IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARY CRUMPTON, individually and on behalf of all others similarly situated, *Plaintiff,* v. OCTAPHARMA PLASMA, INC., *Defendant.*	)	No. 19 C 8402 Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

Plaintiff Mary Crumpton filed this proposed class action against a plasma-donation company, Octapharma Plasma, Inc. ("Octapharma"). Crumpton alleges Octapharma violated the Illinois Biometric Information Privacy Act ("BIPA"). 740 ILCS 14/1, *et seq.*; (Dkt. 1-1). BIPA prohibits private entities from collecting "biometric identifiers"—including fingerprints—from a person unless the entity obtains informed, written consent and provides certain disclosures. 740 ILCS 14/15(b). Crumpton alleges Octapharma violated BIPA § 15(b) by using a donor-identification system that relied upon the collection, storage, and use of donors' fingerprints and biometric information without proper written consent and without making required disclosures. (Dkt. 1-1).

Crumpton moves to strike Octapharma's First and Second Affirmative Defenses, raised in Octapharma's answer. (Dkt. 43). For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

When considering a motion to strike an affirmative defense, courts must take as true all facts alleged in the defense and construe all reasonable inferences in favor of the defendant.[1] *See, e.g., Mittelstaedt v. Gamla-Cedron Orleans LLC*, No. 12 C 5131, 2012 WL 6188548, at *1 (N.D. Ill. Dec. 12, 2012).

Plasma, a component of human blood, is used to create life-saving treatments and therapies for patients suffering various maladies. (Dkt. 16 at 15 ¶¶ 1–2). Octapharma, a company incorporated in Delaware and headquartered in North Carolina, operates a nationwide chain of blood plasma donation centers. (Dkt. 16 at 1 ¶ 1, 3 ¶ 9). Before donating plasma for the first time, Octapharma requires donors to provide a scan of their fingerprint. (Dkt. 16 at 1 ¶ 2). Using this fingerprint scan, Octapharma creates a biometric template as a method of positively identifying individual donors. (Dkt. 16 at 22 ¶ 12). A donor's biometric template is associated with a Donor History Record which includes his or her donation history, results of health screening exams and blood testing, and interviews and questionnaires. (Dkt. 16 at 22 ¶¶ 12–15, 26 ¶¶ 30). Octapharma requires donors to scan their fingerprint each time they donate plasma. (Dkt. 16 at 23 ¶ 15).

Crumpton is an Illinois citizen who donated plasma at Octapharma between June 2017 and August 2018 and submitted a scan of her fingerprint to do so. (Dkt. 16 at 3¶ 8, 8 ¶¶ 28–29). Crumpton filed suit against Octapharma on behalf of a putative class in the Circuit Court of Cook County on December 2, 2019 alleging

[1] At the request of the parties, the Court also accepts as true the facts alleged in the Declaration of Monica H. Byrd attached to Octapharma's Response. (Dkt. 45-1; Dkt. 51 at 11 n. 1).

violation of BIPA § 15(a) and § 15(b). (Dkt. 1-1). The action was subsequently removed to federal court on December 23, 2019. (Dkt. 1). Presently before this Court is Crumpton's cause of action under BIPA § 15(b) in which Crumpton alleges Octapharma failed to obtain donors' informed consent or make required disclosures prior to obtaining the fingerprint template. (Dkt. 1-1 ¶ 41).

In its Answer, Octapharma raised various affirmative defenses, the first two of which are the subject of this motion. Octapharma's First Affirmative Defense is that BIPA is preempted by federal law, specifically the Food, Drug, and Cosmetics Act ("FDCA"), the Public Health Act, and the regulations promulgated by the Food and Drug Administration ("FDA") under those laws. (Dkt. 16 at 30–31 ¶¶ 50–56). Octapharma's Second Affirmative Defense is that it is exempt from BIPA. (Dkt. 16 at 31–32 ¶¶ 57–60). Crumpton moves to strike both the First and Second Affirmative Defense. (Dkt. 43).

LEGAL STANDARD

Motions to strike are governed by Federal Rule of Civil Procedure 12(f), which provides "[t]he court may strike form a pleading an insufficient defense[.]" Fed. R. Civ. P. 12(f). Motions to strike are generally disfavored and affirmative defenses "will be stricken only when they are insufficient on the face of the pleadings." *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). A court should only strike an affirmative defense if it appears beyond a reasonable doubt the pleader can prove no set of facts in support of his defense that would plausibly entitle him to relief. *See, e.g., Mittelstaedt*, No. 12 C 5131, 2012 WL 6188548, at *2. To survive a

motion to strike, an affirmative defense must satisfy a three-part test: "(1) the matter must be properly pleaded as an affirmative defense; (2) the matter must be adequately pleaded under the requirements of Federal Rules of Civil Procedure 8 and 9; and (3) the matter must withstand a Rule 12(b)(6) challenge." *Sarkis' Café, Inc. v. Sarks in the Park, LLC*, 55 F. Supp. 3d 1034, 1039 (N.D. Ill. 2014). Bare legal conclusions are insufficient and must be stricken. *Heller*, 883 F.2d at 1294–95 (granting motion to strike affirmative defenses where defendants omitted any short and plain statement of facts and failed to allege necessary elements of a claim). A majority of district court decisions in this circuit apply the pleading standards set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to affirmative defenses, and this Court will do so as well. *See Maui Jim, Inc. v. SmartBuy Guru Enters.*, 286 F. Supp. 3d 926, 938 (N.D. Ill. 2019) (collecting cases).

DISCUSSION

A. Timeliness

Under Rule 12(f), a party seeking to strike an affirmative defense must file a motion within 21 days of being served with the challenged pleading. Fed. R. Civ. P. 12(f)(2). Octapharma filed its Answer on February 3, 2020, meaning Crumpton's deadline to move to strike an affirmative defense was February 24, 2020. (Dkt. 16). However, the Court issued a stay pending the Seventh Circuit's decision regarding standing in *Bryant v. Compass Grp.*, No. 20-1443 on February 13, 2020. (Dkt. 21). This stay was lifted on May 8, 2020. (Dkt. 31). Accounting for the 9 days elapsed

prior to the February 13th stay, the new deadline for Crumpton to move to strike was May 21, 2020. Crumpton filed the present motion to strike on May 28, 2020. (Dkt. 36 at1). However, in response to the ongoing COVID-19 pandemic, the Northern District of Illinois issued a series of General Orders extending "all deadlines [in civil cases], whether set by the court or by the Rules of Civil Procedure or Local Rules." *See* Amended General Order 20-0012 dated March 16, 2020 (extending all deadlines by 21 days); Second Amended General Order 20-0012 dated March 30, 2020 (extending all deadlines by an additional 28 days); Third Amended General Order dated April 24, 2020 (extending all deadlines by an additional 28 days).

Even imagining Crumpton's motion to strike was untimely, Rule 12 empowers a court to act on its own to strike insufficient defenses. Fed. R. Civ. P. 12(f)(1). A court acting under Rule 12(f)(1) has the discretion "to consider a motion to strike at any point in a case" when the court's attention "was prompted by an untimely filed motion." *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1399 (7th Cir. 1991). This Court therefore addresses the merits of Crumpton's motion.

B. First Affirmative Defense: Preemption

Preemption, rooted in the Supremacy Clause, recognizes Congress's power to preempt or invalidate state laws through federal legislation. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376–77 (2015). Congress may do so expressly in the statutory language or implicitly through conflict preemption or field preemption. *Id.* Congressional purpose "is the ultimate touchstone in every preemption case" and courts presume state police power has not been preempted. *Medtronic, Inc. v. Lohr*,

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