

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOEL RUIZ, on behalf of himself) Case No. 07-5739 SC
and all others similarly situated,)
Plaintiff,) ORDER GRANTING
v.) DEFENDANTS' MOTIONS
GAP, INC., and VANGENT, INC.,) FOR SUMMARY JUDGMENT
Defendants.)
_____)

I. INTRODUCTION

On February 13, 2009, Defendant Vangent, Inc. ("Vangent") filed a Motion for Summary Judgment. Docket No. 99 ("Vangent's Motion"). On the same day, Defendant Gap, Inc. ("Gap") filed a Motion for Summary Judgment. Docket No. 100 ("Gap's Motion"). On February 27, 2009, Plaintiff Joel Ruiz ("Plaintiff" or "Ruiz") filed an Opposition. Docket No. 104. On March 6, 2009, Gap submitted a Reply, and Vangent submitted a Reply. Docket Nos. 112, 116. For the reasons stated herein, Vangent's Motion is GRANTED and Gap's Motion is GRANTED.

Various other motions have been filed, including Plaintiff's Motion for Class Certification, Gap's Request for Judicial Notice, Plaintiff's Request for Judicial Notice, and Defendants' Motion to Strike and Objections to Plaintiff's Expert Reports. See Docket Nos. 92, 102, 106, 114. Defendants filed a Joint Opposition to

1 Plaintiff's Request for Judicial Notice. Docket No. 115. The
2 Court granted Plaintiff leave to file an Opposition to Defendants'
3 Motion to Strike, and Plaintiff did so on March 16, 2009. See
4 Docket Nos. 120, 121. The Court GRANTS Gap's Request for Judicial
5 Notice, and the Court GRANTS Plaintiff's Request for Judicial
6 Notice. The Court DENIES Defendants' Motion to Strike and
7 Objections to Plaintiff's Expert Reports.

8
9 **II. BACKGROUND**

10 **A. Factual Background**

11 On September 17, 2007, a thief gained entry to Vangent's
12 offices in Chicago, Illinois, and stole two laptop computers.
13 Docket No. 89 ("Am. Compl.") ¶ 6. Vangent, a Gap vendor,
14 processes Gap job applications. Id. ¶ 3. At the time the laptop
15 computers were stolen, one of the computers was downloading
16 information about Gap job applicants. Id. ¶ 40. A Vangent
17 employee intended to use the information to prepare a report on
18 Gap's geographic hiring trends. Id. At the time it was stolen,
19 the laptop computer contained the personal information, including
20 social security numbers, of approximately 750,000 Gap job
21 applicants. Id. ¶ 6. The information was not encrypted. Id.
22 ¶ 7.

23 On September 28, 2007, Gap sent a notification letter to the
24 applicants whose personal information was on the computer. See
25 Stern Decl. Ex. C ("Notification Letter").¹ Ruiz received the

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27 ¹ William L. Stern, counsel for Gap, filed a declaration in
28 support of Gap's Motion. Docket No. 101.

1 letter in early October 2007. Stern Decl. Ex A ("Ruiz Dep.") at
2 25:9-24. Gap offered to provide these applicants with twelve
3 months of credit monitoring with fraud assistance at no cost. See
4 Notification Letter. Gap advised job applicants to notify their
5 banks and sign up for a free credit report from one of the three
6 major credit reporting agencies. See id. Ruiz did not enroll for
7 the free credit monitoring. Stern Decl. Ex A ("Ruiz Dep.") at
8 32:3-25. Ruiz did not contact his bank, and although he attempted
9 to sign up for a free credit report, he thinks he was
10 unsuccessful. See id. at 37:20-39:16.

11 **B. Procedural Background**

12 On November 13, 2007, Ruiz filed a Complaint asserting the
13 following causes of action: (1) negligence; (2) bailment (3)
14 violation of California Business and Professions Code § 17200 et
15 seq.; (4) violation of the California Constitutional right to
16 privacy; and (5) violation of California Civil Code § 1798.85.
17 See Docket No. 1 ("Compl."). On March 24, 2008, the Court granted
18 judgment on the pleadings in favor of Gap on the second, third,
19 and fourth claims. See Docket No. 46 ("March 24 Order"). On
20 October 2, 2008, the Court denied Gap's Motion to Strike
21 Plaintiff's Class Definition. See Docket No. 75 ("October 2
22 Order"). Although originally set for October 1, 2008, the
23 discovery cutoff was extended to December 23, 2008. Id. at 1-2.
24 On February 9, 2009, Plaintiff filed an Amended Complaint naming
25 Vangent as a defendant and adding a breach of contract claim
26 against Vangent. See Am. Compl.

