

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 04/03/2015

TIME: 10:30:00 AM

DEPT: C-66

JUDICIAL OFFICER PRESIDING: Joel M. Pressman

CLERK: Robin Smith

REPORTER/ERM: Paula Rahn CSR# 11510

BAILIFF/COURT ATTENDANT: A. Quidilla

CASE NO: **37-2014-00022411-CU-MT-CTL** CASE INIT.DATE: 07/08/2014

CASE TITLE: **D'Angelo Santana vs Rady Children's Hospital-San Diego [E-File]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Mass Tort

EVENT TYPE: Demurrer / Motion to Strike

MOVING PARTY: Rady Children's Hospital-San Diego, Rady Childrens Health Services San Diego,
Rady Childrens Hospital and Health Center

CAUSAL DOCUMENT/DATE FILED: Demurrer, 03/04/2015

EVENT TYPE: Civil Case Management Conference

MOVING PARTY: D'Angelo Santana

CAUSAL DOCUMENT/DATE FILED: Complaint, 07/08/2014

EVENT TYPE: Demurrer / Motion to Strike

MOVING PARTY: Rady Children's Hospital-San Diego, Rady Childrens Health Services San Diego,
Rady Childrens Hospital and Health Center

CAUSAL DOCUMENT/DATE FILED: Motion to Strike, 03/04/2015

APPEARANCES

E Elliot Adler, counsel, present for Plaintiff(s).

PATRICK N KEEGAN, counsel, present for Plaintiff(s).

Robert A Waller, Jr, counsel, present for Plaintiff(s).

James Jason Hill, counsel, present for Plaintiff(s).

JON KARDASSAKIS, counsel, present for Defendant(s).

Mona Amini, counsel, present for Plaintiff(s).

The Court hears oral argument and modifies the tentative ruling as follows:

Rady Children's Hospital's Demurrer to the First Cause of Action is OVERRULED.

Defendants are correct that the remedy specified in section 56.36 subdivision (b), section 56.101 allows a private right of action for negligent maintenance only when such negligence results in unauthorized or wrongful access to the information. Regents of University of California v. Sup. Ct. (2013) 220 Cal.App.4th 549; Sutter Health v. Sup. Ct. (2014) 227

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Cal.App.4th 1546.

Plaintiffs have sufficiently alleged that their individual identifiable medical information has been viewed as well as facts supporting Plaintiffs' claims that their information was in fact viewed by 4 identifiable, unauthorized persons. (¶¶24-25, 29-32, and 36(a)-(d)).

For example, paragraph 25 alleges, in pertinent part: "All 4 such persons viewed Plaintiffs' and Class members' individual identifiable "medical information" because Defendant intentionally sent the non encrypted spreadsheet to all 4 such persons and intended the information contained in such non encrypted spreadsheet to be viewed by all 4 such persons..."

This allegation is sufficiently different from the problem faced in Regents, *supra*, where the allegation was that defendant negligently lost possession of material. In this case, defendants allegedly *intentionally* sent the medical information to four individuals intended to be viewed to gauge aptitude.

The Demurrer to the Second Cause of Action for Violation of the UCL is SUSTAINED, with 30 days leave to amend.

Standing under the UCL is "limited to those who have 'suffered injury in fact and [have] lost money or property as a result of...unfair competition.'" Bus. & Prof. Code, § 17204.)" Zhang v. Superior Court (2013) 57 Cal. 4th 364, 372. "Accordingly, to bring a UCL action, a private plaintiff must be able to show economic injury caused by unfair competition. Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 326; Hall v. Time Inc. (2008) 158 Cal. App. 4th 847, 849; In re Firearm Cases (2005) 126 Cal.App.4th 959, 981

Plaintiffs do not allege that they lost any money or property as a result of the alleged violation of the CMIA. Rather, Plaintiffs contend they suffered a "significantly increased risk of identity fraud," "being exposed to a threat of future harm," an "increased...risk of future harm that the Plaintiffs and the Class would have otherwise faced.," and "the necessity of credit monitoring."

In opposition, Plaintiffs allege that Paragraph 38 alleges economic injury. However, this allegation only indicates loss of money in fees and costs for the underlying health care. Plaintiffs have not alleged that these fees and costs were incurred as a result of the alleged unlawful conduct. (The nominal damages and penalties awardable under Civil Code Section 56 et seq. would be awardable under a direct cause of action for violation and do not support injury as a result of the violation for purposes of the UCL.)

Plaintiffs reliance on Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310 and related cases are inapposite given that Kwikset dealt with *fraudulent* behavior under the UCL. In Kwikset, the Court held that economic injury can be shown where the consumer *relies on a misrepresentation* and would not have bought a product but for the misrepresentation.

