UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JENNIFER HARRINGTON, JESSICA SEYMOUR, TRAVIS SALLADAY, EVELYN O'KEEFFE, CHARLES SLAVIN, and JOHNNY CLOY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CHOICEPOINT INC., a corporation, CHOICEPOINT SERVICES INC., a corporation, CHOICEPOINT PUBLIC RECORDS INC., a corporation, and CHOICEPOINT WORKPLACE SOLUTIONS INC., a corporation,

Defendants.

CASE No. CV 05-1294 MRP (JWJx)

MEMORANDUM OF DECISION RE: Defendants' Motion to Dismiss First Amended Consolidated Class Action Complaint, or in the Alternative, Motion for Summary Judgment

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

On August 12, 2005, Defendants ChoicePoint Inc., ChoicePoint Service Inc., ChoicePoint Public Records Inc. and ChoicePoint Workplace Solutions ("ChoicePoint" or "Defendants") filed a motion to dismiss the First Amended Consolidated Class Action Complaint, or in the alternative, motion for summary judgment. On September 12, 2005, this court heard oral argument and took the motion under submission.

57

BACKGROUND

In late 2004, ChoicePoint Inc., one of the nation's largest providers of identification and credential verification services, learned that organized criminals ("fraudsters") had fraudulently posed as legitimate businesses to open accounts as ChoicePoint customers and thereby gain access to certain ChoicePoint internet-based data products. After discovering this criminal activity, ChoicePoint allegedly sent notices to approximately 35,000 California residents and approximately 110,000 residents of other states informing them that their personal information had been disclosed to fraudsters. *See Consolidated Compl.* ¶ 26. Plaintiffs were presumably among those who received such notice.

Between February and March 2005, Plaintiffs filed four separate lawsuits against ChoicePoint. This court granted Plaintiffs leave to file a consolidated complaint. On June 30, 2005, Plaintiffs filed the First Amended Consolidated Class Action Complaint (the "Consolidated Complaint"). The Consolidated Complaint alleges that ChoicePoint improperly disclosed information about Plaintiffs in violation of: 1) the Fair Credit Reporting Act, 15 U.S.C. §1681 ("FCRA"); 2) the California Consumer Credit Reporting Agencies Act, Civil Code §1785.1 ("CCRAA"); 3) the California Investigative Consumer Reporting Act, Civil Code §1786 ("ICRAA"); 4) California Civil Code §1798.53 ("Invasion of Privacy"); 5) California Civil Code §1798.81.5 ("Failure to Maintain Reasonable Security Procedures"); and 6) California Business & Professions Code §17200. Plaintiff Salladay also alleges that ChoicePoint failed to comply with his request for a complete copy of all information maintained and compiled about him in violation of

California Civil Code §1785.10, 1785.15 and 1785.15.3. ChoicePoint seeks dismissal of each of Plaintiffs' claims under F.R.C.P., Rule 12(b)(1), 12(b)(6) and 56(b).

JURISDICTION

It is claimed the court has original jurisdiction over this matter pursuant to FCRA §1681p and 28 U.S.C. §1331, as the FCRA claim arises under the consumer credit laws of the United States as set forth in FCRA §1681 et seq., and under 28. U.S.C. §1332. The court has supplemental jurisdiction over the California state law claims under 28 U.S.C. §1367, as those claims are joined with related claims under FCRA.

LEGAL STANDARD FOR MOTION TO DISMISS ON SUMMARY JUDGMENT

Defendants' primary argument is that Plaintiffs have not suffered an injury and therefore they lack standing to bring their claims. If Plaintiffs lack standing this court does not have subject matter jurisdiction over the claims and they must be dismissed. A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. ChoicePoint's challenges are primarily factual.

In a factual challenge, a defendant may present evidentiary material outside the complaint, and the court "need not presume the truthfulness of the plaintiffs' allegations." *Id.* If a defendant submits an affidavit in support of its Rule 12(b)(1) motion, the plaintiff must "present affidavits or any other evidence necessary to

satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v. City of Chico*, 880 F.2d 199, 201(9th Cir. 1989).

Where "jurisdictional issue[s of fact] and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action(,)" a district court reviewing a Rule 12(b)(1) or Rule 12(b)(6) motion to dismiss should employ the standard applicable to a motion for summary judgment. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" *Id.* (Citing *Sun Valley Gasoline, Inc. v. Ernst Enterprises*, Inc., 711 F.2d 138, 139 (9th Cir. 1983)). This court finds that the jurisdictional questions of fact in this case are intertwined with the substantive merits of Plaintiffs' claims and accordingly applies the summary judgment standard.

