IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL SECTION

AVRUM M. BAUM, as parent and guardian of Chaya Baum, individually and on behalf of all others similarly situated,	:	**JANUARY TERM, 2011**
Plaintiff	:	**No. 3876**
v.	:	
KEYSTONE MERCY HEALTH PLAN and AMERIHEALTH MERCY HEALTH PLAN,	:	**1925b Opinion**
	:	**CLASS ACTION OPINION ON REMAND**

ORDER

Colins, J. **March, 2015**

INTRODUCTION

This matter concerns the efforts of plaintiff Avrum M Baum (Baum), individually and on behalf of his minor daughter, Chaya Baum, to represent a class of individuals whose personal health information was stored on a flash drive that Keystone Mercy Health Plan and Amerihealth Mercy Health Plan (defendants) irretrievably lost on or about September 20, 2010. Baum asserted claims not only of negligence and negligence *per se*, but also a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa.C.S. § 201-1, *et seq*. On July 25, 2013, this court denied plaintiff's motion for certification on all

counts. Baum appealed and on December 9, 2014, the Superior Court affirmed in part and vacated in part, and remanded. *Baum v. Keystone Mercy Health Plan, et al.*, 2677 EDA 2013. This opinion addresses the issue remanded for further consideration.

ISSUE RAISED

The Superior Court directs this court to address whether there is a class to be certified on plaintiff's claim of deceptive practices under the "catch-all" provision of the UTPCPL which prohibits one from "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 Pa.C.S. § 201-2(4)(xxi).

BACKGROUND AND SUMMARY

This court reviewed again materials submitted on the original motion for class certification, the testimony and other evidence submitted at the class certification hearing on April 29, 2013, the post-remand supplemental briefs filed by the parties, and the parties' post-remand oral argument on February 18, 2015. The court finds the plaintiff's motion for class certification should be denied because the requirements for typicality, adequacy of representation and predominance have not been satisfied. Even though any one of these grounds alone is fatal to plaintiff's motion for class certification, the court will address the each of the Rule 1702 requirements for class certification on the claim of deceptive practices under the UPTPCL.

FINDINGS OF FACT

The findings of fact set forth in its pre-remand, July 25, 2013, 1925b opinion, are incorporated herein as follows:

At the [Class Certification] April 29, 2013, hearing, plaintiff presented his own testimony and that of his expert, Murali Krishna Chemuturi (Chemuturi), and of Barbara G. Jones (Jones), an employee of the defendant, AmeriHealth Caritas.

The Parties

(1) **Plaintiff Avrum M. Baum (plaintiff) is a resident of Philadelphia, Pennsylvania, and is the father and guardian of Chaya Baum, a special-needs minor child who has health insurance with the defendant Keystone Mercy Health Plan. N.T., 04.29.13, at 10-11, 46-47, 93-93 (Baum). Plaintiff himself was and is not insured by the defendants. N.T., 04.29.13, at 41-42, 92 (Baum).**

(2) **The Commonwealth of Pennsylvania pays for Chaya Baum's health insurance with Keystone through the Medicaid program. N.T., 04.29.13, at 46-47 (Baum); N.T., 04.29.13, at 92-93 (Jones).**

(3) **The named defendants are health insurance carriers Keystone Mercy Health Plan and AmeriHealth Mercy Health Plan. A couple of weeks prior to the Certification Hearing, defendant Keystone Mercy Health Plan became Keystone First and AmeriHealth Mercy Health became AmeriHealth Caritas Pennsylvania. Both Keystone First and AmeriHealth Caritas Pennsylvania are plans that are now part of the AmeriHealth Caritas "family of companies." N.T., 04.29.13, at 61-62. For the purposes of this memorandum, these entities are referred to collectively as "the defendants."**

Plaintiff's claims

(4) **Pursuant to Rule 1702, 1708 and 1709, Pa. R. C. P., plaintiff seeks certification of:**

> **All individuals who suffered an invasion of privacy or whose privacy was violated or compromised through the defendants' misfeasance by the loss of a portable computer USB Flash Drive ("Flash Drive") containing the personal health information ("PHI") or other confidential, personal information of Class members (the "Class").**

Page 1, *Motion for Class Certification,* October 12, 2012.

