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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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TOM HAMMOND, WILLIAM H. WICKS,  
LINDA YOUNG, LOIS GIORDANO, DEBBIE  
BERNSTEIN, ALYSON KANNEY, and KEN  
WITEK, on behalf of themselves and all others  
similarly situated,

Plaintiffs,

- against -

THE BANK OF NEW YORK MELLON CORP.,

Defendant.  
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08 Civ. 6060 (RMB) (RLE)

**DECISION & ORDER**

**I. Introduction**

This case is one of many similar litigations (most brought as purported class actions) in which plaintiffs seek damages for the loss of personal identification information through accident or theft. See, e.g., Bell v. Acxiom Corp., No. 06 Civ. 485, 2006 WL 2850042 (E.D. Ark. Oct. 3, 2006); Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1 (D.D.C. 2007); Amburgy v. Express Scripts, Inc., 671 F. Supp. 2d 1046 (E.D. Mo. 2009); Giordano v. Wachovia Sec., LLC, No. 06 Civ. 476, 2006 WL 2177036 (D.N.J. July 31, 2006); Key v. DSW, Inc., 454 F. Supp. 2d 684 (S.D. Ohio 2006); see also Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629 (7th Cir. 2007); Ruiz v. Gap, Inc. ("Ruiz III"), No. 09-15971, 2010 WL 2170993 (9th Cir. May 28, 2010); Stollenwerk v. Tri-West Healthcare Alliance, 254 F. App'x 664 (9th Cir. 2007); Willey v. J.P. Morgan Chase N.A., No. 09 Civ. 1397, 2009 WL 1938987 (S.D.N.Y. July 7, 2009); Cherny v. Emigrant Bank, 604 F. Supp. 2d 605 (S.D.N.Y. 2009); Caudle v. Towers, Perrin, Forster & Crosby, Inc., 580 F. Supp. 2d 273 (S.D.N.Y. 2008); Shafran v. Harley-Davidson, Inc., No. 07 Civ. 1365, 2008 WL 763177 (S.D.N.Y. Mar. 20, 2008); Ruiz v. Gap, Inc. ("Ruiz I"), 540 F.

Supp. 2d 1121 (N.D. Cal. 2008); Ruiz v. Gap, Inc. (“Ruiz II”), 622 F. Supp. 2d 908 (N.D. Cal. 2009), aff’d, Ruiz III; McLoughlin v. People’s United Bank, Inc., No. 08 Civ. 944, 2009 WL 2843269 (D. Conn. Aug. 31, 2009); Matthys v. Green Tree Servicing, LLC (In re Matthys), No. 09-50794, 2010 WL 2176086 (Bankr. S.D. Ind. May 26, 2010); Belle Chasse Auto. Care, Inc. v. Advanced Auto Parts, Inc., No. 08 Civ. 1568, 2009 WL 799760 (E.D. La. Mar. 24, 2009); Pinero v. Jackson Hewitt Tax Serv. Inc., 594 F. Supp. 2d 710 (E.D. La. 2009); Melancon v. La. Office of Student Fin. Assistance, 567 F. Supp. 2d 873 (E.D. La. 2008); Ponder v. Pfizer, 522 F. Supp. 2d 793 (M.D. La. 2007); In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 613 F. Supp. 2d 108 (D. Me. 2009); Hendricks v. DSW Shoe Warehouse, Inc., 444 F. Supp. 2d 775 (W.D. Mich. 2006); Forbes v. Wells Fargo Bank, N.A., 420 F. Supp. 2d 1018 (D. Minn. 2006); Guin v. Brazos Higher Educ. Serv. Corp., No. 05 Civ. 668, 2006 WL 288483 (D. Minn. Feb. 7, 2006); Kahle v. Litton Loan Serv. L.P., 486 F. Supp. 2d 705 (S.D. Ohio 2007).

While there is a split in authority as to how to analyze these cases, every court to do so has ultimately dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) or under Rule 56 following the submission of a motion for summary judgment. Several courts, including federal district courts in Arkansas, Missouri, New Jersey, Ohio, and the District of Columbia, have determined that the potential risk of identity theft resulting from the loss of personal information is not an “injury-in-fact” within the meaning of Article III of the United States Constitution and have dismissed these cases after concluding that plaintiffs lacked “standing.” See, e.g., Randolph, 486 F. Supp. 2d at 1, 8–9 (“Plaintiffs’ claims that they are subject to an increased risk of identity theft and inconvenience” as a result of the theft of a laptop containing their names, addresses, and Social Security numbers fail to allege an injury in fact and “Plaintiffs’ allegation that they have incurred or will incur costs in an attempt to protect

themselves against their alleged increased risk of identity theft fails to demonstrate an injury that is sufficiently ‘concrete and particularized’ and ‘actual or imminent.’”); Key, 454 F. Supp. 2d at 690; Amburgy, 671 F. Supp. 2d at 1052; Giordano, 2006 WL 2177036, at \*4; Bell, 2006 WL 2850042, at \*2; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Other courts have determined that similarly situated plaintiffs had standing but concluded, for one reason or another, that loss of identity information is not a legally cognizable claim.<sup>1</sup> See, e.g., Pisciotta, 499 F.3d at 634 (“Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy. Plaintiffs have not come forward with a single case or statute, from any jurisdiction, authorizing the kind of action they now ask this federal court . . . to recognize as a valid theory of recovery[.]”); McLoughlin, 2009 WL 2843269, at \*4; Caudle, 580 F. Supp. 2d at 280; Ruiz III, 2010 WL 2170993, at \*1<sup>2</sup>; see also Forbes, 420 F. Supp. 2d at 1020–21 (where the Court rejected plaintiffs’ breach of contract and negligence claims and plaintiffs’ contention that they had suffered damage as a result of the time and money they had spent to monitor their credit).

For the reasons set forth below, this Court concludes that Plaintiffs here do not have Article III standing (i.e., there is no “case or controversy”) because they claim to have suffered little more than an increased risk of future harm from the loss (whether by accident or theft) of their personal information. The opinion goes on to say that even if, arguendo, Plaintiffs had demonstrated standing, their claims properly would be dismissed. See Shafran, 2008 WL

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<sup>1</sup> A helpful overview is presented in an article entitled “Poised on the Precipice: A Critical Examination of Privacy Litigation,” by Andrew B. Serwin. 25 Santa Clara Computer & High Tech L.J. 883, 931–95 (2009).

<sup>2</sup> The Ninth Circuit’s unpublished Memorandum Opinion in Ruiz III “is not precedent[.]” 2010 WL 2170993, at \*1 n.\*; see also United States Court of Appeals for the Ninth Circuit Rule 36-3(a).

763177, at \*2 (“an increased risk of future identity theft is not, in itself, an injury that the law is prepared to remedy”).

