

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
JAMES WALLEN, ROYCE LADER, RITA	:	
FAHRNER, LEEANN BIDDIX, FRANK	:	
HIGHSMITH, JERRY HILL, HELEN	:	
KASSAMANIAN, and ERNEST BRANIGH,	:	
individually and on behalf of all others similarly	:	
situated,	:	<u>OPINION AND ORDER</u>
	:	
Plaintiffs,	:	21 CV 8624 (VB)
	:	
v.	:	
	:	
CONSUMER REPORTS, INC.,	:	
Defendant.	:	
-----X		

Briccetti, J.:

Plaintiffs James Wallen, Royce Lader, Rita Fahrner, LeeAnn Biddix, Frank Highsmith, Jerry Hill, Helen Kassamanian, and Ernest Branigh bring this putative class action against defendant Consumer Reports, Inc., arising out of defendant’s practice of renting or exchanging data about its subscribers to third parties for profit, including subscribers’ names, titles of publications subscribed to, and home addresses. Plaintiffs claim this practice misappropriates subscribers’ names, identities, or likenesses in violation of the right of publicity statutes of Alabama, California, Hawaii, Indiana, Nevada, Ohio, and Washington (together, the “Misappropriation Statutes”).

Now pending is defendant’s motion to dismiss the first amended complaint (“Amended Complaint” or “Am. Compl.”) under Rule 12(b)(6). (Doc. #28).

For the reasons set forth below, the motion is GRANTED.

The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(d).

BACKGROUND

For the purpose of ruling on the motion to dismiss, the Court accepts as true all well-

pleaded allegations in the Amended Complaint and draws all reasonable inferences in plaintiffs' favor, as summarized below.

Plaintiffs are residents of Alabama, California, Hawaii, Indiana, Nevada, Ohio, and Washington and subscribers to defendant's Consumer Reports magazines. They allege defendant provides information about subscribers, including their names, titles of publications subscribed to, and home addresses, to other companies that aggregate this information with data about the subscribers from other sources, such as sex, age, race, and political party. The aggregated data is then returned to defendant (the "Subscriber Lists"), which defendant sells, licenses, exchanges, or rents to third parties for a "significant" profit. (Am. Compl. ¶¶ 42, 49).

Defendant allegedly does not seek its subscribers' consent before providing their names and identities on the Subscriber Lists; thus, "customers remain unaware their identities are being" disclosed. (Am. Compl. ¶ 47).

DISCUSSION

I. Rule 12(b)(6) Standard of Review

In deciding a Rule 12(b)(6) motion, the Court evaluates the sufficiency of the complaint under the "two-pronged approach" articulated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).¹ First, a plaintiff's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and thus are not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they

¹ Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and alterations.

plausibly give rise to an entitlement to relief.” Ashcroft v. Iqbal, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the complaint’s allegations must meet a standard of “plausibility.” Ashcroft v. Iqbal, 556 U.S. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 556).

“[A] district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes.” Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998). Courts may also take judicial notice of legislative history materials when ruling on motions to dismiss. See, e.g., Quick Cash of Westchester Ave. LLC v. Vill. of Port Chester, 2013 WL 135216, at *5 (S.D.N.Y. Jan. 10, 2013) (bill jackets); Wang v. Pataki, 356 F. Supp. 2d 445, 453 (S.D.N.Y. 2005) (same).

II. Misappropriation Statutory Claims

Defendant argues the alleged disclosure of the Subscriber Lists is not a prohibited commercial use under the Misappropriation Statutes.

The Court agrees.

A. Statutes

Each of the Misappropriation Statutes prohibits certain commercial uses of names or likenesses on or in a product, without consent.

The Alabama statute states:

[A]ny person or entity who uses or causes the use of the indicia of identity of a person, on or in products, goods, merchandise, or services entered into commerce in this state, or for

purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise, or services . . . without consent shall be liable under this article to that person, or to a holder of that person's rights.

Ala. Code § 6-5-772.

The California statute states:

Any person who knowingly uses another's name, . . . or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, . . . shall be liable.

Cal. Civ. Code § 3344.

The Hawaii statute states:

[A]ny person who uses or authorizes the use of a[n]. . . individual's or personality's name, . . . or likeness, on or in goods, merchandise, or services entered into commerce in this State, or for purposes of advertising products, merchandise, goods, or services, . . . without express or implied consent of the owner of the right, has infringed a publicity right under this chapter.

Haw. Rev. Stat. Ann. § 482P-5.

The Indiana statute states: “A person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime . . . without having obtained previous written consent.” Ind. Code § 32-36-1-8(a). Commercial purpose includes “the use of an aspect of a personality's right of publicity as follows: (1) On or in connection with a product, merchandise, goods, services, or commercial activities. (2) For advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities.”

Id. § 32-36-1-2.

The Nevada statute states:

1. There is a right of publicity in the name . . . or likeness of every person. The right endures for a term consisting of the life of the person . . . regardless of whether the person commercially exploits the right during his or her lifetime.

2. Any commercial use by another of the name . . . or likeness of a person requires the written consent of that person.

Nev. Rev. Stat. Ann. § 597.790. Commercial use under the statute encompasses “the use of the name . . . or likeness of a person on or in any product, merchandise or goods or for purposes of advertising, selling or soliciting the purchase of any product, merchandise, goods or service.” Id. § 597.770.

The Ohio statute states: “[A] person shall not use any aspect of an individual’s persona for a commercial purpose . . . [d]uring the individual’s lifetime.” Ohio Rev. Code Ann. § 2741.02. A “persona” is defined as “an individual’s name . . . [or] likeness” if they “have commercial value.” Id. § 2741.01. Commercial purpose is “the use of or reference to an individual’s persona . . . [o]n or in connection with a place, product, merchandise, goods, services.” Id.

The Washington statute states: “Every individual . . . has a property right in the use of his or her name . . . or likeness.” Wash. Rev. Code § 63.60.010. Further, “[a]ny person who uses or authorizes the use of a[n] . . . individual’s . . . name . . . or likeness, on or in goods, merchandise, or products entered into commerce in this state” without consent “has infringed such right.” Id. § 63.60.050.

For the reasons set forth below, plaintiff has not stated a claim for relief under any of the Misappropriation Statutes.

B. Infringing Commercial Use

Defendant advances four reasons why its alleged disclosures are not a proscribed commercial use under the Misappropriation Statutes: (i) the subscribers’ names are not used to sell, endorse, or draw attention to anything; (ii) the subscribers’ names were not used “on or in” a product that is separate or distinct from the names themselves; (iii) selling the Subscriber Lists

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.