(5) **Plaintiff claims that because they mishandled and lost the Flash Drive, the defendants are liable to the class for a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. § 201-1, *et seq.* (Count I), common law negligence (Count II), and negligence *per se* (Count III). *First Amended Complaint* of September 20, 2012.**

(6) **In addition to economic and statutory damages, plaintiff seeks injunctive and equitable relief prohibiting further wrongdoing by defendants, requiring the defendants to protect all class member data, mitigation, interest and attorneys' fees. Prayer for Relief, *Amended Complaint.***

Facts Pertaining to Class Certification

(7) **Sometime in 2010, one of the defendants' employees copied data from the defendants' computer system onto an unencrypted Flash Drive that was misplaced and never found. N.T., 04.29.13, at 71-74 (Jones).**

(8) **The Flash Drive contained private health information (PHI) that is protected: by the defendants' own privacy practices; under federal law governing Privacy of Individually Identifiable Health Information (HIPPA Privacy Rule), 45 C.F.R. 160 et seq.; and under Pennsylvania law, the Privacy of Consumer Health Information, 31 Pa. Code § 416. N.T., 04.29.13, at 18-19 and Ex. P-4; N.T., 04.29.13, at 64-65, 71 (Jones).**

(9) **On September 2010, Barbara G. Jones, defendants' Chief Compliance & Privacy Officer, learned that the Flash Drive had been lost. N.T., 04.29.13, at 71-73 (Jones). She conducted an investigation that involved, among other things, identifying what information was on the Flash Drive and enlisting the assistance of all defendants' employees in finding it. N.T., 04.29.13, at 73-74, 77-78 (Jones); Defendants' *Answer to the Complaint*, ¶¶ 3, 28, and 42.**

(10) **Through Ms. Jones, defendants provided notice of the missing Flash Drive to the Pennsylvania Department of Public Welfare (DPW) on October 5, 2010, and to the federal Department of Health and Human Services Office for Civil Rights (OCR) on October 25, 1010. N.T., 04.29.13, at 80 (Jones).**

(11) **The information on the Flash Drive included, variously, names, addresses/zip codes, date of birth, social security numbers, member identification numbers and clinical information, including medications, lab results and health screening information. N.T., 04.29.13, at 82-86 (Jones).**

(12) **According to the report that the defendants sent to DPW, the Flash Drive contained partial social security numbers of 801 individuals and the complete social security numbers of seven individuals. For the remaining more than 283,000 individuals, the data included, variously, member identification numbers, clinical health screening information, names and addresses. N.T., 04.29.13, at 8487, 91-92 (Jones).**

(13) **Defendants sent notices to 285,691 individuals concerning the loss, informing those individuals what personal data was on the Flash Drive and inviting them to**

contact the defendants for additional information. N.T., 04.29.13, at 79-80; 91-92 (Jones).

(14) Defendants offered credit monitoring to the 808 individuals whose partial or complete social security numbers appeared on the Flash Drive (808 SSN individuals) because, in defendants' view, their PHI was most at risk. N.T., 04.29.13, at 31 (Baum); N.T., 04.29.13, at 93 (Jones). Plaintiff was not among the 808 individuals offered such monitoring. *Id.*

(15) The notice that the plaintiff received in October of 2010 informed him that his daughter's member identification number (Member ID) and health screening information were on the lost Flash Drive. N.T., 04.29.13, at 16, 92 (Baum); Exhibits P-2 and P-3.

(16) Neither Chaya Baum's name, social security number nor address was on the Flash Drive. N.T., 04.29.13, at 39, 44 (Baum); *id.* at 128-30 (Chemuturi).

(17) Plaintiff never contacted the defendants for additional information. N.T., 04.29.13, at 42-43 (Baum).

(18) The record contains no evidence that defendants' reports and corrective measures concerning loss of the Flash Drive failed to satisfy any requirements of either DPW or the OCR. N.T., 04.29.13, at 96-97, 99-100 (Jones).

(19) The record contains no evidence that any of Chaya Baum's personal information on the lost Flash Drive was subject to unauthorized access. N.T., 04.29.13, at 46-49 (Baum).

(20) The record contains no evidence that any information about any of the more than 283,000 individuals on the flash has been subject to unauthorized access since its loss in 2010. N.T., 04.29.13, at 95 (Jones).