## II. Background

On April 22, 2009, Tom Hammond (“Hammond”), William H. Wicks (“Wicks”), Linda Young (“Young”), Lois Giordano (“Giordano”), Debbie Bernstein (“Bernstein”), Alyson Kanney (“Kanney”), and Ken Witek (“Witek”), on behalf of themselves and all others similarly situated (collectively, “Plaintiffs”), filed a second amended putative class action complaint (“Complaint”) against the Bank of New York Mellon Corporation (“BNY” or “Defendant”).<sup>3</sup> Plaintiffs assert common law claims of negligence, negligence *per se*, breach of implied contract, and breach of fiduciary duty, as well as statutory claims under the New York Consumer Protection Law, N.Y. Gen. Bus. § 349 *et seq.*, the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, the Illinois Consumer Fraud and Deceptive Business Practices Act, 805 Ill. Comp. Stat. § 505 *et seq.*, the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.*, and the New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 *et seq.* (collectively, the “State Consumer Protection Laws”). (Second Am. Compl., dated Apr. 22, 2009 (“Compl.”), ¶¶ 107–174.)

<sup>3</sup> Giordano previously brought a similar putative class action regarding a (unrelated) data loss involving Wachovia Bank, alleging that “a report which contained financial information about [Giordano] and tens of thousands of other Wachovia customers” was missing. *Giordano*, 2006 WL 2177036, at \*1. Her complaint asserted claims of negligence, invasion of privacy, breach of the duty of confidentiality, and conversion and, as here, sought remedies including that the 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.” *Id.* at \*2 (internal quotation omitted). Upon a motion brought by defendants under Fed. R. Civ. P. 12(b)(1) and (b)(6), her claim was dismissed. *See id.* at \*5 (“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.’”). According to Plaintiffs, this case is materially different from Giordano’s previous case. (*See pp.* 25–26, *infra.*)

Plaintiffs' claims arise out of two incidents (referred to herein as the "tape losses") in which it is alleged that the "names, addresses, Social Security numbers, bank account information, financial data, debit or credit card, checking account numbers and information and/or shareholder account information (the 'Sensitive Personal Information') was stolen, accessed and/or compromised by third parties while entrusted to Defendant[.]" (Compl. ¶ 1.) Specifically, Plaintiffs allege that, in February 2008, "a BNY metal box with six to ten unencrypted computer back-up tapes containing the Sensitive Personal Information of consumers was 'lost' from a truck operated by a transport company hired by BNY," (Compl. ¶ 2), and that, in April 2008, "a backup data storage tape containing images of scanned checks and other payment documents was 'lost' while being transported from Philadelphia to Pittsburgh" by an outside carrier. (Compl. ¶¶ 4, 43.) Plaintiffs seek actual damages, equitable relief, fees, costs, and expenses. (Compl. ¶¶ 176–178.)

On December 2, 2009, Defendant moved for dismissal as follows: (1) pursuant to Fed. R. Civ. P. 12(b)(1), arguing that Plaintiffs lack standing to sue because the "mere increased risk of harm" resulting from the tape losses is "not an actual or imminent injury"; and (2) pursuant to Fed. R. Civ. P. 56(c), arguing that summary judgment should be granted because "neither an increased risk of future identity theft nor the emotional distress and worry relating to the increased risk constitute 'harm' that the law is prepared to remedy." (Def.'s Mem. of Law in Supp. of its Mot. for Summ. J., dated Dec. 2, 2009 ("Mot."), at 10–16.)<sup>4</sup>

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<sup>4</sup> Defendant also argues that: Plaintiffs' claim for breach of implied contract fails because "there was no assent or consideration"; Plaintiffs' claim for breach of fiduciary duty fails because Plaintiffs "cannot establish the existence of a fiduciary relationship"; Plaintiffs' claim for negligence *per se* fails because the statutes and regulations that Defendant is alleged to have violated "do not provide a private right of action"; and there can be no liability under the state Consumer Protection Laws because Plaintiffs "ha[ve] not directly engaged the [D]efendant in any consumer-oriented business." (Mot. at 16–22.)

On January 7, 2010, Plaintiffs filed an opposition to Defendant's motion and a cross-motion for class certification pursuant to Fed. R. Civ. P. 23. (See Pls.' Mem. of Law in Opp'n to Def.'s Mem. of Law in Supp of its Mot. for Summ. J. & Mem. of Law in Supp. of Pls.' Mot. for Class Certification, dated Jan. 6, 2010 ("Opp'n").) Plaintiffs argue, among other things, that: (1) "the risk of future harm created by a data breach is a sufficient injury-in-fact to confer standing"; and (2) Defendant's failure "to properly safeguard [Plaintiffs'] personal information is sufficient to state a claim for at least nominal damages." (Opp'n at 11-15.) Plaintiffs also contend, among other things, that a class action is called for because: "there are several common issues in this case which predominate over individual ones (and which are subject to generalized proof), such as whether BNY's uniform conduct harmed all Class members"; and "class action is superior to other available methods [because] any individual Class member . . . would have little incentive to file their own case[.]" (Opp'n at 22.)<sup>5</sup>

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Defendant submitted, along with its motion for summary judgment, a Statement of Undisputed Material Facts as required by Local Rule 56.1. (See Def.'s Local Civil Rule 56.1 Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J., dated Dec. 2, 2009 ("Def. 56.1").)

<sup>5</sup> Plaintiffs also argue that: "an entity that is entrusted with the sensitive financial information of consumers has an implied contractual obligation to take reasonable measures to safeguard the data"; "[c]ourts have found a fiduciary duty of confidentiality to exist in circumstances virtually identical to those presented here"; "the absence of [a private right of action] does not automatically preclude the claim[s]" under the State Consumer Protection Laws; and "there was direct contact between Plaintiffs and BNY when BNY sent out materially misleading" letters to Plaintiffs notifying them of the tape losses, and sending the letters was "consumer-oriented conduct." (Opp'n at 15-20.)

Plaintiff also submitted, along with its opposition to Defendant's motion, a Statement of Disputed Material Facts in opposition to Defendant's Statement of Undisputed Material Facts. (See Pls.' Local Civil Rule 56.1 Statement of Disputed Material Facts in Opp'n to Def.'s Statement of Undisputed Material Facts, dated Jan. 6, 2010 ("Pls. 56.1").)

On January 29, 2010, Defendant filed a reply in further support of its motion for summary judgment and an opposition to Plaintiffs' motion for class certification. (See Def.'s Mem. of Law in Further Supp. of its Mot. for Summ. J. & in Opp'n to Pls.' Mot. for Class Certification, dated Jan. 29, 2010 ("Reply").) Defendant argues, among other things, that because the named Plaintiffs "have suffered no injury," they "are not typical or adequate class representatives." (Reply at 13.) Defendant also argues that the case is "unmanageable as a class action [because] the law of multiple jurisdictions must be applied." (Reply at 15–16.)

