

FILED  
CLERK, U.S. DISTRICT COURT  
SEP 14 2005  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

ENTERED  
CLERK, U.S. DISTRICT COURT  
SEP 15 2005  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY  
BY DW

SCANNED  
Priority  
Send  
Cisd  
Enter  
JS-5/ JS-6  
JS-2/JS-3

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

1  
2 BACKGROUND

SCANNED

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

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

1 California Civil Code §1785.10, 1785.15 and 1785.15.3. ChoicePoint  
2 seeks dismissal of each of Plaintiffs' claims under F.R.C.P., Rule  
3 12(b)(1), 12(b)(6) and 56(b).  
4

#### 5 JURISDICTION

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

#### 13 LEGAL STANDARD FOR MOTION TO DISMISS ON SUMMARY JUDGMENT

14 Defendants' primary argument is that Plaintiffs have not suffered  
15 an injury and therefore they lack standing to bring their claims. If  
16 Plaintiffs lack standing this court does not have subject matter  
17 jurisdiction over the claims and they must be dismissed. A Rule  
18 12(b)(1) jurisdictional attack may be facial or factual. *White v.*  
19 *Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the  
20 challenger asserts that the allegations contained in a complaint are  
21 insufficient on their face to invoke federal jurisdiction. By  
22 contrast, in a factual attack, the challenger disputes the truth of  
23 the allegations that, by themselves, would otherwise invoke federal  
24 jurisdiction. ChoicePoint's challenges are primarily factual.

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

1 satisfy its burden of establishing that the court, in fact, possesses  
2 subject matter jurisdiction." *St. Clair v. City of Chico*, 880 F.2d  
3 199, 201 (9th Cir. 1989).

4 Where "jurisdictional issue[s of fact] and substantive issues are  
5 so intertwined that the question of jurisdiction is dependent on the  
6 resolution of factual issues going to the merits of an action(,)" a  
7 district court reviewing a Rule 12(b)(1) or Rule 12(b)(6) motion to  
8 dismiss should employ the standard applicable to a motion for summary  
9 judgment. See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
10 (9th Cir. 2004). "The question of jurisdiction and the merits of an  
11 action are intertwined where 'a statute provides the basis for both  
12 the subject matter jurisdiction of the federal court and the  
13 plaintiff's substantive claim for relief.'" *Id.* (Citing *Sun Valley  
14 Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir.  
15 1983)). This court finds that the jurisdictional questions of fact in  
16 this case are intertwined with the substantive merits of Plaintiffs'  
17 claims and accordingly applies the summary judgment standard.

18 Summary judgment is appropriate when the evidence submitted shows  
19 that "there is no genuine issue as to any material fact and . . . the  
20 moving party is entitled to a judgment as a matter of law." Fed. R.  
21 Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986).  
22 A defendant moving for summary judgment satisfies the initial burden  
23 of production by providing evidence negating any essential element of  
24 the nonmovants' claims or by showing "that there is an absence of  
25 evidence to support the non-moving party's case." *Id.* at 325; *Nissan  
26 Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-05 (9th Cir.  
27 2000). Once the moving party carries its burden of production, the  
28 non-moving party must come forward with specific facts to support its

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

#### 10 ANALYSIS

##### 11 I. The FCRA

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

19 d)(1) In general. The term "consumer report" means any  
20 written, oral, or other communication of any information by  
21 a consumer reporting agency bearing on a consumer's credit  
22 worthiness [creditworthiness], credit standing, credit  
23 capacity, character, general reputation, personal  
24 characteristics, or mode of living which is used or expected  
25 to be used or collected in whole or in part for the purpose  
26 of serving as a factor in establishing the consumer's  
27 eligibility for--

(A) credit or insurance to be used primarily for  
28 personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 604 [15

