UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:12-cv-22800-UU

PATRICK A. BURROWS, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

PURCHASING POWER, LLC, a foreign limited liability corporation, and WINN-DIXIE STORES, INC., a Florida Corporation,

Defendants.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.E. 17) and Plaintiff's Request for Oral Argument (D.E. 32).

THE COURT has reviewed the Motion, the pertinent parts of the record, and is otherwise fully briefed on the premises.

I. BACKGROUND

On August 7, 2012, Plaintiff, Patrick A. Burrows("Burrows"), filed the operative pleading–his first Amended Complaint. (D.E. 5.) On September 7, 2012, Defendants Purchasing Power, LLC, ("Purchasing Power") and Winn-Dixie Stores, Inc. ("Winn-Dixie") timely[1] filed the instant Motion to Dismiss (D.E. 17.)

[1]The Court extended the response deadline upon consideration of the parties' Joint Stipulation to Extend Time for Defendants to Respond to Amended Complaint. (D.E. 13.)

As alleged in the Amended Complaint, Purchasing Power runs a program that offers employees of Winn-Dixie the ability to pay for computers, appliances, and other items via automatic payroll deductions. (D.E. 5 at ¶ 15.) Apparently pursuant to this program, Winn-Dixie either transferred the Personally Identifiable Information (PII) of Burrows, a Winn-Dixie employee, to Purchasing Power, or Winn-Dixie permitted Purchasing Power to access the same.[2] (*Id.*) In either event, Burrows alleges that Winn-Dixie made his PII available to Purchasing Power without his knowledge or consent. (*Id.* at ¶ 21.)

In October 2011, defendants allegedly learned that unauthorized persons had obtained the PII of Burrows and others whose personal data was stored on Purchasing Power's computer systems. (*Id.* at ¶¶ 2, 18.) On January 27, 2012, Winn-Dixie notified Burrows that a Purchasing Power employee had "inappropriately accessed" the name, address, date of birth, social security number, and salary of Winn-Dixie employees. (*Id.* at ¶ 17.) Burrows further alleges that a person unknown to him used his PII to file a federal income tax return, presumably prior to the filing deadline in 2012. (*Id.* at ¶22.) As a result, when Burrows filed his own return he was informed that a return had already been filed on his behalf and that he would not be able to obtain the tax refund due to him. (*Id.*) Additionally, Burrows claims that due to the alleged breach

[2] The Amended Complaint also alleges a Class Action claim that mirrors Burrow's claim as applied to "[a]ll persons throughout the state of Florida which were employees of Winn-Dixie and who had their PII transferred by Winn-Dixie to Purchasing Power, or where Purchasing Power acquired the PII of Plaintiff and Class Members from Winn-Dixie." (*Id.* at ¶ 25.) As Defendants at this time to do not challenge the validity of the Class in this case, it is not necessary at present for the Court to consider whether the Complaint complies with Fed. R. Civ. P. 23 and Local Rule 23.1.

he has incurred "costs associated with the need for vigilant credit monitoring to protect against additional identity theft," (*Id.* at ¶62.), and that he will "continue to be exposed" to damages from people stealing his identity because his PII has now been accessed. (*Id.* at ¶ 77.)

Defendants seek to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of standing and Rule 12(b)(6) for failure to state a claim. (D.E. 17.)

II. RULE 12(B)(1)

a. Legal Standard

A motion to dismiss for lack of standing is one attacking the Court's subject matter jurisdiction, therefore it is appropriately brought under Fed. R. Civ. P. 12(b)(1). *See Doe v. Pryor*, 344 F. 3d 1282, 1284 (11th Cir. 2003). The plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A Fed. R. Civ. P. 12(b)(1) motion can be made in the way of a "facial attack" on the complaint" which "requires the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citations omitted). In the alternative, a defendant may raise a "factual attack" which challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings." *Id.* at 1529. Because a factual Rule 12(b)(1) motion challenges the court's power to hear the claim, the court must closely examine the plaintiff's factual allegations and "is free to weigh

the evidence and satisfy itself as to the existence of its power to hear the case." *Id*. The court is not limited to the four corners of the complaint, and it may consider materials outside of the pleadings to determine whether or not it has jurisdiction. "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating itself the merits of jurisdictional claims." *Id*.