Summary judgment is appropriate when the evidence submitted shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986). A defendant moving for summary judgment satisfies the initial burden of production by providing evidence negating any essential element of the nonmovants' claims or by showing "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325; *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-05 (9th Cir. 2000). Once the moving party carries its burden of production, the non-moving party must come forward with specific facts to support its

claims. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nissan Fire & Marine*, 210 F.3d at 1103. If the nonmoving party fails to produce sufficient evidence to create a genuine issue of material fact, the moving party must prevail on the motion for summary judgment. *Celotex Corp.*, 477 U.S. at 322; *Nissan Fire & Marine*, 210 F.3d at 1103. But if the nonmoving party produces "enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion." *Nissan Fire & Marine*, 210 F.3d at 1103.

ANALYSIS

I. The FCRA

Plaintiffs allege that ChoicePoint violated two sections of the FCRA, Sections 1681b and 1681e(a). These sections govern the manner and purpose under which a "consumer reporting agency" ("CRA") may make available a "consumer report" for use by third parties. Plaintiffs allege that the information ChoicePoint disclosed to fraudsters constituted a "consumer report" within the meaning of FCRA. The FCRA defines "consumer report" as follows:

> d)(1) In general. The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness [creditworthiness], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 604 [15

USCS § 1681b].

15 U.S.C. §1681a(d)(1).

Under this definition, information must meet three requirements to qualify as a "consumer report." The first requirement is that the personal information must actually be ***communicated*** to a third party. If information is not communicated there is no FCRA violation. The second requirement concerns the ***content*** of the information. The information must "bear[] on" one of the seven enumerated statutory factors - (1) a consumer's credit worthiness, (2) credit standing, (3) credit capacity, (4) character, (5) general reputation, (6) personal characteristics, or (7) mode of living. The last requirement concerns the ***purpose*** for which the information is used or collected. The information must be used, expected to be used, or have been collected, at least in part, for the purpose of serving as a factor in determining the consumer's eligibility for credit, insurance or employment, or for one of the other purposes authorized by Section 1681b, including collection of a consumer credit account.

A. The Alleged Communication of Information

Plaintiffs allege that "ChoicePoint has indicated . . . it disclosed . . . the personal information of approximately 35,000 residents of California and an additional 110,000 residents of other states" and that "according to ChoicePoint" Plaintiffs' information was communicated to fraudsters. Consolidated Complaint ¶¶ 26, 31 and 32. ChoicePoint challenges these allegations as they relate to Plaintiffs Salladay, Slavin, O'Keeffe, Cloy and Harrington and contends these Plaintiffs did not have their personal information disclosed to fraudsters. Defendants submitted declarations from Mr. Martin Smith and Mr. William Still, employees of ChoicePoint, stating

that an internal review of ChoicePoint's systems revealed that personal information about Plaintiffs Salladay, Slavin, O'Keeffe Cloy and Harrington was not disclosed. Had the declarations been admissible, they would have sufficiently challenged an essential element of the Plaintiffs FCRA claim. Plaintiffs would then have been required to come forward with specific facts to support their allegation that their personal information was communicated.

As discussed above, the court is applying the summary judgment standard of review to Defendants' motion. The declarations are not admissible in their current form because they do not comply with Rule 56(e). Rule 56(e) governs the form of affidavits submitted in support of a motion for summary judgment. Rule 56(e) reads in relevant part, "affidavits shall be made on personal knowledge [and]. . . [s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." The Still and Smith declarations refer to "re-created" searches, "web server logs," and "transaction logs," none of which were attached to the declarations.[1]

"An affidavit of the witness is not exempt from Rule 56(e)'s attachment requirements simply because the affidavit references documentary evidence *and* personal knowledge as a source of information. If documentary evidence is cited as a source of factual contention, Rule 56(e) requires attachment." *Sch. Dist. No. 1J v. AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).[2] The "re-created"

---

[1] Smith Declaration ¶¶ 9-21; ChoicePoint Appendix B ¶¶ 5, 11 and 16; ChoicePoint Appendix C ¶¶ 5, 11 and 16; ChoicePoint Appendix D ¶ 5.

[2] The court admonishes Defendants against selectively quoting cases. Defendants miscited *Sch. Dist. No. 1J* for the

searches, "web server logs," and "transaction logs" were referenced in the declarations and appear to be the primary basis upon which Still and Smith concluded that no communications were made. These materials should have been attached to the declarations. If Defendants resubmit the declarations with appropriate documentary evidence (i.e. "re-created" searches, "web server logs," and "transaction logs") the court will take them under consideration once Plaintiffs have had an opportunity to review the material and submit updated declarations in response.

