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Maria Chona Rodriguez v. El Toro Medical Investors Limited Partnership et al.

SACV 16-00059-JLS (KES)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2016 U.S. Dist. LEXIS 160077

November 16, 2016, Decided
November 16, 2016, Filed

COUNSEL: [*1] ATTORNEYS FOR PLAINTIFF: Not Present.

ATTORNEYS FOR DEFENDANT: Not Present.

JUDGES: JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

OPINION BY: JOSEPHINE L. STATON

OPINION

CIVIL MINUTES -- GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER DENYING DEFENDANTS' MOTION TO DISMISS (Doc. 23)

Before the Court is Defendants El Toro Medical Investors Limited Partnership and Life Care Centers of America, Inc.'s Motion to Dismiss. (Mot., Doc. 23.) Plaintiff opposed (Opp'n, Doc. 36), and Defendants replied (Reply, Doc. 42). For the reasons set forth below, the Court DENIES Defendants' Motion.

I. BACKGROUND

On January 15, 2016, Plaintiff Maria Chona Rodriguez filed this putative nationwide class action against El Toro Medical Investors Limited Partnership and Life Care Centers of America, Inc. (Compl., Doc. 1.) In her First Amended Complaint, filed on March 15, 2016, Plaintiff alleges claims under (1) the *Fair Credit Reporting Act* ("FCRA") for failure to make proper disclosures, (2) the FCRA for failure to obtain proper authorization, (3) the Unfair Competition Law (*Cal. Bus. & Prof. Code § 17200, et seq.*), (4) the California Labor Code for overtime wages (*Cal. Lab. Code §§ 510* & *1198 et seq.*), (5) the California Labor Code for failure to provide accurate itemized statements (*Cal. Lab. Code § 226*), (6) the California Labor Code [*2] for failure to provide wages when due (*Cal. Lab. Code §§ 201, 202, 203*), and (7) the Private Attorneys General Act ("PAGA") (*Cal. Lab. Code §§ 2698, et seq.*). (FAC at ¶¶ 55-116, Doc. 11.)

Plaintiff's Fair Credit Reporting Act claims relate to the "Kroll Background Check Release Form" that Plaintiff signed as part of the Defendants' standard employment application materials. (*Id.* at ¶¶ 14-15; Release Form, Exh. A, Doc. 36-1.) Through the form, Life Care Centers of America ("LCCA") sought Plaintiff's authorization to obtain a "consumer and/or investigative consumer report" that could include a broad array of highly personal information, such as:

> information as to my character, general reputation, personal characteristics, and

> mode of living; . . . personal references and interviews; my personal credit history based on reports from any credit bureau; my driving history, including any traffic citations; workers' compensation records after a conditional job offer has been extended and to the extent permitted by law; a Social Security number trace; present and former addresses; criminal and civil history/records; and any other public record.

(Exh. A, Release Form.) After granting Life Care Centers of America authorization to obtain all of this information [*3] "from any person, business entity, or governmental agency," the form included an exculpatory clause, providing, "I release from liability all persons, companies, and governmental or other agencies disclosing such information." (*Id.*)

II. LEGAL STANDARD

A. *Rule 12(b)(1)*

A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1)*. "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 984-85 (9th Cir. 2008)*. When considering a *Rule 12(b)(1)* motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)*. "The party asserting [] subject matter jurisdiction bears the burden of proving its existence." *Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010)*.

B. *Rule 12(f)*

Under *Rule 12(f)*, a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." [*4] *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010)* (quoting *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)*, rev'd on other grounds, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*).

"[M]otions to strike, as a general rule, are disfavored." *Wein v. Kaiser, 647 F.2d 200, 201 (D.C. Cir. 1981)*. This is because they are "often used as delaying tactics, and because of the limited importance of pleadings in federal practice." *Bureerong v. Uvawas, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996)* (citing Schwarzer, et al., Federal Civil Procedure § 9:375). "[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Lilley v. Charren, 936 F. Supp. 708, 713 (N.D. Cal. 1996)*.

