

13-0116

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LARRY TABATA, *et al.*,

Plaintiffs,

v.

CHARLESTON AREA MEDICAL
CENTER, INC., *et al.*,

Defendants.

Civil Action No. 11-C-524
Judge James Stucky

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

On the 31st day of May, 2013, came the Plaintiffs, by counsel, and presented their Motion for Class Certification to the Court. Defendants, Charleston Area Medical Center, Inc. ("CAMC"), and CAMC Health Education and Research Institute, Inc. ("CHERI"), by counsel, were present and formally opposed the motion. As the issues have been fully briefed and analyzed, the Court finds that this matter is ripe for decision and makes the following ruling for purposes of class certification only:

FINDINGS OF FACT

1. Plaintiffs filed a Motion for Class Certification on December 14, 2012.
2. The underlying suit was filed by Plaintiffs Larry Tabata, William Wells, Donald R. Holstein, Jr., Kay Kirk and Shirley Chancey,¹ individually and on behalf of a class of persons similarly situated ("Plaintiffs"), on March 30, 2011. Plaintiffs then filed their Amended Complaint on December 30, 2011, adding CHERI as a named Defendant.

¹ The initial Complaint listed Dorothy Elkins as one of the five (5) named Plaintiffs in this matter. In Plaintiffs' Amended Complaint, Dorothy Elkins was removed as a named Plaintiff. The Amended Complaint adds Shirley Chancey as one of the five (5) named Plaintiffs. Through agreement of the parties, Kay Kirk and Shirley Chancey were also removed as Plaintiffs.

3. Plaintiffs' Amended Complaint asserts the following causes of action: (1) Breach of the Duty of Confidentiality; (2) Invasion of Privacy – Intrusion Upon the Seclusion of the Plaintiffs; (3) Invasion of Privacy – Unreasonable Publicity into the Plaintiffs' Private Life; and (4) Negligence.

4. Leading up to the hearing on class certification, the parties exchanged written discovery and conducted several depositions, including those of Plaintiffs Larry Tabata, Williams Wells, and Donald Holstein, as well as that of Lynn Brookshire, the Vice President for Information Services and Chief Information Officer for CAMC.

5. Discovery has revealed that neither Plaintiffs nor Defendants are aware of any unauthorized and malicious users attempting to access or actually accessing the records.

6. Neither Plaintiffs nor Defendants are aware of any of the 3,655 affected patients having any actual or attempted identity theft.

7. The remaining named Plaintiffs have not suffered any personal or property injuries or sustained any actual economic losses. Additionally, they are not aware if any other potential class members have.

8. Plaintiffs contend that their primary damages arise from the alleged increased risk of future identity theft and the alleged annoyance and/or inconvenience of potentially having had their personal information accessible on the internet from September 2010 to February 2011.

9. Plaintiffs have provided no evidence, expert or otherwise, for calculating such increased risk of future identity theft or a methodology for redressing such increased risk on a class-wide basis.

10. Determining whether or not an increased risk of future identity theft exists and was caused by this incident will necessarily involve a consideration of how class members handled and protected their personal information before and after the security vulnerability.

11. Except for Larry Tabata, who requested a credit freeze on April 15, 2013, none of the named Plaintiffs have taken any affirmative action to protect their identity. Additionally, none have knowledge of whether any other member of the proposed class has taken any measures to protect his/her identity.

12. During his deposition, Larry Tabata confirmed that he has never had an actual or attempted identity theft. His concern over the potential disclosure is whether that information may be used some time in the future. He does not know if his information was ever accessed and believes that it is unlikely that his identity will be stolen, since the alleged disclosure happened over two years ago. Additionally, Larry Tabata testified that his wife manages their finances, including paying bills online, but vigilantly watches their bank and credit card statements. In 2013, after he and his wife refinanced their home and purchased a car and camper, they imposed a freeze on their credit because they had no need to access their credit in the near future. However, he does maintain approximately four or five active credit cards. His wife uses them to shop online, including using a debit card to shop online. They file their taxes electronically.

