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CENTRAL DISTRICT OF CALIFORNIA  
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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 05-01294 MRP (JWJx)/  
Master Case File  
Consolidated with CASE Nos.  
CV 05-01683 MRP (JWJx)  
CV 05-01993 MRP (JWJx)  
CV 05-02016 MRP (JWJx)

MEMORANDUM OF DECISION  
AND ORDER RE: DEFENDANTS'  
RENEWED MOTION TO DISMISS  
THE FIRST AMENDED  
CONSOLIDATED CLASS ACTION  
COMPLAINT OR, IN THE  
ALTERNATIVE, MOTION FOR  
SUMMARY JUDGMENT

INTRODUCTION

On August 10, 2006, Defendants ChoicePoint Inc., ChoicePoint Services Inc.,  
ChoicePoint Public Records Inc. and ChoicePoint Workplace Solutions Inc. (collectively,  
"ChoicePoint" or "Defendants") filed a Motion to Dismiss the First Amended Consolidated  
Class Action Complaint for Lack of Subject-Matter Jurisdiction and Failure to State a Claim on  
Which Relief can be Granted, or in the Alternative, Motion for Summary Judgment ("Motion").  
On August 31, 2006, Plaintiffs Jennifer Harrington, Jessica Seymour, Travis Salladay, Evelyn

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1 O’Keeffe, Charles Slavin, and Johnny Cloy (collectively, “Plaintiffs”) filed their Opposition to  
2 Defendants’ Motion to Dismiss the First Amended Complaint or, in the Alternative, Motion for  
3 Summary Judgment (“Opposition”). On September 11, 2006, Defendants filed their Reply  
4 (“Reply”). On September 18, 2006, the Court heard oral argument from all parties and took the  
5 Motion under submission.

## 6 7 **FACTUAL AND PROCEDURAL BACKGROUND**

### 8 **I. Procedural Background**

9 In late 2004, ChoicePoint, one of the nation’s largest providers of identification and  
10 credential verification services, learned that organized criminals (“fraudsters”) had fraudulently  
11 posed as legitimate businesses to open accounts as ChoicePoint customers and thereby gain  
12 access to certain ChoicePoint Internet-based data products. After discovering this criminal  
13 activity, ChoicePoint sent notices to approximately 35,000 California residents and  
14 approximately 110,000 residents of other states informing them that their personal information  
15 might have been improperly accessed by the fraudsters. (Consolidated Compl. ¶ 26.) Plaintiffs  
16 were allegedly among those who received such notice.

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

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maintained and compiled about him in violation of California Civil Code §§ 1785.10, 1785.15 and 1785.15.3.

On August 12, 2005, ChoicePoint filed a Motion to Dismiss the First Amended Consolidated Class Action Complaint, or in the Alternative, Motion for Summary Judgment.<sup>5</sup> In an order dated September 15, 2005, the Court dismissed with prejudice Plaintiffs' third and fifth causes of action. Docket No. 57. The Court denied Defendants' motion with respect to Plaintiffs' remaining claims but indicated it would reconsider its ruling upon their submission of procedurally adequate declarations. The Court ruled that the declarations of Martin Smith ("Smith") and William Still ("Still"), employees of ChoicePoint, did not comply with Rule 56(e) because the declarations did not include copies of documents referenced in the declarations.

ChoicePoint subsequently filed a Renewed Motion to Dismiss the First Amended Consolidated Class Action Complaint for lack of Subject-Matter Jurisdiction, or in the Alternative, Motion for Summary Judgment, on October 13, 2005, in connection with which it also filed a third declaration from Smith (the "Third Smith Declaration"), attaching appropriate supporting documentation. A fourth Smith declaration (the "Fourth Smith Declaration") updating certain information was subsequently filed as well. In December, 2005, the Court deferred ruling on Defendants' motion, and issued an order allowing Plaintiffs to take depositions of ChoicePoint employees Smith, Still and Kenneth Meiser ("Meiser").

On March 1, 2006, the Court denied Defendants' summary judgment motion without prejudice. While reiterating its concern that "there is still no apparent factual basis for Plaintiffs' allegations," the Court granted Plaintiffs' request for four months to conduct additional discovery. Docket No. 93 at 1. Plaintiffs subsequently conducted what appears to have been extensive discovery of the Defendants, including service of interrogatories, document requests and additional depositions. On July 10, 2006, the Court held a status conference at which Plaintiffs indicated their discovery had produced no additional evidence of disclosure of personal information in violation of the FCRA or the various state laws asserted against Defendants. Defendants subsequently filed the present Motion.

