

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PATRICK A. BURROWS, individually,
and on behalf of all others similarly situated,

Plaintiff,

v.

PURCHASING POWER, LLC, a foreign
limited liability corporation, and WINN-
DIXIE STORES, INC., a Florida
corporation,

Defendants.

CASE NO:

COMPLAINT - CLASS ACTION

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff, PATRICK A. BURROWS, individually and on behalf of all persons similarly situated (the "Class" or "Class Members"), by and through his attorneys, brings this Class action Complaint against Defendants, PURCHASING POWER, LLC, a foreign limited liability corporation, and WINN-DIXIE STORES, INC., a Florida corporation, and alleges:

NATURE OF THE ACTION

1. Pursuant to Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3), Plaintiff brings this consumer Class action lawsuit against the Defendants, Purchasing Power, LLC and Winn-Dixie Stores, Inc. for their failure to adequately safeguard and secure the financial and other personally identifiable information including their names, addresses, dates of birth, salaries, and social security numbers (collectively "Personally Identifiable Information" or "PII") of Plaintiff and Class Members.

2. The present case stems from the unauthorized access of Purchasing Power's computer storage systems. In or on the fall of 2011, on an exact date known by Defendants,

Defendants learned that unauthorized persons had accessed and obtained PII of Plaintiff and Class Members contained on Purchasing Power's computer storage systems.

3. Despite their duty to expeditiously notify individuals that their PII may have been compromised, Defendants kept their knowledge of the Data Breach secret from the Plaintiff and Class Members until sending Plaintiff and Class Members a letter on January 27, 2012.

4. As a result of Defendants' failure to adequately protect and secure Plaintiff's and Class Members' PII, unauthorized persons gained access to and obtained PII belonging to Plaintiff and Class Members. Upon information and belief, these unauthorized persons gained access to Plaintiff's and Class Members' PII for the purpose of stealing it and using it for improper purposes, including the theft of the identity of Plaintiff and Class Members for the filing of false tax returns.

5. Defendants' failure to maintain reasonable and adequate procedures to protect and secure Plaintiff's and Class Members' PII, and Defendants' failure to provide Plaintiff and Class Members with timely information regarding the unauthorized access to their PII, has resulted in Plaintiff and Class Members being placed at grave risk of identity theft and other possible fraud and abuse.

6. Plaintiff and Class Members have suffered irreversible damage and will continue to suffer from the misuse of their PII. As a proximate result of the unauthorized access, thousands of consumers, including Plaintiff and Class Members, have had their PII compromised, their privacy invaded, have incurred or will incur out-of-pocket costs and have otherwise suffered economic damages. The protection through the issuance of an injunction against continued and future unauthorized intrusions and access is necessary to safeguard the PII of Plaintiff and Class Members.

7. Plaintiff expressly reserves the right to supplement this Complaint as other information relevant to this action becomes available.

PARTIES, JURISDICTION AND VENUE

8. Plaintiff, Patrick A. Burrows, is an individual residing in Miami-Dade County, Florida.

9. Defendant, Purchasing Power, LLC, ("Purchasing Power") is a Georgia Limited Liability Company, having its principal place of business in Atlanta, Fulton County, Georgia. Purchasing Power, LLC conducts substantial and not isolated business throughout the state of Florida. Purchasing Power conducts business in this state and provides services in this district almost exclusively through the Internet. Purchasing Power is subject to personal jurisdiction in this district.

10. Defendant, Winn-Dixie Stores, Inc. ("Winn-Dixie") is a corporation organized under the laws of Florida, and is headquartered in Jacksonville, Florida. Winn-Dixie operates a chain of food markets throughout the state of Florida, including approximately 99 Winn-Dixie stores in this district, as well as a distribution center within this district. Winn-Dixie resides in and is subject to personal jurisdiction in this district.

11. Subject matter jurisdiction exists in this Court under 28 U.S.C. § 1331 because this action arises, in part, under Federal law. This Court also has supplemental subject matter jurisdiction over the state law allegations raised in this Complaint as provided by 28 U.S.C. § 1367(a).

12. In addition, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because this is a Class action lawsuit in which the amount in controversy exceeds \$5,000,000, exclusive of interests and costs, and Plaintiff and other Members of the putative Class are citizens of states other than the state of Georgia, the state in which the Defendant Purchasing Power is a citizen.

13. Venue is proper in this judicial district under 28 U.S.C. §1391(a)(2), (b) and (c) because, as alleged herein, Defendants conduct and transact substantial business in this judicial district, a substantial portion of the events and conduct giving rise to the violations complained of in

this action occurred in this judicial district, Defendants conduct business with consumers in this judicial district, and because at least one Defendant resides in this judicial district.