13. Plaintiff William Wells testified that he thinks he is at risk for identity theft but has not experienced any actual or attempted identity thefts. After receiving notification of the security incident, he simply checked his bank to make sure his money was there but did not sign up for credit monitoring. He does not know what a credit freeze is. He has taken no action to protect his identity and just "hopes nothing bad happens." As for his finances, William Wells'

wife handled them until she became ill. They bank primarily through writing and cashing checks and having debits taken directly from their banking account. Their daughter has access to their financial accounts. William Wells e-files his taxes.

14. Plaintiff Donald Holstein testified that he thinks he is at risk for identity theft in the future but has not experienced any actual or attempted identity thefts. Since being notified of the security incident, he has taken no steps to protect his identity. Regarding his personal financial situation, Donald Holstein uses only hardcopy checks and cash to conduct his financial affairs. Every month he reviews his bank statements and then shreds them, as well as credit card offers that come in the mail. He has never borrowed money, nor has he ever possessed a credit card or any kind of credit account. He lives at home with his parents, does not have a computer, and has never been on the internet.

15. On May 9, 2013, Plaintiffs deposed Lynn Brookshire, the Vice President for Information Services and Chief Information Officer for CAMC. During the deposition, counsel asked if the individuals affected by the security incident were at an increased risk of identity theft. Lynn Brookshire stated "I think it was one of the risks. It would have added to, it would have been an additional risk for those people. I can't say if it was increased or not because, again, for 3,000 people, I don't know what they've been doing yesterday, last June" Later in the deposition, when asked about the confidence of the affected patients in the security of their personal information, Ms. Brookshire reinforced the personal nature of such sentiment, stating "There's a big variability in 3,000 people" and "individuals react to this whole world we live in differently"

CONCLUSIONS OF LAW

1. In order to certify a class under Rule 23 of the West Virginia Rules of Civil Procedure, a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a):

- (1) The class is so numerous that joinder of all members is impracticable,
- (2) There are questions of law or fact common to the class,
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) The representative parties will fairly and adequately protect the interests of the class.

W. Va. R. Civ. P. 23(a); *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 521-25, 694 S.E.2d 815, 854-55 (2010). A circuit court must further find that one of the three subdivisions of Rule 23(b) has been met, and in this case, the relevant subsection is Rule 23(b)(3),² which states:

- (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 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.

W. Va. R. Civ. P. 23(b)(3).

2. The party seeking class certification under Rule 23 bears the burden of satisfying the requirements of Rule 23. Syl. Pt. 6, *Jefferson Co. Bd. of Educ. v. Jefferson Co. Educ. Ass'n*,

² Although Plaintiffs list Rule 23(b)(2) as their choice for complying with Rule 23(b), the substance of their analysis follows the requirements of Rule 23(b)(3). Accordingly, the Court's analysis and ruling are specific to Rule 23(b)(3).

183 W.Va. 15, 16, 393 S.E.2d 653, 654 (1990). The standard of proof is a preponderance of the evidence. Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23[2][a] (4th ed. 2012).

3. In ruling on a motion for class certification, a circuit court may conduct “an exploration beyond the pleadings [] to make an informed judgment” *Love v. Georgia Pac. Corp.*, 214 W.Va. 484, 488, 590 S.E.2d 677, 681 (2003) (citing *Burks v. Wymer*, 172 W.Va. 478, 485, 307 S.E.2d 647, 654 (1983) (discussing a prior version of Rule 23)). In fact, “a class action may only be certified if the trial court is satisfied, after a *thorough analysis*, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied.” *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W.Va. 443, 454, 607 S.E.2d 772, 783 (2004) (emphasis added). An order certifying a class should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions. *Id.* Conclusory statements of a plaintiff and a court that the requirements of Rule 23 have been satisfied are not sufficient. *Id.*

4. For the reasons set forth more fully below, Plaintiffs have failed to carry their burden showing that class certification is supported by current law and warranted by the facts of this case.

5. Plaintiffs have failed to show commonality among the claims of the named Plaintiffs and the class members because there has been no showing that all class members suffered the same type of harm and because proof of causation and damages cannot be ascertained on a class-wide basis.