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1 Prior to the September 18, 2006 hearing on this Motion, this Court asked both parties to  
2 answer three questions concerning the type of information furnished under certain of  
3 ChoicePoints' search products and the processes involved in obtaining such information. Both  
4 parties were given the opportunity to answer those questions during oral argument. The Court  
5 then directed the parties to supplement the record with a declaration or other evidence supporting  
6 any new facts discussed in answering those questions during oral argument. Docket No. 125.  
7 Defendants filed a Third Declaration of Kenneth Meiser ("Third Meiser Declaration") and  
8 Plaintiffs filed a declaration of Robert M. Bramson, counsel to Plaintiffs, in response to the  
9 Court's inquiry and matters discussed in oral argument on September 18, 2006.

## 11 II. The ChoicePoint Services

12 The Internet-based search products with which the searches at issue in Defendants'  
13 Motion were conducted are ChoicePoints' AutoTrackXP® Faces of the Nation ("FOTN") and  
14 AutoTrackXP® Drivers of the Nation ("DOTN") services. In order to access either service, a  
15 user must first fill out a subscriber agreement. (Still Harrington Decl. ¶¶ 8-9.) Once they have  
16 been processed, in order to log on to either service, the user must enter his or her username and  
17 password and identify a permissible purpose under the Gramm-Leach-Bliley Act for the search  
18 the user wishes to conduct. (Third Meiser Decl. at ¶ 3.)

19 Once the user has logged on to either service, he or she may enter various search  
20 parameters (names, addresses, zip codes, Social Security numbers, etc.) and the service will  
21 return a list of matching results. If the list is sufficiently long, these results will appear on  
22 multiple pages, which the user must access separately. Prior to October 31, 2004, when the  
23 searches at issue were conducted, each page would have contained 10 results under FOTN and 15  
24 results under DOTN. (*Id.* at ¶¶ 3-6.)

25 In response to a FOTN search, the results initially returned will include some or all of the  
26 following information, depending on whether the information is in ChoicePoints' database for a  
27 given individual: name, address, telephone number, Social Security number, age, date of birth,  
28 and the date the information was reported to ChoicePoint. (*Id.* at ¶ 5.) From an initial search

1 screen, a user may click on any name appearing in the search results, which in turn will open a  
2 new screen (referred to as a “detailed report”), containing the following additional information  
3 about the individual in question: 1) up to ten additional addresses associated with the person’s  
4 name; 2) any aliases associated with the person; 3) location and date of issuance of the person’s  
5 Social Security number; and 4) whether a death indicator is associated with the person’s Social  
6 Security number. (*Id.* at ¶ 8.) From this screen a user may also order, for an additional fee and  
7 upon again verifying a permissible purpose for ordering the search, additional and more detailed  
8 reports on the individual in question, including a “Basic Report,” a “Basic Report Plus  
9 Associates Feature Report,” a “National Comprehensive Report” or a “National Comprehensive  
10 Report Plus Associates Feature Report.” (*Id.* at ¶ 9.) Depending on which report is ordered,  
11 these more comprehensive searches may return considerably more information related to the  
12 individual in question.

13 In response to a DOTN search, the results initially returned will include some or all of the  
14 following information, depending on whether the information is in ChoicePoints’ database for a  
15 given individual: name, address, driver’s license number, Social Security number and date of  
16 birth. (*Id.* at ¶ 6.) As with a FOTN search, a user may order a detailed report on any individual  
17 included in the search results by clicking on the person’s name. (*Id.* at ¶ 10.) A detailed report  
18 ordered under DOTN will include some or all of the following information: 1) location and date  
19 of issuance of the person’s Social Security number; 2) whether a death indicator is associated  
20 with the person’s Social Security number; 3) the person’s age; and 4) driver’s license  
21 information, including license class, height, weight, hair color, eye color, gender, issue date, state  
22 of issuance and date of expiration. (*Id.*) From this detailed report screen, a user may also order  
23 one of the more comprehensive reports also available under FOTN, in a similar manner. (*Id.* at ¶  
24 11.)