III. DISCUSSION

Defendants move to dismiss both of Plaintiff's FCRA causes of action, arguing that Plaintiff has not suffered a concrete injury-in-fact. (Mem. at 3-10, Doc. 23.) Defendants also move to dismiss Plaintiff's second FCRA claim under *section 1681b(b)(2)(A)(ii)* for duplicating Plaintiff's first FCRA cause of action under *section 1681b(b)(2)(A)(i)*. (Mem. at 11; Reply at 13-15.) For the reasons elaborated below, the Court denies Defendants' Motion.

A. Article III Standing

In enacting the FCRA, Congress recognized that "unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system" and "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . a respect for the consumer's right to privacy." [*5] *15 U.S.C. §§ 1681(a)(1), (4)*; *Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007)*. As part of a subsequent amendment in 1996, Congress adopted a provision, now codified at *15 U.S.C. § 1681b(b)(2)(A)*, which prohibits an employer from obtaining a consumer report, unless:

> (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, *in a document that consists solely of the disclosure*, that a consumer report may be obtained for

> employment purposes; and
>
> (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. § 1681b(b)(2)(A) (emphasis added); *Omnibus Consolidated Appropriations Act, 1997*, Pub. L. No. 104-208, 110 Stat. 3009, 3009-431 (1996). Congress adopted this provision out of concern that employers' authority under the Fair Credit Reporting Act to obtain consumer reports of current and prospective employees "may create an improper invasion of privacy." S. Rep. No. 104-185, at 35 (1995). To mitigate this risk, the amendment imposes stringent disclosure and consent requirements before an employer can obtain access to an employee or applicant's consumer report. *See* 138 Cong. Rec. H9370, H9376, *available at* 1992 WL 237537 (noting that the amendment mandates "comprehensive disclosure [*6] to consumers of their rights under the Fair Credit Reporting Act").

As Defendants seemingly acknowledge, *15 U.S.C. § 1681b(b)(2)(A)* requires an employer to procure an employee's authorization in a document that "consists solely of the disclosure." (*See* Mem. at 2.) Both the Federal Trade Commission and courts have repeatedly construed *section 1681b(b)(2)(A)* as precluding employers from including material besides the mandated disclosures and an employee or applicant's authorization. *See, e.g., Harris v. Home Depot U.S.A., Inc., 114 F. Supp. 3d 868, 870 (N.D. Cal. 2015)*; *Advisory Opinion to Hauxwell*, 1998 WL 34323756 (June 12, 1998); *Advisory Opinion to Coffey*, 1998 WL 34323748 (Feb. 11, 1998); *Advisory Opinion to Steer*, 1997 WL 33791227 (Oct. 21, 1997). Congress created an express private right of action allowing affected consumers to seek damages for an employer's failure to comply with *15 U.S.C. § 1681b(b)(2)(A)*. *See 15 U.S.C. §§ 1681b, 1681n, 1681o*.

Despite the alleged violation of this statutorily-granted right, Defendants argue that Plaintiff has suffered no concrete Article III injury-in-fact. (Mem. at 3-10.) Relying primarily on the Supreme Court's recent decision in *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)*, Defendants argue that the inclusion of the liability waiver does not constitute a cognizable injury because "[t]he only 'injury' Plaintiff could have suffered is that her eyes had to read an extra 13-word [actually 15-word] sentence." (Mem at 3.) The Court finds that Defendants' inclusion of a waiver provision purporting to exculpate "any person, business entity, or governmental [*7] agency" providing sensitive personal information to Defendants is a concrete Article III injury.

For a plaintiff to have Article III standing, she must (1) have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) the harm must be "fairly trace[able]" to the defendants' conduct, and (3) the Court must be able to redress the claimed injury. *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. At each stage of a suit, the elements of Article III standing must "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id. at 561*. Thus, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*; *Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011)*.