FACTUAL ALLEGATIONS

14. Plaintiff and Class Members are residents of Florida.

15. On information and belief, Winn-Dixie and Purchasing Power agreed to provide an employee benefit program for the alleged benefit of Winn-Dixie employees. Apparently, pursuant to their arrangement, Winn-Dixie either transferred the PII of Plaintiff and Class Members to Purchasing Power, or Winn-Dixie allowed Purchasing Power to access all of the PII of Plaintiff and Class Members.

16. Winn-Dixie and Purchasing Power maintain computerized data on their respective systems that includes Plaintiff's and Class Members' personal information.

17. On January 27, 2012 Winn-Dixie notified Plaintiff and Class Members that "a Purchasing Power employee had inappropriately accessed the personal data or PII (name, address, date of birth, social security number, and salary) of Winn-Dixie team members, whether they participated in the Purchasing Power program or not."

18. Winn-Dixie acknowledged also that it had become aware of the theft of the PII of Plaintiff and Class Members in October 2011. Surprisingly, Winn-Dixie did not explain its delay in notifying Plaintiff and Class Members of their theft of PII and this breach of security. Despite its duty to do so, Purchasing Power, to this date, has not notified Plaintiff or Class Members that this Data Breach and data theft has occurred.

19. Without the consent or knowledge of Plaintiff and Class Members, Winn-Dixie either enabled Purchasing Power to access or it transferred to Purchasing Power the PII of each Winn-Dixie employee (which includes Plaintiff and Class Members). To justify the transfer of this information, Winn-Dixie claimed that it did so "[a]s part of our ongoing initiatives to offer the best and most

flexible benefits to our team members we commonly seek out innovative programs offered by third-party providers. In recent years, one of these benefits has been the 'Purchasing Power' program, which offers Winn-Dixie team members the ability to pay for new computers, appliances, and other items via automatic payroll reductions." Presently, it is not known whether any economic benefit or incentives were given to Winn-Dixie by Purchasing Power in exchange for this information.

20. Purchasing Power is a for-profit business which touts itself on its website as offering one of the country's premier purchase programs for employees. Purchasing Power claims that it "gives employees the opportunity to purchase the latest name brand products like computers, electronics, home appliances, and furniture through payroll reductions, when they would prefer not to use cash or credit." Supposedly, goods purchased by employees of Winn-Dixie could be paid through deductions from the payroll received from Winn-Dixie over a period of time. Purchasing Power claims that employees of participating companies can purchase goods without a credit check and are preapproved.

INDIVIDUAL PLAINTIFF'S ALLEGATIONS

21. Plaintiff, Patrick A. Burrows, was an employee of Winn-Dixie. Winn-Dixie, without his knowledge and consent, intentionally divulged or made available to Purchasing Power his PII, which materially compromised the security and confidentiality of his PII.

22. Based on the timing of the theft of his PII, Mr. Burrows believes that his PII was compromised by Defendants through their misconduct outlined in this Complaint and that a person unknown to Plaintiff used his PII to file a federal income tax return seeking a refund of money rightfully owed to him by the United States government. When Plaintiff filed his own tax return, he was informed that someone else had already filed a tax return on his behalf. As a result, Plaintiff is currently unable to obtain the tax refund lawfully due to him.

23. Mr. Burrows is particularly disturbed by reports that Defendants knew about the breach for a significant amount of time prior to making any information about the breach known to Winn-Dixie employees and that to date Defendants have not provided him with notification of specific information regarding the breach.

24. As a result of Defendants' failure to maintain reasonable and adequate procedures to protect and secure Plaintiff's PII and Defendants' failure to provide Plaintiff with timely information regarding the unauthorized access to his PII, Plaintiff has suffered damages, including but not limited to the lost monetary value of his PII, out-of-pocket expenses, the inability to obtain an income tax refund and interest on that refund, and the loss of his privacy rights.

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action on his own behalf and on behalf of all others similarly situated as permitted by Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3). While the exact number of Class Members is unknown at this time, Plaintiff is informed and believes there are at least thousands in the proposed Class. The proposed Class consists of:

All persons throughout the state of Florida which were employees of Winn-Dixie and who had their PII transferred by Winn-Dixie to Purchasing Power, or where Purchasing Power acquired the PII of Plaintiff and Class Members from Winn-Dixie.

Excluded from the Class are Defendants and any entity in which any of the Defendants have a controlling interest, and their legal representatives, officers, directors, assignees and successors. Also excluded from the Class is any judge to whom this action is assigned, together with any relative of such judge, and the spouse of any such persons.