## 25 26 JURISDICTION

27 This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as the  
28 FCRA claim arises under the consumer credit laws of the United States as set forth in FCRA §§

1 1681, *et seq.* This Court has supplemental jurisdiction over the California state law claims  
2 pursuant to 28 U.S.C. § 1367, as those claims are joined with related claims under the FCRA

### 3 4 LEGAL STANDARDS

#### 5 I. Motion to Dismiss for Lack of Subject-Matter Jurisdiction Under Rule 12(b)(1)

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject-  
7 matter jurisdiction of the court. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40  
8 (9th Cir. 2003). The party asserting jurisdiction bears the burden of establishing the propriety of  
9 the court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994);  
10 *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001). A  
11 Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242  
12 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a  
13 complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v.*  
14 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, the challenger disputes the truth  
15 of the jurisdictional facts that, alleged by themselves, would otherwise invoke federal  
16 jurisdiction. *Id.* Defendants' challenges are primarily factual. (Def.'s Mem. Supp. Mot. Dismiss  
17 Or Summ. J. 2, 4-6.)

18 In a factual challenge, a defendant may present evidentiary material outside the  
19 complaint, and the court "need not presume the truthfulness of the plaintiffs' allegations." *White*,  
20 227 F.3d at 1242. If a defendant submits an affidavit in support of its Rule 12(b)(1) motion, the  
21 plaintiff must "present affidavits or any other evidence necessary to satisfy its burden of  
22 establishing that the court, in fact, possesses subject-matter jurisdiction." *St. Clair v. City of*  
23 *Chico*, 880 F.2d 199, 201 (9th Cir. 1989). The court may weigh affidavits and other evidence  
24 properly before it in determining whether it has jurisdiction, resolving factual disputes where  
25 necessary. *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000).

26 Where "jurisdictional issue[s] of fact] and substantive issues are so intertwined that the  
27 question of jurisdiction is dependent on the resolution of factual issues going to the merits of an  
28 action[.]" a district court reviewing a Rule 12(b)(1) motion to dismiss should employ the

1 standard applicable to a motion for summary judgment. *Safe Air for Everyone*, 373 F.3d at 1039  
2 (citation and quotation marks omitted); *Resales v. United States*, 824 F.2d 799, 803 (9th Cir.  
3 1987)). “The question of jurisdiction and the merits of an action are intertwined where a statute  
4 provides the basis for both the subject-matter jurisdiction of the federal court and the plaintiff’s  
5 substantive claim for relief.” *Safe Air for Everyone*, 373 F.3d at 1039-40 (citation and quotation  
6 marks omitted). Applying this standard, the court must assume the truthfulness of the allegations  
7 in a plaintiff’s complaint “unless controverted by undisputed facts in the record.” *Roberts v.*  
8 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). However, “a court need not assume the truth  
9 of legal conclusions merely because they are cast in the form of factual allegations.” *Id.* (citation  
10 and quotation marks omitted). Dismissal of an action in which the jurisdictional issues and  
11 merits of the action are intertwined is proper only where “the material jurisdictional facts are not  
12 in dispute and the moving party is entitled to prevail as a matter of law.” *Augustine v. United*  
13 *States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ’g Co. v. Gen. Tel. & Elecs.*  
14 *Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979)); accord, *Rosales*, 824 F.2d at 803. This Court finds  
15 that the jurisdictional questions of fact in this case are intertwined with the substantive merits of  
16 Plaintiffs’ claims and accordingly applies the summary judgment standard to Plaintiffs’ claims  
17 that are challenged by Defendants under Rule 12(b)(1).

## 18

### 19 **II. Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6)**

20 Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed when a  
21 plaintiff’s allegations fail to state a claim upon which relief can be granted. Fed. R. Civ. P.  
22 12(b)(6). The court must construe the complaint liberally, and dismissal should not be granted  
23 unless “it appears beyond a doubt that the plaintiff can prove no set of facts in support of his  
24 claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also  
25 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988) (stating that a complaint  
26 should be dismissed only when it lacks a “cognizable legal theory” or sufficient facts to support a  
27 cognizable legal theory). The court must accept as true all factual allegations in the complaint  
28 and must draw all reasonable inferences from those allegations, construing the complaint in the

1 light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667,  
2 670 (9th Cir. 1993); *Balistreri*, 901 F.2d at 699. Dismissal without leave to amend is appropriate  
3 only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured  
4 by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

### 6 **III. Motion for Summary Judgment**

7 Summary judgment is appropriate when the evidence submitted shows that “there is no  
8 genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a  
9 matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986).