6. Pursuant to Rule 23(a)(2), the party seeking class certification must show that there are questions of law or fact common to the class. Syl. Pt. 11, *In re West Virginia Rezulin*

Litigation, 214 W.Va. 52, 57, 585 S.E.2d 52, 57 (2003). The West Virginia Supreme Court of Appeals has said that “a common nucleus of operative fact or law is *usually* enough to satisfy the commonality requirement.” *Id.* (internal citation omitted) (emphasis added). In the same opinion, the Court continued “[t]he threshold of commonality is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.” *Id.* The Court even noted “[t]he common questions need be neither important nor controlling, and one significant common question of law or fact will satisfy this requirement.” *Id.* (citing *Ga. State Conf. of Branches of NAACP v. Georgia*, 99 F.R.D. 16, 25 (S.D. Ga. 1983)).

7. Recent decisions from the Supreme Court of Appeals and the United States Supreme Court, however, have limited the overbroad application of the *Rezulin* interpretation of commonality under Rule 23. *See Ways v. Imation Enter. Corp.*, 214 W.Va. 305, 312-14, 589 S.E.2d 36, 43-45 (2003) (*per curiam*) (“[I]t cannot be shown that the resolution of common questions affect all or a substantial number of class members.”)

8. Similarly, the *Litigation Handbook on West Virginia Rules of Civil Procedure* reflects the narrowing scope of commonality post-*Rezulin*. “The commonality requirement for class certification requires that class members suffer common deprivation; *it is not sufficient that class members share common circumstance.*” Cleckley, Davis and Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(a)[2][b] (emphasis added). “The correct standard for determining if common questions of law or fact exist for class action purposes, is *whether common or individual questions would be the object of most of the efforts of the litigants and the court.*” *Id.* (emphasis added).

9. Recently, the U.S. Supreme Court acknowledged that the language of Rule 23(a)(2) of the Federal Rules of Civil Procedure, which mirrors the West Virginia Rule,³ “is easy to misread, since ‘[a]ny competently crafted class complaint literally raises common ‘questions.’” *Wal-Mart Stores, Inc.* at ___, 131 S. Ct. at 2551 (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131–132 (2009)). The Court continued, explaining that raising common questions is not the relevant determination, rather “the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation” should be the focus. *Id.* Further clarifying, the Court stated “[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers[]” and thus defeat commonality. *Id.* Citing *Gen. Tel. Co. of Southwest v. Falcon*, the Court explained:

[The claims of the named plaintiffs] must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. To attain this level of commonality, plaintiffs must “demonstrate that the class members have suffered the same injury.” *Id.* (internal citations omitted).

10. To survive a challenge under commonality, a plaintiff must show that the class members have suffered the same injury and that the contested *questions and answers*, which

³ A federal court’s interpretation of a comparable Federal Rule of Civil Procedure is to be considered persuasive authority. *Perrine* at 522, 694 S.E.2d at 856 n. 48 (2010) (“Traditionally, this Court has utilized decisions of federal courts when interpreting and applying our Rules of Civil Procedure.” *Kiser v. Caudill*, 215 W.Va. 403, 410 n. 4, 599 S.E.2d 826, 833 n. 4 (2004) (citations omitted). *See also Love v. Ga. Pac. Corp.*, 214 W.Va. 484, 488 n. 2, 590 S.E.2d 677, 681 n. 2 (2003) (*per curiam*) (Davis, J., dissenting) (“Due to the similarities between our Rules of Civil Procedure and the Federal Rules, we often look to decisions of the Federal Courts interpreting their rules as persuasive authority on how to apply our own rules.” (citation omitted)); *Lawyer Disciplinary Bd. v. Cunningham*, 195 W.Va. 27, 33 n. 11, 464 S.E.2d 181, 187 n. 11 (1995) (“[W]e follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure.”) (citation omitted)).

will drive the litigation, will be common to the claims of the class members, allowing for the efficient resolution of the claims of the class. In this case, Plaintiffs have failed to make this showing.