26. The Class is so numerous that joinder of all Members is impracticable.

27. The common questions of law and fact among all Class Members predominate over any issues affecting individual Class Members and include the following:

- a. Whether Defendants failed to implement and maintain commercially reasonable procedures to ensure the security of consumers' PII;
- b. Whether Defendants failed to adequately secure PII stored in its processing system;
- c. Whether Defendants took reasonable measures to determine the extent of the Data Breach;
- d. Whether Defendants acted negligently in failing to implement and maintain commercially reasonable procedures to secure Plaintiff's and Class Members' PII;
- e. Whether Defendants acted negligently in delaying or failing to inform Plaintiff and Class Members of the Data Breach;
- f. Whether Defendants' conduct constitutes negligence;
- g. Whether Defendants' conduct violated the Federal Stored Communications Act;
- h. Whether Defendants' conduct was unfair, deceptive, and/or unconscionable.
- i. Whether Plaintiff and Class Members are entitled to injunctive and declaratory relief;
- j. Whether Plaintiff and the Class Members have sustained monetary loss and the proper measure of that loss; and
- k. Whether Plaintiff and the Class Members have sustained consequential loss, and, if so, to what measure.

28. Plaintiff will fairly and adequately protect the interests of the Class.

29. Plaintiff's claims are typical of those of other Class Members', as there are no material differences in the facts and law underlying their claims and Plaintiff's prosecution of their claims will advance the claims of all Class Members.

30. Plaintiff has retained competent Counsel experienced in the prosecution of this type of Class litigation.

31. Class treatment of the claims set forth in this Complaint is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation would make it impracticable or impossible for the proposed Class Members to prosecute their claims individually. Absent a Class action, a multiplicity of individual lawsuits would be required to address the claims between the Class Members and the Defendants so that inconsistent treatment and adjudication of the claims would likely result.

32. The litigation and trial of Plaintiff's claims are manageable. Defendants' uniform conduct, the consistent provisions of the relevant laws, and the readily ascertainable identities of many Class Members demonstrates that there would be no significant manageability problems with prosecuting this lawsuit as a Class action.

33. Adequate notice can be given to Class Members directly using information maintained in Defendants' records or through publication.

34. Unless a Class-wide injunction is issued, Defendants may fail to properly secure the PII of Plaintiff and Class Members, may continue to refuse to provide proper notification to Plaintiff and Class Members regarding the scope of the Data Breach, and may continue to act unlawfully as set forth in this Complaint.

35. Defendants have acted or refused to act on grounds that apply generally to the Class, making final injunctive and declaratory relief appropriate to the Class as a whole.

36. Defendants' acts and omissions are the direct and proximate cause of damage described more fully in the succeeding paragraphs of this Complaint.

COUNT I

Negligence—As To Both Defendants

37. Plaintiff repeats and fully incorporates the allegations in paragraphs 1 through 36 above as if fully set forth in this Count.

38. Upon accepting and storing Plaintiff's and Class Members' PII in their respective computer database systems, Defendants undertook and had a duty to exercise reasonable care to secure and safeguard that information and to utilize commercially reasonable methods to do so.

39. Through their acts and omissions described herein, including their failure to provide adequate security and their failure to protect Plaintiff's and Class Members' PII from being foreseeably captured, accessed, disseminated, stolen and misused by third-parties under Defendants' control, Defendants unlawfully breached their duty to use reasonable care to protect and secure Plaintiff's and Class Members' PII within their possession or control.

40. Further, through its failure to provide timely and clear notification of the Data Breach to consumers, Defendants prevented Plaintiff and Class Members from taking meaningful, proactive steps to secure their financial data and bank accounts. Defendants unlawfully breached their duty to use reasonable care to protect and secure Plaintiff's and Class Members' PII within their possession of control.

41. Upon information and belief, the PII of Plaintiff and Class Members was improperly and inadequately safeguarded in violation of, *inter alia*, federal and industry rules and regulations at the time of the unauthorized access.

42. Defendants knew or should have known that their computer databases and network for processing Plaintiff's and Class Members' PII and related information had security vulnerabilities. Defendants were negligent in light of those vulnerabilities and the sensitivity of the data.

43. Defendants' failure to take proper security measures to protect Plaintiff's and Class Members' sensitive PII as described in this Complaint, created conditions conducive to a foreseeable

intervening criminal act, namely the unauthorized access by third parties to Plaintiff's and Class Members' PII stored on Defendants' computer systems.