1 **III. LEGAL STANDARD**

2 Entry of summary judgment is proper "if the pleadings, the
3 discovery and disclosure materials on file, and any affidavits
4 show that there is no genuine issue as to any material fact and
5 that the movant is entitled to judgment as a matter of law." Fed.
6 R. Civ. P. 56(c). "Summary judgment should be granted where the
7 evidence is such that it would require a directed verdict for the
8 moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250
9 (1986). Thus, "Rule 56(c) mandates the entry of summary judgment
10 . . . against a party who fails to make a showing sufficient to
11 establish the existence of an element essential to that party's
12 case, and on which that party will bear the burden of proof at
13 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In
14 addition, entry of summary judgment in a party's favor is
15 appropriate when there are no material issues of fact as to the
16 essential elements of the party's claim. Anderson, 477 U.S. at
17 247-49.

18 **IV. DISCUSSION**

19 **A. Standing**

20 As a threshold matter, the Court determines whether Ruiz has
21 standing to bring this suit. To satisfy the standing requirement
22 of Article III of the Constitution, there must be the "irreducible
23 constitutional minimum" of an injury-in-fact. Lujan v. Defenders
24 of Wildlife, 504 U.S. 555, 560 (1992). An injury-in-fact is "an
25 invasion of a legally protected interest which is (a) concrete and
26 particularized . . . and (b) actual or imminent, not conjectural
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1 or hypothetical." Id. (internal citations and quotation marks
2 omitted).

3 Some courts have held that plaintiffs in "lost-data" cases
4 have not suffered an injury-in-fact sufficient to confer Article
5 III standing. See Randolph v. ING Life Ins. and Annuity Co., 486
6 F. Supp. 2d 1, 6-8 (D.D.C. 2007) (no standing where laptop
7 computer stolen during burglary and plaintiffs pled increased risk
8 of identity theft); Bell v. Axiom Corp., No. 06-0485, 2006 WL
9 2850042, at *1-2 (E.D. Ark. Oct. 3, 2006) (class action dismissed
10 for lack of standing where hacker downloaded information and sold
11 it to marketing company); Key v. DSW, Inc., 454 F. Supp. 2d 684,
12 690 (S.D. Ohio 2006) (class action dismissed for lack of standing
13 where unauthorized persons obtained access to information of
14 approximately 96,000 customers); Giordano v. Wachovia Sec. LLC,
15 No. 06-476, 2006 WL 2177036, at *4 (D.N.J. July 31, 2006) (credit
16 monitoring costs resulting from lost financial information did not
17 constitute injury sufficient to give plaintiff standing).

18 However, the only circuit court to consider the question of
19 standing in a lost-data case determined that the plaintiff did
20 have standing to assert negligence and contract claims. Pisciotta
21 v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007). Old
22 National Bancorp ("ONB") operated a marketing website where
23 individuals seeking banking services could complete online
24 applications. Id. at 631. The applications requested names,
25 addresses, social security numbers, driver's license numbers, date
26 of birth, mother's maiden name, and other information. Id. A
27 third-party hacker obtained access to the information of tens of
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1 thousands of applicants. Id. The scope and manner of access
2 suggested the intrusion was "sophisticated, intentional and
3 malicious." Id. at 632. After ONB sent written notice to those
4 affected, plaintiffs filed a putative class action asserting
5 negligence and breach of contract claims and requesting
6 compensation for credit monitoring services. Id. The Seventh
7 Circuit held that plaintiffs had standing because "the injury-in-
8 fact requirement can be satisfied by a threat of future harm or by
9 an act which harms the plaintiff only by increasing the risk of
10 future harm that the plaintiff would have otherwise faced, absent
11 the defendant's actions." Id. at 634.