The Court finds persuasive the District Court case of Falkenberg v. Alere Home Monitoring ("Falkenberg"), 2014 U.S. Dist. LEXIS 142856, 11-13(N.D. Cal. Oct. 7, 2014). Like our case, in Falkenberg, plaintiffs alleged violations of the UCL based on CMIA after a laptop allegedly containing their confidential medical information was stolen from the car of defendant's employee. The Court found that plaintiffs did not allege money was lost as a result of the alleged violations of the CMIA even though plaintiffs had alleged expenditures for on identity theft protection. In our case, no expenditures have been identified as a result of the alleged violation of the CMIA.

In the alternative, even if the court found that UCL claim was validly stated, the court would abstain from the injunctive relief requested.

Abstention Doctrine Does Apply

Judicial abstention is appropriate where (1) plaintiff's claims would necessarily require the trial court to resolve complex policy issues and (2) there is an alternative mechanism for resolving the issues plaintiffs raise in their complaints. (Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1366.) The issue raised in this case is the use of reasonable precautions to ensure the safe storage of individual medical information. (Plaintiffs' Opposition to Demurrer ("Opposition"), p. 2.) To remedy the release of Plaintiffs' medical information two orders are sought (in addition to the nominal damages sought based upon the First Cause of Action): restitution of monies received as a result of Defendant's unlawful conduct and an injunctive order instructing Defendant to (1) prohibit unauthorized access to medical information, (2) adequately maintain confidentiality of the medical information, and (3) enjoining Defendant from disclosing the medical information without prior written authorization.

Plaintiff's restitution request would require the Court to determine what, if any, amount of health care premiums is attributable to the decision to choose a healthcare provider because of the provider's confidentiality precautions. This would require extensive research into how premiums are computed and how subscribers choose their healthcare provider. This would pull the court "deep into the thicket of the health care finance industry" (Desert Healthcare Dist. v. PacifiCare FHP, Inc. (2001) 94 Cal. App. 4th 781, 796.) The Plaintiff's cause of action for Violations of the Confidentiality of Medical Information Act provides an alternative mechanism for resolving the Plaintiff's issue, which seems to be the contemplation of the legislature.

Plaintiff's injunctive relief requested would require the Court to oversee and regulate Defendant's data security policies. The Confidentiality of Medical Information Act already provides a mechanism for enforcement of medical information confidentiality. Plaintiff's request for the Court to regulate Defendant's data security policies infringes on the regulatory oversight already provided by existing state and federal administrative agencies.

Request for Injunctive Relief is Improper

Because an injunction must seek to prevent harm, not to punish the wrongdoer, the injunctive remedy under the unfair competition law (UCL) should not be exercised in the absence of any evidence that the acts are likely to be repeated in the future. (Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal. App. 4th 997, 1012.) Here, Plaintiff has not alleged any facts that the release of confidential medical information is likely to occur again. As such, the request for an injunction is improper.

Defendant's Motion to Strike is GRANTED, in part, and DENIED, in part.

The Court GRANTS the motion with respect to:

Page 5, line 28: The words "for each violation";
Page 11, line 28: The words "per violation";
Page 16, line 25: The words "for each violation";
Page 19, line 23: The words "per violation";

The Court DENIES the motion with respect to:

Page 19, line 3: The word "each";

Page 19, line 24: The words "to Plaintiffs individually and to each member of the Class".

The issue in the calculation of "nominal damages" in Civil Code § 56.36(b)(1). That section states:

(b) In addition to any other remedies available at law, any individual may bring an action against any person or entity who has negligently released confidential information or records concerning him or her in violation of this part, for either or both of the following:

(1) Nominal damages of one thousand dollars (\$1,000). In order to recover under this paragraph, it shall not be necessary that the plaintiff suffered or was threatened with actual damages.

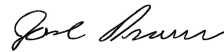
(2) The amount of actual damages, if any, sustained by the patient.

It is clear from plain language in the statute that nominal damages apply to "any individual" whose confidential information was negligently released by Defendant. Any individual who establishes negligent release of confidential information would be entitled to nominal damages of \$1000. The fact that plaintiffs litigate as a class action should not make a difference and to construe the statute differently would penalize an individual who is litigating as part of a class.

The statute does not include the language "per violation," which as defendants discuss, is used elsewhere in the Section 56.36. Thus, the language "per violation" is stricken from the Consolidated Amended Class Complaint. However, the statute appears to apply individually.

Civil Case Management Conference is continued pursuant to party's motion to 07/17/2015 at 08:30AM before Judge Joel M. Pressman.

IT IS SO ORDERED.



Judge Joel M. Pressman