(21) Plaintiff's expert, Murali Krishna Chemuturi (Chemuturi), analyzed a duplicate Flash Drive created by defendants from data on their servers and offered an opinion as to what information appears on the drive and on the adequacy of the steps that defendants took post-loss in order to protect confidential information that it contained. N.T., 04.29.13, at 110-11 (Chemuturi).

(22) Chemuturi was able to confirm that the lost drive contained PHI about Chaya Baum and others. N.T., 04.29.13, at 112-15, 118-19, 126-27 (Chemuturi).

(23) Chemuturi wrote *inter alia* that:

(a) "there is a reasonable basis to believe it [the Flash Drive] could be used to identify Chaya Baum." Page 7, ¶17, Expert Report of Murali Krishna Chemuturi (Chemuturi Report), Exhibit B to Plaintiff's *Motion for Class Certification*;

(b) "the information about Chaya Baum contained on the missing Flash Drive files was identifiable health information relating to the provision of health care to Chaya Baum, through the Medicaid program administered by the defendants;" *id.* at pg. 8, ¶20.

(24) At the class certification hearing, Chemuturi testified that Member IDs are confidential, peculiar to individuals in the organizational data base, and can be and are used to extract information associated with the member number from the organization's information systems. N.T., 04.29.13, at 116-17 (Chemuturi).

(25) He opined that "[t]he member ID is the key for the particular person in the system," that it "has to be kept confidential," and that the Member ID appeared for 99 percent of the individuals whose information was on the Flash Drive. N.T., 04.29.13, at 117-18.

(26) Chemuturi asserted that the files on the Flash Drive were not security protected. N.T., 04.29.13, at 120 (Chemuturi).

(27) He said also that the Member ID is used to identify individuals in the master file on defendants' servers. N.T., 04.29.13, at 112-13, 129-30 (Chemuturi). The master file contains all the data related to any single Member ID, including the name and PHI associated with that number. *Id.*

(28) Chemuturi testified that the information on the lost Flash Drive concerning Chaya Baum was accessible to him only because plaintiff's counsel had furnished him photo copy of her member card, which contained both her name and her Member ID. N.T., 04.29.2013, at 127-129.

(29) With Chaya Baum's Member ID, Chemuturi extracted from the Flash Drive her PHI which was arrayed on a printed screen shot that showed PHI associated with Chaya Baum's number, but did not include her name. Plaintiff's Exhibit P-11.

(30) On cross-examination, Chemuturi testified regarding the relationship of the Member ID to an individual's identity as follows:

> Question: And you have that [printed screen shot] right in front of you, right?
>
> Answer: Yes, sir.

Question: Tell me somebody else's name besides Chaya Baum?

Answer: If I have to do this, I have to look at the master file of the membership number, and then I have to extract from this. In this particular screen shot, in this particular table, names are not given.

Question: Yes, so you can't tell form that number what the name of an individual is if the name isn't otherwise disclosed; correct?

Answer: From the membership number we have to access the master file and then we find out. See, key – only one file will have all the master data. The rest of the files will always be based on this membership number.

Question: But that so-called master file is in computer servers that you don't have access to: isn't that right.

Answer: Right. I do not have.

N.T., 04.29.13, at 128-29 (Chemuturi).

(31) The foregoing testimony undermines Chemuturi's written statement that there is a "reasonable basis to believe it [the Flash Drive] could be used to identify Chaya Baum." *See* ¶ 17(a), *supra.* According to Chemuturi, the Member ID on the Flash Drive *could not* be used to identity Chaya Baum or to link the PHI associated with that number to her unless (a) one also had her name *or* (b) one had access to the internal computer records on defendants' servers. N.T., 04.29.13, at 125-30, 13134, 147-48 (Chemuturi).

(32) While Chemuturi testified that the defendants' software on their servers is vulnerable to hacking by anyone familiar with MS Excel, he also said that he had not examined the defendants' computer systems nor had he made any determinations about the security of their servers. N.T., 04.29.13, at 123-25, 130-31 (Chemuturi). The security of defendants' servers is not a subject of plaintiff's class action. N.T., 04.21.13 at 133-34 (Chemuturi); *Amended Complaint.*

(33) Regarding the class definition, Chemuturi's expert report offered only the conclusion that what Chaya Baum has in common with over 283,000 individuals is that her PHI appears on the Flash Drive. Page 12, ¶ 36, *Chemuturi Report.* The remainder of his report concerned the (a) adequacy of the defendants' investigation of the lost data: (b) and an analysis of the number of individuals who had certain medical conditions, health screens, or vaccines, and (c) the numbers of individuals whose full or partial social security numbers were contained on the Flash Drive. *Id.* at 7-13.