11. In particular, Plaintiffs have not shown that the members of the class have suffered any injury, much less a similar injury, and that the contested issues are capable of being resolved on a class level. To properly analyze commonality, a court must look at the elements of the counts in the complaint. West Virginia law recognizes a cause of action for the breach of the duty of confidentiality in the context of a physician wrongfully disclosing patient information; however, there is no recitation of the elements of such cause of action. *Morris v. Consol. Coal Co.*, 191 W.Va. 426, 434, 446 S.E.2d 648, 656 (1994). Other jurisdictions recognizing this cause of action have analyzed it in the context of medical malpractice and the breach of a fiduciary duty, thus requiring proof of damages and causation. *See, e.g., Pierce v. Caday*, 244 Va. 285, 291, 422 S.E.2d 371, 374 (1992); *Alberts v. Devine*, 395 Mass. 59, 68-69, 479 N.E.2d 113, 120 (1985). Likewise, traditional common law elements of negligence require proof of damages and causation. *Jenkins v. CSX Transp., Inc.*, 220 W.Va. 721, 729, 649 S.E.2d 294, 302 (2007). Accordingly, to prevail on Counts I and IV of the Amended Complaint, the Plaintiffs must offer proof of the same injury within the class and common proof as to causation.

12. The Plaintiffs' inability to fulfill these elements is best demonstrated by the total lack of any injury to any of the remaining representative plaintiffs. As noted in their discovery responses and their deposition testimony, the named Plaintiffs have not suffered any actual or attempted identity thefts. None of them had money stolen, charges or medical bills wrongfully incurred on their behalf, or any other property interest affected. They are not even aware if

any person viewed or attempted to access their information while it was viewable through an advanced internet search. They do not know what, if any, damages any other member of the class may have endured. The representative Plaintiffs all agree that their claim for damage or injury is all prospective; that is, the possibility that something may occur in the future to damage their credit or identity. Even then, such risk exists in significantly varying degrees.

13. For example, Larry Tabata, who has imposed a credit freeze and has no intention of lifting it, stands at a considerably lower risk of future identity theft than Larry Wells, who files his taxes electronically, has given his daughter access to his financial accounts, and has taken no action to protect his identity. This variance in the type and degree of injury shows that individual matters of proof on just Counts I and IV of the Amended Complaint will preclude the prosecution of this case as a class action. Further, a plaintiff, such as Larry Tabata, can hardly be said to have the same injury or same interest in the litigation as a class member, who may have actually had his/her identity stolen. Even farther removed is Donald Holstein, who has never borrowed money, never owned a credit card, never applied for a loan, and has no intention of doing so at any point in the future.

14. During the May 31 hearing, counsel for Plaintiffs argued that a present “common” injury pervaded the class based on the increased risk of future identity theft and based solely on annoyance and inconvenience without any present cognizable injury. In arguing the existence of a remedial harm for an increased risk of future identity theft, Plaintiffs’ counsel argued to extend the rationale of medical monitoring claims to data breach cases. This Court hereby rejects both arguments for a common injury.

15. This Court refuses to extend the future risk analysis of medical monitoring cases to data security incidents. In *Bower v. Westinghouse Elec. Corp.*, the Supreme Court of Appeals

established a “cause of action . . . for the recovery of medical monitoring costs” Syl. Pt. 2, 206 W.Va. 133, 135, 522 S.E.2d 424, 426 (1999); *see also State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W.Va. 443, 455, 607 S.E.2d 772, 784 (2004). Plaintiffs want their fear of future identity theft to be deemed a damage akin to the element of “an increased risk of contracting a serious latent disease” for a medical monitoring action. *Id.* This State’s highest court declined to make a similar expansion based on fear alone for property monitoring cases. *See Carter v. Monsanto Co.*, 212 W.Va. 732, 736, 575 S.E.2d 342, 346 (2002). In the *Carter* case, the Court rejected plaintiff’s contention that a current “well founded fear” of future contamination of his property constituted a present injury and limited the applicability of the analysis of medical monitoring suits. *Id.*

16. Further, Plaintiffs’ assertion that mere annoyance and inconvenience are cognizable injuries by themselves and are adequate to find commonality, typicality, and predominance for certification purposes are not supported by existing West Virginia law. Claims for inconvenience or annoyance must be related to a present personal injury or physical damage to property. *McClenathan v. Rhone-Poulenc, Inc.*, 926 F. Supp. 1272, 1280 (S.D. W. Va. 1996); *see also McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 421, 475 S.E.2d 507, 513 (1996); *Muzelak v. King Chevrolet, Inc.*, 179 W. Va. 340, 345-46, 368 S.E.2d 710, 715-16 (1988). In this case, except for a hypothetical and conjectural risk of future identity theft, Plaintiffs have not even alleged a currently existing, cognizable personal or property damage claim, to which damages of annoyance and/or inconvenience could attach. Accordingly, annoyance and inconvenience cannot serve as a common injury.