Although Plaintiffs Salladay, Slavin, O'Keeffe, Cloy and Harrington have not proffered any evidence in support of their allegation that their information was communicated to fraudsters, without an admissible factual challenge the court must accept the material allegations in the complaint as true. *White*, 227 F.3d 1214, 1242. Allegations in a complaint, of course, must comply with Federal Rule of Civil Procedure 11. Rule 11(b)(3) requires that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" The Consolidated Complaint asserts that ChoicePoint "indicated" Plaintiffs' information **had** been communicated to fraudsters. Consolidated Complaint ¶¶ 26, 31 and 32. This allegation is not "specifically identified" as being "likely to have evidentiary support." In other words, the allegation was not asserted on

---

proposition that "Rule 56(e) requires a declarant to attach documents to her decleration only when 'documentary evidence is cited as a source of factual contention,' as opposed to the declarant's personal knowledge." Defendants' Reply at 4. *See* Order at 7 line 19 for complete quotation.

information and belief. Plaintiffs therefore, must have actual supporting evidence for the allegation in order to comply with Rule 11(b).

B. The Alleged Content of Information.

Plaintiffs allege on information and belief that the information disclosed by ChoicePoint included: age, marital status, past bankruptcies, legal judgments, real estate ownership and other similar information. Consolidated Complaint ¶¶ 10-15. In addition, Plaintiff Seymour alleges that her address, records of prior existing lawsuits and liens, UCC filings and business corporate affiliations were also disclosed. Consolidated Complaint ¶¶ 27 and 29. ChoicePoint attacks the factual basis of these allegations with the submission of the Still and Smith declarations. Again, because the declarations are lacking, the court accepts the allegations as true. The alleged content of the information "bears on" a persons "personal characteristics" and "mode of living" and arguably other factors enumerated under FCRA. Plaintiffs therefore, have sufficiently pled the content requirement. Whether the allegations were made in compliance with Rule 11 remains to be seen.

C. The Alleged Purpose for Which the Information was Used, Expected to be Used or Collected.

In order to survive Defendants' Motion, Plaintiffs must allege or the evidence must show, that the information communicated was either: 1) used, 2) expected to be used, or 3) was collected, at least in part, for the purpose of serving as a factor in determining the consumer's eligibility for credit, insurance or employment; or for one of the other purposes authorized by Section 1681b, including collection of a consumer credit account. 15 U.S.C. §1681a(d)(1).

Each of the fraudsters at issue in this case represented on the face of their ChoicePoint subscriber agreements that they would use ChoicePoint's data systems for credit application and/or collection activity. *See Still Salladay Dec.*, Ex. A & B; *Still Harrington Dec.*, Ex. A.[3] "Credit application" and "collections" are both purposes covered by FCRA. ChoicePoint should have expected the information it disclosed would be used for FCRA purposes.

Defendants argue that the subscriber agreements also stated that ChoicePoint's data products were not to be used "for consumer credit purposes, consumer insurance underwriting, employment purposes, tenant screening purposes, or for any other purose(s) covered by FCRA or similar state statute." *See Id.* Ex. A ¶ 7. Based on this contract language, included in all subscriber agreements, ChoicePoint contends it could not expect that information it might disclose would be used for a FCRA purposes. Defendants' Motion at 16. The court does not agree. Once the fraudsters indicated they intended to use the information for FCRA purposes, it does not matter that in another part of the agreement they promised not to do it. ChoicePoint should have expected the information might be so used. Deciding otherwise would allow ChoicePoint to contract around FCRA liability. Despite the court's reservations about the factual basis of many of Plaintiffs' allegations, Plaintiffs' FCRA claim survives.

II. California State Law Claims

In their Consolidated Complaint Plaintiffs alleged various violations of California State law. Plaintiffs now acknowledge deficiencies in their third cause of action (ICRAA) and fifth cause of

---

[3] The subscriber agreements were properly attached to the declarations. Thus, they are admissible.

action (Cal. Civil Code § 1798.81.5) and do not oppose dismissal of those claims. Opposition at n.1. Accordingly, those claims are dismissed with prejudice. Plaintiffs' remaining state law claims are for violations of 1) the California Consumer Credit Reporting Agencies Act, Civil Code §1785.1 ("CCRAA"); 2) California Civil Code §1798.53 ("Invasion of Privacy"); and 3) California Business & Professions Code §17200. Plaintiff Salladay also alleges violation of California Civil Code §1785.10, 1785.15 and 1785.15.3.