On February 19, 2010, Plaintiffs filed a reply in further support of their motion for class certification. (See Pls.' Reply Mem. of Law in Further Supp. of Mot. for Class Certification & Sur-Reply Mem. of Law in Further Opp'n to Def.'s Mot. for Summ. J., dated Feb. 19, 2010.)

On June 15, 2010, the Court heard oral argument.

#### **Additional Background**

Plaintiffs Wicks, Kanney, Hammond, Young, Giordano, Bernstein, and Witek are residents of New York, New York, Michigan, Pennsylvania, New Jersey, California, and Illinois, respectively. (See Compl. ¶¶ 12–26.) Defendant BNY "is a financial institution comprised of a number of business units" including, among others, Shareowner Services and Working Capital Solutions ("WCS"). (Def. 56.1 ¶¶ 1, 3; see Pls. 56.1 ¶¶ 1, 3.)

"Shareowner Services and WCS produced back-up Tapes of computer information and used third party vendors to transport and, in some instances, store those Tapes in secure storage facilities." (Def. 56.1 ¶ 4; see Pls. 56.1 ¶ 4.) "In late February 2008, Archive Systems, Inc. ('Archive'), a vendor transporting Shareowner Services' back-up tapes by truck, discovered that one of ten boxes was missing" ("February 2008 tape loss"). (Def. 56.1 ¶ 5; see Pls. 56.1 ¶ 5.) "A separate incident, involving WCS, occurred in April 2008 when a national courier service lost

a back-up tape with payment information” (“April 2008 tape loss”). (Def. 56.1 ¶ 7; see Pls. 56.1 ¶ 7.)<sup>6</sup> According to Plaintiffs, the missing tapes “contained the unencrypted Sensitive Data of approximately 12.5 million individuals[.]” (Pls. 56.1 ¶ 4; see also Decl. of Steven L. Ratner, dated Dec. 2, 2009 (“Ratner Decl.”), Ex. W (Expert Report of Fred H. Cate, dated July 24, 2009 (“Cate Report”)), at 3.)

In the months following the February 2008 and April 2008 tape losses, BNY notified the affected individuals by letter. (See Def. 56.1 ¶¶ 9–10; Pls. 56.1 ¶¶ 9–10; see also, e.g., Decl. of Joseph G. Sauder, dated Jan. 6, 2010 (“Sauder Decl.”), Ex. 15 (Ltr. from BNY Mellon Shareowner Services, dated Sept. 15, 2008) (“Dear Sir or Madam, We are writing to let you know that computer tapes containing some of your personal information were lost while being transported to an off-site storage facility by our archive services vendor. While we have no reason to believe that this information has been accessed or used inappropriately, we deeply regret that this incident occurred and we wanted to explain the precautionary steps we have taken to help protect you.”).) And, “[a]t no cost, BNY Mellon offered the individuals affected by the February and April tape losses the following services: a minimum of 24 months of credit monitoring, \$25,000 of identity theft insurance (where permitted by applicable law), reimbursement for certain credit freeze costs, and a toll-free number to handle inquiries.” (Def. 56.1 ¶ 11; see Pls. 56.1 ¶ 11.)<sup>7</sup>

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<sup>6</sup> Plaintiffs dispute Defendant’s characterization of the April 2008 tape loss. (See Pls. 56.1 ¶ 7 (“[T]his statement is disputed to the extent that it characterizes the back-up tape as ‘lost.’ . . . Upon the arrival of the package containing the back-up tape at the Pittsburgh destination it was discovered that the seam of the envelope that was supposed to contain the backup storage tape was split, and the envelope was empty.”).)

<sup>7</sup> At oral argument, Plaintiffs’ counsel stated: “BNY is culpable because BNY [made] misstatements about what happened to the data tapes . . . . And that information is material because consumers would want to know the real risk to which their information has been

Plaintiffs now seek remedies beyond those already (voluntarily) provided by Defendant, including compensatory damages for: the “value of their Sensitive Personal Information that was improperly stolen, misplaced and/or compromised”; the “unauthorized disclosure and/or compromise of their Sensitive Personal Information”; “monetary losses for money stolen from their accounts and/or fraudulent charges made on their accounts”; the “value of all time expended and/or out-of-pocket expenses incurred to proactively safeguard and/or repair their credit”; and “the burden and expense of comprehensive credit monitoring.” (Compl. ¶ 176.) Plaintiffs also seek equitable relief, “to wit, [the] creation of a fund for comprehensive credit monitoring for more than two (2) years into the future, as well as . . . the appointment of an administrator and advisory panel . . . so as to prevent any additional harm and remedy actual harm, that has or will occur.” (Compl. ¶ 176.)

Of the seven named Plaintiffs, only Hammond, Kanney, and Bernstein claim to have suffered “unauthorized credit transactions” after the tapes were lost. (Def. 56.1 ¶ 21; see Pls. 56.1 ¶ 21.)<sup>8</sup> Both Hammond and Kanney acknowledge that they were reimbursed for any unauthorized charges they encountered. (See Pls. 56.1 ¶ 21; Def. 56.1 ¶ 21.) Bernstein acknowledges that the unauthorized charge which she encountered and which was not reimbursed “was unrelated to the tape loss.” (Def. 56.1 ¶ 23; see Pls. 56.1 ¶ 23.)<sup>9</sup> Kanney

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compromised . . . And [BNY] made those statements because they had a perverse incentive to keep down the number of people that enrolled in the credit monitoring that BNY offered.” (Hr’g Tr. at 6:21–7:5; see also pp. 25–27, infra.)

<sup>8</sup> Six of the seven named Plaintiffs were also notified that personal information was lost in the February 2008 tape loss. Young was “affected” only by the April 2008 tape losses. (See Def. 56.1 ¶ 8; Pls. 56.1 ¶ 8.)

<sup>9</sup> Both Hammond and Bernstein also testified that they had experienced other unauthorized charges prior to the February 2008 tape loss. For example, Hammond suffered unauthorized charges on his bank account in December 2007, i.e., two months before the February 2008 tape

testified that, after being notified of the February 2008 tape loss and learning that a credit card had been opened in her name, she incurred additional costs through “purchas[ing] extra [fraud] protection.” (Sauder Decl. Ex. 46 (Dep. of Alyson Kanney, dated May 15, 2009 (“Pls.’ Kanney Dep. Excerpts”)), at 57:11–58:5; see Pls. 56.1 ¶ 21). She “admits that a coincidence in timing is her sole basis for alleging that [the] unauthorized [credit card account] in her name was related to the [February 2008] tape loss.” (Defs. 56.1 ¶ 22; see Pls. 56.1 ¶ 22.)