b. Analysis

To bring a "case or controversy" under Article III, Section 2 of the U.S. Constitution, Burrows must show: (1) he suffered an injury in fact; (2) the injury is "fairly traceable" to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a judgment in the plaintiff's favor. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servic. (TOC), Inc.,* 528 U.S. 167, 180-81 (2000). Defendants argue that Burrows lacks standing because he has not suffered an injury in fact and because his perceived injury is not fairly traceable to Defendants. (D.E. 17 at ¶5.) Burrows responds that he has alleged cognizable injuries and that no "great inferential link" is needed to connect his alleged injuries with the data theft at issue here. (D.E. 30 at ¶¶6-12.)

The Court agrees with Burrows that the alleged misuse of his PII amounts to an injury in fact. In *Resnick v. Avmed, Inc.*, No. 11-13694, 2012 WL 3833035 (11th Cir. Sept. 5, 2012), the Eleventh Circuit Court of Appeals held that where a plaintiff suffers a monetary loss as a result of identity theft there is an injury in fact that

confers standing. *Id.* at *3. Here, Burrows claims that he suffered a monetary loss when he failed to obtain his tax refund due to a fraudulent filing occasioned by the theft of his PII. Thus, Burrows has alleged a recognized injury in fact for the purposes of demonstrating standing.

Defendants argue that inasmuch as Burrows has alleged a monetary loss the claimed injury is speculative, and therefore insufficient to confer standing, because Burrows has yet to challenge the denial of his tax refund with the IRS. (D.E. 17 at 2; D.E. 36 at 4.) Defendants' argument fails because by alleging actual identity theft Burrows has standing independent of the economic damages that he claims to have suffered and that Defendants characterize as speculative. Even in *Reilly v. Pluemarcher*, 664 F.3d 38 (3d Cir. 2011), where the Court of Appeals excoriated the "skimpy rationale" behind the decisions finding standing based on the mere risk of future identity theft in *Pisciotta*[3] and *Krottner*[4], the Third Circuit maintained that the misuse of private information or identity theft represents an actual injury. *Id.* at 46. In the present case, Burrows has alleged that his identity was stolen when an unknown individual misused his PII to file a tax return. This misuse constitutes an actual injury under *Reilly's* comparatively strict standard for showing standing in personal data malfeasance cases.[5]

---

[3] *Pisciotta v. Old Nat'l Bancorp*, 499 F. 3d 629 (7th Cir. 2007).

[4] *Krottner v. Starbucks Corp.*, 628 F. 3d 1139 (9th Cir. 2010).

[5] Although the Eleventh Circuit noted the economic damages suffered by plaintiffs in *Resnick,* the opinion of the Court of Appeals also suggests that actual misuse even devoid of monetary loss is sufficient to confer standing. In a footnote, the majority drew a distinction between

Finally, the Court agrees with Burrows that his injury is "fairly traceable" to defendants' actions. A showing that an injury is "fairly traceable" requires less than a showing of "proximate cause." *Resnick*, 2012 WL 3833035, at *3; *see also*, *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 314 F.3d 1263, 1273 (11th Cir. 2003) ("fairly traceable"standard does not require proof of causation beyond a reasonable doubt or by clear and convincing evidence). Even a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement. *Resnick*, 2012 WL 3833035, at *3. Here, Burrows alleges that as a result of defendants' failure to secure his personal data, a rogue Purchasing Power employee stole his PII. Defendant Winn-Dixie allegedly notified Burrows of the breach, thus lending further credence to the allegation that the breach had occurred. Moreover, within months of the breach, Burrows alleges that an unknown person using the personal data purloined from defendants–Burrows' name, social security number, address, and date of birth–filed a tax return on his behalf. For the purposes of standing, these allegations are sufficient to "fairly trace" Burrows' injuries to defendants' actions.[6]

---

plaintiffs, like those in *Resnick*, who alleged actual identity theft and those who alleged only the harm of future identity theft. *Resnick*, 2012 WL 3833035, at *13, n.1. The clear implication taken from this distinction is that a plaintiff who alleges actual identity theft without economic harm has an injury for standing purposes under *Resnick*, whereas a plaintiff who alleges only speculative harm would not have standing under that case.