17. Like injury, the analysis of causation will be equally individualized. Again, within the circumstances of the named Plaintiffs, considerable factual differences exist over how

causation could be shown. Evaluating causation, as related to a risk of future identity theft, will require an examination of each class member's handling of personal information, such as how he/she banks, to whom personal information has been provided, what steps have been taken prior to and after the security incident to protect personal information, and whether he/she has had any prior identity theft.

18. Further hindering the named Plaintiffs' ability to achieve commonality is their inability to present expert testimony quantifying a common risk or degree of causal relatedness to the security incident. Plaintiffs do not intend to present any expert testimony at the class certification stage. Accordingly, for Counts I and IV, Plaintiffs have not shown that the members of the class have suffered any injury and that the contested issues of these claims can be resolved on a class-wide basis.

19. Likewise, for Counts II and III, Plaintiffs have failed to offer evidence establishing commonality. These counts involve allegations of invasion of privacy, both intrusion upon the seclusion and unreasonable publicity into one's private life. Although no reported cases in West Virginia define the elements for these causes of action, courts have typically adopted the description set forth in the Restatement (Second) of Torts. See *Curran v. Amazon.com, Inc.*, CIV.A. 2:07-0354, 2008 WL 472433, at *6 (S.D. W. Va. Feb. 19, 2008) (referring to the tort of invasion of privacy through the intrusion upon seclusion). The Restatement (Second) of Torts, Section 652B defines the tort of unreasonable intrusion as:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. To have an invasion of privacy through the unreasonable publicity of private affairs, a plaintiff must show that the defendant gave publicity to a matter concerning the private life of

another and the matter publicized would be highly offensive to a reasonable person and not of legitimate concern to the public. Restatement (Second) of Torts § 652D (1977). One who has established a cause of action for invasion of privacy is entitled to recover damages for the harm to his privacy interest and special damages for which the invasion is a legal cause. Restatement (Second) of Torts § 652H (1977). Accordingly, any type of recovery for invasion of privacy will require Plaintiffs to show an actual injury to their privacy and a corresponding causal link to the security incident.

20. With respect to the injury, the named Plaintiffs do not know whether their information or that of other class members was actually viewed or accessed. The problem is that the named Plaintiffs are not able to identify, either through the research of their counsel or an expert, whether there was an actual injury to their privacy interest. Not only does the Plaintiffs' inability to identify a common injury defeat commonality, it makes conducting a causal analysis and determining the type of proof required to show causation impossible. Once again, to find liability against Defendants for Counts II and III, the Court will have to hear evidence specific to each representative plaintiff, such as was his/her information accessed; if so, who accessed it; how many times was it accessed; and when was it accessed. The commonality requirement of Rule 23(a)(2) was designed to eliminate this type of individualized inquiry. Accordingly, the Court finds a lack of commonality.

21. Plaintiffs have failed to show typicality because the evidence does not establish whether the class members have suffered the same type of legal harm, which will consequently require individual determinations of the appropriate remedies.

22. While acknowledging that the "commonality and typicality requirements of Rule 23(a) tend to merge," the Supreme Court of Appeals has stated that:

[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Ways at 312, 589 S.E.2d at 43. The typicality requirement for class certification under Rule 23(a)(3) requires that the “claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” *In re West Virginia Rezulin Litigation* at 52, 585 S.E.2d at 52 (citing W. Va. R. Civ. P. 23(a)(3)). “A representative party’s claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.” *Id.* at 57, 585 S.E.2d at 57.

