4851-1357-0897/216-7001

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

------------------------------------------------------X

MATTHEW RANDALL, :

 : 17 CV.5428 (ADS)(GRB)

Plaintiff, :

– against – :

 :

 :

DISH NETWORK L.L.C., :

 :

Defendant. :

------------------------------------------------------X

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT’S MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULE 12(b)(1) AND (6)**

**LAW OFFICE OF ABEL L. PIERRE,**

**ATTORNEY-AT-LAW, P.C.**

Attorney ID #: AP-5508

140 Broadway, 46th Floor

New York, New York 10005

Telephone: (212) 766-3323

Facsimile: (212) 766-3322

abel@apierrelaw.com

**Attorney for Plaintiff**

 **Contents**

Page

Authorities 3

Statement of Facts 4

Preliminary Statement 5

Point I 6

*Dish Network’s Rule 12 (b) (1) and 12 (b) (6) Motion*

*is premature and should be denied under this basis.*

Point II 8

*Despite Dish Network’s claims to the contrary, the claims*

*in the complaint are valid and should not be disturbed by*

*the court at this time in the litigation*

Point III 10

*If this Court were to dismiss this complaint either partially or*

*in its entirety, it is requested that it does so without prejudice.*

Conclusion 11

 **Authorities**

Page

*Cases*

Berman v. Parco, 986 F. Supp. 195 (SDNY 1997) 11

First Fin. Ins. v. Allstate Interior Demolition, 6

193 F. 3d 109 (2nd Cir. 1999)

Friedl v. City of New York, Human Resources Admin., 10

210 F. 3d 79, 88 (2nd Cir. 1999)

Galper v. JP Morgan, 802 F. 3d 437 (2nd Cir. 2015) 7-9

Longman v. Wachovia, N.A., 8

702 F. 3d 148, 150 (2nd Cir. 2012)

Nielsen v. AECOM Tech Corp., 7

762 F. 3d 214, 218 (2nd Cir. 2014)

Redhead v. Winston & Winston, P.C., 2002 WL 31106934, 8

2002 US Dist Lexis 17780 (SDNY 2002)

Ritchie v. Northern Leasing Systems, Inc., 6

14 F. Supp 3d 229 (SDNY 2014)

Speedmark Transp. Inc. v. Mui, 7

778 F. Supp. 2d 439, 444 (SDNY 2011)

Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1545, 194 L. Ed. 2d 635 (2016) 6

 **Statement of Facts**

Although the plaintiff Matthew Randall has absolutely no connection with the state of Georgia, Dish Network, L.L.C. (hereinafter referred to as “Dish Network”) opened an account in the plaintiff’s name after making an inquiry with Equifax on his credit bureau report.

On May 22, 2017, Dish Network made an inquiry onto Mr. Randall’s credit report with Equifax. Mr. Randall through his identity fraud alert account with “MyIDCare” was notified on May 24, 2017, about the inquiry. On May 25, 2017, Mr. Randall contacted Dish Network’s fraud bureau about the identity theft and fraudulent account set up using his identity in Georgia. On May 31, 2017, Mr. Randall requested that Dish Network remove the inquiry on his credit account.

However, to this day, the inquiry made by Dish Network on his credit report is still there and it is still negatively impacting his credit score by twenty points (according to Credit Karma). Despite notifying Equifax and disputing the entry on his credit file along with working with Dish Network’s fraud team, the inquiry remains as if he was the one to request an account to be opened under his name and not some imposter. A fiction was created and is being held out as fact.

On September 15, 2017, Mr. Randall sued Dish Network under the Fair Credit Reporting Act (hereinafter referred to as the “FCRA). Dish Network has responded by filing this instant motion under Rule 12(b)(1) and (6).

 **Preliminary Statement**

In moving to dismiss the complaint, Dish Network believes that despite making an inquiry on Mr. Randall’s account when he did not authorize such inquiry and failing to adequately investigate who was requesting such to guard against identity theft, Dish Network is not legally blameworthy. On top of this, Dish Network still believes that Mr. Randall is the one who requested the opening of the account in Georgia (despite the fact he has zero connections with the state of Georgia) as they refuse to remove the inquiry. If they truly believe he did not authorize the inquiry as a good corporate citizen, they would remove the entry, no?

 The FCRA imposes many obligations upon furnishers of information to the credit reporting agencies. Dish Network is a furnisher of information. Those who furnish information are under a legal obligation to make sure anything that they report is not only correct but if they learn that it was not, they have a duty to correct. Has Dish Network met this standard? There are other obligations under the FCRA along with New York State’s matching statute. Many intricate facts are still to be learned as to what Dish Network did and did not do; and whether these actions and/or omissions makes them liable to Mr. Randall. Yet prior to any discovery being conducted, Dish Network wishes to have the case dismissed. Not only is their motion premature but it is also misguided as the known facts support the allegations in the complaint.

