specific proof otherwise.[FN64]The *Berger* court observed:

FN64.*Id.* at 479.

To the contrary, we have described "[t]he adequacy requirement [as one that] mandates an inquiry into ... the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of the absentees."Likewise, ..."it must appear that the representative[s] will vigorously prosecute the interests of the class through qualified counsel."Both understandings-even accepting the variance between them-require the class representatives to possess a sufficient level of knowledge and understanding to

be capable of "controlling" or "prosecuting" the litigation.[FN65]

FN65.*Id.* at 482-83 (citations omitted).

Class action lawsuits are intended to serve as a vehicle for capable and committed advocates to pursue the goals of the class members through counsel, not for capable, committed counsel to pursue their own goals through those class members.[FN66]

FN66. *Berger,* 257 F.3d at 484.

***10** There is a complete absence of proof regarding the named class representatives' activities with respect to the *instant* litigation. Named class representatives were unable to testify first-hand regarding the plight (*i.e.,* illnesses) suffered by others in the Norco community outside of the individuals who either reside in their household or comprise their close family members. Ms. Richard testified as to no particular specifics regarding the adverse health effects to members of the community outside of her immediate family.

Alvin Smith, intending to serve as a class representative, was present briefly just prior to the commencement of the class certification hearing, but inexplicably left the Courthouse and did not return to testify in support of class certification as scheduled.[FN67] Review of Mr. Smith's deposition testimony reveals that: (1) he did not know the location of the spill; (2) he did not view any television programs or review any news that described what happened in the incident; and (3) he did not attend any meetings with Parish officials, the Parish Waterworks' Department, or consult any other sources about the spill.[FN68] Smith could not even say for sure whether his own children were treated by a physician on account of adverse effects of drinking the water.[FN69] Without question, the requisite zeal on the part of Smith is sorely lacking, even with respect to his own claim for monetary damages against the defendants. Moreover, the Court cannot find on this record that the shortcomings on Smith's part are diffused or counterbalanced by the competence or zeal of the few class representatives who appeared and testified live at the evidentiary hearing.

FN67. The defendants withdrew their objection to admitting Smith's deposition testimony in lieu of his live testimony at the hearing.

FN68. Deposition of Alvin Smith, Jr., at p. 48.

FN69.*Id.* at p. 47.

Shelley Moliere Rainey could only speak for herself, her mother and her infant son. She testified in deposition specifically that she could not even speak for her dad or her brothers and sisters, who occupied the same household.[FN70] Rainey testified that after the incident she did not inquire into the situation of any of her neighbors, co-workers or anyone else the community, either regarding information about the spill or its effect on individuals in the community.[FN71] It is clear that Rainey has not taken an active role in the litigation. The full extent of her participation is reactive, and not proactive. Rainey testified that she simply filled out a claim form that was delivered to her at work sometime in June of 2001, and then mailed back.[FN72] She admittedly did not perform any independent inquiry into the nature or size of the spill, or the effects thereof, and has made no efforts to determine what company was responsible, and/or whether or not the offending party had been fined.[FN73]

FN70. Deposition of Shelley Moliere-Rainey, at pp. 21-22, 28-29.

FN71.*Id.* at p. 29.

FN72.*Id.* at pp. 36-37.

FN73.*Id.* at p. 39.

Not one named class representative fostered the impression that he or she has or had his or her hands

on the pulse of the case. It was not apparent that any one or more of the named representatives had assumed an active role in the litigation *vis a vis* the prosecution of a "class" of claims aside from their participation in the evidentiary hearing on class certification.