For an injury to be "concrete," it must be "'real,' and not 'abstract.'" *Spokeo, 136 S. Ct. at 1548* (citation omitted). But an injury need not be tangible--some injuries, though immeasurable, are sufficiently concrete to establish Article III standing. *Id. at 1549*. When determining whether an intangible harm is concrete, "both history and the judgment of Congress play important roles." *Id.* As Congress "is well positioned to identify [*8] intangible harms that meet minimum Article III requirements," it "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan, 504 U.S. at 580* (Kennedy, J., concurring in part and concurring in judgment)). Congress does not have unbridled discretion in recognizing harms sufficient to confer standing, for "*Article III* . . . requires a concrete injury even in the context of a statutory violation." *Id.* Yet Congress may properly "elevat[e] intangible harms" previously insufficient at common law. *Id.*

When a plaintiff faces a "*risk* of real harm" due to a violation of a procedural right established by statute, the injury may be sufficiently concrete that she "need not allege any *additional* harm beyond the one Congress has identified."[1] *Id.* For this proposition, *Spokeo* drew support from the common law's recognition of certain

rights that a person may vindicate without alleging any actual harm. *Id.*; *see, e.g., Restatement (First) of Torts § 867 cmt. d* (1934) (interference with privacy); *Restatement (First) of Torts § 163* (1934) (trespass to land); *Restatement (First) of Torts § 569* (1938) (libel); *Restatement (First) of Torts § 570* (1938) (slander [*9] *per se*); *see also Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)* (holding that plaintiffs may seek nominal damages for violations of their procedural due process rights because "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money").

> 1 In *Spokeo*, Justice Thomas, writing in a concurrence, reasoned that the injury-in-fact requirement is more forgiving when "private plaintiffs . . . allege[] a violation of their own rights" as opposed to public rights. *Id. at 1550* (Thomas, J., concurring). Citing *Havens*, Justice Thomas justified the distinction based on the lesser separation-of-power concerns presented when a plaintiff alleges a violation of a personal right: "[W]here one private party has alleged that another private party violated his private rights, there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual." *Id. at 1553* (Thomas, J., concurring).

The Supreme Court has repeatedly approved of Congress's efforts to elevate intangible [*10] injuries inadequate at common law into cognizable claims. In *Havens Realty Corp. v. Coleman*, for instance, the Supreme Court held that a "tester"--someone who poses as a prospective tenant or buyer in an attempt to uncover violations of the *Fair Housing Act*--had *Article III* standing, even though the plaintiff had no "intent to rent or purchase a home or apartment." *455 U.S. 363, 373-74, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1984)*. Even though the "tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home," the violation of the plaintiff's Congressionally-established right to accurate information was sufficient on its own to confer standing on the plaintiff. *Id. at 374*. Likewise, in *Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)*, and *FEC v. Akins, 524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998)*, the Supreme Court recognized that the violation of a plaintiff's statutory right to information can constitute a sufficient injury-in-fact to establish standing.

After *Spokeo*, in *Thomas v. FTS USA, LLC*, the district court concluded that an employer's violation of *15 U.S.C. § 1681b(b)(2)(A)* is a sufficiently concrete injury for purposes of Article III standing. *No. 3:13-CV-825, 2016 U.S. Dist. LEXIS 85545, 2016 WL 3653878, at *9 (E.D. Va. June 30, 2016)*. The court reasoned that an affected consumer has suffered two distinct injuries: (1) an informational injury (*i.e.*, the right to specific information in [*11] a specific form) and (2) the invasion of the consumer's right to privacy. *Meza v. Verizon Commc'ns, Inc., No. 1:16-CV-0739 AWI MJS, 2016 U.S. Dist. LEXIS 122495, 2016 WL 4721475, at *3 (E.D. Cal. Sept. 9, 2016)*. Relying on *Havens*, *Akins*, and *Public Citizen*, the district court concluded that "Congress may create a legally cognizable right to information, the deprivation of which will constitute a concrete injury" and, "[b]y extension, it is well within Congress' power to specify the form in which that information must be presented." *Thomas, 2016 U.S. Dist. LEXIS 85545, 2016 WL 3653878, at *9*. On the invasion of the plaintiff's privacy, the district court concluded that "Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law, and citizens whose statutory right to informational privacy has been invaded may bring suit under the statute to vindicate that right." *2016 U.S. Dist. LEXIS 85545, [WL] at *10*. Because *section 1681b(b)(2)(A)* simply augments a consumer's well-established right to privacy, the district court concluded that the plaintiff had constitutional standing when his statutory right was violated. *Id. at *11*. In *Meza v. Verizon Communications, Inc.*, the district court adopted *Thomas*' reasoning, concluding that an employer's violation of *section 1681b(b)(2)(A)* necessarily constitutes a concrete injury-in-fact. [*12] *2016 U.S. Dist. LEXIS 122495, 2016 WL 4721475, at *3*.