 **POINT I**

*Dish Network’s Rule 12 (b) (1) and 12 (b) (6) Motion*

*is premature and should be denied under this basis.*

At this stage of the litigation, on a motion to dismiss, one must assume the facts asserted in the complaint are true and the motion will be denied unless it appears beyond doubt that no facts support the claim. First Fin. Ins. v. Allstate Interior Demolition, 193 F. 3d 109 (2nd Cir. 1999). The known facts are simple. Mr. Randall did not contact Dish Network to set up an account in Georgia. Dish Network without proper authorization accessed Mr. Randall’s credit report via Equifax and refuses to remove the inquiry even though it is harming the plaintiff’s credit score. Their averment that they did not know an imposter had requested the account is meaningless as we are at the motion to dismiss stage and not disputing factual issues. Ritchie v. Northern Leasing Systems, Inc., 14 F. Supp 3d 229 (SDNY 2014). Dish Network alleging good faith and a permissible purpose in obtaining the plaintiff’s credit report is immaterially at this stage as there are no facts to dispute. Id at 245. The question is does the complaint clearly state a cause of action upon which relief can be granted? And from the plaintiff’s factual claims, it clearly does.

Even if we accept as true, Dish Network’s assertion that they accessed Mr. Randall’s credit report for a permissible purpose, that is only half the equation as the FCRA also regulates the use of such report. Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1545, 194 L. Ed. 2d 635 (2016). The use here is clearly impermissible as a fraudulent account was set up in his name; and damages are permissible depending on whether the use was negligent or done in a willful manner. See FCRA § 1681n (a), § 1681o (a). So not only is the Dish Network’s motion premature but it is also incomplete. Dish Network must show that not only was the accessing of the report lawful; but, additionally, that the use was lawful. Unfortunately for Dish Network it is indisputable that the use was for a fraudulent account. How Dish Network can thread this needle (and claim that the use was lawful) is a mystery.

By disregarding the premature factual claims presented by Dish Network, the real question is revealed; and that question is simple, is there sufficient factual material articulated in the complaint to state a claim plausible on its face? If so, the motion must be denied. Nielsen v. AECOM Tech Corp., 762 F. 3d 214, 218 (2nd Cir. 2014). The courts are very reluctant to grant motions to dismiss at this stage when the cases involve fact intensive inquiries as these cases are not suitable to be resolved at the motion to dismiss stage. Speedmark Transp. Inc. v. Mui, 778 F. Supp. 2d 439, 444 (SDNY 2011). It is just premature to do so.

Cases under the FCRA tend to be very fact specific. We still do not fully understand the dynamics of how and why an account was opened under Mr. Randall’s name in Georgia, despite the fact he has no connections to that state. What were the steps used by Dish Network to guard against identity theft? Were they used in this case? What are their internal workings in requesting access to a person’s credit report and again, were they followed? Although we know Mr. Randall’s identity was stolen, we do not know by whom. Was an employee involved? Such circumstances are not beyond the realm of possibility. Galper v. JP Morgan, 802 F. 3d 437 (2nd Cir. 2015).

Dish Network may not like the implications of the allegations against them in the complaint; but they are plausible in the world of identity theft. Dish Network alleges that they acted in good faith and accessed the plaintiff’s credit record for a permissible basis; but those facts are not known yet. Discovery has yet to be conducted and afterwards, the story may not line up as they allege in their motion. Simply put, the facts alleged in the complaint must be assumed to be correct and these facts state a claim against Dish Network that is plausible on its face. Dish Network’s so called reasonable belief is immaterial at this time. Its alleged careful and good faith investigation is also immaterial at this time of the litigation. Their motion must be denied as the complaint stands on its own with credible allegations against Dish Network and it should not be disturbed at this point of the litigation.

 **POINT II**

*Despite Dish Network’s claims to the contrary, the claims in the complaint are valid and should not be disturbed by the court at this time in the litigation.*

 Although Dish Network alleges that their accessing of the plaintiff’s credit report was for a proper purpose, as has been stated, such an affirmation at this point of the litigation is of no import. Besides, without discovery having been conducted, how do we know such an assertion is even true? Is there an identity theft ring operating out of their offices? Again, as was previously stated, it is not unheard of. Galper, 802 F. 3d at 446.

