SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FIRST STUDENT, INC. CASES	JCCP 4624 COURT'S FINAL RULING AND ORDER RE: STATUTORY INTERPRETATION Hearing Date: January 15, 2020

I. BACKGROUND

On October 17, 2019, the Court ordered the parties to submit briefing on ten legal issues related to the Investigative Consumer Reporting Agencies Act ("ICRAA"). Civ. Code §§ 1786-1786.60. *See* Dkt. – Order After Status Conf., Oct. 17, 2019. These issues include:

(1) Whether actual damages are necessary to recover ICRAA's $10,000 statutory award;

(2) Whether Plaintiffs can recover the $10,000 statutory award per report;

(3) Whether Plaintiffs can recover the $10,000 statutory award from multiple Defendants for the different wrongs arising from the same report (i.e. $10,000 from First for failing to obtain consent to request a report and $10,000 from HireRight for failing to obtain a certification before creating the requested report);

(4) Whether one or more $10,000 statutory awards would violate the due process or excessive fines clauses without proof of actual damages;

(5) Whether the Court may rely on equitable considerations to award less than the $10,000 fixed statutory award;

(6) Whether actual damages are required to obtain punitive damages under ICRAA;

(7) Whether mailed (and cashed) checks that First sent directly to certain Plaintiffs in June and July 2019 constitute settlements of, or otherwise satisfy, their pending claims;

(8) Whether Plaintiffs who failed to opt-out of an earlier Fair Credit Reporting Act class action can nonetheless proceed with their claims here; and

(9) The legal effect of disclosure forms First presented to certain Plaintiffs.

The Court heard argument on January 15, 2020, and took the matter under submission to consider some points raised by Defendants.

II. DISCUSSION

The questions presented are ones of first impression, and most of them involve issues of statutory interpretation. As with all exercises in statutory interpretation, the Court "must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" *Murphy v. Kenneth Cole Prods.*, Inc., 40 Cal. 4th 1094, 1103 (2007) (quoting *Hsu v. Abbara*, 9 Cal. 4th 863, 871 (1995)). Statutes are to be read in context and their "words are to be given their plain and commonsense meaning." *Id.* "These canons generally preclude judicial construction that renders part of the statute 'meaningless' or 'inoperative.'" *Goehring v. Chapman Univ.*, 121 Cal. App. 4th 353, 375 (2004). Courts may only "turn to extrinsic aids to assist in interpretation," *Murphy*, 40 Cal. 4th at 1103, if the statute is ambiguous. Acceptable extrinsic sources include "the ostensible objectives to be achieved by the statute, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction[,] and the statutory scheme of which the statute is a part." *Id.* at 1105. Absent ambiguity, however, the Court end its inquiry by giving effect to the statute's plain language, *id.* at 1103, unless doing "so would

yield an unreasonable or mischievous result." *B.H. v. Cnty. of San Bernardino*, 62 Cal. 4th 168, 189 (2015).

Under the Investigative Consumer Reporting Agencies Act ("ICRAA"), Civ. Code §§ 1786-1786.60, an entity may only procure an investigative consumer report on an employee that is not the subject of an investigation into suspected wrongdoing or misconduct if it: (1) has a permissible purpose, *id.* at § 1786.16(a)(2)(A); (2) "provides a clear and conspicuous disclosure in writing to the [employee] at any time before the report is procured or caused to be made in a document that consists solely of [certain] disclosure[s]," *id.* at § 1786.16(a)(2)(B); and (3) the employee "has authorized in writing the procurement of the report." *Id.* at § 1786.16(a)(2)(C). Relatedly, before an investigative consumer reporting agency may prepare an investigative consumer report it must receive a certification from the requesting employer that the above disclosures were made to the employee. *Id.* at §§ 1786.12(e), 1786.16(a)(4).

ICRAA provides that "[a]n investigative consumer reporting agency or user of information that fails to comply with any requirement under this title with respect to an investigative consumer report is liable to the consumer who is the subject of the report in an amount equal to the sum of all the following: (1) Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, ten thousand dollars ($10,000), whichever sum is greater[, and] (2) [i]n the case of any successful action to enforce any liability under this chapter, the costs of the action together with reasonable attorney's fees as determined by the court." *Id.* at § 1786.50(a)(1)-(2). ICRAA also provides that "[i]f the court determines that the violation was grossly negligent or willful, the court may, in addition, assess, and the consumer may recover, punitive damages." *Id.* at § 1786.50(b). Nonetheless, there is no liability "to a consumer who is the subject of the report where the failure to comply results in a more favorable investigative consumer report than if there had not been a failure to comply." *Id.* at § 1786.50(c).

With the relevant provisions of ICRAA established, the Court address each question presented in turn.