12 Relying on Pisciotta, the District Court for the Southern
13 District of New York determined that plaintiffs had standing in a
14 lost-data case. Caudle v. Towers, Perrin, Forster & Crosby, Inc.,
15 580 F. Supp. 2d 273, 280 (S.D.N.Y. 2008). In Caudle, an employee
16 was notified that several laptop computers had been stolen, one of
17 which contained the employee's personal information, including his
18 social security number. Id. at 276. Although the Second Circuit
19 has not decided whether the standing requirement can be satisfied
20 by an increased future risk of identity theft, the Second Circuit
21 has decided that standing exists where there is an increased
22 future risk of harm based on exposure to environmental toxins or
23 potentially unsafe food products. See Baur v. Veneman, 352 F.3d
24 625, 634 (2d Cir. 2003); LaFleur v. Whitman, 300 F.3d 256, 270 (2d
25 Cir. 2002). Against this backdrop, the court determined the
26 plaintiff alleged an adequate injury-in-fact for standing
27 purposes. Caudle, 580 F. Supp. at 280.

1 The Court finds that Ruiz has standing to bring this suit.
2 Like the plaintiffs in Pisciotta, Ruiz submitted an online
3 application that required him to enter his personal information,
4 including his social security number. See Am. Comp. ¶ 38. Like
5 the theft in Caudle, this theft involves laptop computers that
6 contained personal information. See id. ¶ 46. Here, it is less
7 clear than it was in Pisciotta that the thief was targeting the
8 plaintiff's personal information. Ruiz submits the expert opinion
9 of Dr. Larry Ponemon to support this contention. Rivas Decl., Ex.
10 N ("Ponemon Decl.").² Dr. Ponemon opines that given the nature of
11 the theft, "it is substantially likely that the laptops were
12 stolen for the Gap employee applicant data." Id. ¶ 2. This
13 opinion conflicts with that of the Chicago Police Department and
14 the Federal Bureau of Investigation ("FBI"), who viewed the theft
15 as a property crime, where the thief was after the laptop
16 computers themselves, rather than the information they contained.
17 Stern Decl. Ex. B ("White Dep.") at 89:21-23; 125:3-9. However,
18 in Caudle, the court determined that the plaintiff had standing
19 even though nothing in the record shed light on "whether the
20 laptops were stolen for their intrinsic value, for the value of
21 the data or for both." 580 F. Supp. 2d at 276.

22 While the Ninth Circuit has not determined that standing
23 exists based on an increased risk of identity theft, it has
24 determined in a case concerning the management of water resources

26 ² Rosemary M. Rivas, counsel for Ruiz, submitted a declaration
27 in opposition to Defendants' motions for summary judgment. Docket
28 No. 105.

1 that "the possibility of future injury may be sufficient to confer
2 standing" Cent. Delta Water Agency v. United States, 306
3 F.3d 938, 947 (9th Cir. 2002). Furthermore, Ruiz submits an
4 expert report in support of his contention that he faces an
5 increased risk of identity theft. Rivas Decl. Ex. M ("Van Dyke
6 Decl."). According to a study conducted by James Van Dyke in
7 2008, "of the 11% of Americans notified of a data breach in the
8 last 12 months, 19% reported becoming victims of identity fraud in
9 the last 12 months. In contrast, only 4.32% of all Americans
10 reported becoming victims of identity fraud in the last 12 months,
11 a difference reflecting over a four-to-one general increased
12 likelihood that a data breach will lead to actual fraud
13 victimization." Id. ¶ 4. Based on Ruiz's increased risk of
14 identity theft, and the reasoning of several federal courts
15 including the Seventh Circuit, the Court finds that Ruiz has
16 standing to bring this suit.

17 **B. Ruiz's Negligence Claim**

18 Ruiz alleges that as a result of Defendants' failure to
19 exercise due care, "Plaintiff and the Class have been injured and
20 harmed since Defendants' compromising of their [personal
21 information] has placed them at an increased risk of identity
22 theft. Plaintiff and the Class have suffered damages; they have
23 spent and will continue to spend time and/or money in the future
24 to protect themselves as a result of Defendants' conduct." Am.
25 Compl. ¶ 80.

26 Under California law, appreciable, nonspeculative, present
27 harm is an essential element of a negligence cause of action. Aas

1 v. Super. Ct., 24 Cal. 4th 627, 646 (2000). Under California law,
2 the breach of a duty causing only speculative harm or the threat
3 of future harm does not normally suffice to create a cause of
4 action for negligence. See id.; see also Zamora v. Shell Oil Co.,
5 55 Cal. App. 4th 204, 211 (4th Dist. 1997) (finding there has not
6 been the requisite damage for a negligence cause of action where
7 defective water pipes had not yet leaked); San Francisco Unified
8 Sch. Dist. v. W.R. Grace & Co. 37 Cal. App. 4th 1318, 1327-30 (1st
9 Dist. 1995) (finding that presence of asbestos products in
10 buildings did not satisfy damage element of negligence cause of
11 action when products had not contaminated buildings by releasing
12 friable asbestos); Khan v. Shiley, Inc., 217 Cal. App. 3d 848, 857
13 (4th Dist. 1990) (no cause of action for negligence premised on
14 risk that implanted heart valve may malfunction in the future).