 Even if their initial inquiry was valid, under Section1681s 2(b), once Dish Network was notified by the credit reporting agency of a dispute, they have a duty to correct and their failure to do so opens a private right of suit for the aggrieved individual. Longman v. Wachovia, N.A., 702 F. 3d 148, 150 (2nd Cir. 2012). *See also*, Redhead v. Winston & Winston, P.C., 2002 WL 31106934, 2002 US Dist Lexis 17780 (SDNY 2002). Mr. Randall upon learning of the identity theft contacted not only Dish Network but also Equifax. Equifax accepted Mr. Randall’s complaint. Thus, under the statutory regime, when this information was forwarded to Dish Network, it put a legal obligation upon Dish Network to investigate the matter, thoroughly. Longman, 702 F. 3d at 150. As we know, Dish Network also has a fraud unit to conduct said investigations; and we know that because Mr. Randall contacted that unit. Apparently, not much of an investigation was done as the inquiry that was based on identity theft is still on the plaintiff’s credit report.

 Dish Network cites to Bickley, as an example of the proper purpose in making a credit inquiry. See Defendant’s Memorandum of Law at 6-7. When Dish Network realized that the information provided by the imposter did not match what they gleaned from the credit report, an account was not opened. Here, Dish Network is claiming an account was opened assumedly because the information did match up. However, such an inference establishes Dish Network’s recklessness and negligence in this case and not Dish Network following any proper protocol.

 Mr. Randall was no connection to Georgia in general and more specifically, he has no ties to Douglas, Georgia. A cursory review of his credit history would have established that fact and an account would not have been opened. But an account was opened. Which begs many questions such as did Dish Network live up to its legal obligation to investigate this matter both prior to and after opening an account? Was the credit inquiry really made for a permissible purpose? What else will we learn in discovery?

 As to the defendant’s claim that federal law preempts the NYS statute, NYS GBL § 380, so that the state claim should be dismissed is erroneous. There are too many unknown facts to make such an assertion at this point of the litigation. The federal FCRA statute only pre-empts claims that mirror the reporting requirements of the federal FCRA devised by Congress. Galper, 802 F. 3d at 446. As to furnishers of information, the act only preempts state claims based on their responsibilities as a furnisher of information under the FCRA. Id. State claims that are outside this regulatory scheme are not affected.

As was stated earlier, in Galper, some of JP Morgan’s employees were part of an identity theft scheme. The company was sued under multiple theories including NYS GBL§ 380. JP Morgan moved to dismiss claims under this statute as being preempted by the federal statute. The Second Circuit rejected this attempt stating that the conduct fell outside the reporting requirements and was therefore not preempted. Id. Likewise, not all the plaintiff’s claims in this case falls under the reporting regimen created by Congress in enacting the FCRA. Mr. Randall (along with complaining to Equifax directly) complained directly to Dish Networks fraud unit. This was outside the reporting system devised by Congress. On this separate basis, Mr. Randall’s claim under NYS law is not preempted as it falls outside the dictates of the federal FCRA. Additionally, we do not yet know if any employees from Dish Network were involved in stealing Mr. Randall’s identity. Such conduct (like in Galper) would surely be actionable under NYS GBL§ 380.

A fair reading of the facts alleged in the complaint clearly shows that the allegations against Dish Network on both the federal and state basis are valid and that they should not be dismissed at this time. As we look to the four corners of the complaint, there is no basis to disturb it at this point in the litigation.

 **POINT III**

*If this Court were to dismiss this complaint either partially*

*or in its entirety, it is requested that it does so without prejudice.*

The right to amend a complaint should be freely given by the court when justice will be served. See FRCP § 15 (2). Unless there is prejudice to the defendant or some undue delay on the plaintiff’s part, the court should grant the request. Friedl v. City of New York, Human Resources Admin., 210 F. 3d 79, 88 (2nd Cir. 1999). Here, the case is still in its infancy. There have been no delays. Also, the plaintiff’s allegations of facts are well known by reading the complaint so if some technical error must be corrected, there is no harm done to the defendant by doing so. However, if the claims are dismissed with prejudice (like the state claim), the plaintiff will have no avenue to pursue justice as his claims will have been extinguished. If the state claim was dismissed with prejudice, Mr. Randall could not pursue his grievances in state court.

Also, the defendant points out in their Memorandum of Law that there is no private claim for violating Section 1681 m of the FCRA. If this claim were to be dismissed, the plaintiff should have a right to bring other claims based on the same fact pattern such as Section 1681 q of the FCRA as that part of the FCRA allows for civil liability. Berman v. Parco, 986 F. Supp. 195 (SDNY 1997).

A fair reading of the complaint clearly shows that the plaintiff was wronged by the defendant. If there are some technical errors in the complaint, the plaintiff should be allowed to correct them. The equities of justice demand it. Dish Network has known for months that the person who opened on account with them was not the plaintiff. Yet, Dish Network has not corrected their errors but instead sat on their hands refusing to undo the damage that they have wrought. The equities of this case demand that it moves forward and if some counts must be replead, then this Court must allow the plaintiff time to do so. We must remember, that Dish Network has had six months to correct their mistake. We are still waiting for that to happen.

 **Conclusion**

For the reasons stated above, the motion under Rule 12 (b) (1) and 12 (b)(6) should be denied.