(34) At the close of plaintiff's case, defendants chose not to call their expert who was present in court. N.T., 04.29.13, at 152-53.

Pertinent to this appeal, but not included in the court's original opinion, is the following finding of fact:

(35) At the time of Chaya's enrollment in Keystone's claim, Keystone distributed to her and others a Notice of Privacy Practices. N.T., 04.29.13, at 18-19. The Notice said:

SUMMARY

Keystone Mercy Health Plan takes our members' right to privacy seriously. In order to provide you with your benefits, Keystone Mercy Creates and/or receives personal information about your health. This information comes from you, your physicians, hospitals, and other health care services providers. This information can be oral, written, or electronic. Keystone Mercy must keep this information confidential. We have set up ways to make sure that all personal health information is used correctly. For example. All Keystone Mercy employees must sign and follow the Company's Confidentiality Policy. Another example is all company computers are password protected and equipped with security protection devices.

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KINDS OF INFORMATION THAT THIS NOTICE APPLIES TO

This notice covers any information we have that would allow someone to identify you and learn something about your health.

▪ ▪ ▪

WHO MUST FOLLOW THIS NOTICE

- ***Keystone Mercy Health Plan***
- ***All employees, staff, interns, volunteers and other personnel whose work is under direct control of Keystone Mercy Health Plan.***

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OUR LEGAL DUTIES

- **The law requires that we maintain the privacy of your health information.**
- **We are required to provide this Notice of Privacy Practices and legal duties regarding health information to you.**
- **We are required to follow the terms of this notice until we officially adopt a new notice.**

Plaintiff's Exhibit P-4: BAUM -00028-00029; see Plaintiff's Post-Remand Supplement (Plaintiff's Supplement), at 10-11.

DISCUSSION

A. Questions Presented

This court is charged with deciding whether the following class is certifiable solely on the claim that the Health Plans violated the UTPCPL's prohibition against deceptive practices under the "catch-all provision" of the act:

> **All individuals who suffered an invasion of privacy or whose privacy was violated or compromised through the defendants' misfeasance by the loss of a portable computer USB Flash Drive ("Flash Drive") containing the personal health information ("PHI") or other confidential, personal information of Class members (the "Class").[1]**

The Superior Court held that this court acted properly in denying certification on the plaintiff's negligence claims because he had not met the requirement of "typicality" within the meaning of Rule 1702(3), Pa. R. Civ.P. Slip Op. at 9. Specifically, the Superior Court agreed that where there was no evidence that information on the flash drive could be linked to Chaya Baum and there was no evidence that the drive could result in identify theft or loss of privacy, class certification was not supportable. *Id.* at 7-9.

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[1] This class description has changed somewhat post-remand. *See* note 3, below.

- **The law requires that we maintain the privacy of your health information.**
- **We are required to provide this Notice of Privacy Practices and legal duties regarding health information to you.**
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The Superior Court held further, however, that this court erred in declining to certify a class on the claim of deceptive conduct on the ground that Baum had not shown reliance because justifiable reliance is not a requirement for a claim of deceptive practices under the UPTPCL. *See Grimes v. Enterprise Leasing Co. of Phila, LLC*, 66 A.3d 330, 337 n.4 (Pa. Super. 2012) (holding, ". . . to the extent that Grimes alleges Enterprise's conduct was deceptive, as opposed to fraudulent, she need not allege justifiable reliance."), *rev'd and remanded on other grounds*, 105 A.3d 1188 (Pa. 2014). Accordingly, this court conducts a new class action analysis under Rule 1702, Pa.R.C.P., solely on plaintiff's UTPTPL claim of deceptive conduct, namely "conduct that is likely to deceive a consumer acting reasonably under similar circumstances." *Ries v. Curtis*, No. CIV.A. 13-1400, 2014 WL 5364972, at *10 (E.D. Pa. Oct. 22, 2014).