***11** The Court has not ignored and cannot ignore the testimony of Richard and Johnson to the effect that both are generally concerned with issues of environmental justice, and in fact have a special advocacy interest in such issues. Richard's community involvement as a past-president of Norco Concerned Citizen's organization and as a board member of the Environmental Protection Agency Board for the Petroleum Sector are sincerely held commitments. The same is true of Johnson's past community activity concerning issues of "environmental justice." However, both named representatives Richard and Johnson no longer reside in Norco. Even assuming that both remain in close contact with area residents, not a shred of evidence suggests that Richard and Johnson have done so for the purpose of taking an active role in seeking redress for injuries *via* the subject litigation. Indeed, it appears their participation, albeit in name only, rather serves the purpose of ideologies embraced by organizations which they serve (*i.e.*, ideologies which they hold dear). Further assuming that Johnson's disability due to numerous health problems FN74 would not prevent her from taking an active role in guiding the course of the instant litigation, the Court must express real concern that her professed agenda regarding "environmental justice" (*i.e.*, teaching corporate perpetrators of environmental injustice "a lesson") may well conflict with the less complex much larger interest of the absent class members, who simply seek to secure the recovery monetary damages sufficient to compensate them for their alleged physical, mental and emotional injury, *i.e.*, to be "made whole," as a result of the single incident of July 28, 1999.

FN74. Johnson testified that she is (1) a disabled stroke victim, (2) no longer lives in Norco, and (3) suffers from a number of debilitating afflictions, including asthma, arthritis, a heart condition, and residuals from a stroke.

The Court further recognizes that potential differences such as allergies, sensitivity, personal habits, and preexisting disabilities FN75 may create variances in the ways that the named plaintiffs and potential class members prove causation and damages, but such differences do not affect the alignment of their interests.FN76 Nevertheless, no evidence was adduced demonstrating that the named plaintiffs were even close to fluent with the progress of the litigation and/or have made themselves available as a liaison between their counsel and the absent members. Whether or not the named plaintiffs were at any time in the past and/or are presently active in community organizations, regarding environmental issues in general or otherwise, is not the panacea.

FN75. To be illustrative, the Court reiterates the testimony of Johnson that she is disabled and drinks a lot of water, whereas Richard testified that she is in good health and is "not a water drinker."

FN76. See *Mullen*, 186 F.3d at 626.

This Court cannot presume adequacy of class representation. At best, the evidence suggests that two of named representatives (Richard and Johnson) are vocal and active participants in organized efforts to quell alleged environmental injustice. However, evidence of their active participation or an intention to become actively engaged in controlling the course of the instant litigation is absent. Because plaintiffs failed to adduce sufficient evidence to satisfy the requirement of adequacy as to their own representation, the Court need not and does not address the competency of counsel prong of the adequacy analysis.

B. *Rule 23(b)(3): Predominance and Superiority*

***12** In *Castano v. American Tobacco Company*, 84

F.3d 734 (5th Cir.1996), the Fifth Circuit made it clear that deciding whether common issues predominate and whether the class action is the superior method to resolve the controversy requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case.[FN77] The plaintiffs' class proposal fails to satisfy Rule 23(b)(3)'s requirement that the common questions of law or fact *predominate*.The Rule's express language indicates that for a class to be certified under 23(b)(3), there must not simply be some commonality of issues among claims. Rather the issues that are common must *predominate* over individual issues.

FN77. *Castano*, 84 F.3d at 744.

As to plaintiffs' claims for compensatory damages under Louisiana law, the focus is almost entirely on facts and issues specific to individuals, rather than as to the class as a whole. Even according to the plaintiffs' experts, [FN78] causation and damages will turn on the following varying individual factors: (1) extent of the exposure of each class member; (2) sensitivities which may be found to exist in individual members of the class which might have precipitated the same symptoms; (3) the mental or emotional stability of each class member; (4) how the injuries may have impacted the individual class member's ability to work or function in daily life; (5) varying medical treatment, if any, each plaintiff received; (6) the expense of such treatment, and so on. Factors such as age, weight, sex, preexisting conditions, and medical history are expected to play a dominant role in resolution of this litigation. Additionally, the predominant ailments (*i.e.*, headaches, nausea, dizziness, and sore throat) are quite common maladies which may be caused by any number of factors other than the individuals' varying types of and degree of exposure to the elements of diesel fuel-during the 24-hour period following the spill. As for fright and emotional injury, Ms. Johnson forthrightly testified that fear is a "constant" for Norco residents. Johnson attributed that constant fear to the happenstance of the location of their residences between Shell's refinery on one side and its chemical plant on the other, without regard to any breach whatsoever in the handling of potentially harmful substances.