A. The CCRAA

The CCRAA essentially mirrors the FCRA. The only notable difference between the two statutes is that to qualify as a consumer report under CCRAA the ***content*** of information must "bear[] on" one of three specified factors, rather than one of seven factors under FCRA. One of the CCRAA's three specified factors is establishing consumer eligibility for personal and household credit. Cal. Civil Code §1785.3(c). The narrower coverage of the CCRAA does not alter the court's analysis because the content of the information Plaintiffs have alleged was disclosed "bears on" eligibility for personal or household credit. Accordingly, for the same reasons discussed in previous section on FCRA, Plaintiffs' CCRAA claim survives, albeit with the same reservations about Plaintiffs' factual allegations.

B. Invasion of Privacy (IPA)

The IPA creates a cause of action against:

> Any person . . . who intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency or from "records" within a "system of records" . . . maintained by a federal government agency . . . .

Cal. Civil Code §1798.53. To show cognizable injury under Section

1798.53, Plaintiffs must have suffered the disclosure of personal information that (a) is "not otherwise public" and (b) "was obtained from personal information maintained" by a California or federal government agency.

Defendants submitted the declaration of Mr. Kenneth Meiser, a ChoicePoint employee, to contest Plaintiffs' factual allegations. Mr. Meiser states that ChoicePoint's Discovery! database, which fraudsters used to access information concerning Plaintiff Seymour, contains only publicly available state and federal information. *See Meiser Decl.* ¶¶ 6,7. Mr. Meiser also states that ChoicePoint's AutoTrackXP databases, which fraudsters used to access information concerning Plaintiffs Salladay, Cloy and Harrington, do not contain any information obtained from a California or federal government agency. *See Id.* ¶¶ 3,4.

Although Mr. Meiser's declaration is admissible, it is not dispositive because it appears to discuss the content of ChoicePoint's current databases. The relevant question is what information the databases contained at the time they were accessed by the fraudsters. If Defendants resubmit a new declaration discussing the appropriate time period, the court will take it under consideration once Plaintiffs have had an opportunity to review the declaration and to submit updated declarations in response.

C. California Business & Professions Code §17200

Section 17200 prohibits "unlawful", "unfair" and "fraudulent" business activities. An "unlawful" business practice "is an act or practice, committed pursuant to business activity, that is at the same time *forbidden by law.*" *Bernardo v. Planned Parenthood Fed. Of Am.*, 115 Cal. App.4th 322, 351-52 (2004). Because Plaintiffs have claims

that have survived summary judgment, those claims may serve as the predicate for an unlawful business practice claim under Section 17200.

The court disagrees with Plaintiffs' contention that an order requiring ChoicePoint to pay for identity theft insurance is within the scope of equitable relief available under §17200. Plaintiffs may be entitled to an injunction preventing ChoicePoint from engaging in certain business practices if they are ultimately shown to be unlawful. Injunctive relief, however, is only appropriate when there is a "real and immediate threat" of being harmed in a similar manner. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). At this time there is insufficient evidence to conclude whether Plaintiffs have been injured and, if so, whether they are at risk of immediate similar harm. Accordingly, the Section 17200 claim survives.

D. Plaintiff Salladay's Section 1785.10, 1785.15 and 1785.15.3 Claims

Plaintiff Salladay alleges that ChoicePoint failed to comply with his request for a complete copy of all information maintained and compiled about him in violation of California Civil Code Sections 1785.10, 1785.15 and 1785.15.3. Defendants seek to dismiss Plaintiff Sallady's claim under Rule 12(b)(6) and argue that the remedial provisions of § 1785.31 require a plaintiff to have suffered actual damages in order to bring suit. The Consolidated Complaint does not allege actual damages. However, Section 1785.31(b) and (f) permit Plaintiff to seek injunctive relief in the absence of actual damages. Plaintiff Sallady seeks an order requiring ChoicePoint to provide him with information he is entitled to receive under the statute. Consolidated Complaint ¶¶ 10 and 79. Plaintiff Salladay states a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, Plaintiffs' third cause of action (ICRAA) and fifth cause of action (Cal. Civil Code § 1798.81.5) are dismissed with prejudice. Defendants' motion with respect to the remaining claims is DENIED.

IT IS SO ORDERED

DATED: September 13, 2005

Honorable Mariana R. Pfaelzer
United States District Judge