1 USCS § 1681b].  
 2 15 U.S.C. §1681a(d) (1).

3 Under this definition, information must meet three requirements  
 4 to qualify as a "consumer report." The first requirement is that the  
 5 personal information must actually be **communicated** to a third party.  
 6 If information is not communicated there is no FCRA violation. The  
 7 second requirement concerns the **content** of the information. The  
 8 information must "bear[] on" one of the seven enumerated statutory  
 9 factors - (1) a consumer's credit worthiness, (2) credit standing, (3)  
 10 credit capacity, (4) character, (5) general reputation, (6) personal  
 11 characteristics, or (7) mode of living. The last requirement concerns  
 12 the **purpose** for which the information is used or collected. The  
 13 information must be used, expected to be used, or have been collected,  
 14 at least in part, for the purpose of serving as a factor in  
 15 determining the consumer's eligibility for credit, insurance or  
 16 employment, or for one of the other purposes authorized by Section  
 17 1681b, including collection of a consumer credit account.

18 **A. The Alleged Communication of Information**

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

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

8 As discussed above, the court is applying the summary judgment  
9 standard of review to Defendants' motion. The declarations are not  
10 admissible in their current form because they do not comply with Rule  
11 56(e). Rule 56(e) governs the form of affidavits submitted in support  
12 of a motion for summary judgment. Rule 56(e) reads in relevant part,  
13 "affidavits shall be made on personal knowledge [and]. . . [s]worn or  
14 certified copies of all papers or parts thereof referred to in an  
15 affidavit shall be attached thereto or served therewith." The Still  
16 and Smith declarations refer to "re-created" searches, "web server  
17 logs," and "transaction logs," none of which were attached to the  
18 declarations.<sup>1</sup>

19 "An affidavit of the witness is not exempt from Rule 56(e)'s  
20 attachment requirements simply because the affidavit references  
21 documentary evidence and personal knowledge as a source of  
22 information. If documentary evidence is cited as a source of factual  
23 contention, Rule 56(e) requires attachment." *Sch. Dist. No. 1J v.*  
24 *AcandS, Inc.*, 5 F.3d 1255, 1262 (9<sup>th</sup> Cir. 1993).<sup>2</sup> The "re-created"  
25

26 <sup>1</sup> Smith Declaration ¶¶ 9-21; ChoicePoint Appendix B ¶¶ 5, 11  
27 and 16; ChoicePoint Appendix C ¶¶ 5, 11 and 16; ChoicePoint  
Appendix D ¶ 5.

28 <sup>2</sup> The court admonishes Defendants against selectively  
quoting cases. Defendants miscited *Sch. Dist. No. 1J* for the

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

10 Although Plaintiffs Salladay, Slavin, O'Keeffe, Cloy and  
11 Harrington have not proffered any evidence in support of their  
12 allegation that their information was communicated to fraudsters,  
13 without an admissible factual challenge the court must accept the  
14 material allegations in the complaint as true. *White*, 227 F.3d 1214,  
15 1242. Allegations in a complaint, of course, must comply with Federal  
16 Rule of Civil Procedure 11. Rule 11(b)(3) requires that "allegations  
17 and other factual contentions have evidentiary support or, if  
18 specifically so identified, are likely to have evidentiary support  
19 after a reasonable opportunity for further investigation or  
20 discovery[.]" The Consolidated Complaint asserts that ChoicePoint  
21 "indicated" Plaintiffs' information had been communicated to  
22 fraudsters. Consolidated Complaint ¶¶ 26, 31 and 32. This allegation  
23 is not "specifically identified" as being "likely to have evidentiary  
24 support." In other words, the allegation was not asserted on

25 \_\_\_\_\_  
26 proposition that "Rule 56(e) requires a declarant to attach  
27 documents to her declaration only when 'documentary evidence is  
28 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.



1 information and belief. Plaintiffs therefore, must have actual  
2 supporting evidence for the allegation in order to comply with Rule  
3 11(b).

SCANNED

4 **B. The Alleged Content of Information.**

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

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

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

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

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

## 23 II. California State Law Claims

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

---

27  
28 <sup>3</sup> The subscriber agreements were properly attached to the  
declarations. Thus, they are admissible.