10 A defendant moving for summary judgment satisfies the initial burden of production by  
11 providing evidence negating any essential element of the nonmovants' claims or by showing “that  
12 there is an absence of evidence to support the non-moving party's case.” *Celotex*, 477 U.S. at  
13 325; *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-05 (9th Cir. 2000). Once  
14 the moving party carries its burden of production, the non-moving party must come forward with  
15 specific facts to support its claims. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475  
16 U.S. 574, 587 (1986); *Nissan Fire & Marine*, 210 F.3d at 1103. If the nonmoving party fails to  
17 produce sufficient evidence to create a genuine issue of material fact, the moving party must  
18 prevail on the motion for summary judgment. *Celotex*, 477 U.S. at 322; *Nissan Fire & Marine*,  
19 210 F.3d at 1103. But if the nonmoving party produces “enough evidence to create a genuine  
20 issue of material fact, the nonmoving party defeats the motion.” *Nissan Fire & Marine*, 210 F.3d  
21 at 1103.

## 23 **ANALYSIS**

### 24 **I. The Fair Credit Reporting Act**

25 Plaintiffs allege that ChoicePoint violated two sections of the FCRA, Sections 1681b and  
26 1681e(a). These sections govern the manner and purpose under which a “consumer reporting  
27 agency” may make available a “consumer report” for use by third parties. In order to prove a  
28 violation of Sections 1681b or 1681e(a) a plaintiff must demonstrate: 1) the existence of a

1 consumer report; and 2) that the consumer report was “furnished” to a third party. *See Wantz v.*  
2 *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Washington v. CSC Credit Servs.*  
3 *Inc.*, 199 F.3d 263, 267 (5th Cir. 2000). The FCRA defines a “consumer report” as being:

4 any written, oral, or other communication of any information by a consumer  
5 reporting agency [2] bearing on a consumer's credit worthiness, credit standing,  
6 credit capacity, character, general reputation, personal characteristics, or mode of  
7 living [3] which is used or expected to be used or collected in whole or in part for  
8 the purpose of serving as a factor in establishing the consumer's eligibility for:

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

11 (B) employment purposes; or

12 (C) any other purpose authorized under section 1681b of this title.

13 15 U.S.C. § 1681a(d)(1).

14 Under this definition, information must meet three requirements to qualify as a  
15 “consumer report.” The first requirement is that personal information must actually be  
16 *communicated* to a third party. “[W]here there is no evidence of disclosure to a third party, the  
17 plaintiff cannot establish the existence of a consumer report.” *Wantz*, 386 F.3d at 834. The  
18 second requirement concerns the *content* of the information disclosed. The third requirement  
19 concerns the *purpose* for which the information is used or collected. *See Ali v. Vikar Mgmt. Ltd.*,  
20 994 F. Supp. 492, 497 (S.D.N.Y. 1998) (analyzing purpose prong under the FCRA).

21 A. Communication of Information

22 Defendants argue that in order to meet the communication prong of the consumer report  
23 definition, Plaintiffs must be able to establish that a screen containing their information was  
24 actually accessed by a fraudster’s computer or, put another way, that the information was actually  
25 *transmitted* by Defendants to a fraudster’s computer. Defendants have submitted to the Court  
26 declarations by knowledgeable Choicepoint employees related to recreated searches based on  
27 those conducted by the fraudsters that purport to show that although the fraudsters’ search results  
28 did contain information on the Plaintiffs, this information appeared on numerous screens and: 1)  
in the cases of Plaintiffs Salladay, Slavin and Cloy, the fraudsters did not attempt to access any

1 screen containing information on any of these Plaintiffs, and, accordingly, no information related  
2 to any of them was transmitted to the fraudsters' computers; and 2) in the cases of Plaintiffs  
3 Harrington and O'Keeffe, it cannot be determined whether the fraudsters did or did not attempt  
4 to access any screen containing information on either of these Plaintiffs, and therefore whether  
5 any information related to either of them was transmitted to the fraudsters' computers. (Third  
6 Smith Decl. ¶¶ 15-31.)

7 Plaintiffs, however, argue that personal information need not be actually transmitted to, or  
8 accessed by, a user of Defendants' services in order for there to have been a "communication" for  
9 purposes of meeting the FCRA's definition of a consumer report. According to Plaintiffs, "[a]  
10 communication may exist even if never furnished to anyone . . . [a] 'communication' . . . may be  
11 never sent, never received or received but never read (or heard)." (Opp'n at 3.) Plaintiffs would  
12 thus appear to argue that once a user of ChoicePoints' services is in a position to access personal  
13 information in ChoicePoints' databases, whether that information is ever actually transmitted to  
14 that user or not, the communication prong of the consumer report definition is satisfied.