15 While Ruiz has standing to sue based on his increased risk of
16 future identity theft, this risk does not rise to the level of
17 appreciable harm necessary to assert a negligence claim under
18 California law. Ruiz testified that he has never been a victim of
19 identity theft. See Ruiz Dep. at 23:17-19; 73:10-12. Ruiz's case
20 hinges on his increased risk of future identity theft. To support
21 his contention that this risk is sufficient to assert a negligence
22 claim, Ruiz relies on cases where California courts allowed
23 recovery for future medical monitoring after the plaintiffs were
24 exposed to toxic substances. See In re Mattel, Inc., 588 F. Supp.
25 2d 1111, 1116-17 (C.D. Cal. 2008); Potter v. Firestone Tire &
26 Rubber Co., 6 Cal. 4th 965, 1009 (1993).

27 Ruiz's reliance on these medical monitoring cases is
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1 misplaced for a number of reasons. First, Ruiz has not presented
2 any authority that endorses treating lost-data cases as analogous
3 to medical monitoring cases. This Court doubts a California court
4 would view these two types of cases as analogous. For example, in
5 allowing recovery of medical monitoring costs, the California
6 Supreme Court in Potter noted that "there is an important public
7 health interest in fostering access to medical testing for
8 individuals whose exposure to toxic chemicals creates an enhanced
9 risk of disease, particularly in light of the value of early
10 diagnosis and treatment for many cancer patients." 6 Cal. 4th at
11 1008. There is no such public health interest at stake in lost-
12 data cases.

13 Second, even if a California court were to treat these kinds
14 of cases as analogous, the Court notes that toxic exposure
15 plaintiffs seeking to recover the costs of future medical
16 monitoring face "significant evidentiary burdens." Id. at 1009.
17 In Potter, the court held that:

18 the cost of medical monitoring is a
19 compensable item of damages where the proofs
20 demonstrate, through reliable medical expert
21 testimony, that the need for future monitoring
22 is a reasonably certain consequence of a
23 plaintiff's toxic exposure and that the
24 recommended monitoring is reasonable. In
25 determining the reasonableness and necessity
26 of monitoring, the following factors are
27 relevant: (1) the significance and extent of
28 the plaintiff's exposure to chemicals; (2) the
toxicity of the chemicals; (3) the relative
increase in the chance of onset of disease in
the exposed plaintiff as a result of the
exposure, when compared to (a) the plaintiff's
chances of developing the disease had he or
she not been exposed, and (b) the chances of
the members of the public at large of
developing the disease; (4) the seriousness of

1 the disease for which the plaintiff is at
2 risk; and (5) the clinical value of early
detection and diagnosis.

3 Id. Ruiz has not presented evidence sufficient to overcome the
4 kind of evidentiary burdens that apply in medical monitoring
5 cases. At a minimum, Ruiz would be required to present evidence
6 establishing a significant exposure of his personal information.
7 Here, Ruiz has not presented such evidence. Instead, Ruiz relies
8 on the expert report of Dr. Ponemon to overcome this evidentiary
9 burden. See Opp'n at 11. However, as Ruiz himself concedes, all
10 Dr. Ponemon's report establishes is that there is a "significant
11 risk" that Ruiz's information was exposed. See id. Ruiz presents
12 no evidence showing there was an actual exposure of his personal
13 information, much less that it was significant and extensive. The
14 Court is convinced that even if a California court were to apply
15 the standard it has adopted in medical monitoring cases, summary
16 adjudication of Ruiz's negligence claim would still be
17 appropriate.