A. Requirements of Rule 1702

Rule 1702 requires plaintiff seeking class certification to create a record satisfying all of the following requirements:

> (1) the class is so numerous that joinder of all members is impracticable (*numerosity*);
>
> (2) there are questions of law or fact common to the class (*commonality*);
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class *(typicality)*;
>
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709 (*adequate representation*); and
>
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708 (*fair and efficient*)."

This court provides the following evaluation of these requirements in light of the record, noting that in certain respects its previous analyses of the claim of fraudulent conduct apply equally to the deceptive practices claim and will refer that earlier opinion where appropriate.

(1) Numerosity

This court found originally that the class number -- ranging anywhere from 808 to 283,000 individuals – is sufficient to satisfy plaintiff's burden on the requirement of numerosity. Slip op. at 12, *Baum v. Keystone Mercy, et al.*, No. 3876 (C.P. Phila. April 29, 2013). On remand, plaintiff argues that the 200,000 or more individuals who are described as follows satisfies the numerosity requirement:

> "all persons whose privacy was violated or compromised by defendants' deceptive conduct – though defendants' failure to comply with the privacy policies and laws requiring that PHI [private health information] be properly protected and the confusion or misunderstanding created about the supposed safeguards purportedly had in place to ensure that the PHI was adequately protected – resulting in the loss of the Flash Drive that went missing containing Class Members un-encrypted PHI and/or other confidential information.[2]

Plaintiff's Post-Remand Supplemental Proposed Findings of Fact and Conclusions of Law (Plaintiff's Post-Remand Submission), at 27. This court agrees that the requirement is satisfied, and, as before, defendants do not contest this finding.

(2) Common Issues of Law or Fact: Rule 1702(2)

Regarding this requirement in the context of this action, this court said in its original opinion:

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[2] This description of the class differs slightly from plaintiff's original version which stated: *"All individuals who suffered an invasion of privacy or whose privacy was violated or compromised through the defendants' misfeasance by the loss of a portable computer USB Flash Drive ("Drive") containing the personal health information ("PHI") or other confidential, personal information of Class members (the "Class").* Page 1, Motion for Class Certification, October 12, 2012. The current version deletes "*invasion of privacy*" and adds language alleging that defendants' conduct created "*confusion and misunderstanding.*"

"The second prerequisite for class certification is that "there are questions of law or fact common to the class." Rule 1702(2), Pa. R. Civ. P. Common questions exist where the class members' claims arise "out of the 'same practice or course of conduct" on the part of the class opponent. *Janicik,*[3] *supra.* at 547. The existence of questions that are unique to individual class members will not defeat class certification if there is "a predominance of common issues shared by all class members which can be justly resolved in a single proceeding." *D'Amelio v.* Super. 1985). When evaluating the commonality requirement, the court must focus on the cause of injury, not the amount of alleged damages. *Weismer by Weismer v. Beech-Nut Nutrition*, 615 A.2d 428, 431 (Pa. Super. 1992)."

This court's analysis of what questions of law or fact are common is limited to plaintiff's claim that the defendants engaged in "deceptive or unfair conduct" in violation of the UTPCPL's "catch-all" provision. 73 Pa. C. S. § 201-2(4)(xxi). To establish liability under the "catch-all" provision of the UTPCPL, a plaintiff must show a "deceptive act that is likely to deceive a consumer acting reasonably under similar circumstances." *Prukala v. Elle,* 11 F.Supp.3d 443, 447 (M.D. Pa. 2014).

"Deceptive conduct" under the UTPCPL's catch-all provision is conduct which creates a likelihood of confusion or of misunderstanding. *Id.* at § 201-2(4)(xxi). An act or a practice is deceptive or unfair if it has the "capacity or tendency to deceive." *Com. ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1236 (Pa. Cmwlth. Ct. 2007). The claim here is that when the defendants told the plaintiff that his child's information was protected from disclosure when, in fact, (a) it was not encrypted and (2) it was on a Flash Drive that was lost, they were

[3] *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451 (Pa. Super. 1982).

engaged in a deception. This is the two-pronged course of conduct out of which the plaintiff's action arises and which invites a finding of commonality.