44. Defendants failed to take proper security measures to protect Plaintiff's and Class Members' sensitive PII. Defendants' conduct was grossly negligent and departed from all reasonable standards of care, including, but not limited to encryption of PII stored on their computers; limiting access and disclosure of PII; employing industry standard file permissions to secure PII; and negligently supervising employees having access to PII.

45. Defendants breached their duty to Plaintiff and Class Members by failing to adequately protect their databases from a reasonably foreseeable breach, failing to utilize appropriate encryption techniques, and failing to provide Plaintiff and Class Members with prompt and sufficient notice that their sensitive PII had been compromised.

46. Florida law imposes an affirmative duty on Defendants to timely disclose the unauthorized access and theft of the PII to Plaintiff and the Class so that Plaintiff and Class Members could take appropriate measures to mitigate damages, protect against adverse consequences, and thwart future misuse of their PII.

47. Defendants breached their duty to notify Plaintiff and Class Members of the unauthorized access by waiting several weeks after learning of the breach to notify Plaintiff and Class Members and then by failing to provide Plaintiff and Class Members any information regarding the breach until other press and internet sites first began reporting on the breach. To date, Defendants have not provided sufficient information to Plaintiff and Class Members regarding the extent of the unauthorized access and continues to breach its disclosure obligations to Plaintiff and the Class.

48. Neither Plaintiff nor the other Class Members contributed to the Data Breach described in this Complaint or to the unauthorized access of their sensitive PII.

49. As a direct and proximate cause of Defendants' conduct, Plaintiff and the Class suffered damages including, but not limited to monetary loss for the use of their PII and identity theft; loss of privacy; and other economic damages.

COUNT II

Violation of the Federal Stored Communications Act 18 U.S.C. § 2702—As to Both Defendants

50. Plaintiff repeats and fully incorporates the allegations in paragraphs 1 through 45 above as if fully set forth in this Count.

51. The Stored Communications Act ("SCA") provides consumers with redress if a company mishandles their electronically stored information. The SCA was designed, in part, to protect individuals' privacy interests in personal and proprietary information.

52. Section 2702(a)(1) of the SCA provides "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1).

53. The SCA defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15).

54. Through their computer equipment, Defendants provide an "electronic communication service to the public" within the meaning of the SCA.

55. By failing to take commercially reasonable steps to safeguard Plaintiff's and Class Members' sensitive PII while in electronic storage, Defendants have allowed unauthorized access to their processing system and knowingly divulged customer credit and debit account information.

56. Section 2702(a)(2)(A) of the SCA provides "a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service on behalf of, and received by

means of electronic transmission from (or created by means of computer processing or communications received by means of electronic transmission from), a subscriber or customer of such service.” 18 U.S.C. § 2702(a)(2)(A).

57. The SCA defines “remote computing service” as “the provision to the public of computer storage or processing services by means of an electronic communications system.” 18 U.S.C. § 2711(2).

58. The SCA defines “electronic communications system” as “any wire, radio, electromagnetic, photo-optical or photo electronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.” 18 U.S.C. § 2510(14).

59. Defendants store personal and financial information on behalf of consumers and utilize such information to process their respective services on behalf of consumers.

60. By failing to take commercially reasonable steps to safeguard sensitive consumer financial data and PII and allowing their respective computer systems to be breached, Defendants knowingly divulged PII, and which allowed unauthorized persons to access and use their PII for improper purposes.

61. Upon learning that its respective servers and computer storage systems had been intruded upon and information had been obtained and accessed by third-parties, Defendants failed to inform Plaintiff and the Class of the Data Breach and continued to knowingly divulge PII to third-parties.

62. As a result of Defendants’ conduct described in this Complaint and their violations of the SCA, Plaintiff and Class Members have suffered injuries described herein including, but not limited to, lost money and the costs associated with the need for vigilant credit monitoring to protect against additional identity theft, Plaintiff and the Class seek judgment in their favor against

Defendants awarding them the maximum statutory damages available under 18 U.S.C. § 2707, including punitive damages for willful or intentional violations.

COUNT III

Violations of Florida's Unfair and Deceptive Trade Practices Act—As to Both Defendants

63. Plaintiff repeats and fully incorporates the allegations in paragraphs 1 through 45 above as if fully set forth in this Count.

64. The Florida Unfair and Deceptive Trade Practices Act (hereinafter "FFUDTPA") is expressly intended to protect "persons" from potentially confusing or deceptive trade practices.

65. Defendants are a "person" within the meaning of the FUDTPA and, at all pertinent times, were subject to the requirements and proscriptions of the FUDTPA with respect to all of their business and trade practices described herein.