The other four named Plaintiffs “admit that they have not suffered identity theft, nor have they been victimized by fraud as a result of the tape loss.” (Def. 56.1 ¶ 24; see Pls. 56.1 ¶ 24.) Wicks testified that, other than his “knowledge of the tape loss,” he had not suffered any injury. (Ratner Decl. Ex. K (Dep. of William H. Wicks, dated Apr. 3, 2009 (“Def.’s Wicks Dep. Excerpts”)), at 70:23–71:2; see also Def. 56.1 ¶ 27; Pls. 56.1 ¶ 27.) Young testified that she “does not know what damages she has suffered as a result of the tape loss.” (Def. 56.1 ¶ 31; see Pls. 56.1 ¶ 31; see also Ratner Decl. Ex. M. (Dep. of Linda Young, dated Apr. 3, 2009 (“Def.’s Young Dep. Excerpts”)), at 49:21–50:1 (“Q. What injuries have you suffered as a result of the tape loss? A. Fear of having my identity maybe taken away from me [as] a result of this. Q. Anything else? A. No.”).) Giordano testified that while “to her knowledge nobody has assumed her identity,” (Pls. 56.1 ¶ 26; see Def. 56.1 ¶ 26), “[s]omebody could turn around and use my information tomorrow and run up all sorts of – cause me all kinds of problems.” (Ratner Decl. Ex. H (Dep. of Lois Giordano, dated Mar. 17, 2009 (“Def.’s Giordano Dep. Excerpts”)), at 89:14-16; see id. at 89:12-19 (“Q. Why is it that you don’t know the full extent of damages? . . . Because you could suffer damages at some point in the future? A. Absolutely.”).) Witek testified that he has not been the victim of identity theft; he “does not know what kind of damage

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loss. (See Def. 56.1 ¶¶ 34, 38; Pls. 56.1 ¶¶ 34, 38; see also Ratner Decl. Ex. I (Dep. of Thomas C. Hammond, dated Apr. 9, 2009 (“Def.’s Hammond Dep. Excerpts”)), at 146:4–148:20.)

has occurred”; and he “is concerned at this time only because he feels he is at higher risk of incurring damage.” (Def. 56.1 ¶¶ 29–30; see Pls. 56.1 ¶¶ 29–30.)

“None of the named Plaintiffs has received treatment from any medical or other healthcare provider in connection with whatever stress and annoyance they may claim to have experienced as a result of the tape loss.” (Def. 56.1 ¶ 25; Pls. 56.1 ¶ 25.)

According to Defendant’s proposed expert, “irrespective of how the fraud rate is calculated” among members of Plaintiffs’ purported class, “all of the resulting figures are lower than the ‘ambient’ fraud rate . . . of 1 per every 1,010 people . . . in the general population.” (Cate Report at 12–13.)

### **III. Legal Standard**

Standing under Article III of the United States Constitution includes three elements. “First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Lujan, 504 U.S. at 560–61 (internal citations and quotations omitted). Standing is “an essential and unchanging part of the case-or-controversy requirement of Article III.” Horne v. Flores, -- U.S. --, 129 S. Ct. 2579, 2592 (2009) (quoting Lujan, 504 U.S. at 560).

Summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Caudle, 580 F. Supp. 2d at 277–78 (quoting Fed. R. Civ. P. 56(c)). The Court must “view the evidence in the light most

favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party.” *Id.* at 278 (citation omitted).

#### **IV. Analysis**

##### **Standing**

Defendant argues that Plaintiffs lack standing because “the mere ‘increased risk of harm’ after a data loss is not an actual or imminent injury and cannot alone support standing.” (Mot. at 14.) Plaintiff counters that “the risk of future harm [and] the increased risk of identity theft . . . created by a data breach is a sufficient injury-in-fact to confer standing,” (Opp’n at 11.)

Article III standing requires a “certainly impending” injury. *Lujan*, 504 U.S. at 563 n.2. At the summary judgment stage, a plaintiff “must set forth by affidavit or other evidence specific facts” establishing standing. *Id.* at 561 (“Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . at the successive stages of the litigation.”). Where, as here, a complainant “surmises that, as a result of [a] security breach, he [or she] faces an increased risk of identify theft at an unknown point in the future,” the “claimed injury [is] in the realm of the hypothetical. . . . [S]uch abstract injuries do not provide the injury-in-fact required for Article III standing.” *Amburgy*, 671 F. Supp. 2d at 1052–53 (citing *Lujan*, 504 U.S. at 565 n.2; *Johnson v. Missouri*, 142 F.3d 1087, 1089–90 (8th Cir. 1998)); see *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (“Allegations of possible future injury do not satisfy the requirements of Art[icle] III.”).

The Court concludes that Plaintiffs lack standing because their claims are future-oriented, hypothetical, and conjectural. There is no “case or controversy.” See *Lujan*, 504 U.S. at 560–

61. And, as noted, several other courts have reached the same conclusion in factually similar cases, both where data have been lost and where data have been stolen. For example, in Randolph, where a laptop computer belonging to defendant's employee and containing the personal data of some 13,000 individuals was stolen from the employee's home, plaintiffs alleged that they had been "placed at a substantial risk of harm in the form of identity theft" and that they had "incurred and will incur actual damages in an attempt to prevent identity theft by purchasing services to monitor their credit information." 486 F. Supp. 2d at 7–8. The court in Randolph determined that plaintiffs had "failed to demonstrate an injury that is sufficiently 'concrete and particularized' and 'actual or imminent.'" Id. at 8 (quoting Lujan, 504 U.S. at 560). And, in Giordano v. Wachovia Securities, LLC, supra, where a report containing financial information about plaintiff and tens of thousands of other customers was lost in transit and plaintiff "only allege[d] a potential injury," plaintiff was found to lack standing.<sup>10</sup> 2006 WL 2177036 at \*1–2, 5 (citing Luis v. Dennis, 752 F.2d 604, 608 (3d Cir. 1984) ("the alleged injury is not of sufficient immediacy and reality to permit adjudication by a federal court"))).

Similarly, in Key v. DSW, Inc., supra, where "[b]ecause of DSW's alleged improper retention [of] and failure to secure . . . confidential personal financial information of approximately 1.5 million consumers[,] . . . unauthorized persons obtained access to and acquired the information of approximately 96,000 customers," 454 F. Supp. 2d at 685–86, and in Bell v. Acxiom Corp., supra, where defendant's "computer bank was hacked and client files were compromised" and plaintiff alleged that defendant's "lax security jeopardized her privacy and left her at a risk of receiving junk mail and of becoming a victim of identify theft," 2006 WL 2850042 at \*1, the courts found that the plaintiffs had not suffered a concrete injury sufficient to

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<sup>10</sup> The plaintiff in Giordano is also a Plaintiff in this case. (See n.3, supra.)

confer standing. See Key, 454 F. Supp. 2d at 690; Bell, 2006 WL 2850042, at \*4. And, in Amburgy v. Express Scripts, Inc., supra, where defendant's "inadequate security measures in relation to its computerized database system allowed unauthorized persons to gain access to confidential information" and plaintiff alleged that members of his purported class had incurred "an increased risk of becoming victims of identity theft crimes, fraud, abuse, and extortion [and] have spent (or will need to spend) considerable time and money to protect themselves" as a result, 671 F. Supp. 2d at 1049, the court concluded that "[i]f a party were allowed to assert such remote and speculative claims to obtain federal court jurisdiction, the Supreme Court's standing doctrine would be meaningless." Id. at 1053.