23. While typicality does not require that the claims of all class members be identical, it does require them to arise “out of the same legal or remedial theory.” *Id.* at 68, 585 S.E.2d at 68 (citing *United Broth. of Carpenters and Joiners of Am., Local 899 v. Phoenix Assoc., Inc.*, 152 F.R.D. 518, 522 (S.D. W.Va. 1994)). While commonality looks at the similarity of the representative plaintiffs and class members, typicality requires that the legal harm sustained be the same, so that there can be a class-wide remedy. *Id.* (citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991)). In both *In re West Virginia Rezulin Litigation* and *State of West Virginia ex rel. Chemtall Inc. v. Madden*, the Supreme Court of Appeals relied on the ability or inability of plaintiffs to prove a common harm and common remedy when analyzing typicality. See *Madden*, 216 W.Va. 443, 455, 607 S.E.2d 772, 784 (2004); *In re West Virginia Rezulin Litigation* at 68, 585 S.E.2d at 68. Recognizing the harm- and remedy- based approach to typicality, Professor Cleckley defined the test for typicality as “(1) whether other members have the same or similar injury, (2) whether the action is based on

conduct which is not unique to the named representatives, and (3) whether other class members have been injured by the same course of conduct.” Cleckley, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(a)[2][c].

24. Even though Plaintiffs have sued under the same causes of action, they have failed to identify and prove whether members of the class have suffered the same harm, whether any such harm resulted from the same course of conduct of the Defendants, and whether the same legal remedies are capable of addressing the alleged injuries. As noted above, the named Plaintiffs have no knowledge as to whether any of the other class members have suffered any type of damage or injury, other than an alleged risk of future identity theft, which is essentially all that is claimed by the named Plaintiffs. Further, the named Plaintiffs have offered no statistical or other analytical tool for quantifying on a class-wide basis the risk of future identity theft.

25. Without such common proof, any remedy sought to address claimed injuries will have to be individualized based on the specific damage to the particular class member. This type of proof necessarily precludes a common, class-wide remedy. The differences among the named Plaintiffs demonstrate the necessity of this individualized approach. For example, Donald Holstein, who has never applied for any type of credit, could entirely eliminate any risk of future financial identity theft by simply placing a credit freeze. Oppositely, if a member of the class has already suffered an actual identity theft, a credit freeze would not likely be an adequate remedy. Based on the particular situation of the class member, an adequate remedy could range from no action to financial reimbursement for credit monitoring and actual economic losses. Consequently, from the evidence or lack thereof currently before this Court, it appears that this suit will necessarily devolve into individualized claims of harm, requiring

individualized remedies. For these reasons, Plaintiffs have failed to satisfy the typicality requirement.

26. The record shows that individual issues regarding damages, causation, and adequate remedies will predominate over common issues of law or fact at trial. In addition to failing to meet the requirements of Rule 23(a), Plaintiffs have not satisfied Rule 23(b).

27. Rule 23(b)(3) requires that 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. W. Va. R. Civ. P. 23(b)(3). These requirements are typically referred to as the predominance and superiority tests or criteria. The predominance test forces the plaintiff to show that common questions of law or fact outweigh individual questions. *In re West Virginia Rezulin Litigation* at 71, 585 S.E.2d at 71. “The central question raised by the predominance criterion is whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.” *Mantz v. St. Paul Fire and Marine Ins. Co.*, 2003 WL 23109763, at *5 (Kanawha Co. Cir. Ct. December 17, 2003) (internal citations omitted).

28. The U.S. Supreme Court has confirmed that an analysis of individualized concepts of proof for causation and damages is appropriate under the predominance test. The Supreme Court has held that the predominance criterion makes the plaintiffs “show (1) that the existence of individual injury . . . was capable of proof at trial through evidence that [was] common to the class rather than individual to its members; and (2) that the damages resulting from that injury were measurable on a class-wide basis through use of a common methodology.” *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426, 1430 (2013) (citations omitted).

Once again, being mindful of the purpose of class actions to resolve efficiently numerous disputes, the Court said: “[w]ithout presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* Similarly, in a data breach case, the District Court emphasized the inability of the plaintiffs to show a common basis for proving damages class-wide in its decision to deny class certification under predominance. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 2:08-MD-1954-DBH, 2013 WL 1182733, at *8-10 (D. Me. March 20, 2013).

29. This analytical framework mirrors the methodology applicable to typicality outlined above. As previously described, the focus of the litigation will be on the extent, if any, of the damages sustained by each individual class member and the causation of such harm, which will necessarily involve individual inquiries into the particular class member’s personal conduct regarding his/her handling of personal information. Due to the uniqueness of injury and causative factors, the resulting remedy, if any, will be fashioned specifically for each class member. This individualized proof and remedy illustrates the lack of predominance of common issues and the impropriety of granting class status in this case.