66. Plaintiff and Class Members are "persons" "likely to be damaged" by Defendants' ongoing deceptive trade practices.

67. Defendants' unlawful conduct as described in this Complaint, was directed, and emanated from Defendants' headquarters to the detriment of Plaintiff and Class Members in Florida and throughout the United States.

68. Defendants violated the FUDTPA by failing to properly implement adequate, commercially reasonable security measures to protect consumers' sensitive PII.

69. Defendants also violated the FUDTPA by failing to immediately notify affected Plaintiff and Class Members of the nature and extent of the Data Breach.

70. Defendants represent their services as a particular standard and quality, which allows them to provide a safe and secure environment for the transmission of consumers' financial information. Contrary to this representation, Defendants failed to properly implement adequate,

commercially reasonable security measures to protect Plaintiff's and Class Members' sensitive PII, and to protect against the loss and misuse of this information.

71. Plaintiff and Class Members have suffered ascertainable losses as a direct result of Defendants' employment of unconscionable acts or practices, and unfair or deceptive acts or practices.

72. Pursuant to Florida's Unfair and Deceptive Trade Practices Act, Plaintiff and the Class are entitled to preliminary and permanent injunctive relief without proof of monetary damage, loss of profits, or intent to deceive. Plaintiff and the Class seek equitable relief and to enjoin Defendants on the terms that the Court considers appropriate.

73. Defendants' conduct caused and continues to cause substantial injury to Plaintiff and Class Members. Unless preliminary and permanent injunctive relief is granted, Plaintiff and the Class will suffer harm, Plaintiff and the Class do not have an adequate remedy at law, and the balance of the equities weighs in favor of Plaintiff and the Class.

74. At all material times, Defendants' deceptive trade practices were willful within the meaning of the FUDTPA and, accordingly, Plaintiff and the Class are entitled to an award of attorneys' fees, costs and other recoverable expenses of litigation.

COUNT IV

Invasion of Right to Privacy—As to Both Defendants

75. Plaintiff repeats and fully incorporates the allegations in Paragraphs 1 through 45 above as if fully set fresh in this Count.

76. Plaintiff and Class Members had a legitimate expectation of privacy to their PII, and were entitled to the protection of this information against commercial exploitation and against disclosure to others of whom they had not authorized.

77. In addition to a common right, the Florida Constitution Art. 1, § 23 also protects the financial information of Plaintiff and Class Members. Defendants violated the privacy rights of Plaintiff and consumers, by failing to protect the PII of Plaintiff and Class Members as particularly alleged in paragraphs 1 through 6 and 14 through 16. Plaintiff and Class Members have suffered damage and will continue to be exposed to usage as a result of Defendants' conduct and failures.

RELIEF SOUGHT

FOR ALL THESE REASONS, Plaintiff, Patrick A. Burrows, individually and on behalf of all others similarly situated, seeks relief as more fully set forth in this Complaint as follows:

- a. For an order certifying that the action may be maintained as a Class action, under Rule 23, Federal Rules of Civil Procedure and certifying Plaintiff, Patrick A. Burrows, as Class Representative, and designating his counsel as Counsel for the Class;
- b. Finding that Defendants breached their duty to safeguard and protect Plaintiff's and Class Members' PII processed or stored on Defendants' computer network;
- c. For an award of equitable relief as follows:
 - i. Requiring Defendants to adequately safeguard Plaintiff's and Class Members' PII, which may include requiring Purchasing Power to destroy Plaintiff's and Class Members' PII, and subject itself to an independent audit to ensure this information is destroyed.
 - ii. Enjoining Defendants from engaging in similar unfair, unlawful, and deceptive misconduct in the future;
 - iii. Requiring Defendants to make full restitution of all monies wrongfully obtained as a result of the wrongful conduct described in this Complaint;

- iv. Requiring Defendants to disgorge all ill-gotten gains flowing from the wrongful conduct described in this Complaint;
- v. Requiring Defendants to engage in a correct notice campaign;
- d. For an award of attorney's fees and costs;
- e. For an award of damages to be determined at trial; and
- f. For any further legal and equitable relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on issues so triable.

Respectfully submitted,

/s/ John A. Yanchunis
JOHN A. YANCHUNIS, ESQUIRE
FBN: 0324681
jyanchunis@forthepeople.com
MORGAN & MORGAN, P.A.
201 North Franklin Street, 7th Floor
Tampa, Florida 33602
(813) 223-5505 Telephone
(813) 223-5402 Facsimile