FN78. See Deposition of Sharee Major Rusnak, at 70 (noting that she did not know how long it took St. Charles Parish east bank residents to manifest symptoms, and that would depend vary between individuals, according to a number of factors including whether th person was an adult or a child)[Plaintiffs' Exhibit Rusnak "3"]; and Deposition of Gordon Goldman, at p. 8, 71-72, 109, 135 (testifying that (1) the level of exposure could have an effect on some individuals and absolutely no effect on others, (2) concentration of diesel may pe *partly responsible for health problems*, (3) a lot depends on individuals, and (4) different people have different sensitivities)[Plaintiffs' Exhibit Goldman "3"].

In *Castano*, the Fifth Circuit observed that under such circumstances involving a myriad of individual factors, an action conducted nominally as a "class action" would "degenerate in practice to multiple lawsuits separately tried."[FN79] The predominance of individual-specific issues relating to the plaintiffs' claims for compensatory damages would in turn detract from the superiority of the class action device in resolving the plaintiffs' claims.[FN80] In *Amchem Products, Inc. v. Windsor*,[FN81] the Supreme Court instructed:

FN79. *Castano*, 84 F.3d at 745 n. 19 (citing Fed. R. Civ. P 23 (advisory committee notes)).

FN80. See *id.*(explaining that the greater the number of individual issues, the less likely superiority can be established).

FN81. *Amchem*, 521 U.S. 591, 117 S.Ct. 2231 (1997).

In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action...."FN82

FN82. *Amchem,* 117 S.Ct. at 2246.

***13** The Supreme Court further recognized that although the predominance test is readily met in certain cases involving consumer or securities fraud or violations of anti-trust law, even when arising from a common cause mass tort or mass accident, cases are likely to present *significant questions* affecting individuals in different ways:

Even mass tort cases arising from a common cause or disaster may, depending on the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revisions of Rule 23... noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses to liability, ... affecting individuals different ways."And the Committee advised that such cases are "ordinarily not appropriate" for class treatment.FN83

FN83.*Id.* at 2250 (citations omitted). However, the *Amchem* Court did recognize that the text of Rule 23 does not categorically exclude mass tort cases from class certification and that the district courts have certified such mass tort cases in increasing numbers since the 1970's. *Id.*

In *Smith v. Texaco, Inc.,* the Fifth Circuit explained that the cause of action as a whole must satisfy Rule 23(b)(3)'s predominance requirement, before Rule 23(c)(4) becomes available to sever common issues for class trial.FN84The predominance requirement cannot be met by repeatedly splitting off claims pursuant to subsection (c)(4). The Fifth Circuit explained:

FN84. *Smith,* 263 F.3d 394, 409 (5th Cir.2001).

To read the rule [23(c)(4)]... as allowing a court to pare issues repeatedly until predominance is achieved, would obliterate Rule 23(b)(3)'s predominance requirement, resulting in automatic certification in every case in which any common issue exists, a result the drafters of the rule could not have intended.FN85

FN85. *Smith,* 263 F.3d at 409.

The instant case is not unlike that considered by the district court in *Mattoon v. City of Pittsfield.*FN86That case similarly involved multiple defendants, and proximate causation presented a difficult issue. In the case at bar, the Parish and Orion may be liable under different theories for different courses of conduct. This is not a case where one set of operative facts establishes liability. Proximate cause will necessarily be different for every person in the proposed class, based on each individual class member's likely variances of exposure to contaminated drinking water and/or diesel vapor, notice of the problem, pre-existing medical conditions, individual sensitivities, and a whole host of other factors. For these reasons, liability cannot be determined on class-wide basis in this case. Indeed, here as in *Mattoon,* proximate causation "remains a thorny individual question," and the issue of damages presents individual considerations as well.FN87

FN86. 128 F.R.D. 17 (D.Mass.1989).