None of the named Plaintiffs has alleged in the Complaint or adduced any evidence in discovery to suggest that their alleged injuries are more than "speculative" or "hypothetical." This is fatal to their standing before this Court.<sup>11</sup> See Giordano, 2006 WL 2177036, at \*4 ("A complaint alleging the mere potential for an injury does not satisfy [p]laintiff's burden to prove standing."). Four of the seven named Plaintiffs acknowledge that they have suffered no injury other than an increased fear that their personal information may be used improperly. See id.; Key, 454 F. Supp. 2d at 690; Bell, 2006 WL 2850042, at \*2; (see also Def. 56.1 ¶ 24; Pls. 56.1 ¶ 24.). A fifth named Plaintiff, Bernstein, claims that her personal information was improperly used after the tape losses but acknowledges also that the unauthorized use "was unrelated to" the tape losses. See Lujan, 504 U.S. at 560; (see also Def. 56.1 ¶ 23; Pls. 56.1 ¶ 23.). And the remaining two named Plaintiffs, Hammond and Kanney, claim that their personal information was improperly used but acknowledge they were reimbursed for the unauthorized charges. See

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<sup>11</sup> It may also undermine Plaintiffs' roles as lead plaintiffs, because lead plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Warth v. Seldin, 422 U.S. 490, 502 (1975).

People to End Homelessness, Inc. v. Develco Singles Apts. Assocs., 339 F.3d 1, 9 (1st Cir. 2003) (plaintiff “does not have standing to pursue its lawsuit because its alleged injuries, to the extent they can be redressed, have already been remedied”); (see also Defs.’ Hammond Dep. Excerpts at 92:5–93:19 (“Q. And what did Capital One do in response to your call? A. They did an investigation and cleared the matter. . . . Q. And is it your understanding that . . . you don’t have to pay for unauthorized charges on your [Capital One] credit card? A. That is correct.”); Ratner Decl. Ex. J (Dep. of Alyson Kanney, dated May 15, 2009 (“Def.’s Kanney Dep. Excerpts”)), at 61:25–62:4 (“Q. Did you ever have to pay any charges associated with that Capital One account? A. No.”); Pls. 56.1 ¶ 21 (“It is not disputed that Hammond and Kanney did not incur any unreimbursed credit card charges[.]”); Def. 56.1 ¶ 21.)

Nor does the report, dated April 7, 2009, prepared by Plaintiffs’ proposed expert, Daniel J. Solove, demonstrate that any of the named Plaintiffs have suffered an injury-in-fact. (See Sauder Decl. Ex. 42 (Decl. of Daniel J. Solove, dated Apr. 7, 2009 (“Solove Report”)).) The principal conclusions of the Solove Report appear to be that: (1) “the exposure of a person’s SSN [Social Security number] (as well as other personal information) creates a harm,” (Solove Report at 4), such as “an increased risk of identity theft, fraud, or improper access of personal records,” (*id.* at 2); and (2) that two years of credit monitoring offered by Defendant “is an insufficient time” because “any enterprising identity thief . . . will simply wait a few years before using the data.” (*Id.* at 5.)<sup>12</sup>

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<sup>12</sup> Defendant’s proposed expert, Fred H. Cate, disputes that Plaintiffs’ risk of identity theft has actually been increased following the tape losses. (See Cate Report at 4 (“I have been asked to provide an expert opinion on three issues [including] [w]hether the two tape losses increased the individuals’ risk of identity theft . . . . The research data concerning these three questions is clear and consistent. Based on those data I conclude that: [t]he two BNY Mellon tape losses did not increase the risk of identity theft faced by those individuals whose data were included on the missing tapes[.]”), 10–13, 19–20, 26–27); see also James Graves, “‘Medical’ Monitoring for

The Court, respectfully, is not persuaded by Plaintiffs' argument that Pisciotta, Caudle, or McLoughlin govern here. As noted in Amburgy, the Seventh Circuit in Pisciotta "relied on cases from the Second and Sixth Circuits, which addressed increased risk of future medical injury; and from the Fourth and Ninth Circuits, which addressed increased risk of future environmental injury. Other than citing these cases, the court engaged in no discussion applying the Supreme Court's recognized standard for determining whether the plaintiffs in [a] database breach case had standing under Article III of the United States Constitution." Amburgy, 671 F. Supp. 2d at 1051 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006); Lujan, 504 U.S. at 560; Whitmore, 495 U.S. at 161)); see also In re Ford, 415 B.R. 51, 60 (Bankr. N.D.N.Y. 2009) ("there is no 'law of the district' mandated for district judges to follow"); Serwin, supra n.1, at 932-33 (because "the clear mandate of Lujan requires the plaintiff meet his burden of proof 'with the manner and degree of evidence required at the successive stages of the litigation' . . . the analysis of the Bell v. Acxiom line of cases [which conclude there is no standing] appears to be more consistent with Lujan" than the analysis in Caudle and Pisciotta, which "inconsistently find that plaintiff[s] have met their burden under standing, but fail as a matter of law to meet their evidentiary burden to state a claim"). Moreover, the facts of the cases relied upon in Caudle are sufficiently different from the facts of the instant action so as to be unpersuasive. See Caudle, 580 F. Supp. 2d at 279-80 (citing Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006); Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003)); see also Barracano v. Lord, 620 F. Supp. 1284, 1287 (E.D.N.Y. 1985); People to End Homelessness, 339 F.3d at 8

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Non-Medical Harms: Evaluating the Reasonable Necessity of Measures to Avoid Identity Fraud After a Data Breach," 16 Rich. J.L. & Tech. 2, 40 (2009) (plaintiff must "not only have a risk of future harm, but an increased risk, and [must show] that the increase have been caused by the breach" (emphasis in original)).

(“As litigation progresses, Article III places an increasingly demanding evidentiary burden on parties that seek to invoke federal jurisdiction. A plaintiff who has standing at the motion to dismiss stage, does not automatically have standing at the summary judgment or trial stage.”); Pisciotta, 499 F.3d at 634; Ruiz II, 622 F. Supp. 2d at 912; Lewis v. Casey, 518 U.S. 343, 358 (1996) (citing Lujan, 504 U.S. at 561); (Pls. 56.1 ¶¶ 20–31, 34–40; Def. 56.1 ¶¶ 20–31, 34–40); Ariane Siegel et al., “Survey of Privacy Law Developments in 2009: United States, Canada, and the European Union,” 65 Bus. Law. 285, 295 (Nov. 2009).