Specifically, Baum contends that the following issues are common to the putative class:

a. Whether the defendants collected and stored Plaintiff's and the Class members' PHI in un-encrypted electronic format;

b. Whether the defendants adequately safeguarded Plaintiff's and the Class members' PHI;

c. Whether the defendants acted deceptively in storing Plaintiff's and the Class members' PHI by storing that data in the manner in which they did;

d. Whether the defendants permitted the un-encrypted copying of PHI and other confidential information of Class members onto electronic media, including member ID numbers and health screening information;

e. Whether the missing Flash Drive contained un-encrypted PHI and/or other confidential and sensitive information about plaintiff [Chaya Baum] and the class members; and

f. Whether Plaintiff and the Class members have sustained damages, and if so, to what degree and in what amount.

The court finds that the issues in paragraphs "a" through "f" satisfy the commonality requirement because they relate to plaintiff's claim that the defendants promised to protect the data from unauthorized access and to the claim that this promise was likely to create confusion and misunderstanding.[4] These questions arise out of the defendants' common course of conduct relative to all class members. In addition, the court includes paragraph "f" (subject to the discussion of "ascertainable loss," above) because it is mindful that individualized

[4] The Flash Drive contained information of certain individuals who are **not insured** by the defendants and who under no theory can be regarded as purchasers or lessees of goods or services as required showing for private actions under the UTPCPL. *See* discussion below. There is nothing on the record regarding what representations, if any, were made to these persons regarding their private data.

determinations as to damages, standing alone, need not defeat the commonality requirement. *Janicik v. Prudential Ins. Co.*, 451 A.2d 451, 461 (Pa. Super. 1982).

(3) Typicality: Rule 1702(3)

This court previously concluded that plaintiff could not satisfy the "typicality requirement" on his negligence claims because she could not show that Chaya faced identify theft due to the loss of the Flash Drive; that is, she did not face any harm. Regarding "deceptive practices," the plaintiff has framed the claim somewhat differently. He asserts that defendants' course of conduct (failure to comply with their promises and their legal obligation to protect the data) created "confusion and misunderstanding," an element of the cause of action under the UPTCPL.

There is no evidence on the record to support a claim of "confusion and misunderstanding" because there is no evidence that defendants lost anything that the plaintiff claims defendants promised to protect. The defendants expressly pledged to protect "*any information we have that would allow someone to identify you and learn something about your health.*"[5] Plaintiff's Exhibit P-4: BAUM -00028-00029; *see* Plaintiff's Supplement, at 10-11. As to this plaintiff, the evidence was that no information on the Flash Drive can be identified with Chaya. The information means nothing to any person who may have access to it. Chaya did not

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[5] Specifically, the notice said:

> **KINDS OF INFORMATION THAT THIS NOTICE APPLIES TO**
>
> **This notice covers any information we have that would allow someone to identify you and learn something about your health.**

"lose" her own personal data and she did not "lose" privacy. In effect, she "lost" nothing. Any information regarding Chaya Baum that could be "found" on the flash drive is anonymous. Since plaintiff cannot show that he (or Chaya) lost protected data, he cannot claim to represent those class members who did lose such data and who, therefore, may have been subjected to a deception.

To overcome the anonymous data problem, the plaintiff urges the court (a) to infer that someone finding the Flash Drive could determine Chaya Baum's identity and (b) to base this negative inference on the fact that the defendants did not call their expert witness, even though he was available. Plaintiff's Supplement at 14, 22. The court finds this argument unpersuasive. "The missing witness rule," does not operate in plaintiff's favor on this record. Plaintiff's own expert testified that the Flash Drive data was not vulnerable to disclosure except as to those individuals whose partial or full social security numbers were included; plaintiff's daughter is not among those individuals. Plaintiff seeks to meet his burden of proof by discrediting his own witness with evidence that he imagines the defendants would offer. Defendants' decision not to call their expert witness was their prerogative and is as easily understood to have been based on the view that, in light of plaintiff's expert testimony, that testimony was no longer needed. Nothing on the record invites this court to second guess that decision with a factual inference that is contrary to the plaintiff's own evidence.

