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28UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIALINDA KLEINER, et al.,
Plaintiffs,
v.
EARTHLINK, INC.,
Defendant.

Case No. 2:16-cv-1609-WHO

**ORDER DENYING MOTION TO
DISMISS**

Re: Dkt. No. 9

INTRODUCTION

Plaintiff Linda Kleiner alleges that defendant EarthLink, Inc., debited her account on a recurring basis for internet services without obtaining her authorization or providing her with a copy of such authorization as required by the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693 *et seq.*, and its applicable regulations. EarthLink brings a factual challenge to subject matter jurisdiction, arguing that she lacks standing because the statutory rights at issue belong to her son, Dennis Kleiner. However, Linda Kleiner has produced a bank statement showing a debit by EarthLink. She declares that she is the sole owner of that bank account. She has met her burden under the EFTA to plausibly allege that she is the relevant consumer whose authorization was required before EarthLink transferred money from her personal bank account. The motion to dismiss for lack of standing is DENIED.

BACKGROUND**I. PLAINTIFF’S ALLEGATIONS & DECLARATION**

Around December 2015, Linda Kleiner called EarthLink to purchase internet services. Complaint (“Compl.”) (Dkt. No. 1) ¶ 9. During this call, she learned that EarthLink’s “services were a ‘dial-up’ type internet” and told EarthLink that she “had no interest in their services.” Declaration of Linda Kleiner (Dkt. No. 29-1) ¶ 5.

1 Thereafter, she began noticing recurring charges automatically deducted from her personal
2 bank account by EarthLink. Compl. ¶ 11. EarthLink charged her bank account \$14.95 a total of
3 three times. Kleiner Decl. ¶ 6; Ex. A (copy of bank statement). This bank account is Linda
4 Kleiner’s alone. Kleiner Decl. ¶ 7. She alleges that she never authorized EarthLink to deduct
5 money from her bank account on a recurring basis. Compl. ¶ 13. EarthLink did not provide and
6 she did not execute “any written or electronic writing memorializing or authorizing the recurring
7 or automatic payments.” *Id.* ¶ 14. She did not provide EarthLink with “a written or an electronic
8 signature authorizing the recurring or automatic payments.” *Id.* ¶ 15.

9 Linda Kleiner brings this suit on behalf of herself and all others similarly situated against
10 EarthLink for violation of the EFTA, 15 U.S.C. § 1693e(a), and section 205.10(b) of Regulation
11 E, 12 C.F.R. § 205.210(b). *Id.* ¶¶ 16, 45. The complaint requests statutory damages of \$1,000 for
12 each class member and an injunction to stop EarthLink’s conduct in violation of the EFTA. *Id.* ¶¶
13 27, 48.

14 **II. EARTHLINK’S FACTUAL CHALLENGE**

15 EarthLink submitted a declaration by Jennifer Spindel, the Senior Vice President and
16 Managing Director of Consumer Products at EarthLink, who described that when a person
17 purchases an EarthLink product or service by contacting its call center, the call center
18 representative enters the person’s name, contact information, address, and payment information
19 into a database. Declaration of Jennifer Spindel (Dkt. No. 9-2) ¶ 1, 4. The database then creates a
20 customer account in MIDAS, EarthLink’s billing system. *Id.* Call center representatives have the
21 ability to enter notes about customer interactions in Vantive, an interactive database. *Id.* They can
22 also pull and reference customers’ accounts in MIDAS and Vantive, as well as update the account
23 information to reflect additional communications. *Id.*

24 EarthLink’s records in Vantive and MIDAS show that Dennis Kleiner called EarthLink on
25 November 10, 2015, to purchase internet service. *Id.* ¶ 5. Dennis Kleiner provided a home
26 address in Rocklin, California, home and work phone numbers, an email address, and Visa card
27 payment information. *Id.* ¶ 6; *see also* Spindel Decl., Exs. A & B (copies of records). That day,
28 EarthLink opened an account for Dennis Kleiner and provided him with an EarthLink email

1 address. Spindel Decl. ¶ 7. The account details that the service cost \$14.95 per month. Spindel
2 Decl., Ex. A. EarthLink sent information about Dennis Kleiner’s account to both his personal and
3 EarthLink email addresses, and by mail to his street address. Spindel Decl. ¶ 7. EarthLink’s
4 records reflect that Dennis Kleiner was the owner of this account at all times. *Id.*