[6]Defendants cite to the portion of *Resnick* that addresses whether plaintiffs' allegation of data breach "caused" identity theft for the purposes of satisfying the well-pleaded complaint requirements under *Twombly* and *Iqbal*. *Resnick*, 2012 WL 3833035, at*4-6. Thus, the "causation" standard from *Resnick* relied on by defendants is inapposite to the present question of whether Burrows' injuries can be fairly traced to defendants' conduct for standing purposes. Similarly, the causation standard that defendants cites from *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005), is inapplicable to present question.

IV. RULE 12(B)(6)

a. Legal Standard

To survive a motion to dismiss, a pleading must only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While the court at this stage of the litigation must accept the Plaintiff's well pleaded allegations as true, it need not accept legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). Legal conclusions must be supported by "enough facts to raise a reasonable expectation that discovery will reveal evidence." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *see also* Fed. R. Civ. P. 8(a)(2).

In practice, to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 677 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677 (citation omitted). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Determining whether a complaint states a plausible claim for relief is a "context-specific undertaking that requires the court to draw on its judicial experience

and common sense." *Iqbal*, 556 U.S. at 679 (citations omitted).

b. Count I - Negligence

Burrows alleges that Defendants were negligent in storing his personal data. (D.E. 5 at ¶38.) As a direct and proximate cause of Defendants' negligence, Burrows further alleges that he suffered damages including "monetary loss for the use of their PII and identity theft; loss of privacy; and other economic damages." (*Id.* at ¶49.) And elsewhere in the Amended Complaint, Burrows alleges that he suffered "the lost monetary value of his PII" and "out-of-pocket expenses." (*Id.* at ¶24.) In the instant Motion, Defendants argue that Plaintiff's allegations of damages fails to comply with Fed. R. Civ. P. 8(a)(2) as construed by *Twombly* and *Iqbal*. (D.E. 17 at 8.) This Court finds that Burrows's claim for monetary loss for the use of his PII and identity theft as alleged in paragraph 49 satisfies Fed. R. Civ. P. 8(a)(2), but the remaining damage allegations do not.

Burrows has sufficiently alleged facts to support his claims for damages resulting from the monetary loss from the use of his PII and identity theft. Burrows specifically claims that as a result of the theft of his PII from Purchasing Power, an unknown individual filed a federal tax return in his name which meets the statutory definition of identity theft. *See* 15 U.S.C. § 1681a(q)(3) (defining identity theft as a fraud committed using the identifying information of another person). However, Burrows does not explain what he means by "monetary value" of his PII, and the term itself is vague. Personal data does not have an apparent monetary value that

fluctuates like the price of goods or services. Absent a "clear and plain statement" of this claim, the allegation Burrows suffered the "lost monetary value of his PII" (D.E. 5 ¶24) is insufficient under Fed. R. Civ. P. 8(a)(2). Similarly, Burrows must clarify what "other economic damages" he has suffered. Finally, as discussed in Section (e), *infra*, invasion of privacy under Florida common law is an intentional tort and therefore cannot be pleaded as part of a claim for negligence.

Accordingly, Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.E. 17) as to Count I is GRANTED IN PART.

c. Count II - Violation of the Federal Stored Communications Act

Burrows alleges that Defendants violated the Federal Stored Communications Act ("FSCA") 18 U.S.C. § 2702. (D.E. 5 at ¶¶ 50-62.) The FSCA provides consumers with redress if a company mishandles their electronically stored information. Section 2702(a)(1) of the FSCA prohibits "a person or entity providing an electronic communication service to the public [from] knowingly divulg[ing] to any person or entity the contents of a communication while in electronic service by that service." Additionally, Section 2702(a)(2) of the act makes it unlawful for "a person or entity providing remote computing service to the public [to] knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service . . .from . . . a subscriber or customer of such service." Defendants argue that this claim should be dismissed because Burrows does not allege facts supporting the allegation.

