UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-60442-CIV-COHN/SELTZER

KAREN RODRIGUEZ, et al.,

Plaintiffs,

vs.

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant.
_____/

ORDER DENYING MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss [DE 35] ("Motion"). The Court has reviewed the Motion, Plaintiffs' Response [DE 45], Defendant's Reply [DE 46], Plaintiffs' Surreply [DE 52], and Defendant's Response thereto [DE 53]. The Court has also reviewed a Notice of Supplemental Authority [DE 54] filed by Plaintiffs.

The Court has considered these filings, the record in this case, and is otherwise advised in the premises. For the reasons that follow, the Court will **DENY** the Motion.

I. Background

Plaintiffs bring this putative class action lawsuit against a homeowner's insurance company for the company's alleged failure to safeguard certain electronic data.

Plaintiffs allege that Defendant compromised their data by permitting anyone to access unencrypted copies of their insurance documents, "such as declaration pages and evidence of insurance coverage," on Defendant's website. [DE 32 at 3.] These documents contained "sensitive customer information aggregated in one place,

including customer name, mailing address, email address, telephone number, and limits of insurance." [Id.] Plaintiffs allege that Defendant did this despite a contractual promise "that it maintains 'physical, electronic, and procedural safeguards to ensure the confidentiality of the personal information we obtain about you.'" [Id. at 4.]

Plaintiffs sue under four theories. First, Plaintiffs sue for Breach of Contract, ostensibly through Defendant's breach of an implied covenant of good faith and fair dealing. Second, Plaintiffs sue for Unjust Enrichment. Third, Plaintiffs sue for Defendant's willful violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, et seq. And, Fourth, Plaintiffs sue for Defendant's negligent violation of that same Act.

Defendant has moved to dismiss all counts for lack of standing and failure to state a claim.

II. Discussion

The Court first addresses Defendant's arguments concerning standing. After concluding that Plaintiffs have standing to sue, the Court then evaluates whether Plaintiffs have properly stated each of their purported claims.

A. Standing

Defendant devotes the bulk of its Motion to arguing that the Court should dismiss Plaintiffs' Complaint for lack of Article III standing. Defendant properly presents this Defense by pre-answer motion under Federal Rule of Civil Procedure 12(b)(1).

The Supreme Court has established "that the irreducible constitutional minimum of standing contains three elements." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical." Id. (internal quotation marks and citations omitted).

"Second, there must be a causal connection between injury and the conduct complained of." Id. That is, the injury must be traceable to the defendant's challenged conduct and not result from the independent action of some nonparty. Id. Third, a favorable decision must be likely to redress the plaintiff's injury. Id. at 561. Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing standing. Id. At the motion-to-dismiss stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." Id.

In this case, Defendant most vigorously challenges Plaintiffs' allegations concerning the first element identified above. That is, Defendant argues that Plaintiffs have failed to allege an injury in fact. Defendant asserts that Plaintiffs' alleged injury is too speculative. [DE 25 at 7.] Further, Defendant argues in its Reply memorandum that Plaintiffs' alleged injury is insufficiently concrete in light of the Supreme Court's intervening decision in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). The Court rejects both these arguments. It will address each in turn.

Defendant relies on the Supreme Court's decision in Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013), in arguing that Plaintiffs' alleged injury is too speculative to satisfy Article III's standing requirement. In Clapper, the Supreme Court rejected Amnesty International's claim of standing to challenge new warrantless surveillance laws. Amnesty International argued that it had standing to challenge these new laws because the government would likely use them to target the organization and its clients. But the Supreme Court held that this was not enough. It observed that the statute at issue "at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear." Clapper, 133 S. Ct. at 1149. The law left the decision of who to

surveil to the government's discretion. In short, the infringement on its rights that Amnesty International feared had not actually occurred. Accordingly, the Supreme Court concluded that Amnesty International's standing theory "relies on a highly attenuated chain of possibilities," and therefore "does not satisfy the requirement that the threatened injury must be certainly impending." Id. at 1148.

Defendant premises its effort to analogize this case to Clapper on a misinterpretation of Plaintiffs' theory of injury. Defendant characterizes Plaintiffs' injury as the theft and misuse of Plaintiffs' information that Defendant improperly published on its website. [DE 25 at 7.] If this were so, Defendant would have a strong argument that Plaintiffs—as in Clapper—have not yet experienced the injury they fear and have failed to sufficiently allege that it is certainly impending. 133 S. Ct. at 1148; see also Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012). But this is not Plaintiffs' theory of injury. As Plaintiffs state in their Opposition, the injury they assert is Defendant's "failure to secure the database." [DE 45 at 5.] In other words, Plaintiffs contend that Defendant's mere act of posting Plaintiffs' data on publicly accessible portions of its website constitutes an Article III injury-in-fact sufficient to confer standing. Plaintiffs assert that this publication alone constitutes a breach of contract, violates the FCRA, and has caused Defendant to be unjustly enriched. Plaintiffs accordingly allege an actual injury that has already occurred, not one that is speculative within the meaning of Clapper.