15 The Court rejects Plaintiffs' argument. The Plaintiffs' proposed reading of  
16 "communication" is at odds with the plain meaning of that word, which at a minimum requires  
17 some act of transmission of information from one source to another. Further, the argument is  
18 unsupported by case law. Plaintiffs urge the Court to follow *Trans Union Corp. v. FTC*, 81 F.3d  
19 228 (D.C. Cir. 1996), which they claim stands for the proposition that once personal information  
20 is under a user's "control," that information has been communicated for purposes of establishing  
21 a consumer report. However, the facts in that case differ significantly from those in the present  
22 case insofar as the personal information communicated by Trans Union was unquestionably in  
23 the possession of the user; the defendant's argument there involved the form of the information  
24 as used by Trans Union's customers and whether or not the credit related content of that  
25 information could be understood as such by those customers. The question of whether or not  
26 information had actually been transmitted to the user, which is before the Court here, was not at  
27 issue in that case. Moreover, the concept of actual transmittal was critical to the court's  
28 discussion in the *Trans Union* case: "Once the information *passes from* Trans Union *to* the client

1 . . . it is within the client's control [and] has therefore been 'communicated' to the client, whether  
2 or not the client chooses to review it." *Id.* at 233 (emphasis added). If the Court were to expand  
3 the control standard discussed by the *Trans Union* court to apply even where information had not  
4 been transmitted but was simply potentially accessible to a user, it is difficult to see how  
5 ChoicePoints' entire database, or at least those portions of it accessible to the fraudsters once  
6 their initial fraudulent applications had been accepted, would not be deemed "communicated" to  
7 them. The *Trans Union* case does not stand for that proposition.

8 Plaintiffs also cite *Mahon v. Credit Bure u, Inc.*, 171 F.3d 1197, 1201 (9th Cir. 1999),  
9 which discusses the meaning of "communication" as it is used in the Fair Debt Collection  
10 Practices Act. That case deals with an entirely different and unrelated statute and therefore has  
11 no precedential effect on this case.

#### 12 13 B. The Content of Information

14 The second requirement for establishing whether personal information constitutes a  
15 consumer report concerns the *content* of the information. The information must "bear[] on" one  
16 of the seven enumerated statutory factors concerning a consumer's: 1) credit worthiness; 2) credit  
17 standing; 3) credit capacity; 4) character; 5) general reputation; 6) personal characteristics; or 7)  
18 mode of living.

19 There is no dispute that the personal information about Plaintiffs returned by the searches  
20 at issue here consisted, in each case, of some or all of the following information: name, address  
21 (in some cases multiple addresses), telephone number, year and/or date of birth, Social Security  
22 number, driver license number, and the date the information was reported to ChoicePoint.<sup>1</sup>

23 \_\_\_\_\_  
24 <sup>1</sup>As discussed above, under the FOTN product, if a user orders a "detailed report" on an individual  
25 appearing in the results of an initial search, they may also get additional information related to multiple addresses,  
26 aliases, state and date of issue of the person's Social Security number and any death indicator. Based on  
27 ChoicePoints' records, two such detailed reports were ordered in connection with one of two FOTN searches that  
28 returned results including information related to Plaintiff Harrington (a/k/a Huneke), although it is unknown whether  
either of these detailed reports related to Plaintiff Harrington. As described above, other additional information is  
also available from a detailed report ordered through the DOTN search product, and an even larger amount of  
information is available if a user orders a "Basic Report," "Basic Report Plus Associates Feature Report," "National  
Comprehensive Report" or "National Comprehensive Report Plus Associates Feature Report" under either search

1 Having reviewed relevant case law and Federal Trade Commission ("FTC") materials, the  
2 Court finds that the information contained in the initial search results under both FOTN and  
3 DOTN, as well as that contained in a detailed report ordered under FOTN, without more, does  
4 not bear on any of the seven enumerated statutory factors. *See, e.g., In re Matter of Trans Union*  
5 *Corp.*, Dkt. No. D-9255, S III.D (Fed. Trade Comm'n Sept. 10, 1993) (noting that prior consent  
6 order entered into by FTC established the standard that none of name, telephone number,  
7 mother's maiden name, address, zip code, year of birth, age, generational designation, Social  
8 Security number or substantially similar information bear on any of the seven enumerated  
9 factors); *see also Individual Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C.  
10 2001) (name, address, Social Security number and phone number do not bear on the factors); *Ali*,  
11 994 F. Supp. at 497 (address data does not bear on factors); *Dotzler v. Perot*, 914 F. Supp. 328,  
12 330 (E.D. Mo. 1996) (name, current and former addresses and Social Security number do not  
13 bear on the factors), *aff'd*, 124 F.3d 207 (8th Cir. 1997).