Defendants claim that Burrows cannot state a claim under the act because

Defendants do not provide an electronic communications service ("ECS") or a remote computing service ("RCS") within the well-established meaning of these statutory terms. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). The Senate Report on the FSCA provided that, "telephone companies and electronic mail companies are providers of electronic communication services. Other services like remote computing services may also provide electronic communication services." S. Rep. No. 99-541 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3555, 3568. Courts have generally adhered to that definition when applying the FSCA. *See In re Application of United States*, 509 F. Supp. 2d 76, 79 (D. Mass. 2007) (cell phone service provider is an ECS); *Kaufman v. Nest Seekers, LLC.*, No. 05 CV 6782, 2006 WL 2807177, at *5 (S.D.N.Y. Sept 26, 2006) (host of electronic bulletin board is an ECS); *Freedman v. American Online, Inc.*, 325 F. Supp. 2d 638, 643 n. 4 (E.D. Va. 2004) (internet service provider, America Online, is an ECS).

However, a company is not an ECS if it does not provide the ability to send or receive communications. *State Wide Photocopy Corp. v. Tokai Fin. Servs., Inc.*, 909 F. Supp. 137, 145 (S.D.N.Y. 1995) (dismissing without leave to re-plead FSCA claims against financing company that used fax machines and computers to receive customer information from plaintiff but did not provide ability to send or receive communications). Furthermore, an entity that maintains a website and receives electronic communications containing personal information from its customers in

connection with the purchase of goods is not an ECS provider. *Crowley v. CyberSourceCorp.*, 166 F.Supp.2d 1263, 1270 (N.D. Cal. 2001) (rejecting plaintiff's argument that Amazon.com was a ECS provider because it received electronic communications from customers); *see also*, *In re Jet Blue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299, 309 (E.D.N.Y. 2005)(as a matter of law a company that provides traditional products and services over the Internet, as opposed to Internet access itself, is not an ECS.)

The Court agrees that Burrows has not alleged facts supporting the assertion that Defendants offer ECS or RCS. Winn-Dixie operates a chain of supermarkets in Florida and Purchasing Power allows employees at participating companies to make payroll deductions in order to purchase various home goods. (D.E. 5 at ¶¶ 10, 20.) While Burrows alleges that Defendants provide an ECS to the public (*Id.* at ¶54), this allegation is conclusory and not supported by any factual allegations in the Amended Complaint. Furthermore, Defendants do not provide an RCS within the meaning of the FSCA. The term RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communication system." 18 U.S.C. § 2711(2). In *In re Jet Blue* the Court held that while Jet Blue compiled and stored information concerning passengers through its website, those functions were incidental to providing airline reservation services and did not transform the airline into an RCS. *In re Jet Blue*, 379 F. Supp. 2d at 310. Similarly, while Purchasing Power stores Winn-Dixie employees' personal information, this function is incidental to Purchasing

Power's main service of providing the employees with a way to purchase household goods through payroll deductions, and therefore Defendants do not provide RCS for purposes of the FSCA. Finally, 18 U.S.C. §§ 2702(a)(1) and 2702(a)(2) provide that Defendants must not "knowingly" divulge the contents of a communication. Burrows makes no allegations that Defendants knowingly divulged Plaintiff's PII.

Because the sole basis for Burrows' claim under the FSCA is that Defendants provided ECS and RCP, which as a matter of law they did not, Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.E. 17) as to Count II is GRANTED without leave to amend.

d. Count III Violation of FDUTPA

In count III of the Amended Complaint, Burrows alleges that Defendants violated the FDUTPA, Fla. Stat. §501.201 *et seq*, by:(1) failing to properly implement adequate, commercially reasonable security measures to protect Plaintiff's PII; (2) by failing to immediately notify Plaintiff of the nature and extent of the data breach, and; (3) by representing their services to be of a particular standard and quality which they failed to adhere to. (D.E. 5 ¶¶ 68-70.)