Of course, this does not end the inquiry. In addition to being "actual" under the Supreme Court's standing framework, a plaintiff must show that his alleged injury is both "concrete" and "particularized." Lujan, 504 U.S. at 560. Perhaps recognizing that this is the better line of attack, Defendant devotes a substantial portion of its Reply to

arguing that Plaintiffs' injury is not sufficiently "concrete" in light of the Supreme Court's intervening decision in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). [DE 46 at 3.]

In Spokeo, the Supreme Court reversed the Ninth Circuit for conflating Article III's requirements that an injury be both "concrete" and "particularized" to confer standing. 136 S. Ct. at 1550. The Ninth Circuit considered only whether the harm that flowed from an FCRA violation was "particularized." Id. It did not analyze whether the plaintiff's harm was sufficiently "concrete." Id. The Supreme Court reversed and remanded with instructions to conduct the missing analysis. Id. Accordingly, Spokeo's holding is narrow.

However, Spokeo also contains substantial dicta describing the concreteness requirement. Specifically, the Supreme Court stated that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." Id. at 1548. The injury must be "real" and not "abstract." Id. But money damages are not required. Indeed, the injury needn't even be "tangible." Id. In determining whether an intangible injury qualifies as "concrete," "both history and the judgment of Congress play important roles." Id. at 1549. "Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." Id. (internal quotation marks and alterations omitted); see also Church v. Accretive Health, Inc., No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016) (unpublished) (finding standing, post-Spokeo, where plaintiff alleged that a defendant failed to provide information required under the Federal Fair Debt Collection Practices Act). Further, an injury that carries with it "the risk of real harm" can satisfy the requirement of concreteness notwithstanding a lack of proven actual harm. Spokeo, 136 S. Ct. at 1549. As examples, the Supreme Court cites libel

and slander per se, which allow redress without proof of damages because "their harms may be difficult to prove or measure." Id.

Here, even after Spokeo, the Court concludes that Plaintiffs' alleged injury is sufficiently concrete under Article III. Plaintiffs first allege that Defendant breached a contract term that required Defendant to safeguard their personal information. A breach of contract—even one that does not yield immediately cognizable money damages—qualifies as "a harm that has traditionally been regarded as a basis for a lawsuit in English or American courts." Spokeo, 136 S. Ct. at 1549. The same goes for Plaintiffs' Unjust Enrichment claim. Finally, Plaintiffs' FCRA claims allege that by making Plaintiffs' personal information available on a publicly accessible portion of Defendant's website, Defendant violated a statutory duty to maintain reasonable procedures to safeguard this information. The Supreme Court recognized that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements." Id. Further, the increased risk of identity theft incumbent in Defendant's alleged mishandling of Plaintiffs' information entails a "risk of real harm" sufficient to satisfy the requirement of concreteness, despite being "difficult to prove or measure." Id.[1]

Finally, the Court notes that it has limited its discussion to standing's requirement of an injury-in-fact, and particularly the requirements that this injury-in-fact be both actual and concrete. These are the aspects of standing that Defendant has challenged. The Court has, as it must, "independently analyzed all other elements of standing and

[1] This "risk of real harm" renders the alleged FCRA violation a sufficiently concrete injury. This is a different inquiry from whether the FCRA violation itself is "actual" or "imminent," as Article III also requires.

[has] concluded this case is properly before the Court." Church, 2016 WL 3611543, at *3 n.3.

B. Statement of Claims

Defendant also moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiffs' Complaint for failure to state a claim. The Court denies this request.

Under Rule 12(b)(6), a court shall grant a motion to dismiss where, based upon a dispositive issue of law, the factual allegations of the complaint cannot support the asserted cause of action. Glover v. Ligget Grp., Inc., 459 F.3d 1304, 1308 (11th Cir. 2006). "Factual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

Importantly, a complaint must be liberally construed, assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in the plaintiff's favor. Twombly, 550 U.S. at 555. A complaint should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. Id. A well-pleaded complaint will survive a motion to dismiss "even if it appears that a recovery is very remote and unlikely." Id. at 556. With this standard in mind, the Court turns to Plaintiffs' claims.