5 On December 22, 2015, the Vantive records indicate that Linda Kleiner called EarthLink
6 “to complain that she was not aware of having an account with EarthLink.” *Id.* ¶ 8. Although no
7 account was associated with Linda Kleiner’s name, she provided information that matched Dennis
8 Kleiner’s account information.¹ *Id.* The call center representative then canceled Dennis Kleiner’s
9 account. *Id.*

10 On July 21, 2016, as reflected in the Vantive records, Linda Kleiner called EarthLink
11 again. *Id.* ¶ 9. She asserted that EarthLink set up an account in December 2015 without her
12 permission and provided the case number for this lawsuit. *Id.* The call center representative could
13 not locate an account under Linda Kleiner’s name during the call, and Linda Kleiner hung up
14 before the call center representative could locate any relevant accounts. *Id.* After the
15 conversation, the call center representative conducted an Internet search for “Linda Kleiner” and
16 found an individual who resided in Roseville, California. *Id.* ¶ 10. Based on that information, the
17 call center representative searched EarthLink’s records for customers named “Kleiner” with
18 addresses near Roseville and found Dennis Kleiner’s account. *Id.*

19 EarthLink has no record of an account opened by Linda Kleiner or of any other
20 communications with her. *Id.* ¶ 11.

21 **III. PROCEDURAL HISTORY**

22 Although EarthLink filed its motion with Spindel’s declaration, Kleiner’s opposition did
23 not include any evidence. At oral argument, plaintiff’s counsel indicated that Kleiner had
24 evidence to rebut EarthLink’s motion. Rather than dismiss the case and allow Kleiner the ability
25 to amend, I directed that she submit that evidence after the hearing, which she did. Declaration of
26

27 ¹ Neither party has provided evidence of whether there is any relation between Linda Kleiner and
28 Dennis Kleiner. However, plaintiff’s counsel indicated during oral argument that Dennis Kleiner
is plaintiff’s son.

1 Linda Kleiner (Dkt. No. 29-1). EarthLink responded. Response to Plaintiff’s Supplemental
2 Opposition (“Supp. Reply”) (Dkt. No. 30).

3 **LEGAL STANDARD**

4 A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(1) is a
5 challenge to the court’s subject matter jurisdiction. “Federal courts are courts of limited
6 jurisdiction,” and it is “presumed that a cause lies outside this limited jurisdiction.” *Kokkonen v.*
7 *Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the
8 federal court bears the burden of establishing that the court has the requisite subject matter
9 jurisdiction to grant the relief requested. *Id.* “A suit brought by a plaintiff without Article III
10 standing is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject
11 matter jurisdiction over the suit.” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

12 A challenge pursuant to Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d
13 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the
14 allegations pled in the complaint. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). “[T]he
15 challenger asserts that the allegations in the complaint are insufficient on their face to invoke
16 federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To
17 resolve this challenge, the court assumes that the allegations in the complaint are true and draws
18 all reasonable inference in favor of the party opposing dismissal. *Wolfe*, 392 F.3d at 362.

19 “By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by
20 themselves, would otherwise invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039. To resolve
21 this challenge, the court “need not presume the truthfulness of the plaintiff’s allegations.” *Id.*
22 (citation omitted). Instead, the court “may review evidence beyond the complaint without
23 converting the motion to dismiss into a motion for summary judgment.” *Id.* (citations omitted).
24 “In response to a factual attack, Plaintiffs must present affidavits or any other evidence necessary
25 to satisfy their burden of establishing that the court, in fact, possesses subject matter jurisdiction.”
26 *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016) (internal citation and quotation marks
27 omitted).

28

1 **DISCUSSION**

2 “Standing doctrine assures that the litigant is entitled to have the court decide the merits of
3 the dispute or of particular issues by demanding that he or she possess a direct stake in the
4 outcome of the case.” *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1114 (9th Cir. 2014)
5 (internal citations and quotation marks omitted). To demonstrate Article III standing, “a plaintiff
6 must show: (1) [she] has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b)
7 actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
8 challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the
9 injury will be redressed by a favorable decision.” *Friends of the Earth, Inc., v. Laidlaw Envtl.*
10 *Servs., Inc.*, 528 U.S. 167, 180–81 (2000).