To state a claim under the FDUTPA a plaintiff must allege a deceptive act or unfair practice, causation, and actual damages. *City First Mortgage Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. Dist. Ct. App. 2008). Defendants argue that Burrows has failed to do so. (D.E. 17 at 15-16.)

A deceptive practice under the FDUTPA is a "material representation or omission that is likely to mislead the consumers acting reasonably under the

circumstances." *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to World Indices*, 715 F. Supp. 2d 1265, 1281 (S.D. Fla. 2010) (internal citations omitted). An unfair practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Id*. at 1277.

Burrows's first FDUTPA allegation, that Defendants failed to adequately secure his PII, qualifies as an unfair practice. Winn-Dixie allegedly transferred to Purchasing Power the personal data of Winn-Dixie's employees regardless of whether these employees had participated in the Purchasing Power program. (D.E. 5 ¶ 17.) The second FDUTPA allegation, that Defendants failed to immediately notify Burrows of the breach also qualifies as an unfair practice. By not immediately notifying Burrows that his PII had been compromised, Defendants did not afford Burrows the chance to take any remedial measures, such as credit monitoring, or filing his federal tax return at the earliest date. Furthermore, due to the fact that Winn-Dixie transferred the PII of employees not participating in the Purchasing Power program, the injury was not reasonably avoidable by the consumers (employees) and was certainly not outweighed by any countervailing benefits.

Because Defendants fail to show that Burrows has not sufficiently alleged a deceptive practice or unfair act, the Motion as to Count III is DENIED.

e. Count IV - Invasion of Right to Privacy

The final count of the Amended Complaint alleges a violation of Burrow's right

to privacy under the Florida Constitution and under Florida common law. (D.E. 5 at ¶¶ 74-77.) Burrow's invasion of privacy claim is governed by state law and this Court has supplemental jurisdiction under 28 U.S.C. § 1367 to hear this claim. Article I, Section 23 of the Florida Constitution provides, "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. 1, § 23. The Florida Supreme Court has held that the privacy provision applies only to government action and no private right of action exists under the Florida Constitution. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995). As Burrows does not, and cannot, claim that either Defendants are acting on behalf of the government, the invasion of privacy claim under the Florida Constitution fails as a matter of law.

As to the claim under Florida common law, Burrows does not allege that either Defendant intentionally divulged his PII. Instead he alleges that an unknown employee of Purchasing Power stole the PII from Purchasing Power's computer system. (D.E. 5 at ¶¶ 17-18.) However, under Florida law invasion of privacy is an intentional tort. *See Florida Dept. of Corrections v.* Abril, 969 So.2d 201, 206-207 (Fla. 2007) ("For example, we have noted that the impact rule does not apply to any intentional torts, such as . . . invasion of privacy . . . ."); *Purrelli v. State Farm Fire and Cas. Co.*, 698 So. 2d 618, 620 (Fla. Dist. Ct. App. 1997) ("Florida courts have recognized invasion of privacy to be an intentional tort."). As Burrows has not alleged that either Defendant

intentionally divulged his PII, the common law claim for invasion of privacy also fails.

Accordingly, Defendants' Motion to Dismiss Count IV of Plaintiff's Amended Complaint (D.E. 17) is GRANTED IN PART.

V. CONCLUSION

Accordingly, it is hereby ORDERED AND ADJUDGED that Defendants' Motion is GRANTED IN PART. It is further ORDERED AND ADJUDGED

1. Count 1 is DISMISSED WITHOUT PREJUDICE with leave to amend.

2. Count 2 is DISMISSED WITH PREJUDICE.

3. Count 4 is DISMISSED WITH PREJUDICE as to the invasion of privacy claim under the Florida Constitution and DISMISSED WITHOUT PREJUDICE with leave to amend as to the invasion of privacy claim under Florida common law.

4. Plaintiff shall file an Amended Complaint no later than October 26, 2012.

5. The Initial Planning and Scheduling Conference is RESCHEDULED to November 16, 2012, at 9:30 a.m.

6. Plaintiff's Request for Oral Argument (D,E, 32) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of October, 2012.

UNITED STATES DISTRICT JUDGE

copies provided: counsel of record