IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION	)	MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to CONSUMER Cases

ORDER

Defendants Capital One Financial Corporation, Capital One Bank (USA), N.A., and Capital One, N.A. (collectively, "Capital One") have filed a Motion for Judgment on the Pleadings as to Plaintiffs' Unjust Enrichment and Implied Contract Claims, [Doc. No. 996] (the "Motion" or "Mot."). [1] A hearing was held on the Motion on December 9, 2020, *see* [Doc. No. 1096], following which the Court took it under advisement while the parties conferred regarding possible stipulations pertaining to certain issues raised in the Motion. [2] On December 15, 2020, the parties filed a Stipulation Regarding Plaintiffs' Claim for Breach of Express Contract, *see* [Doc. No. 1098] (the "Stipulation").

[1] The factual background of this case has been amply discussed in the briefs, previous orders, and hearings and will not be repeated here.

[2] Capital One contends that its Motion for Judgment on the Pleadings is directed solely against the unjust enrichment and implied contract claims of the Representative Plaintiffs in the Second Amended Representative Complaint, and that none of those Plaintiffs allege that they applied for but did not receive credit card services and therefore all these Plaintiffs entered into the Card Services Agreement, which includes by incorporation the Privacy Notice. For that reason, Capital One contends that its Motion must be decided solely within that context. The Representative Plaintiffs contend otherwise, but in any event the Representative Complaint constitutes a case management mechanism designed to expedite the disposition of the case. It does not displace the individual complaints that have been filed and consolidated, some which appear to allege that a plaintiff applied for but never received credit card services, and therefore never entered into the Card Service Agreement, yet had their PII accumulated, retained and compromised. As reflected in the Case Management Order, those plaintiffs will have an opportunity to contest the applicability to their complaints of rulings made based on the Representative Complaint. *See* [Doc. No. 3] at 19-20. As a result, in order to resolve definitively in these consolidated cases the issue Capital One has raised, the Court will need to consider the Motion with respect to both those plaintiffs that entered into the Card Services Agreement and those that did not.

Plaintiffs' unjust enrichment and implied contract claims appear to allege in substance that Capital One received and used Plaintiffs' personally identifiable information ("PII") for its own purposes and advantage without Plaintiffs' receiving in return the promised, expected or otherwise required level of protection for that PII. *See* [Doc. No. 971] (the "Second Am. Compl.") ¶ 188 (alleging that Capital One was unjustly enriched by its "knowing failure to employ adequate data security measures, [its] continued maintenance and use of the PII belonging to Plaintiffs and class members without having adequate data security measures, and [its] other conduct facilitating the theft of that PII.").

Plaintiffs have alleged a breach of contract claim based on Capital One's Privacy and Opt-Out Notice (the "Privacy Notice") that Capital One issued in connection with its credit card services. Plaintiffs allege that the Privacy Notice "promises that to 'protect your personal information from unauthorized access and use, [Capital One] use[s] security measures that comply with federal law.'" Second Am. Compl. ¶ 215. While the parties are in agreement that an implied contract or unjust enrichment claim cannot be premised on conduct that is governed by an express contract, and that the Privacy Notice represents an express contract, it appears from the pleadings that there may be disputes between the parties concerning the scope, content and enforceability of that express contract. *See* Stipulation at 1 (stating that "Capital One stipulates that the Privacy Notice contains one or more express contractual provisions covering Capital One's obligations with respect to safeguarding Plaintiffs' Personally Identifiable Information, or PII" but that "[t]he Parties make this stipulation without prejudice to their rights to assert their positions . . . with respect to (i) whether the Privacy Notice is a stand-alone contract, and (ii) the scope and enforceability of the Privacy Notice 's contractual obligations."); *see also* [Doc. No. 1060] at 7 (stating Capital One's position that "the parties may dispute

whether certain *other* language in the Privacy Notice is sufficiently definite to be contractually enforceable" and that there may be a dispute concerning "whether certain *other* statements contained in Capital One's Privacy Statement or on its website are *also* part of Plaintiffs' express contract with Capital One.") (emphasis in original). As a result, after viewing the pleadings most favorably to the Plaintiffs, as required, the Court cannot determine as a matter of law that the Privacy Notice constitutes an enforceable express contract that sufficiently covers the same subject matter as the Plaintiffs' unjust enrichment and implied contract claims, such that there are no circumstances under which Plaintiffs' implied contract and unjust enrichment claims might provide the basis for a cognizable claim. Whether such claims may be pursued must be assessed based on a more fulsome record either through summary judgment or trial.

Accordingly, for the above reasons, it is hereby

ORDERED that Defendant Capital One's Motion for Judgment on the Pleadings as to Plaintiffs' Unjust Enrichment and Implied Contract Claims [Doc. No. 996] be, and the same hereby is, **DENIED**.

The Clerk is directed to docket this Order in the lead case (1:19md2915), as required per PTO-1.

Anthony J. Trenga
United States District Judge

Alexandria, Virginia
May 7, 2021