11 Under the EFTA, “[a] preauthorized electronic fund transfer from a consumer’s account
12 may be authorized by the consumer only in writing, and a copy of such authorization shall be
13 provided to the consumer when made.” 15 USC § 1693e. EarthLink argues that any violation of
14 statutory rights under the EFTA belong to Dennis Kleiner, not his mother, and therefore, plaintiff
15 cannot establish any of the three standing requirements. *See Valley Forge Christian Coll. v.*
16 *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (A “plaintiff
17 generally must assert his own legal rights and interests, and cannot rest his claim to relief on the
18 legal rights or interests of third parties.”).

19 EarthLink’s evidence showed that Dennis Kleiner opened an EarthLink account and
20 provided Visa card information for payment. Spindel Decl. ¶¶ 5-7. When Linda Kleiner called
21 EarthLink to stop charges, she provided information matching Dennis Kleiner’s account. *Id.* ¶ 8.

22 In her initial opposition, Linda Kleiner stated that she disputes EarthLink’s assertions and
23 declarations “in their entirety,” but she failed to produce any evidence that it was her bank account
24 that EarthLink debited such that *her* authorization—not Dennis Kleiner’s—was required. *Oppo.*
25 at 2. There was no evidence regarding her relation, if any, to Dennis Kleiner, or whether he had
26 the authority to authorize the relevant transfer.

27 But on her second try, Linda Kleiner succeeds in establishing Article III standing. She
28 produced a bank statement showing a debit by EarthLink for \$14.95 on December 7, 2015.

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1 Kleiner Decl., Ex. A. She declares that EarthLink made a total of three charges. Kleiner Decl. ¶
2 6. And the debited bank account belonged to her alone. *Id.* ¶ 7. Because she has shown a transfer
3 from her bank account, it was her authorization that was required under the EFTA. The statutory
4 rights at issue belong to Linda Kleiner.

5 EarthLink’s argument to the contrary is unconvincing. EarthLink says that, even though
6 plaintiff owns the debited bank account, the statutory rights at issue belong to Dennis Kleiner
7 because he apparently initiated the transaction. Supp. Reply at 3. In support of this argument,
8 EarthLink points to the Official Staff Interpretation of Section 205.3(a) of Regulation E, which
9 provides:

10 The requirements of the regulation apply only to an account for
11 which an agreement for EFT services to or from the account has
been entered into between:

12 [. . .]

13 The consumer and a third party (for preauthorized debits or credits,
14 for example), when the account-holding institution has received
notice of the agreement and the fund transfers have begun.

15 12 C.F.R. § Pt. 205, Supp. I. EarthLink also notes that Congress provided that the EFTA “sets
16 minimum safeguards for consumers who arrange for regular payments . . . to be deducted
17 automatically from their bank accounts.” S. REP. NO. 95-915, at 13 (1978) *reprinted in*
18 U.S.C.C.A.N. 9403, 9415.

19 EarthLink’s arguments ignore the central issue that the statutory rights under the EFTA’s
20 section regulating preauthorized transfers belong to the consumer whose bank account is debited.
21 *See* 15 U.S.C. §§ 1693e, 1693m. Here, that person is Linda Kleiner. Initiation of the transaction
22 by a third party may give rise to an affirmative defense for EarthLink. But for purposes of
23 establishing standing to bring this lawsuit, EarthLink debited a bank account belonging solely to
24 Linda Kleiner. It is, therefore, her statutory rights at issue.

25 Linda Kleiner adequately established all three elements of standing. First, I need not
26 decide whether a statutory violation is sufficient to establish an injury because plaintiff states an
27 economic injury of \$14.95 transferred three times from her bank account. Kleiner Decl., Ex. A.
28 Second, she alleges that EarthLink caused this harm by debiting her account without her

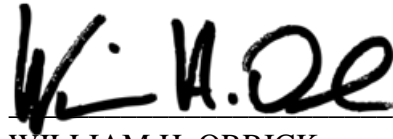
1 authorization. Plaintiff's bank statement shows her injury is traceable to EarthLink. Finally, as
2 she requests statutory damages and injunctive relief, her injury will be redressed through a
3 favorable determination in this suit.

4 **CONCLUSION**

5 Kleiner's supplemental opposition and declaration establish that she is the relevant
6 consumer for this EFTA claim. EarthLink's motion to dismiss under Rule 12(b)(1) for lack of
7 standing is DENIED.²

8 **IT IS SO ORDERED.**

9 Dated: January 20, 2017

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11 WILLIAM H. ORRICK
12 United States District Judge

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² This Order, obviously, makes no determination regarding the merits of plaintiff's claim.