### **Summary Judgment**

Even assuming, arguendo, that Plaintiffs could be said to have standing, Defendant’s motion for summary judgment dismissing Plaintiffs’ claims would be granted because Plaintiffs’ alleged increased risk of identity theft is insufficient to support Plaintiffs’ substantive claims. See Shafran, 2008 WL 763177, at \*3 (“Courts have uniformly ruled that the time and expense of credit monitoring to combat an increased risk of future identity theft is not, in itself, an injury that the law is prepared to remedy. Plaintiff has not presented any case law or statute, from any jurisdiction, indicating otherwise. Plaintiff’s alleged injuries are solely the result of a perceived and speculative risk of future injury that may never occur. Plaintiff has failed to show an actual resulting injury that might support a claim for damages. As damages are an essential element of each of plaintiff’s claims, plaintiff’s claims fail as a matter of law.”); Pisciotta, 499 F.3d at 634; Caudle, 580 F. Supp. 2d at 282–84; McLoughlin, 2009 WL 2843269, at \*8–9.

### **Common Law Claims**

Regarding Plaintiffs’ common law claims, the parties agree that there is no conflict among the laws of New York, New Jersey, Pennsylvania, Illinois, Michigan, and California. See, e.g., Akins v. Glens Falls City Sch. Dist., 424 N.E.2d 531, 535 (N.Y. 1981) (negligence);

Dance v. Town of Southampton, 467 N.Y.S.2d 203, 206 (App. Div. 1983) (negligence per se); Colello v. Colello, 9 A.D.3d 855, 859 (App. Div. 2004) (breach of fiduciary duty); Maas v. Cornell Univ., 94 N.Y.2d 87, 93–94 (1999) (breach of implied contract); (see also Compl. ¶¶ 12–16; Mot. at 23–25 & nn.27–31; Opp’n at 20.)<sup>13</sup>

### **Negligence**

Under New York law, “the elements of a negligence claim are the existence of a duty, a breach of that duty, and damages proximately caused by that breach of duty.” Rangon v. Skillman Ave. Corp., No. 37311/07, 2010 WL 2197787, at \*2 (N.Y. Sup. Ct. June 3, 2010); Shmushkina v. Price is Right of Brooklyn, Inc., 839 N.Y.S.2d 683, 684 (Sup. Ct. 2007).

Summary judgment for Defendant would be granted because, among other reasons, Plaintiffs cannot establish that Defendant owed them any duty. See Silverman Partners L.P. v. First Bank, 687 F. Supp. 2d 269, 281 (E.D.N.Y. 2010). None of the named Plaintiffs had any direct dealings with Defendant. (See Def.’s Bernstein Dep. Excerpts at 62:16–64:22, 135:10-16; Def.’s Giordano Dep. Excerpts at 47:11–49:9, 79:5–86:17; Def.’s Hammond Dep. Excerpts at 31:9-14, 66:23–67:12; Def.’s Kanney Dep. Excerpts at 31:22–32:3; Def.’s Wicks Dep. Excerpts at 33:23–34:17, 50:22–51:11, 67:16–68:12; Def.’s Witek Dep. Excerpts at 29:9-19; Def.’s Young Dep. Excerpts at 16:12-24, 34:10–40:10.) And, “[g]enerally, banks owe no duty of care to their non-customers.” Silverman Partners, 687 F. Supp. 2d at 281. Rather, Plaintiffs had relationships (only) with institutional clients of Defendant, such as the Walt Disney Company, the Borough of Avalon, New Jersey, the American Water Company, and “other establishments like the Vesper Club.” (Compl. ¶ 1.) Plaintiffs gave their personal data over to those entities,

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<sup>13</sup> For purposes of this discussion, the Court assumes that New York law applies. See Wall v. CSX Transp., Inc., 471 F.3d 410, 422–23 (2d Cir. 2006) (citing Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co., 769 N.Y.S.2d 487, 489 (App. Div. 2003)).

which, in turn, forwarded the data to Defendant (which stored the data on the tapes that ultimately were lost or stolen). (See Def. 56.1 ¶¶ 13–15; Pls. 56.1 ¶¶ 13–15; Compl. ¶¶ 1, 31–33); see also Silverman Partners, 687 F. Supp. 2d at 281.

Because there is no duty owed by the Defendant to the Plaintiffs, Plaintiffs also cannot establish breach of duty, and summary judgment would be appropriate for that reason as well. See Mojica v. Gannett Co., 897 N.Y.S.2d 212, 214 (App. Div. 2010) (citing Pulka v. Edelman, 358 N.E.2d 1019, 1020 (N.Y. 1976) (“In the absence of duty, there is no breach and without a breach[,] there is no liability.”)).

And, as a matter of law, Plaintiffs cannot demonstrate that they suffered damages as a result of the tape losses. Shafran, 2008 WL 763177, at \*2. Plaintiffs’ principal complaint is that they have a heightened fear of having their identities stolen in the future and have, as a result, taken steps to monitor their credit more vigilantly. (See pp. 8–10, supra.) There is lacking a “high degree of probability that a future injury will occur[.]” Caudle, 580 F. Supp. 2d at 281; see id. at 282 (“New York would not allow a negligence [claim] to proceed on the facts of this case.”); Shafran, 2008 WL 763177, at \*2; Willey, 2009 WL 1938987, at \*9; McLoughlin, 2009 WL 2843269, at \*8 (applying New York law).<sup>14</sup>

### **Breach of Fiduciary Duty**

The elements of this claim are: “breach by a fiduciary of a duty owed to plaintiff; defendant’s knowing participation in the breach; and damages.” SCS Commc’ns, Inc. v. Herrick

<sup>14</sup> The Court need not consider separately Plaintiffs’ claim of negligence per se, as negligence per se is “a method of proving certain elements of a negligence claim (i.e., duty and breach of the duty) rather than a distinct [claim.]” In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig., Nos. 04 Civ. 2535, 05 Civ. 2101, 05 Civ. 3588, 2007 WL 2541216, at \*34 (E.D. Pa. Aug. 29, 2007); see also Stutts v. De Dietrich Group, No. 03 Civ. 4058, 2006 WL 1867060, at \*19 (E.D.N.Y. June 30, 2006).

Co., 360 F.3d 329, 342 (2d Cir. 2004). “Absent extraordinary circumstances . . . parties dealing at arms length in a commercial transaction lack the requisite level of trust or confidence between them necessary to give rise to a fiduciary obligation.” U.S. Bank Nat’l Ass’n v. Ables & Hall Builders, -- F. Supp. 2d --, No. 08 Civ. 2540, 2010 WL 996761, at \*10 (S.D.N.Y. Mar. 19, 2010) (quoting Henneberry v. Sumitomo Corp. of Am., 415 F. Supp. 2d 423, 460 (S.D.N.Y. 2006)).

Summary judgment would be granted for Defendant because there is no proof of the existence of a fiduciary relationship between Defendant and Plaintiffs. See id. at \*10 (quoting Mandelblatt v. Devon Stores, Inc., 521 N.Y.S.2d 672 (App. Div. 1987) (“A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.”)). As described above, (see pp. 18–19, supra), there is no evidence to indicate any direct dealings between Plaintiffs and Defendant and there is no evidence to support the existence of a fiduciary relationship. See Thermal Imaging, Inc. v. Sandgrain Sec., Inc., 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001) (“Here, the relationship between plaintiffs and defendants was far too attenuated to give rise to a fiduciary duty. To Sandgrain, Thermal was, at most, a client of a client; the two businesses engaged in no other direct transaction.”).

And, as described above, Plaintiffs cannot establish damages. See Shafran, 2008 WL 763177, at \*2; Caudle, 580 F. Supp. 2d at 283 (“Here, the plaintiff has not shown that he has yet suffered any damage . . . . For the same reasons that he cannot recover in negligence, he may not recover on a breach of fiduciary duty theory.”); McLoughlin, 2009 WL 2843269, at \*8.

### **Breach of Implied Contract**

“To form a valid contract under New York law, there must be an offer, acceptance, consideration, mutual assent and intent to be bound.” Leibowitz v. Cornell Univ., 584 F.3d 487,

507 (2d Cir. 2009). “A contract implied in fact may result as an inference from the facts and circumstances of the case,” Jemzura v. Jemzura, 330 N.E.2d 414, 420 (N.Y. 1975), and requires proof of the elements of an express contract. Leibowitz, 584 F.3d at 507 (citing Maas, 94 N.Y.2d at 93).

Plaintiffs have adduced no evidence of Defendant’s “assent” to be contractually bound to any named Plaintiff. Harvey v. Gen. Cable Corp., 147 N.Y.S.2d 380, 381 (App. Div. 1955) (“The assent of the person to be charged is necessary, and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted.”). As described above, (see pp. 18–19, supra), none of the named Plaintiffs had any direct dealings with Defendant; Plaintiffs dealt only with Defendant’s institutional clients. A contract cannot be implied-in-fact unless there has been a “meeting of the minds” between the parties in question, which a reasonable jury could not find to have occurred where, as here, the parties had no relationship with one another. I.G. Second Generation Partners, L.P. v. Duane Reade, 793 N.Y.S.2d 379, 382 (App. Div. 2005); see also Austin v. Wilson, 11 N.Y.S. 565, 567 (Super. Ct. 1890) (no meeting of the minds where “the parties were strangers [and] had never previously had dealings”).

Summary judgment for Defendant as to Plaintiffs’ breach of implied contract claim would also be appropriate because, among other reasons, of Plaintiffs’ inability to demonstrate damages. See Shafran, 2008 WL 763177, at \*2; Conception Bay, Inc. v. Koenig Iron Works, Inc., No. 103361/09, 2010 WL 2217799, at \*4 (N.Y. Sup. Ct. May 28, 2010) (“the following elements must be pled: the existence of a binding contract; plaintiff’s performance of the contract; defendant’s material breach of the contract; and damages”).

Plaintiffs contend that they are entitled to recover “nominal damages based on the breach of BNY’s implied contract” to safeguard Plaintiffs’ personal data. (Opp’n at 13.) At oral argument, Plaintiffs’ counsel contended (unpersuasively) that a plea for nominal damages was “implicit” in two sections of the Complaint, *i.e.*, Paragraph 124 and the “prayer for relief” at page 52. (See Hr’g Tr. at 9:15–11:6.) Defendant’s counsel responded (persuasively) that Plaintiffs’ nominal damages (oral) argument “doesn’t save the day” because, among other reasons, nominal damages “is not pled” and “nominal damages can’t satisfy the injury requirement.” (Hr’g Tr. at 3:22–4:4, 13:20–14:2.)

In fact, Plaintiffs do not include a plea for nominal damages in the Second Amended Complaint and they cannot use their motion submissions to amend their pleadings. (See Compl. ¶ 124 (“Plaintiffs and the Class members have incurred and/or can be expected to incur actual damages including, but not limited to: anxiety, emotional distress, loss of privacy, and other economic and non-economic harm.”); *id.* at 52 (“WHEREFORE, Plaintiffs . . . respectfully request that this Court . . . award to Plaintiffs and the Class members such other and further relief to which they are justly entitled.”); see also Bear, Stearns Funding, Inc. v. Interface Group-Nev., Inc., No. 03 Civ. 8259, 2007 WL 1988150, at \*21 (S.D.N.Y. July 10, 2007) (“Interface has failed to present any evidence of actual damages . . . . Interface now suggests that it may be entitled to nominal damages on this issue, but its counterclaims pleaded actual, not nominal, damages.”).<sup>15</sup>

#### **State Consumer Protection Law Claims**

State consumer protection laws typically are intended to “identify consumer-oriented misconduct which is deceptive and materially misleading to a reasonable consumer, and which

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<sup>15</sup> See also Lex Tenants Corp. v. Gramercy N. Assocs., 732 N.Y.S.2d 340, 341 (App. Div. 2001) (“Accordingly, the causes of action seeking damages were correctly dismissed, since [plaintiff] will be unable to recover any more than nominal compensatory damages at trial[.]”).

causes actual damages.” Wilner v. Allstate Ins. Co., 893 N.Y.S.2d 208, 214 (App. Div. 2010). Such laws typically allow individuals to bring a cause of action for consumer fraud or unfair competition.<sup>16</sup> Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 155 (Ill. 2002); see also Stutman v. Chem. Bank, 731 N.E.2d 608, 611 (N.Y. 2000) (“a plaintiff under Section 349 [the New York Consumer Protection Law] must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act”); Franklin Elec. Publishers, Inc. v. Unisonic Prods. Corp., 763 F. Supp. 1, 5 (S.D.N.Y. 1991) (“plaintiff claims damages based on defendants’ alleged violation of the New York Consumer Protection Law . . . but it has not alleged injury to consumers . . . and thus has not stated a claim under the statute”); Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 898 (N.Y. 1999); Paduano v. Am. Honda Motor Co., 88 Cal. Rptr. 3d 90, 103 (Cal. Ct. App. 2009) (the California Unfair Competition Law (“UCL”) “prohibits unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising”); Walker v. Geico Gen. Ins. Co., 558 F.3d 1025, 1027 (9th Cir. 2009) (under the California UCL, plaintiff must “ha[ve] lost money or property”); Zekman v. Direct Am. Mkters., Inc., 695 N.E.2d 853, 860 (Ill. 1998) (Illinois Consumer Fraud and Deceptive Business Practices Act (“CFDBPA”) requires: “(1) a deceptive act or practice by the defendant; (2) defendant’s intent that plaintiff rely on the deception; . . . (3) the occurrence of the deception in the course of conduct involving trade or commerce . . . and that an individual’s damages be a result of a violation of the Act[.]”); Oliveira, 776 N.E.2d at 160 (“any person who suffers actual damage as a result of a violation of the [CFDBPA] may bring an action”); Munem v. Best Buy

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<sup>16</sup> The parties agree that the Court should apply the law of the state in which each Plaintiff resides. (See Mot. at 23 n.26; Opp’n at 20); see also In re Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 146 (S.D.N.Y. 2008) (citing In re Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 71 (S.D.N.Y. 2002)).

Co., No. 224366, 2002 WL 43484, at \*2 (Mich. Ct. App. Jan. 11, 2002) (the Michigan Consumer Protection Act (“MCPA”) provides that an individual “who suffers harm from any of the acts enumerated in M.C.L. § 445.903 can bring suit under the MCPA”); Mayhall v. A.H. Pond Co., 341 N.W.2d 268, 270 (Mich. Ct. App. 1983) (the MCPA “require[s] a plaintiff to have sustained a loss as a condition for bringing an action to recover damages”); Bethea v. Metro. Life Ins. Co., 2009 WL 690852, at \*4 (N.J. Super. Ct. App. Div. Mar. 18, 2009) (under the New Jersey Consumer Fraud Act, a plaintiff must demonstrate “each of three elements: (1) unlawful conduct by the defendant; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant’s unlawful conduct and the plaintiff’s ascertainable loss”).

Plaintiffs cannot establish that Defendant engaged in consumer-oriented fraud or other misconduct which caused actual damages within the meaning of the laws of their respective states. See, e.g., Wilner, 893 N.Y.S.2d at 214. Thus, it is not surprising that the United States District Courts in New York, California, Illinois and Michigan (applying state law) have each found that the increased risk of identity theft (in the future) is not a cognizable claim. See Shafran, 2008 WL 763177, at \*2 (“As damages are an essential element . . . of plaintiff’s claims [under Section 349], plaintiff’s claims fail as a matter of law.”); Ruiz II, 622 F. Supp. 2d at 913 (applying California law); Rowe v. UniCare Life & Health Ins. Co., No. 09-C-2286, 2010 WL 86391, at \*6 (N.D. Ill. Jan. 5, 2010); Hendricks, 444 F. Supp. 2d at 782 (“[T]he court is aware of no Michigan authority which recognizes, as injury in an action under the MCPA, recovery for a potential future loss which has not actually occurred.”) (citing Henry v. Dow Chem. Co., 701 N.W.2d 684, 688–89 (Mich. 2005)). The United States District Court for the District of New Jersey, dismissing a claim brought under the New Jersey Consumer Fraud Act (among other claims), found that a plaintiff asserting only increased risk of fraud and identity theft had

“fail[ed] to assert that he has suffered an actual injury due to the [b]reach.” Hinton v. Heartland Payment Sys., No. 09 Civ. 594, 2009 WL 704139, at \*1 (D.N.J. Mar. 16, 2009) (citing Giordano, 2006 WL 2177036, at \*4); see also Pisciotta, 499 F.3d at 634 (“**Plaintiffs have not come forward with a single case or statute, from any jurisdiction, authorizing the kind of action they now ask this federal court . . . to recognize as a valid theory of recovery[.]**”) (emphasis added).

Plaintiffs argue that this case is unique because Defendant made “misstatements about what happened to the data tapes,” *i.e.*, presumably by stating that the Tapes were lost when, according to Plaintiffs, they were stolen.<sup>17</sup> Plaintiffs contend “that information is material because consumers would want to know the real risk to which their information has been compromised, and that they are at [greater] risk of identity theft[.]” (Hr’g Tr. at 6:20–7:5.) According to Plaintiffs, Defendant made those statements because they had a “perverse incentive to keep down the number of people that enrolled in the credit monitoring that BNY offered.” (Hr’g Tr. at 7:3-5.)

The Court perceives that Plaintiffs’ position is not unique and counsel’s argument merely presents a distinction without difference. The Court agrees with Defendant that Plaintiffs’ attempt “to reframe their case as one about purported intentional misrepresentations . . . serves only to distract attention from the undisputed facts showing no fraud causally connected to the tape losses.” (Reply at 1–2.) In any case, Plaintiffs cannot demonstrate that Defendant’s alleged

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<sup>17</sup> At oral argument, counsel for Plaintiffs also stated: “[T]his is *sui generis*. . . . Our case is different and distinguishable from [all] other cases because our case primarily is about the misrepresentations that BNY made.” (Hr’g Tr. at 8:11, 9:1-3; see also Hr’g Tr. at 8:19-25 (“THE COURT: All of the other cases were dismissed either on standing or merits grounds, right? MR. JOHNS: That’s correct, your Honor. THE COURT: You are saying that your case, though, shouldn’t be dismissed because it is ‘*sui generis*’. MR. JOHNS: That’s correct, your Honor.”).)

misstatements were the cause of any damages.<sup>18</sup> See, e.g., Randolph, 486 F. Supp. 2d at 7–8.

The only named Plaintiff who purchased additional credit monitoring – Kanney – gave little or no indication that she chose to purchase additional credit monitoring because of the Tape Losses. (See Pls.’ Kanney Dep. Excerpts at 56:6–57:22 (“Q. You mentioned that you received a notification from Experian regarding the Capital One credit card. . . being opened in your name? A. Yes. Q. What did you do in response to learning that? . . . A. I called Equifax to report credit fraud . . . and then I purchased extra protection.”), 109:3-7 (“Q. Do you know one way or the other whether a criminal has obtained your personal information from the lost Tapes? A. I can’t prove that[.]”).) Even if all of the links in Plaintiffs’ attenuated alleged chain of causation were to be proven, Plaintiffs could not prove that they had suffered any damages. See Shafran, 2008 WL 763177, at \*3 (“Courts have uniformly ruled that the time and expense of credit monitoring to combat an increased risk of future identity theft is not, in itself, an injury that the law is prepared to remedy.”).

### **Class Certification**

Because the Court has found that Plaintiffs lack Article III standing, the Court need not consider the merits of Plaintiffs’ cross-motion for class certification. See Lewis, 518 U.S. at 358 n.6 (“The standing determination is quite separate from certification of the class.”); see also Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 647 n.2 (S.D.N.Y. 2006) (citing Schweizer v. Trans Union. Corp., 136 F.3d 233, 239 (2d Cir. 1998)).

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<sup>18</sup> At oral argument on June 15, 2010, counsel for Defendant also stated: “Each and every one of the named Plaintiffs who have testified have established that there is just no injury here . . . . Here, bottom line, no causation, no damages.” (Hr’g Tr. at 4:7-17.)

**V. Conclusion and Order**

For the reasons stated herein, Defendant's motion for summary judgment [#73] is granted. Plaintiffs' cross-motion for class certification [#83] is denied as moot. The Clerk of Court is respectfully requested to close this case.

Dated: New York, New York  
June 25, 2010

Handwritten signature of Richard M. Berman in black ink.

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**RICHARD M. BERMAN, U.S.D.J.**