Here, the Court need not hold as broadly as *Thomas* and *Meza* to find that Defendants' inclusion of an exculpatory clause poses a sufficiently concrete injury to confer on Plaintiff *Article III* standing. If the clause were enforceable, Plaintiff suffered a clear change in legal position as a result of Defendants' alleged violation of *section 1681b(b)(2)(A)*. Specifically, she released from

liability every "person, business entity, or governmental agency" that provides any information about her to Defendants. (Exh. A, Release Form.)

But, regardless of its enforceability, the exculpatory clause misleads both the applicant and third party providers of information, creating a substantial risk of harm to applicants. *See Spokeo, 136 S. Ct. at 1549*. An exculpatory clause embedded within the FCRA-mandated disclosure form may detract from the warnings that Congress found so vital or, likelier still, leave consumers with the false impression that they have no recourse against third party providers of information, no matter how inaccurate, incomplete, or misleading the information they submit. Indeed, a frequently-cited em pirical study found that consumers were less likely to seek redress for their injuries if they signed a contract that included an exculpatory [*13] clause, even though the clause would likely be found unenforceable. *See* Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 Behav. Sci. & L. 83, 90 (1997). This finding is consistent with a growing body of research that indicates that most consumers resolve disputes informally based on their intuition about what their legal rights are.[2] Because consumers generally believe that exculpatory provisions are enforceable, even if they are clearly not, they are likely to seek less--if any--recompense for their injuries when businesses include these terms in contracts of adhesion. *See, e.g.*, Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral, 81 U. Chi. L. Rev. 2077, 2101 n.70 (2014)*. Separately, because third party providers of information would also likely believe that an exculpatory clause is enforceable, such a provision may induce these sources to be less careful in their provision of information, thereby magnifying the danger that an employer will make decisions based on incomplete or inaccurate information. These substantial risks--which are antithetical to the aims of the Fair Credit [*14] Reporting Act--are sufficiently concrete to establish Article III standing. *See Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014)* (holding that a "substantial risk that the harm will occur" is a sufficient injury-in-fact).

> 2 *See, e.g.*, Anne Fleming, *The Long Shadow of Doctrine, 163 U. Pa. L. Rev. Online 337, 340-41 & n.17 (2015)*; Tess Wilkinson-Ryan, *Intuitive Formalism in Contract, 163 U. Pa. L. Rev. 2109, 2122-23, 2126-27 (2015)*; Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract, 47 Wake Forest L. Rev. 843, 853-54 (2012)*.

Both Congress's judgment and the common law's treatment of exculpatory provisions underscore the concreteness of Plaintiff's injury. Defendants do not dispute that Congress intended to permit consumers to sue if an employer improperly appends additional material to the mandated disclosure form. Under *Spokeo*, Congress's conclusion that this constitutes a cognizable injury is "instructive and important." *136 S. Ct. at 1549*. Likewise, courts have long recognized that contracts that aim to absolve a party of liability prospectively can cause serious mischief. *See, e.g., Bisso v. Inland Waterways Corp., 349 U.S. 85, 90, 75 S. Ct. 629, 99 L. Ed. 911 (1955)* (recognizing the "judicial history and cogent reasons in support of a rule outlawing [exculpatory] contracts"). As a result, many jurisdictions have developed specialized rules that allow for the enforcement of such provisions only if "unequivocal and clear" and not against public policy. *See* 8 Williston on Contracts § 19:25 (4th [*15] ed.). Of course, at common law, a party could not sue another party for inserting an exculpatory clause in a contract of adhesion. But the common law's deeply-rooted wariness of exculpatory clauses imbedded in contracts of adhesion indicates that Plaintiff's injury is sufficiently concrete to establish standing.