14 Plaintiffs argue that certain of these factors, such as age, the existence of phone service or  
15 the existence of multiple addresses, could indicate information relevant to a person's credit  
16 standing. However, while it might be true that a person's age, for example, could be a factor  
17 relevant to a creditor in deciding whether to extend credit to that person, that information, in and  
18 of itself, does not bear on any of the seven enumerated factors in a meaningful way. Moreover, if  
19 the seven-factor statutory test is to be applied at such a level of generality or attenuation that even  
20 very basic, publicly available information of the type at issue here qualifies a communication as a  
21 consumer report, then virtually any information about a person will be deemed to satisfy the  
22 content prong of the consumer report definition. This clearly is not the intent of the test. As case  
23 law, FTC commentary and common sense all confirm, the very basic demographic and identity  
24 related information contained in the initial results of a FOTN or a DOTN search and the detailed

25  
26  
27 product. However, as the declarations submitted by Defendants conclusively demonstrate, no detailed reports under  
28 DOTN and none of the more comprehensive reports available under either search product were ordered in  
connection with any Plaintiff. The Court therefore need not concern itself with assessing whether the content of  
these reports meet the statutory standard for a consumer report.

1 report ordered under FOTN do not meet the content standard for a consumer report envisioned by  
2 Congress when it drafted the seven-factor test.

3  
4 C. The Purpose for Which the Information was Used, Expected to be Used or  
5 Collected

6 The last requirement concerns the *purpose* for which the information is used or collected.  
7 The information must be used, expected to be used, or have been collected, at least in part, for  
8 the purpose of serving as a factor in determining the consumer's eligibility for credit, insurance  
9 or employment, or for one of the other purposes authorized by Section 1681b, including  
10 collection of a consumer credit account. In its September 15, 2005 Order, this Court initially  
11 found that, based on the allegations in the Consolidated Complaint and the declarations  
12 submitted by the parties, the purpose requirement of a consumer report had likely been satisfied.  
13 Docket No. 57 at 10. However, upon further review of the evidence and arguments put forth by  
14 both parties since that Order, the Court believes there may be reasonable grounds to contest that  
15 initial finding. At present, the Court declines to reach a conclusion on whether the purpose  
16 requirement is met, as it can decide the merits of Defendants' Motion on the other grounds  
17 discussed in this Order.

18  
19 D. Plaintiffs Salladay's, Slavin's and Cloy's FCRA Claims

20 Plaintiffs allege that "ChoicePoint . . . disclosed . . . the personal information of  
21 approximately 35,000 residents of California and an additional 110,000 residents of other states"  
22 to fraudsters. (Consolidated Compl. ¶ 26.) Defendants challenge these allegations as they relate  
23 to Plaintiffs Salladay, Slavin, Cloy, O'Keeffe, and Harrington.

24 The Third Smith Declaration states that based on an internal review of ChoicePoints'  
25 systems, the personal information of Plaintiffs Salladay, Slavin, and Cloy (the "Three Plaintiffs")  
26 was not communicated or furnished to fraudsters. (Third Smith Decl. ¶¶ 18-26.) According to  
27 that declaration, the fraudsters conducted searches that could have returned the Three Plaintiffs'  
28 personal information. ChoicePoint recreated these searches and found that the searches

1 generated a large number of names and related personal information. The Three Plaintiffs and  
2 their information were included on one of the many pages of search results. None of their names  
3 and information, however, appeared on the first page of results. (*Id.*) ChoicePoint can  
4 determine from a review of its server logs that in the actual searches run by the fraudsters, the  
5 fraudsters only received the first page of results. Because they did not request additional pages,  
6 ChoicePoint concludes that the Three Plaintiffs' information was not transmitted.