18 In an unpublished decision, the Ninth Circuit made a similar
19 determination when considering Arizona law. See Stollenwerk v.
20 Tri-West Health Care Alliance, 254 Fed. Appx. 664, 665-67 (9th
21 Cir. 2007). Plaintiffs sued for negligence after Tri-West Health
22 Care Alliance ("Tri-West") suffered a burglary and computer
23 equipment containing their personal information was stolen. Id.
24 at 665. The personal information included social security
25 numbers. Id. Under Arizona law, toxic exposure plaintiffs can
26 recover the costs of future medical monitoring by establishing a
27 number of factors, including the significance and extent of

1 exposure. Id. at 666. Indeed, the standard for recovering
2 medical monitoring costs under Arizona law is very similar to the
3 standard under California law, as both standards are derived from
4 the same New Jersey case, Ayers v. Township of Jackson, 106 N.J.
5 557 (1987). The Ninth Circuit determined that lost-data
6 plaintiffs who presented no evidence of identity theft would not
7 be able to meet Arizona's standard for recovery of monitoring
8 costs. Stollenwerk, 254 Fed. Appx. at 667. Similarly, this Court
9 is convinced that Ruiz cannot meet California's standard for
10 recovery of monitoring costs because he has presented no evidence
11 that there was a significant exposure of his personal information,
12 and he has presented no evidence that he has become a victim of
13 identity theft.

14 Furthermore, to the extent that Ruiz seeks to recover as
15 damages the money he has spent monitoring his credit, Gap's letter
16 notifying him of the theft of the laptop computers offered Ruiz
17 one year of free credit monitoring and fraud insurance. See
18 Notification Letter. Ruiz contends that credit monitoring beyond
19 one year is reasonably necessary to minimize his risk of identity
20 theft. See Opp'n at 6. The Court gives little weight to Ruiz
21 contention because he chose not to take advantage of Gap's offer
22 of one year of free credit monitoring. See Ruiz Dep. at 32:3-25.

23 This Court's determination with respect to Ruiz's negligence
24 claim is consistent with those of other federal courts. In
25 Pisciotta, as noted above, the Seventh Circuit determined that an
26 online applicant whose personal information was compromised had
27 standing to sue. 499 F.3d at 634. However, the Seventh Circuit
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1 went on to determine that this compromise of the applicant's
2 personal information did not rise to the level of a compensable
3 injury and damages required to state a claim for negligence or for
4 breach of contract under Indiana law. See id. at 635-39. The
5 Seventh Circuit concluded that "[w]ithout more than allegations of
6 increased risk of future identity theft, the plaintiffs have not
7 suffered a harm that the law is prepared to remedy." Id. at 639.
8 Similarly, in Caudle, where the court also found standing, the
9 court went on to determine that a New York court would not allow a
10 negligence claim to proceed in a case where "[d]espite a full and
11 fair opportunity to conduct discovery, there is no evidence . . .
12 regarding the motive or capabilities of the thief . . . [and] no
13 evidence that this plaintiff's data has been accessed or used by
14 anyone as a result of the theft." 580 F. Supp. 2d at 282.

15 In Melancon v. Louisiana Office of Student Financial
16 Assistance, the court noted that "the mere possibility that
17 personal information may be at increased risk does not constitute
18 actual injury sufficient to maintain a claim for negligence." 567
19 F. Supp. 2d 873, 877 (E.D. La. 2008)). In Kahle v. Litton Loan
20 Servicing LP, computer equipment was stolen that contained the
21 personal information of 229,501 former customers of Provident
22 bank. 486 F. Supp. 2d 705, 706 (S.D. Ohio 2007). The court found
23 that "without direct evidence that the information was accessed or
24 specific evidence of identity fraud this Court can not find the
25 cost of obtaining . . . credit monitoring to amount to damages in
26 a negligence claim." Id. at 713.

27 In Forbes v. Wells Fargo Bank, N.A., computers were stolen
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1 from a vendor of Wells Fargo Bank that contained unencrypted
2 customer information. 420 F. Supp. 2d 1018, 1019 (D. Minn. 2006).
3 The court granted summary judgment against the plaintiffs on their
4 negligence claim because their expenditure of time and money
5 monitoring their credit did not establish the essential element of
6 damages. Id. at 1020-21. In Guin v. Brazos Higher Education
7 Service Corp., a laptop computer was stolen that contained
8 unencrypted, nonpublic customer information. No. 05-668, 2006 WL
9 288483, at *1 (D. Minn. Feb. 7, 2006). The court held that the
10 plaintiff could not sustain a claim for negligence because he had
11 experienced no instance of identity theft. Id. at *6.