A. Plaintiffs Need Not Prove Actual Damages to Recover ICRAA's $10,000 Statutory Award.

The text of ICRAA plainly provides that plaintiffs are entitled to "[a]ny actual damages sustained by the consumer as a result of the failure or . . . ten thousand dollars ($10,000), whichever sum is greater." *Id.* at § 1786.50(a)(1). The Court finds the statute's text to plainly provide for two independent alternatives (i.e. actual damages, or a statutory award irrespective of any actual damages). Contrary to Defendants' assertion, the phrase "whichever sum is greater" does not imply that both alternatives must necessarily be greater than zero (i.e. that there must be at least a nominal amount of actual damages). Obviously, $10,000 can—and will always be—greater than zero (i.e. no damages). In such instance, the statutory award prevails.

Defendants' second argument is also unpersuasive. Not requiring proof of actual damages to recover the $10,000 award does not automatically convert that statutory award into a penalty instead of compensatory award. Rather, statutory damages are frequently "designed to ensure that the plaintiff will receive at least a minimum amount of compensation, even though there are little or no actual damages sustained." *Los Angeles Cnty. Metro. Transp. Auth. v. Superior Court*, 123 Cal. App. 4th 261, 276 (2004). Ultimately, a statutory award designed to compensate when actual damages may not exist—or may be hard to prove—can sensibly exist alongside a separate punitive damages provision.

Finally, the Court views subsection (c)'s prohibition on damages where a more favorable report is generated to support Plaintiffs' position, not Defendants'. If the Legislature viewed actual damages to be essential to any recovery under ICRAA, then it would not have separately proscribed damages awards in the situation where a consumer is benefitted (i.e. undamaged).

Requiring proof of actual damages as a precondition for recovery of the statutory award would essentially render subsection (c) a nullity. Such a result cannot stand. *See Goehring*, 121 Cal. App. 4th at 375.

At the hearing, Defendants urged the Court to ignore this plain language and read ICRAA *in pari materia* with CCRAA and the FCRA. The Court declines to do so. First, the canon of reading statutes *in pari materia* is ultimately a reliance on extrinsic sources. *See Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt*, 221 Cal. App. 4th 209, 227 (2013) ("The most edifying extrinsic evidence available as to the meaning of the phrase 'competitive bidding,' as it appears in Humboldt Code section 521-6 and Public Resources Code section 40059, consists of other statutes pertaining to the same subject—i.e., statutes in pari materia—or enacted at the same time."). Caselaw is exceedingly clear, however, that such sources may only be turned to in the face of ambiguity. *See, e.g.*, *Murphy*, 40 Cal. 4th at 1103. Second, Defendants do not seek to use this canon of interpretation in its ordinary function, i.e. harmonizing similar words and phrases between statutes. *See People v. Clayburg*, 211 Cal. App. 4th 86, 91 (2012) (invoking *in pari materia* to "harmonize the two sentences of the statute") (citing *People v. Gonzalez*, 43 Cal. 4th 1118, 1127 (2008) (holding that words and provisions in statues relating to the same subject matter must be harmonized to the extent possible)). Rather, Defendants seek to use this canon to inject damages limitations apparent from the plain language of CCRAA and the FCRA that are plainly not present in ICRAA. Thus, the Court declines to invoke the doctrine of *in pari materia* in the discussion here or below, and its inquiry begins and ends with ICRAA's plain language. *See Murphy*, 40 Cal. 4th at 1103.

B. Plaintiffs Can Recover The $10,000 Statutory Award Per Credit Report Run.

ICRAA provides that "[a]n investigative consumer reporting agency or user of information that fails to comply with any requirement under this title with respect to *an* investigative consumer

report is liable to the consumer who is the subject of *the* report . . . ," Civ. Code § 1786.50(a) (emphasis added). The Court finds the plain language to be dispositive here: ICRAA plainly provides that liability accrues for each report by referencing investigative consumer reports in the singular. If the Legislature intended to limit any individual consumer's right to recover against a defendant to his or her actual damages or one statutory award of $10,000, then it would have so provided. It did not.

Moreover, accepting Defendants' interpretation would raise numerous line-drawing issues (on which the Legislature has provided no guidance) and yield potentially absurd results. For example, if a consumer is limited to a single statutory award of $10,000 against any particular defendant, regardless of the number of reports run, is that a lifetime limit, or a per lawsuit limit? If the former, then an investigative consumer reporting agency held liable for the statutory award under ICRAA in one lawsuit would no longer have to worry about complying with ICRAA's technical or procedural requirements (for which actual damages are either nonexistent or extremely difficult to prove) going forward with that particular consumer. Specifically, that investigative consumer reporting agency would no longer have to obtain a certification for that particular consumer ever again. Such a result could hardly be what the Legislature intended when enacting this consumer protection legislation. If the latter, then it would simply incentivize consumers to bring piecemeal litigation on a per report basis, rather than group their claims into a single lawsuit. Ultimately, neither result can stand, and Defendants' have not presented a persuasive alternative reading of section 1786.50(a).