Several of the decisions Defendants reference do not relate to the insertion of exculpatory clauses into the FCRA-mandated disclosure form. *See, e.g., Nokchan v. Lyft, Inc., No. 15-CV-03008-JCS, 2016 U.S. Dist. LEXIS 138582, 2016 WL 5815287, at *1 (N.D. Cal. Oct. 5, 2016)* (document included unspecified "extraneous information"); *Noori v. Vivint, Inc., No. CV 16-5491 (PA) (FFMx) 2016 U.S. Dist. LEXIS 120963, at *3 (C.D. Cal. Sept. 6, 2016)* (document included additional disclosures required under California law). The Court, therefore, need not disagree with these decisions to find Plaintiff's injury sufficiently concrete.

The two out-of-circuit decisions involving exculpatory clauses that Defendants reference are unpersuasive. In *Smith v. Ohio State University*, the district court found that the plaintiffs lacked Article III standing because they "did not suffer a concrete consequential damage." *No. 15-cv-3030, 2016 U.S. Dist. LEXIS 74612, at *11 (S.D. Ohio June 8, 2016)*. Similarly,

in *Groshek v. Time Warner Cable, Inc.*, the district court held that the plaintiff lacked Article III standing [*16] because he had not suffered an injury akin to being denied the position based on false information in his consumer report or suffering embarrassment after the improper release of his information. *No. 15-C-157, 2016 U.S. Dist. LEXIS 104952, 2016 WL 4203506, at *3 (E.D. Wis. Aug. 9, 2016)*. However, *Spokeo*--in keeping with a well-established line of cases--recognized that a substantial *risk* of harm can satisfy the Article III injury-in-fact requirement. *See 136 S. Ct. at 1549* ("risk of real harm"); *Susan B. Anthony List, 134 S. Ct. at 2341* ("substantial risk"); *Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5, 185 L. Ed. 2d 264 (2013)* (same); *Blum v. Yaretsky, 457 U.S. 991, 1000, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)* ("sufficiently substantial" risk); *Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)* ("a realistic danger of sustaining a direct injury"). By the same token, *Spokeo* acknowledged that the common law has long recognized that certain injuries are actionable without demonstrating any consequential damages. *136 S. Ct. at 1549*, *see, e.g.*, *Restatement (First) of Torts § 867 cmt. d* (1934) (interference with privacy); *Restatement (First) of Torts § 163* (1934) (trespass to land). For instance, at common law, one commits a trespass by stepping on even a single blade of grass on the property of another, regardless of whether the property owner realizes the intrusion or suffers actual harm. *See Ashby v. White*, 92 Eng. Rep. 126, 137 (K.B. 1703) (Holt, C.J.) ("[A] man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the [*17] other has no right to come there.").

In short, Plaintiff suffered, at minimum, a substantial risk of harm by Defendants' inclusion of an exculpatory clause in the FCRA-mandated disclosure form. As this is sufficient to establish Article III standing, the Court DENIES Defendants' Motion.

B. Motion to Strike

Alternatively, Defendants move to dismiss Plaintiff's second cause of action as redundant. Because Defendants are not challenging the legal adequacy of Plaintiff's second cause of action but rather asserting that it duplicates Plaintiff's first claim, the Court will construe Defendants' request as a motion to strike under *Rule 12(f)*. *See Nguyen v. CTS Elecs. Mfg. Sols. Inc., 301 F.R.D. 337, 344 n.2 (N.D. Cal. 2014)* ("*Rule 12(f)*, not *Rule 12(b)(6)*, is the proper vehicle through which a party may seek relief when a complaint contains redundant matter.") While this Court is skeptical that a plaintiff can recover under both *sections 1681b(b)(2)(A)(i)* and *1681b(b)(2)(A)(ii)*,[3] at this early stage "such a redundancy does not act to prejudice Defendant[s] in any way." *Sagan v. Apple Comput., Inc., 874 F. Supp. 1072, 1080 (C.D. Cal. 1994)*. Accordingly, the Court DENIES Defendants' Motion to strike Plaintiff's second cause of action.

3 None of Plaintiff's cited authorities discuss whether a plaintiff can recover under both subsections.

IV. CONCLUSION

For the reasons stated above, the Court DENIES Defendants' Motion.