12 Although these cases are not binding on this Court, the Court
13 finds them persuasive. Plaintiff attempts to distinguish these
14 cases by pointing out that they were not decided under California
15 law. See Opp'n at 13-14. The Court notes, however, that the
16 essential elements of a negligence claim are the same or similar
17 in each of the other jurisdictions. Plaintiff also alleges that
18 other Gap job applicants have claimed identity theft or have had
19 their social security numbers used to open an account at T-Mobile.
20 See Opp'n at 7. Ruiz, however, has presented no evidence in
21 support of these allegations, so they are not sufficient to defeat
22 a summary judgment motion. See Anderson v. Liberty Lobby, Inc.,
23 477 U.S. 242, 248-49 (1986)(determining that nonmoving party must
24 present significant probative evidence to defeat motion for
25 summary judgment). The Court finds that Gap and Vangent are
26 entitled to summary judgment on Ruiz's negligence claim.

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1 **C. Violation of California Civil Code Section 1798.85**

2 California Civil Code § 1798.85 provides that a person or
3 entity may not "[r]equire an individual to use his or her social
4 security number to access an Internet Web site, unless a password
5 or unique personal identification number or other authentication
6 device is also required to access the Internet Web site." Cal.
7 Civ. Code § 1798.85(a)(4). Ruiz alleges that Gap and Vangent
8 violated this provision "[b]y requiring Plaintiff and Class
9 Members to use SSNs to enter the application Web site without also
10 requiring a unique personal identification number or other
11 authentication device." Am. Compl. ¶ 82.³

12 The Court finds that Gap and Vangent did not require Ruiz to
13 use his social security number to "access" the job application
14 website. During his deposition, Ruiz reenacted Gap's online
15 employment application process. See Ruiz Dep. at 52:23-59:7.
16 Ruiz started from the Google website. Id. at 52:23-53:3. Ruiz
17 entered a URL address which took him to the Gap website. Id. at
18 53:4-21. At this point in the application process, Ruiz had
19 accessed the website. See Internet Specialties West, Inc. v.
20 Milon-DiGiorgio Enters., Inc., 2009 WL 690302, at *9 (9th Cir.
21 2009)("A customer accesses ISPWest's website by entering the
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23 ³ Ruiz's Opposition states that Plaintiff alleges only a
24 violation of California Civil Code § 1798.85(a)(2). However, that
25 provision states that a person or entity may not "[p]rint an
26 individual's social security number on any card required for the
27 individual to access products or services provided by the person or
28 entity." Cal. Civ. Code § 1798.85(a)(2). The Court assumes that
29 Ruiz intends to allege only a violation of California Civil Code §
30 1798.85(a)(4).

1 ISPWest domain name into their browser."). Ruiz was not required
2 to enter his social security number to access the Gap website.
3 Id. at 53:22-24. Ruiz navigated through several pages on the Gap
4 website before he reached the page requiring him to enter his
5 social security number. Id. at 53:25-59:7. While entering his
6 social security number was required to submit his application, Gap
7 and Vangent did not require Ruiz to use his social security number
8 to access any website. Gap and Vangent are entitled to summary
9 judgment on Ruiz's claim that there has been a violation of
10 California Civil Code § 1798.85. The Court does not need to reach
11 Gap and Vangent's contention that there is no private right of
12 action under California Civil Code § 1798.85.

13 **D. Ruiz's Breach of Contract Claim**

14 Ruiz alleges a breach of contract claim against Vangent only.
15 Am Compl. ¶¶ 84-91. Ruiz alleges that he and the putative class
16 members are third-party beneficiaries of an Employment Screening
17 Services Agreement ("Agreement") between Gap and Vangent. Id.
18 ¶ 86. Ruiz alleges that Vangent breached the Agreement by, among
19 other things, failing to employ commercially reasonable efforts to
20 preserve the security and confidentiality of personal data under
21 its control, and by failing to encrypt the data. Id. ¶ 89. Ruiz
22 alleges that he and the putative class members "have been injured
23 and harmed by Vangent's failure to comply with the terms of the
24 Agreement. As a direct and proximate result of Vangent's breach,
25 Plaintiff and the Class have suffered damages; they have spent
26 time and/or money, and will continue to spend time and/or money in
27 the future to protect themselves from harm." Id. ¶ 91.