The issue of plaintiff's standing to bring a private action under the UTPCPL also affects the "typicality" determination.[6] A claimant under the UTPCPL must show that he or she is a

[6] This court rejects Baum's contention that the issue of standing was decided conclusively in his favor when the court overruled defendants' preliminary objections. First, a motion for class certification, unlike preliminary objections, requires the court to consider the entire record, including evidence adduced at a hearing. *Cf. Herczeg v. Hampton Twp. Mun. Auth*, 766 A.2d 866, 870 (Pa. Super.) (commenting on the differences between preliminary

"purchaser" or "lessee" and that he or she has "suffered damages arising out of the purchase or lease of goods or services." 73 Pa.C.S. § 201-9.2.[7] There is no evidence on the record that the plaintiff purchased, leased or gave **any** consideration at all for the policy covering his daughter. The court rejects plaintiff's argument that he can meet this requirement despite a lack of privity between him and defendants. The issue in this case is whether there was a **purchase,** as the statute requires. For this reason, he cannot rely on the opinion and facts in *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.* in which the plaintiff indisputably **purchased** a product that its contractor secured from a supplier. The court found only that lack of privity between the plaintiff and the supplier was no barrier to plaintiff's claim where the evidence showed that the plaintiff had made a purchase and that the product was delivered for its benefit. 574 A.2d 641, 646 (Pa. Super. 1990*), aff'd without opinion*, 529 Pa. 512 (1992). The facts in *Valley Forge* are not analogous and do not allow this court to ignore the plain language of the UTPCPL.

Similarly, the record does not support plaintiff's claim to an "ascertainable loss." There is no evidence of a calculable value for the lost data. The court rejects plaintiff's contention that

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objections and motions for summary judgment). Second, courts are admonished to interpret liberally both the requirements of Rule 1702 on motions for class certification and the language of the UTPCPL so that their respective salutary purposes can be realized. *Janicik v. Prudential Ins. Co.*, 305 Pa. Super. 120, 128 (1982) (regarding application of Rule 1702 when certifying class actions); *Fazio v. Guardian Life Ins. Co of America,* 62 A.3d 396, 405 (Pa. Super) (regarding interpretation of the language of the UTPCPL). To achieve this purpose, courts are cautious about early determinations that result in dismissal without allowing a claimant to develop as complete a record as possible. *E.g., Algiori v. Metro Life Ins. Co.*, 879 A.2d 315, 320 (Pa. Super.) (stating that a finding of "ascertainable loss" for the purposes of the UTPCPL "must be established from the factual circumstances of each case"). It is entirely appropriate for this court to revisit the threshold issue of standing.

[7] A private action under the UTPCPL may be brought by "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater." 73 Pa. C. S. § 201-9.2(a).

his personal expenses resulting from his decision to sue is an ascertainable loss within the meaning of the statute. In *Grimes v. Enterprise Leasing Co. of Phila, LLC*, 105 A.3d 1188 (Pa. 2014), the court held that even if attorneys fees and costs had been pled (they were not), they do not count as ascertainable costs for the purpose of establishing standing because allowing a plaintiff to obtain standing "simply by retaining counsel" would produce an untenable result. *Id.* at 1193-94. This logic applies here, with greater force. Allowing a plaintiff to acquire standing to sue under the UPTPCL on the basis of expenses he incurred *after* and by virtue of suing simply defies logic, and this court rejects the proposition.

In short, the court finds that plaintiff cannot satisfy the typicality requirement because he cannot demonstrate that he shared with putative class members any loss or that he has standing to represent those class members who did suffer such a loss.

(4) Adequacy of Representation: Rules 1702(4) and 1709

Rule 1709 requires consideration of the questions:

> (1) whether the attorney for the representative parties will adequately represent the interests of the class,
>
> (2) whether the representative parties have a conflict of interest in the maintenance of the class; and
>
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

There is no contention that counsel cannot represent the interests of the class or that there are inadequate resources prosecute the action. Moreover, there is nothing on the record to suggest that these issues present a barrier to certification. The court accepts that these requirements are satisfied. *Janicik,* 541 A.2d at 460-61 (stating that an attorney's adequacy may be inferred from the pleadings, briefs, and other material presented to the court); *Haft v. U.S.*

Steel Corp., 451 A.2d 445, 448 (1982) (stating that it may be presumed that there is no conflict of interest unless otherwise demonstrated).