C. Plaintiffs Can Recover the $10,000 Statutory Award from Each Group of Defendants.

Defendants' reliance on *Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377, 385-386 (7th Cir. 2018), is unpersuasive. Unlike the Fair Debt Collections Practices Act at issue in that case, ICRAA does not expressly cap damages per "action." *Cf.* 15 U.S.C. §

1692k(a)(2)(A) ("[I]n the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000 . . . ."). On the contrary, ICRAA provides that "[a]n investigative consumer reporting agency or user of information that fails to comply with any requirement . . . ," Civ. Code § 1786.50(a), under ICRAA is liable to the consumer the greater of his or her actual damages or $10,000. As discussed above, ICRAA imposes different requirements on persons that request investigative consumer reports and the investigative consumer reporting agencies that produce them. *Compare* Civ. Code § 1786.12(e), *with* § 1786.16(a)(4). Here, there is no indication that the Legislature intended a requesting person's violation of ICRAA to immunize (partially or otherwise) the investigative consumer reporting agency from liability for its separate and distinct ICRAA violations, or vice versa.

D. Issuing One or Multiple Statutory Awards of $10,000 Without Proof of Actual Damages Would Not Violate the Excessive Fines Clause, but Any Decision on Whether It Violates the Due Process Clause is Premature.

First, the Court agrees with Plaintiff that the excessive fines clause is only implicated by government imposition and collection of fines and penalties, not by wholly private actions divorced from state interests or control. Indeed, the cases cited by Defendants demonstrate that some state action is required for the excessive fines clause to be implicated. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 340 (1998) (holding that the government's disproportionate confiscation of respondent's entire $357,144 for failing to report it when leaving the country violated the excessive fines clause); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 731 (2005) (holding that $14,826,200 fine resulting from civil enforcement action brought by attorney general could potentially violate excessive fines clause depending on resolution of remaining factual issues). Nonetheless, the due process clause is still potentially implicated by an award here. However, the parties both seem to agree that more information is needed before the

Court could determine this matter. *See* Defs.' Br., 23:8-10 ("At minimum, Plaintiffs must establish the quantum of their harm in order for this Court to make an informed determination as to whether the excessive fines [or due process] clause is violated in this matter."); Pls.' Reply Br., 18:14-15 ("If Defendants wish to challenge any award under ICRAA in this case, they must do so when the amount of that award is known."). Thus, for the Court to assess the constitutionality of an ICRAA award, there must first be an ICRAA award.

E. The Court May Not Rely on Equitable Considerations to Award Less Than the $10,000 Statutory Award.

Unlike the FCRA or other statutes, ICRAA does not expressly permit the Court to award statutory damages within a range. Instead, ICRAA sets a fixed amount of statutory damages ($10,000). As Plaintiffs note, the Legislature is fully capable of writing damages provisions that grant the Court discretion in awarding statutory damages—nevertheless, it chose to omit such discretionary language here. Presumably for a reason. Despite that omission, Defendants contend that the Court has discretion to award less than $10,000 in statutory damages based on *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976 (1992), and Civil Code section 3275. *Lusardi* and section 3275, however, are inapposite here since they relate only to a court's authority to relieve a party from a forfeiture or penalty after they make full compensation to the injured party. *See Lusardi*, 1 Cal. 4th at 997. The statutory award under ICRAA, however, is not best characterized as a penalty. Rather, it more apparently serves a compensatory function for damages not easily proven.

F. Plaintiffs Need Not Prove Actual Damages to Recover Punitive Damages Under ICRAA.

Defendants contend that Plaintiffs must prove actual damages as a prerequisite to recovering punitive damages. Defendants rely on Civil Code section 3294(a), the general punitive damages provision, to support their argument. The Court agrees that punitive damages under

section 3294(a) require proof of actual damages. However, section 3294(a) does not control this case. ICRAA's more specific punitive damages provision does, which provides that "[i]f the court determines that the violation was grossly negligent or willful, the court may, in addition, assess, and the consumer may recover, punitive damages." *Id.* at § 1786.50(b). Nothing in the text of ICRAA indicates that actual damages are a prerequisite to recovery of punitive damages. Nonetheless, the Court agrees with Defendants that any such punitive damages award here would need to be assessed for its constitutionality. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003).

G. The Mailed (and Cashed) Checks Sent by First in June and July 2019 Do Not Constitute a Settlement or Satisfaction and Accord of Plaintiffs' Claims.