1 Under California law, a breach of contract claim requires a
2 showing of appreciable and actual damage. See St. Paul Fire and
3 Marine Ins. Co. v. American Dynasty Surplus Lines Ins., 101 Cal.
4 App. 4th 1038, 1060 (2d Dist. 2002) ("An essential element of a
5 claim for breach of contract are damages resulting from the
6 breach.")(italics omitted); Patent Scaffolding Co. v. William
7 Simpson Const. Co., 256 Cal. App. 2d 506, 511 (2d Dist. 1967) ("A
8 breach of contract without damage is not actionable."). Because
9 Ruiz has not been a victim of identity theft, he can present no
10 evidence of appreciable and actual damage as a result of the theft
11 of the two laptop computers. In Aguilera v. Pirelli Armstrong
12 Tire Corp., the Ninth Circuit determined that appellants could not
13 show they were actually damaged by pointing to their "fear of
14 future layoff." 223 F.3d 1010, 1015 (9th Cir. 2000). Similarly,
15 this Court determines that Ruiz cannot show he was actually
16 damaged by pointing to his fear of future identity theft.

17 Relying on Arcilla v. Adidas Promotional Retail Operations,
18 Inc., 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007), Ruiz asserts that
19 "an increased risk of harm is compensable injury." Opp'n at 25.
20 In Arcilla, the plaintiffs alleged that a retailer failed to
21 truncate customers' credit card numbers and to obscure the
22 expiration dates as required by the Fair Credit Transactions Act
23 ("FCRA"). 488 F. Supp. 2d at 966. In denying the defendant's
24 motion to dismiss, the court held that plaintiffs properly alleged
25 actual harm in the form of heightened risk of identity theft. Id.
26 at 967. In Arcilla, however, the court was construing the federal
27 FCRA, not California contract law. Arcilla fails to support
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1 Ruiz's contention that an increased risk of identity theft
2 constitutes appreciable damage under California contract law.

3 Relying on Ross v. Frank W. Dunne Co., 119 Cal. App. 2d 690,
4 700 (1953), Ruiz asserts that "once a breach of contract has been
5 proven nominal damages are presumed to follow as a conclusion of
6 law." Opp'n at 24. In Aguilera, however, the Ninth Circuit
7 noted that nominal damages, like speculative harm or fear of
8 future harm, would not suffice to show legally cognizable damage
9 under California contract law. 223 F.3d at 1015 (9th Cir.
10 2000)(quoting Buttram v. Owens-Corning Fiberglas Corp., 16 Cal.
11 4th 520, 531 n.4 (1997)).

12 Ruiz asserts that the costs he paid for credit monitoring are
13 compensable because they constitute his attempt to mitigate
14 damages. Ruiz relies on Brandon & Tibbs v. George Kevorkian
15 Accountancy Corp., 226 Cal. App. 3d 442, 468 (5th Dist. 1990) to
16 support this contention. In Brandon & Tibbs, the plaintiff sought
17 to mitigate his lost profits damages by opening a new office when
18 the defendant breached a joint venture agreement. See id. at 460-
19 62. Here, however, Ruiz has no actual damages to mitigate since
20 he has never been a victim of identity theft.

21 This decision is consistent with that of other federal courts
22 considering breach of contract claims in lost-data cases. See
23 Pisciotta, 499 F.3d at 633 (affirming district court's decision
24 that "there could be no action for breach of contract under
25 Indiana law in the absence of . . . cognizable damages"); Forbes,
26 420 F. Supp. 2d at 1021 (granting summary judgment in favor of
27 defendant on lost-data plaintiff's breach of contract claim under
28

1 Minnesota law); Hendricks v. DSW Shoe Warehouse, Inc., 444 F.
2 Supp. 2d 775, 779-80 (W.D. Mich. July 26, 2006) (dismissing
3 contract claim of plaintiff who claimed as damages "the costs of
4 protecting herself against a risk that the stolen data will, in
5 the future, be used to her detriment" because plaintiff had
6 "failed to allege damages of a type cognizable under Michigan
7 common law applicable to contract actions."). Ruiz has presented
8 no evidence of legally cognizable damage under California contract
9 law, so Vangent is entitled to summary judgment on Ruiz's breach
10 of contract claim. The Court does not need to reach Ruiz's
11 argument that he and the putative class members are third party
12 beneficiaries of the Agreement between Vangent and Gap.

13
14 **V. CONCLUSION**

15 For the reasons stated about, the Court GRANTS Gap's Motion
16 for Summary Judgment and GRANTS Vangent's Motion for Summary
17 Judgment. The Court DENIES Plaintiff's Motion for Class
18 Certification as moot.

19
20 IT IS SO ORDERED.

21
22 Dated: April 6, 2009



23
24 UNITED STATES DISTRICT JUDGE