Defendants contend, however, that plaintiff himself is an inadequate representative because (a) it is his daughter's, not his data, on the Flash Drive; (b) there are defenses unique to plaintiff that would overwhelm the litigation, namely, standing and damages, that place him in conflict with the interests of the class.

Plaintiff asserts that as Chaya Baum's legal representative, he may represent her interests in the protection of her private data. Regarding potential conflict of interest, he argues that in "seeking redress for the privacy breach they suffered from defendants" he and the class members "share a strong similarity of legal theories and their claims arise from the same underlying events or series of events" and that, on this ground, there is no evidence of individual factual differences sufficient to defeat certification. Plaintiff's Supplement at 32.

The court has already found that plaintiff's liability theories are common to the class. As discussed above, however, the court finds that the plaintiff has not presented evidence of deceptive conduct as to himself or his daughter. Further, his dubious claim to standing throws into doubt the claims of all class members and thereby renders him an inadequate representative of the class. The court concludes that record does not support a finding that the plaintiff satisfies the "adequacy" requirement for class certification.

Fair and Efficient Method of Adjudication: Rules 1702(5) and 1708

Rule 1708[8] sets forth the criteria for determining whether class certification is a "fair and efficient method" of resolving the underlying dispute. There is little in the way of evidence or even fully developed argument from the parties regarding most of those criteria. Defendants contend, however, that the plaintiff has failed to satisfy the first of those criteria, namely that that common questions of law or fact predominate over any question affecting on individual members. Rule 1798(1), Pa.R.C.P. Defendants maintain that the issues of standing and damages, respectively, predominate over those of liability. Plaintiff responds, of course, that standing is not an issue and that damages claims are manageable because: any relief requiring defendants to change their data handling or to protect individuals whose data has been compromised will be class-wide or on the basis of sub-classes and any claims for monetary damages can be handled administratively under the supervision of the courts.

As already explained, however, the issues stemming from the plaintiff's atypicality – whether there is evidence of confusion or misunderstanding arising out any loss and whether there is evidence supporting a claim to standing under the UPTPCL – predominate over any

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[8] The criteria are: (1) Whether common questions of law or fact predominate over any question affecting on individual members; (2) The size of the class and difficulties likely to be encountered in the management of the action as a class action; (3) Whether the prosecution of separate actions by or against individual members of the class would create a risk of: (a) inconsistent or varying adjudication with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct; or (b) adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudication or substantially impair ;or impede their ability to protect their interests; (4) The extent and nature of any litigation already commenced by or against members of the class involving any of the same issues; (5) Whether the particular forum is appropriate for the litigation of the claims of the entire class; (6) Whether inn view of the complexities of the issues or the expenses of litigation the separate claim of individual class members are insufficient in amount to support separate actions; (7) Whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action; and (8) Whether defendants acted or refused to act on grounds generally applicable to the class. Rule 1708, Pa.R.C.P.

common issues of liability. For this reason, the court finds that class action treatment is not appropriate for the plaintiff's claim.

CONCLUSION

For the foregoing reasons, and in accordance with the conclusions in the order appended to this memorandum, the court denies plaintiff's motion for class certification on his claim of deceptive practices under the UTPCPL.

ORDER

AND NOW, this 25 day of March 2015, upon consideration of plaintiff's motion for class certification on his claim of deceptive practices under the UTPCPL, 73. Pa.C.S. § 201-1 et seq., the entire record, and after a hearing and oral argument, it is **ORDERED** that the motion is **DENIED** for the reasons set forth in the memorandum accompanying this Oder and on the basis of the following conclusions of law under Rule 1702, Pa.R.C.P.:

(1) The "numerosity" requirement **is satisfied** because the class is so numerous that joinder of all members is impracticable (Rule 1702(1));

(2) The "commonality" requirement **is satisfied** because here are questions of law or fact common to the class (Rule 1702(2));

(3) The "typicality" requirement **is not satisfied** because he claims of the plaintiff **are not** typical of the claims of the class (Rule 1702(3));

(4) The "adequacy of representation" requirement **is not satisfied** because individual issues predominate over common issues and the plaintiff will not fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709.

(5) The requirements for a determination that class action treatment would be a "fair and efficient method of adjudication" in Rule 1708 **are not satisfied**.

BY THE COURT:

Mary D. Colins

MARY D. COLINS, J.