FN87. See *Mattoon,* 128 F.R.D. at 21; see also *Kemp v. Metabolife International Inc.,*

2002 WL 113894, at p. 3 (E.D.La.)(Berrigan, Chief J.)(involving an over-the-counter diet aid containing a combination of ingredients, noting (1) that some illnesses may well be caused by factors other than consumption of the product, and then to varying degrees citing *Kampen v. American Isuzu Motors,* 157 F.3d 306, 315-316 (5th Cir.1998), and (2) "that the cause of action, as a whole, must satisfy rule 23(b)(3)'s predominance requirement ....," and only then is rule 23(c)(4) available to sever the common issues for a class trial, quoting *Smith v. Texaco, Inc.,* 263 F.3d 394, 409 (5th Cir.2001)); and *Neely v. Ethicon, Inc.,* 2001 WL 1090204, at p. 11 (E.D.Tex.2001) (observing that any fault on the part of defendant is immaterial if an individual class member is unable to prove that the defendant's conduct caused the injury in fact and concluding that individual issues of causation and comparative fault will predominate over the proposed common issues regarding product defect).

As to manageability, the lack of it is a foregone conclusion. A finding of fault on the part of one or both of the class action defendants can only be likened to crossing a threshold, or perhaps sticking the proverbial foot in the door. Thereafter, it is a virtual certainty that the proposed class action will degenerate into a series of liability jury trials addressing the predominate issues (*i.e.,* proof as to the requisite findings under Louisiana law as to individual class members including proximate causation, injury-in-fact, and damages). Plaintiffs provide this Court with no reasonable basis to assume that common issues of fault of either the Parish, Orion, or both, resolved *via* class verdict would not be revisited in the context of sure-to-follow individual trials as to liability.

***14** Assuming *arguendo* that certification would grace the individual trials with some measure of judicial efficiency not otherwise realized, the problems of proof unique to each class member's case predicate to a finding of liability under Louisiana law will likely consume more judicial resources than certification will save, particularly considering the commonplace symptomotology allegedly experienced together, with the plethora of individual-specific factors which figure into the determination of causation and damages B *i.e.,* the "significant" part of each case. Defendants' conduct, while common, is but a minor part of each potential class member's case.[FN88] Suffice it to say, under the circumstances presented, the net result is more likely a waste of judicial resources.[FN89] Ultimately, the battle royale in this case will be fought over causation on an individual basis.

FN88. See *In re Agent Orange Prod. Liability Litigation MDL NO. 381,* 818 F.2d 145, 165-66 (2nd Cir.1987), *cert. denied, sub nom., Pinkney v. Dow Chemical Co.,* 484 U.S. 1004, 108 S.Ct. 695 (1988); and *Commonwealth v. Puerto Rico v. M/V Emily S.,* 158 F.R .D. 9, 15, 1995 A.M.C. 1025 (D. Puerto Rico 1994)("Even if the plaintiffs succeeded in establishing fault or negligence on the part of one or more of the defendants, the personal injury claimants would still have the bulk of their cases to prove, because any successful personal injury claimant will still have to prove injury in fact and causation.

FN89. See *Castano,* 84 F.3d at 749, n. 27 (citing *Sterling v. Velsicol Chemical Corp.,* 885 F.2d 1188, 1196 (6th Cir.1988)(the Rule 23(b)(3) device "was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort and expense.").

Accordingly and for all of the foregoing reasons,

IT IS ORDERED that the plaintiffs' Motions for Class Certification are DENIED.

E.D.La.,2002.
In re American Commercial Lines, LLC
Not Reported in F.Supp.2d, 2002 WL 1066743 (E.D.La.)

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