7 To deflect summary judgment, the Three Plaintiffs are required to come forward with  
8 specific facts to support their claim that their personal information was communicated by  
9 ChoicePoint to the fraudsters. The Three Plaintiffs have failed to do so. Despite having had four  
10 months of additional discovery as they requested, and having taken extensive deposition  
11 testimony of several ChoicePoint employees, including all of its declarants, it appears that the  
12 only evidence the Three Plaintiffs rely upon remains the initial letter received from ChoicePoint  
13 indicating that their personal information "may" have been disclosed. If the nonmoving party  
14 fails to produce sufficient evidence to create a genuine issue of material fact, the moving party  
15 must prevail on the motion for summary judgment. *Celotex*, 477 U.S. at 322; *Nissan Fire &*  
16 *Marine*, 210 F.3d at 1103. In light of the Third Smith Declaration and the lack of evidence  
17 presented by the Three Plaintiffs, a genuine issue of material fact does not exist with respect to  
18 whether the Three Plaintiffs' personal information was communicated or furnished.  
19 Furthermore, even had the personal information of any of the Three Plaintiffs been viewed, the  
20 content of that information for each of the Three Plaintiffs was limited to name, address (two  
21 addresses in the case of Plaintiff Salladay), date of birth, Social Security number, and driver's  
22 license number and state of issue. As is discussed above, this information does not bear on any  
23 of the seven enumerated statutory factors, and accordingly does not satisfy the content prong of  
24 the consumer report definition as a matter of law. Therefore, Defendants' Motion for Summary  
25 Judgment with respect to Plaintiffs Salladay's, Slavin's and Cloy's FCRA claims is GRANTED.

1           E.     Plaintiff Harrington's (a/k/a Huneke) FCRA Claim

2           With respect to Plaintiff Harrington, ChoicePoint submitted the Fourth Smith  
3 Declaration, which discloses information related to Plaintiff Harrington that was omitted from  
4 the Third Smith Declaration. The Third Smith Declaration states that based on a review of  
5 ChoicePoints' systems, ChoicePoint was aware of only two fraudulent searches that could have  
6 returned Harrington's personal information. ChoicePoint recreated these searches which  
7 returned lists of names and limited items of related personal information. The recreated searches  
8 included Plaintiff Harrington's name and her information. Plaintiff Harrington did not appear on  
9 the first page of either search. The fraudsters, however, requested multiple additional pages,  
10 apparently as many as 24. (Opp'n at 9.) ChoicePoint is apparently unable to determine  
11 conclusively whether the additional pages included Plaintiff Harrington's information. Plaintiff  
12 Harrington, despite having had extensive discovery of ChoicePoint, including all of its  
13 declarants, has been unable to offer any evidence that her personal information was  
14 communicated to the fraudsters other than the initial letter from ChoicePoint.

15           Moreover, even if her personal information had been disclosed, it would have been  
16 limited to her name, address and Social Security number. Smith also concluded that the  
17 fraudsters did request two detailed reports on individuals whose names were returned in the  
18 initial search results, although he could not conclude whether or not either of these searches  
19 related to Plaintiff Harrington. (Fourth Smith Decl. ¶ 6.) A detailed report on Plaintiff  
20 Harrington, if ordered, could have included additional personal information beyond that provided  
21 in the initial search results, including additional addresses, any aliases, state and date of issue of  
22 her Social Security number, and any death indicator. As is discussed above, neither the  
23 information in the initial search results, nor any additional information from any detailed report  
24 that may or may not have been ordered on Plaintiff Harrington, whether communicated to the  
25 fraudsters or not, would be sufficient to satisfy the content requirement of the consumer report  
26 definition. Accordingly, Defendants' Motion for Summary Judgment with respect to Plaintiff  
27 Harrington's FCRA claim is GRANTED.

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1            F. Plaintiff O’Keeffe’s FCRA Claim

2            ChoicePoint is aware of only one fraudulent search that could have returned Plaintiff  
 3 O’Keeffe’s personal information. (Third Smith Decl. ¶¶ 27-29.) ChoicePoint recreated this  
 4 search and found that the search returned a large list of people and limited items of personal  
 5 information about them. The recreated search included Plaintiff O’Keeffe’s name and  
 6 information on pages 23 and 27. The fraudsters requested multiple pages, possibly as many as  
 7 21, in addition to the first page. (Opp’n at 10.) They did not request detailed reports on any of  
 8 the individuals returned in the initial search results. (Third Smith Decl. ¶ 29.)