Defendants contend that the mailed (and cashed) checks, purporting to settle the claims of this lawsuit with certain Plaintiffs, constitute a permissible settlement under the doctrine of satisfaction and accord, Com. Code § 3311, and the holding of *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796, 798 (2009). Defendants reliance on the doctrine of satisfaction and accord and *Chindarah* is misplaced. In that case, the Court of Appeal merely affirmed a class action defendant's right to engage in pick-off settlements with *putative* class member. *Id.* Moreover, the putative class members there "accepted the offer and signed a settlement agreement, which included a general release." *Id.*

Neither of those facts are present here. First, this is not a class action, and the Plaintiffs who cashed directly mailed checks are not merely putative members of this action. Rather, they are parties to active and ongoing litigation with Defendants. Accordingly, the Court may only "enter judgment pursuant to the terms of the settlement," Civ. Proc. Code § 664.6, "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof," *id.* This leads to the second

major distinction with *Chindarah*: There is no evidence that any Plaintiffs here signed a written settlement agreement. Therefore, the Court has no basis for accepting—much less enforcing—the mailed checks as a settlement of the dispute pending before it.

Defendants nevertheless contend that the more general doctrine of satisfaction and accord, codified in California Uniform Commercial Code section 3311, controls here. The Court disagrees. Defendants do not offer—and the Court is unaware of—any authority holding that California Uniform Commercial Code section 3311 applies to settlements during active litigation. *See, e.g.*, *Woolridge v. J.F.L. Electric, Inc.*, 96 Cal. App. 4th Supp. 52, 55-61 (2002) (finding a satisfaction and accord where insurance company sent check "for full and final settlement" of plaintiff's injuries prior to the commencement of any litigation). Rather, the doctrine of satisfaction and accord is generally an affirmative defense to be raised in later-brought proceedings. *See* Com. Code § 3311(b).

H. Plaintiffs Who Failed to Opt-Out of an earlier Fair Credit Reporting Act Class Action Can Nonetheless Proceed with Some of Their Claims Here.

Civil Code section 1786.52 provides that "[t]he entry of a final judgment against the investigative consumer reporting agency or user of information in an action brought pursuant to the [FCRA] shall be a bar to the maintenance of any action based on the same act or omission which might be brought under this title." Defendants contend that at least six Plaintiffs who failed to opt-out of two earlier FCRA class actions (*Joshaway v. First Student, Inc.* and *Hunter v. First Transit, Inc.*) should be dismissed from the suit here. Plaintiffs respond that "the order granting final approval in the *Joshaway/Hunter* Lawsuits is limited to the time period from October 5, 2007 through August 10, 2010." Pls.' Reply Br., 28:24-25, whereas this lawsuit alleges ICRAA violations that occurred after August 10, 2010. *See, e.g.*, Consolidated Fourth Amended Compl. ¶ 24. Defendants offer no response to Plaintiffs' counter. Therefore, while some Plaintiffs' abilities

to recover (specifically, for violations before August 10, 2010) may be reduced by the earlier settlements, the Court is unable to dismiss those Plaintiffs' claims outright.

I. At This Time, the Court Cannot Determine the Legal Effect of Disclosure Forms First Presented to Certain Plaintiffs.

Plaintiffs have provided the Court with several disclosure forms produced by Defendants in this litigation. *See* Pyle Decl. ¶¶ 6-7, Exs. D-E. Defendants contend that before the legal effect of any disclosures may be determined, it must first investigate and determine which Plaintiffs had investigative consumer reports produced and when. At this stage, the Court finds this informal briefing to be an inadequate vehicle for resolving questions related to the legal effect of disclosures made to certain Plaintiffs.

III. CONCLUSION

For the foregoing reasons, the Court concludes as follows:

(1) Plaintiffs need not prove actual damages to recover ICRAA's $10,000 statutory award;

(2) Plaintiffs can recover the $10,000 statutory award per credit report run;

(3) Plaintiffs can recover the $10,000 statutory award from each category of Defendants for distinct violations ICRAA concerning the same report;

(4) It is premature to determine whether one or more awards of the $10,000 statutory award would violate the due process clause;

(5) The Court may not rely on equitable considerations to reduce the $10,000 statutory award;

(6) Plaintiffs need not prove actual damages to recover punitive damages under ICRAA;

(7) The checks mailed by First do not constitute settlements of, or otherwise satisfy, Plaintiffs' pending claims;

(8) Plaintiffs who failed to opt-out of earlier FCRA class actions may nevertheless have viable claims for reports run after August 10, 2010, that precludes their outright dismissal from this suit;

(9) At this time, the Court cannot determine the legal effect of disclosures provided to certain Plaintiffs.

Dated: February 5, 2020

Daniel J. Buckley
Judge of the Superior Court