30. Based on the foregoing, this Court finds that Plaintiffs have failed to show by a preponderance of the evidence that they have satisfied the requirements of Rule 23 for the certification of their proposed class. In particular, commonality, typicality, and predominance of common issues of law or fact are lacking.

31. In addition to denying class certification under Rule 23, this Court denies class certification because the named Plaintiffs lack standing as they have failed to articulate and suffer a concrete and particularized injury that is not hypothetical or conjectural.

32. West Virginia courts apply the concept of “standing” to every civil case. The basis for such application is the West Virginia Constitution, which provides “[t]he court shall have appellate jurisdiction in civil cases at law where the matter in controversy, exclusive of interest and costs, is of greater value or amount than three hundred dollars unless such value or amount is increased by the Legislature.” W. Va. Const., art. VIII, § 3. “Section 3 of Article VIII of the West Virginia Constitution refers to the word ‘controversy’ in discussing this Court’s appellate jurisdiction.” *Guido v. Guido*, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998). The applicability of standing extends beyond appeals to the Supreme Court of Appeals. *Id.* (“A party is entitled to prosecute a civil action as the real party in interest when he establishes an actual and justiciable interest in the subject matter of the litigation.”).

33. Under West Virginia law, standing encompasses three parts: 1) the party must have suffered an injury-in-fact, 2) there must be a causal connection linking the injury to some form of conduct; and 3) the injury must be redressible through the court. *Id.* An injury-in-fact is “the invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94-5, 576 S.E.2d 807, 821-22 (2002). A “particularized” injury is one that affects the plaintiff in a personal and individual way. *Men & Women Against Discrimination v. Family Prot. Serv. Bd.*, 229 W.Va. 55, ___, 725 S.E.2d 756, 762-63 (2011) (*per curiam*).

34. Plaintiffs do not have standing because they have not suffered any existing injury and allege in actuality only a prospective injury. In their pleadings, discovery responses, motion, and deposition testimony, Plaintiffs repeatedly emphasize that their injury is the current increased risk of future identity theft. Numerous courts have held that simply the risk of future identify theft, especially when unaccompanied by any present injury, is not an injury-in-fact.

See Reilly v. Ceridian Corp., 664 F.3d 38, 41-46 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2395, 182 L. Ed. 2d 1021 (2012); *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007); *Randolph v. ING Life Ins. and Annuity Co.*, 973 A.2d 702, 708 (D.C. 2009); *Paul v. Providence Health System–Oregon*, 351 Or. 587, 273 P.3d 106, 112 (2012).

35. The named Plaintiffs admitted in their depositions that they believe they are at risk for future identity theft but acknowledged that they have suffered no present injury. They were unable to articulate when an actual injury may occur and conceded that with approximately two years having passed from the security incident without any actual or attempted identity theft, the likelihood of any such theft is low. This type of bare speculation of an indeterminate, yet looming, amorphous and non-quantifiable risk of harm constitutes precisely the type of non-injury that precludes standing. *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1143 (2013). Accordingly, Plaintiffs lack standing.

36. In order to bring a class action, a named plaintiff must have standing at the time of the filing of the complaint and the class certification. *Scarborough v. Austin*, 968 F.2d 1211 (4th Cir. 1992) (citing *Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir. 1987)); Cleckley, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23[2]. The Supreme Court of Appeals has recognized the applicability of standing to class action parties at the pre-certification stage of the lawsuit. *State ex rel. Erie Fire Ins. Co. v. Madden*, 204 W.Va. 606, 610, 515 S.E.2d 351, 355 (1998). Accordingly, because the named Plaintiffs lack standing, they cannot bring this suit as a class action.

It is thus **HEREBY ORDERED** that Plaintiffs' Motion for Class Certification is **DENIED**. The objections and exceptions of the Plaintiffs are noted.

It is so Ordered this the 24 day of June, 2013.

James C. Stucky
Judge Stucky, Presiding

Submitted Pursuant to W.Va. T.C.R. 24.01:

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24th
DAY OF June 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA P