

STATE OF OHIO  
COUNTY OF CUYAHOGA

) IN THE COURT OF COMMON PLEAS  
) SS.  
) Civil Case No. 586371

**DEBORAH LEVINE, ET AL.,**

Plaintiffs,

Vs.

**DSW, INC.,**

Defendant.

)  
)  
) **JOURNAL ENTRY AND**  
) **OPINION**

**Kathleen Ann Sutula, J:**

IT IS SO ORDERED:

This matter comes before the Court on Plaintiffs' motion for class certification and Defendant's motions for summary judgment.

**I. Background**

Plaintiffs, Deborah Levine and Debbie Rabinowitz (a.k.a. Deborah Deutch-Rabinowitz), filed a class action complaint against Defendant, DSW, Inc., in response to a data theft incident involving Defendant's customers.

On March 8, 2005, and April 18, 2005, Defendant issued press releases advising consumers of the theft of credit card and other purchase information from a portion of its customers who had shopped at Defendant's stores from mid-November 2004 through mid-February 2005. Plaintiffs made credit card purchases at Defendant's stores in Ohio during this time period. For each credit card transaction, the stolen information included the name on the card, the credit card number, and the transaction amount.

As a result of the data theft, Plaintiffs allege four causes of action against Defendant: (1) breach of contract; (2) negligence; wanton and reckless misconduct; (3) breach of fiduciary duty; and (4) violation of the Ohio Consumer Sales Practices Act. Defendant filed separate motions for summary judgment as to each Plaintiff.

Upon thorough consideration of the law and arguments submitted by the parties, the Court finds that Defendant's motions for summary judgment are dispositive of the issues in this case. Although Plaintiffs' motion for class certification was filed prior to Defendant's motions for summary judgment, it is within the Court's discretion to rule on the motions for summary judgment before addressing the class certification question. See *Kolar v. Ohio Cas. Group* (8<sup>th</sup> Dist.), 2000 Ohio App. LEXIS 5221; see also, *Castillo v. Nationwide Fin. Servs.* (10<sup>th</sup> Dist.), 2003 Ohio 4766, P26; *Hager v. Waste Techs. Indus.* (7<sup>th</sup> Dist.), 2002 Ohio 3466, P4, fn. 2.

## **II. Summary Judgment Standard**

When ruling on motions for summary judgment, Rule 56(C) of the Ohio Rules of Civil Procedure guides the Court. As the Ohio Supreme Court has outlined, Rule 56(C) permits the Court to grant summary judgment when (1) there are no genuine issues of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the non-moving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the non-moving party. *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370.

Since summary judgment is such a drastic measure, cutting off a party's right to present its case at trial, courts should grant summary judgment motions sparingly. See *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 120 (internal citation

omitted). By the same token, however, courts can, and should, grant summary judgment motions when the record has been fully developed by discovery and such record demonstrates that, construing all the facts and inferences in the non-movant's favor, the non-moving party would not be entitled to judgment as a matter of law. See *id.*

In order for the Court to grant summary judgment, the moving party has the burden of demonstrating through the evidence detailed in Civ.R. 56(C) that the opposing party cannot establish an essential element of its claim(s). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the movant fulfills its burden, the burden will then shift to the non-moving party to produce evidence of a genuine issue of material fact. *Id.* If, however, the non-movant fails to satisfy its burden, a court's granting of summary judgment is not only proper – it is mandated. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

### **III. Analysis**

Defendant makes two arguments. First, Defendant argues that Plaintiffs lack standing to sue because they have not alleged an injury-in-fact. Second, Defendant argues that Plaintiffs have not alleged a cognizable injury under Ohio law.

#### **A. Standing**

Plaintiffs allege that they suffered an injury at the moment their data was stolen. In similar cases, several courts have held that plaintiffs who assert claims based on an increased risk of identity theft lack standing to sue. See, e.g., *Key v. DSW, Inc.* (S.D. Ohio 2006), 454 F. Supp. 2d 684; see also, *Randolph v. Ing Life Ins. & Annuity Co.* (D.D.C. 2007), 486 F. Supp. 2d 1; *Bell v. Acxiom Corp.* (E.D. Ark.), 2006 U.S. Dist. LEXIS 72477; *Giordano v. Wachovia Sec., LLC* (D.N.J.), 2006 U.S. Dist. LEXIS 52266.

Although these courts analyzed standing under federal law, the standing doctrine in Ohio is substantially similar. In Ohio,

[t]he concept of standing asks whether a particular plaintiff may properly raise a particular claim. Where no statute confers standing on a particular plaintiff, the question depends on whether the party has alleged a “personal stake in the outcome of the controversy.” This “personal stake” requirement has three basic elements: (1) “injury in fact” to the plaintiff that is concrete and particularized; (2) a causal connection between the injury and the conduct complained of; and (3) redressability, *i.e.* that it is likely that the injury will be redressed by a favorable decision granting the relief requested.

*Woods v. Oak Hill Community Med. Ctr.* (4<sup>th</sup> Dist. 1999), 134 Ohio App. 3d 261, 268-269 (internal citations omitted).

Plaintiffs’ testimony, viewed in a light most favorable to them, reveals that they have not suffered an injury-in-fact from the data theft. As a result of the data theft, Plaintiffs have not paid for any unauthorized charges; they have not experienced any out-of-pocket expenses or other monetary losses; they have not paid for credit monitoring services; and the credit cards they used have since expired. Plaintiffs have failed to allege a concrete, particularized injury that is actual or imminent. Consequently, they lack standing to sue.

Plaintiffs’ novel argument – that an injury occurred at the moment their data was stolen – is not persuasive. The Court does not see a distinction between this argument and the allegations of increased risk in the factually similar federal cases. In each case, the plaintiffs claim that they suffered an injury from a security breach without any allegation of fraud, identity theft, or out-of-pocket loss. This alleged injury is abstract and speculative, which is precisely what the standing doctrine precludes.

Plaintiffs concede that there is no Ohio case that directly supports their argument. As a result, Plaintiffs attempt to analogize their alleged injury to injuries in other cases. For the reasons that follow, the analogies are not persuasive.

First, Plaintiffs argue that this case is analogous to the unauthorized disclosure of nonpublic medical information. See *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St. 3d 395, 401 (“[I]n Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.”); see also, *Herman v. Kratche* (8<sup>th</sup> Dist.), 2006 Ohio 5938, P23 (“The tortious conduct of an unprivileged disclosure occurs the moment the nonpublic medical information is disclosed to an unauthorized third-party.”). The information disclosed in credit card transactions, however, does not share the same degree of privacy as the information contained in one’s medical records. In this case, the stolen information included the cardholder’s name, credit card number, and transaction amount. One’s unauthorized knowledge of such information, standing alone, does not cause an injury. The unauthorized disclosure of nonpublic medical information, however, causes an injury at the moment the disclosure occurs because medical information is inherently private and because the public has a clearly established interest in protecting the relationships between doctors and patients.

Plaintiffs also analogize their alleged injury to cases involving the release of social security numbers. See *State ex rel. Beacon Journal Publ'g Co. v. City of Akron* (1994), 70 Ohio St. 3d 605; see also, *State ex rel. Office of Montgomery County Pub. Defender v. Siroki* (2006), 108 Ohio St. 3d 207. The right to privacy as addressed in these cases, however, is a right against governmental disclosure of social security

numbers under the U.S. Constitution. See *State ex rel. Beacon Journal Publ'g Co. v. City of Akron* (1994), 70 Ohio St. 3d 605, 612 (“We conclude that the United States Constitution forbids disclosure under the circumstances of this case.”); see also, *State ex rel. Office of Montgomery County Pub. Defender v. Siroki* (2006), 108 Ohio St. 3d 207, 209 (“One of the recognized exemptions is the constitutional right of privacy, which precludes disclosure of Social Security numbers.”). As these cases do not address one’s right against the disclosure of social security numbers by private individuals or organizations, these cases are inapplicable.

Plaintiffs also cite to *Doe v. Chao* (2004), 540 U.S. 614, in which the plaintiff sought recovery from the United States under the Privacy Act of 1974 for the wrongful disclosure of his social security number. Plaintiffs argue that because the U.S. Supreme Court did not address the issue of standing, it implicitly held that the plaintiff had standing to sue. Again, however, the plaintiff in *Doe* had standing based on a constitutional violation. The Privacy Act of 1974 provided for causes of action against the government for certain violations of the constitutional right to privacy. See *16B Am. Jur. 2d Constitutional Law* §603, fn.65 (“Section 2(a)(4) of [the Privacy Act of 1974] contains the Congressional finding that ‘the right to privacy is a personal and fundamental right protected by the Constitution of the United States.’”); see also, *Doe v. Chao* (2004), 540 U.S. 614, 618 (“The Act gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government’s part to comply with the requirements.”). Plaintiffs in this case do not allege a violation of a constitutional right, nor do they cite to any statute that provides for a cause of action based on a constitutional violation.

Plaintiffs also point to dicta in the *Doe* opinion suggesting that an injury-in-fact may exist in privacy tort cases without a showing of specific harm. See *Doe v. Chao* (2004), 540 U.S. 614, 621. In the present case, however, Plaintiffs are not asserting a common law privacy tort claim, and the Court does not interpret *Doe* to mean that an Ohioan whose credit card data has been stolen has necessarily suffered an injury-in-fact.

Finally, Plaintiffs attempt to analogize their need for credit monitoring to the need for medical monitoring as established in the case of *Sutton v. St. Jude Med. S.C., Inc.* (6<sup>th</sup> Cir. 2005), 419 F.3d 568. In *Sutton*, the plaintiff sued on behalf of a proposed class of persons who underwent cardiac bypass surgery and were implanted with a device that was alleged to be defective and unreasonably dangerous. The U.S. Court of Appeals for the Sixth Circuit held that the plaintiff had standing to sue based on an increased risk of future harm that required current medical monitoring.

Several courts have rejected the analogy between medical monitoring and credit monitoring. See *Kahle v. Litton Loan Servicing LP* (S.D. Ohio 2007), 486 F. Supp. 2d 705, 712; see also, *Key v. DSW, Inc.* (S.D. Ohio 2006), 454 F. Supp. 2d 684, 690, 691; *Giordano v. Wachovia Sec., LLC* (D.N.J.), 2006 U.S. Dist. LEXIS 52266 at 11, fn. 4. Likewise, this Court finds *Sutton* distinguishable from the present case. Notably, in *Sutton*, the plaintiff alleged that he had already been implanted with a defective device capable of producing harm on its own. See *Key v. DSW, Inc.* (S.D. Ohio 2006), 454 F. Supp. 2d 684, 691; see also, *Stollenwerk v. Tri-West Health Care Alliance* (9<sup>th</sup> Cir. 2007), 254 Fed. Appx. 664, 666 (“A claim for medical monitoring damages requires evidence of *direct* toxic exposure that *by itself* creates a significantly increased risk of later illness.” (emphasis in the original) (citation omitted)). In the present case, having

one's name and credit card number in the possession of another person, by itself, does not pose such an actual or imminent injury as in *Sutton*. The present case would be more analogous to *Sutton* if fraud or identity theft had already occurred. See *Key v. DSW, Inc.* (S.D. Ohio 2006), 454 F. Supp. 2d 684, 691. Likewise, *Sutton* would be more analogous to the present case if the harm caused by the medical device depended upon future wrongdoing.

Furthermore, the dangers posed by having one's credit card number in the hands of an unauthorized person is simply not comparable to the dangers posed by the risk of a defective medical device in one's heart. In *Sutton*, the plaintiff alleged that the device at issue led to severe and disabling medical conditions in numerous patients, which necessitated the removal of the device and/or monitoring for further harm, including death. See *Sutton v. St. Jude Med. S.C., Inc.* (6<sup>th</sup> Cir. 2005), 419 F.3d 568, 569. Although Plaintiffs posit that their alleged injury is also significant, the same could be said for innumerable situations involving increased financial risk. The distinguishing characteristic in *Sutton* was that a failure to find an exception to the injury-in-fact requirement could have resulted in one's inability to pay for medical monitoring costs, ultimately leading to irreparable harm such as death. See *Stollenwerk v. Tri-West Health Care Alliance* (9<sup>th</sup> Cir. 2007), 254 Fed. Appx. 664, 667 ("A key rationale for awarding medical monitoring damages in the absence of present harm is to ensure that the cost of testing does not prevent plaintiffs from receiving increased medical surveillance that is of actual benefit to them.").

Plaintiffs' analysis of *Sutton* – which would recognize an injury-in-fact whether or not the stolen information is ever used against anyone – is not easily confined to the

facts of this case. On the other hand, the Court's adherence to the injury-in-fact requirements in this case does not insulate wrongdoers from liability, as criminal and administrative proceedings exist to deter data thefts. Furthermore, the law provides plaintiffs with adequate remedies capable of judicial review in the event that fraud or identity theft occurs. Therefore, the holding in *Sutton* is best read as a narrow exception to the general rule that rejects attempts at standing based on an increased risk of future harm. See *Key v. DSW, Inc.* (S.D. Ohio 2006), 454 F. Supp. 2d 684, 690.

### **B. Injury**

The Court notes that the Sixth Circuit's holding in *Sutton, supra*, was limited to the issue of standing. This Court is aware of only one case that found standing based on an allegation of an increased risk of future harm from a data theft. See *Pisciotta v. Old Nat'l Bancorp* (7<sup>th</sup> Cir. 2007), 499 F.3d 629, 634. In the same case, however, the U.S. Court of Appeals for the Seventh Circuit also held that an increased risk of identity theft was not "a harm that the law is prepared to remedy." *Id.* at 639. As explained below, this holding is consistent with the prevailing view among courts.

Across the nation, courts have consistently held that allegations of increased credit monitoring and increased risks of fraud or identity theft are insufficient to show an actual injury or damages. See, e.g., *Kahle v. Litton Loan Servicing LP* (S.D. Ohio 2007), 486 F. Supp. 2d 705; *Shafran v. Harley-Davidson* (S.D.N.Y.), 2008 U.S. Dist. LEXIS 22494; *Stollenwerk v. Tri-West Health Care Alliance* (9<sup>th</sup> Cir. 2007), 254 Fed. Appx. 664; *Ponder v. Pfizer, Inc.* (M.D. La. 2007), 522 F. Supp. 2d 793; *Hendricks v. DSW Shoe Warehouse Inc.* (W.D. Mich. 2006), 444 F. Supp. 2d 775; *Forbes v. Wells Fargo Bank, N.A.* (D.Minn 2006), 420 F. Supp. 2d 1018; *Guin v. Brazos Higher Educ. Serv.*

*Corp.* (D.Minn.), 2006 U.S. Dist. LEXIS 4846. Although these cases do not address Plaintiffs' argument that the injury occurred at the moment the data theft occurred, these cases are nonetheless persuasive. The key inquiry does not concern *when* an injury occurred, but *whether* an injury occurred. An allegation that an injury occurred at the moment of the data theft is no more concrete or imminent than allegations of injuries from increased risks or monitoring costs. The Court finds, therefore, that even if Plaintiffs were found to have standing under *Pisciotta v. Old Nat'l Bancorp* (7<sup>th</sup> Cir. 2007), 499 F.3d 629, they have failed to allege a cognizable injury sufficient to overcome Defendant's motions for summary judgment. See *Kahle v. Litton Loan Servicing LP* (S.D. Ohio 2007), 486 F. Supp. 2d 705, 712 (“[C]redit monitoring costs are not sufficient injury where no fraud has occurred.”); see also, *Stollenwerk v. Tri-West Health Care Alliance* (9<sup>th</sup> Cir. 2007), 254 Fed. Appx. 664, 665-667; *Pisciotta v. Old Nat'l Bancorp* (7<sup>th</sup> Cir. 2007), 499 F.3d 629, 639. Although Plaintiffs repeatedly argue that reasonable minds could find in their favor, the Court declines to create new law to recognize Plaintiffs' alleged injuries.

As the foregoing analysis is dispositive of the issues in this case, the Court does not find it necessary to address the remaining arguments raised in the briefs.

#### **IV. Conclusion**

It is, therefore, ORDERED, ADJUDGED, and DECREED:

There are no genuine issues of material fact, reasonable minds could only find in favor of Defendant, and Defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment on individual claims of Plaintiff Deborah Levine is granted; and Defendant's motion for summary judgment on individual claims

of Plaintiff Deborah Deutch-Rabinowitz is granted. Plaintiffs' claims are dismissed with prejudice.

As no claims remain pending, the motion for class certification filed by Plaintiffs is deemed moot.

Costs to Plaintiffs.

FINAL.

DATE: August \_\_\_\_, 2008

---

KATHLEEN ANN SUTULA, JUDGE

**CERTIFICATE OF SERVICE**

A copy of the foregoing Journal Entry and Opinion has been sent via facsimile and regular U.S. mail on this \_\_\_\_\_ day of August, 2008, to the following:

Attorneys for Plaintiffs

David M. Paris  
Kathleen J. St. John  
Nurenberg, Paris, Heller & McCarthy Co, L.P.A.  
1370 Ontario St., Suite 100  
Cleveland, OH 44113

Attorneys for Defendant

James E. Phillips  
Robert N. Webner  
Amanda Martinsek  
Vorys, Sater, Seymour and Pease LLP  
2100 One Cleveland Center  
1375 East Ninth St.  
Cleveland, OH 44114