Defendant first moves to dismiss Plaintiffs' Breach of Contract claim. Plaintiffs have entitled this claim "Breach of Implied Covenant of Good Faith and Fair Dealing." [DE 1 at 12.] But Plaintiffs actually allege something else. Plaintiffs allege that their contracts with Defendant contain "implied contractual obligations to honor [Defendant's]

Privacy Policy." [Id. at 14.] Plaintiffs further allege that Defendant's Privacy Policy states that Defendant will maintain "physical, electronic, and procedural safeguards to ensure the confidentiality of the personal information we obtain about you." [Id.] Of course, Plaintiffs allege that Defendant failed to do so, and instead published Plaintiffs' personal information on a freely accessible portion of its website. Accordingly, Plaintiffs allege that Defendant has breached a contract term that required Defendant to abide by its Privacy Policy—not an implied covenant of good faith and fair dealing. The Parties' contract is not before the Court at this stage of the litigation. Relying on Plaintiffs' characterization of the Parties' contract in the Complaint, the Court concludes that Plaintiffs have stated a claim for Breach of Contract.

In reaching this conclusion, the Court recognizes that Defendant has devoted a substantial portion of its Motion to addressing the nuances of a claim for breach of an implied covenant of good faith and fair dealing. [See DE 25 at 13–15.] But "a court should not elevate form over substance in reviewing the pleadings of a case." Int'l Broth. of Elec. Workers, Local Union No. 323 v. Coral Elec. Corp., 576 F. Supp. 1128, 1134 (S.D. Fla. 1983). Further, the Court must liberally construe Plaintiffs' claims. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To allow the heading of Plaintiffs' Count I to control over the substance of its allegations would accordingly be inappropriate. See Valentine v. Legendary Marine FWB, Inc., No. 3:09-cv-334, 2010 WL 1687738, at * 3 (N.D. Fla. Apr. 26, 2010).

The Court next addresses Plaintiffs' FCRA claims. The FCRA requires that "[e]very consumer reporting agency . . . maintain reasonable procedures designed to . . . limit the furnishing of consumer reports" to improper persons. 15 U.S.C. § 1681(e).

The FCRA creates a right of action against an entity that negligently or willfully violates this section.

Defendant argues in its Motion to Dismiss that Plaintiffs fail to allege that Defendant is a "consumer reporting agency" or that the information Defendant allegedly disclosed constitutes a "consumer report" within the FCRA. The Court disagrees.

The FCRA defines a "consumer reporting agency" as follows:

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f). The FCRA further defines the term "consumer report" as follows:

> 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, 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 [by the FCRA].

15 U.S.C. § 1681a(d).

Here, Plaintiffs allege that Defendant qualifies as a consumer reporting agency because it regularly provides information bearing on potential policyholders' creditworthiness to a corporate affiliate, Atlas Premium Insurance Company, so that Atlas may determine whether to finance these insurance premiums. [DE 32 at 17.] Further, the documents that Plaintiffs allege that Defendant has failed to safeguard

constitute consumer reports. They contain information concerning Plaintiffs' "personal characteristics" and "mode of living" that was collected to serve as factors in establishing Plaintiffs' eligibility for homeowner's insurance and the financing of their insurance premiums.

The Court rejects Defendant's efforts to argue that the disclosed information falls within an exclusion for "reports containing information solely as to transactions or experiences between" Defendant and its customers. Defendant premises this argument on facts that do not appear in the pleadings. There is simply no basis for the Court to conclude at this stage that "[t]he documents at issue here relate only to [Defendant's] direct experiences with its customers," 15 U.S.C. § 1681a(d)(2)(A)(i). [DE 25 at 19.] Instead, at this stage the Court must accept the truth of Plaintiffs' plausible allegations and make all reasonable inferences in Plaintiffs' favor. Accordingly, Defendant's Motion will be denied as to Plaintiffs' FCRA claims.

Finally, the Court turns to Plaintiffs' claim for Unjust Enrichment. Defendant's argument that Plaintiffs may not maintain this claim in the face of an alleged express contract—the existence of which neither party disputes—has considerable force. But the Court cannot distinguish Plaintiffs' Unjust Enrichment claim here from that which the Eleventh Circuit approved in Resnick v. AvMed, Inc., 693 F.2d 1317 (2012). Accordingly, the Court will deny Defendant's Motion as to this claim as well.

III. Conclusion

Based upon the foregoing, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss [DE 25] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of August, 2016.

Copies provided to counsel of record via CM/ECF.