1 | action (Cal. Civil Code § 1798.81.5) and do not oppose dismissal of  
2 | those claims. Opposition at n.1. Accordingly, those claims are  
3 | dismissed with prejudice. Plaintiffs' remaining state law claims are  
4 | for violations of 1) the California Consumer Credit Reporting Agencies  
5 | Act, Civil Code §1785.1 ("CCRAA"); 2) California Civil Code §1798.53  
6 | ("Invasion of Privacy"); and 3) California Business & Professions Code  
7 | §17200. Plaintiff Salladay also alleges violation of California Civil  
8 | Code §1785.10, 1785.15 and 1785.15.3.

9 | **A. The CCRAA**

10 |       The CCRAA essentially mirrors the FCRA. The only notable  
11 | difference between the two statutes is that to qualify as a consumer  
12 | report under CCRAA the **content** of information must "bear[] on" one of  
13 | three specified factors, rather than one of seven factors under FCRA.  
14 | One of the CCRAA's three specified factors is establishing consumer  
15 | eligibility for personal and household credit. Cal. Civil Code  
16 | §1785.3(c). The narrower coverage of the CCRAA does not alter the  
17 | court's analysis because the content of the information Plaintiffs  
18 | have alleged was disclosed "bears on" eligibility for personal or  
19 | household credit. Accordingly, for the same reasons discussed in  
20 | previous section on FCRA, Plaintiffs' CCRAA claim survives, albeit  
21 | with the same reservations about Plaintiffs' factual allegations.

22 | **B. Invasion of Privacy (IPA)**

23 |       The IPA creates a cause of action against:

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

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

1 1798.53, Plaintiffs must have suffered the disclosure of personal  
2 information that (a) is "not otherwise public" and (b) "was obtained  
3 from personal information maintained" by a California or federal  
4 government agency.

5 Defendants submitted the declaration of Mr. Kenneth Meiser, a  
6 ChoicePoint employee, to contest Plaintiffs' factual allegations. Mr.  
7 Meiser states that ChoicePoint's Discovery! database, which fraudsters  
8 used to access information concerning Plaintiff Seymour, contains only  
9 publicly available state and federal information. See Meiser Decl. ¶¶  
10 6,7. Mr. Meiser also states that ChoicePoint's AutoTrackXP databases,  
11 which fraudsters used to access information concerning Plaintiffs  
12 Salladay, Cloy and Harrington, do not contain any information obtained  
13 from a California or federal government agency. See Id. ¶¶ 3,4.

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

22 **C. California Business & Professions Code §17200**

23 Section 17200 prohibits "unlawful", "unfair" and "fraudulent"  
24 business activities. An "unlawful" business practice "is an act or  
25 practice, committed pursuant to business activity, that is at the same  
26 time forbidden by law." *Bernardo v. Planned Parenthood Fed. Of Am.*,  
27 115 Cal. App.4th 322, 351-52 (2004). Because Plaintiffs have claims  
28

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

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

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

15 Plaintiff Salladay alleges that ChoicePoint failed to comply with  
16 his request for a complete copy of all information maintained and  
17 compiled about him in violation of California Civil Code Sections  
18 1785.10, 1785.15 and 1785.15.3. Defendants seek to dismiss Plaintiff  
19 Salladay's claim under Rule 12(b)(6) and argue that the remedial  
20 provisions of § 1785.31 require a plaintiff to have suffered actual  
21 damages in order to bring suit. The Consolidated Complaint does not  
22 allege actual damages. However, Section 1785.31(b) and (f) permit  
23 Plaintiff to seek injunctive relief in the absence of actual damages.  
24 Plaintiff Salladay seeks an order requiring ChoicePoint to provide him  
25 with information he is entitled to receive under the statute.

26 Consolidated Complaint ¶¶ 10 and 79. Plaintiff Salladay states a  
27 claim upon which relief can be granted.

28

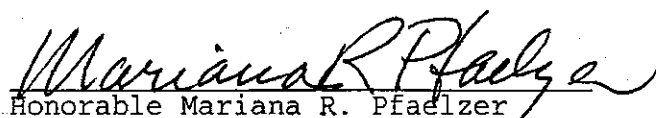
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

SCANNED