9            Again, according to ChoicePoint, their systems do not record which additional pages were  
 10 requested. ChoicePoint is thus apparently unable to determine conclusively whether the  
 11 additional pages viewed by the fraudsters included Plaintiff O’Keeffe’s personal information or  
 12 not. Plaintiff O’Keeffe, despite having had significant discovery from ChoicePoint, including all  
 13 of its declarants, has also been unable to offer any evidence that her personal information was  
 14 communicated to the fraudsters beyond the initial letter she received from ChoicePoint.  
 15 However, even if her personal information had been disclosed, it would have been limited to her  
 16 name, address and Social Security number. As discussed above in Subsection I-B of this order,  
 17 this information, whether communicated to the fraudsters or not, would not be sufficient to  
 18 satisfy the content requirement of the consumer report definition. Accordingly, Defendants’  
 19 Motion for Summary Judgment with respect to Plaintiff O’Keeffe’s FCRA claim is GRANTED.

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 21            **II. California State Law Claims**

22            A. Plaintiffs Salladay, Slavin, Cloy, Harrington, and O’Keeffe

23            In the Consolidated Complaint, Plaintiffs Salladay, Slavin, Cloy, Harrington, and  
 24 O’Keeffe alleged various violations of California law in addition to their federal claims under the  
 25 FCRA. In its September 15, 2005 Order, the Court dismissed Plaintiffs’ third and fifth causes of  
 26 action. Plaintiffs’ remaining state law claims are for violations of: 1) the California Consumer  
 27 Credit Reporting Agencies Act, Civil Code § 1785.1; 2) California Civil Code § 1798.53  
 28 (“Invasion of Privacy”); 3) California Business & Professions Code § 17200; and 4) California

1 Civil Code §§ 1785.10, 1785.15 and 1785.15.3 (Plaintiff Salladay only) (collectively, the “State  
2 Law Claims”).

3 Because the Court is granting Defendants’ Motion for Summary Judgment with respect to  
4 the federal law FCRA claims of Plaintiffs Salladay, Slavins, Cloy, Harrington and O’Keeffe,  
5 there will no longer be any federal question or original jurisdiction to hear those Plaintiffs’  
6 remaining State Law Claims. Pursuant to 28 U.S.C. § 1367(c)(3), the Court hereby declines to  
7 exercise supplemental jurisdiction over the State Law Claims of Plaintiffs Salladay, Slavin, Cloy,  
8 Harrington, and O’Keeffe. Accordingly, the State Law Claims of Plaintiffs Salladay, Slavin,  
9 Cloy, Harrington, and O’Keeffe are DISMISSED without prejudice.

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B. Plaintiff Seymour

Although Plaintiff Seymour is not the subject of the Defendants’ Motion as to any of her  
other causes of action, Defendants have moved to dismiss claims brought by her for violations of  
California Civil Code § 1798.53. Defendants have submitted multiple declarations, including  
several from Smith and Meiser, purporting to show that the source of any information that may  
have been disclosed relating to Plaintiff Seymour was not sourced to a California or federal  
agency. Defendants argue that there can thus be no violation of § 1798.53. Plaintiff Seymour,  
despite having deposed Meiser on two occasions, has come forward with no contradictory  
information, nor does Plaintiffs’ Opposition even make mention of this claim. The Court  
therefore finds that dismissal of Plaintiff Seymour’s § 1798.53 claim is proper. Accordingly, the  
§ 1798.53 claim of Plaintiff Seymour is DISMISSED without leave to amend.

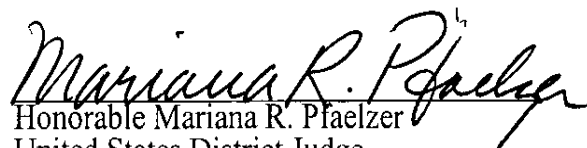
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**CONCLUSION**

For the foregoing reasons, Defendants' Motion for Summary Judgment with respect to Plaintiffs Salladay, Slavin, Cloy, Harrington and O'Keeffe on their FCRA claims, is GRANTED. In addition, the State Law Claims brought by Plaintiffs Salladay, Slavin, Cloy, Harrington and O'Keeffe are DISMISSED without prejudice. Plaintiff Seymour's claim under § 1798.53 is DISMISSED without leave to amend.

IT IS SO ORDERED.

DATED: October 11, 2006

  
Honorable Mariana R. Pfaelzer  
United States District Judge