No. _____

In The
Supreme Court of the United States

M-I, LLC, a Delaware Limited Liability Company,

Petitioner,

v.

SARMAD SYED, an individual, on behalf of himself and all others similarly situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a so-called "informational injury" satisfies the Article III standing requirement of real-world harm articulated in *Spokeo* v. *Robins*, 136 S. Ct. 1540 (2016), where plaintiff alleges at most a bare procedural violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681b.

2. Whether a bare procedural violation of a statute may be deemed "willful"—*i.e.*, knowing and reckless—under *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), where no risk of harm resulted from the alleged violation.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings are those listed on the cover. PreCheck, Inc., a Texas Corporation, was previously involved with the case, but Petitioner believes that PreCheck no longer has an interest in the outcome of this petition. PreCheck and Sarmad Syed reached a settlement during the district court proceedings.

Petitioner M-I, LLC hereby certifies, through its undersigned attorneys of record, that M-I, LLC is a wholly owned subsidiary of Schlumberger Limited, a publicly held corporation. No publicly held entity owns 10 percent or more of Schlumberger Limited's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner M-I, LLC, respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The amended panel opinion and order of the court of appeals denying both rehearing *en banc* and panel rehearing (App., *infra* 1-33) were filed together, and are reported at 853 F.3d 492 (9th Cir. 2017). The original panel opinion (App., *infra* 34-65) was withdrawn but was reported at 846 F.3d 1034 (9th Cir. 2017). The memorandum and order of the district court (App., *infra* 69-85) is unreported and available at 2016 WL 5426862 (E.D. Cal.). The district court's original memorandum and order (App., *infra* 86-95) is unreported and available at 2014 WL 4344746 (E.D. Cal.).

STATEMENT OF JURISDICTION

The court of appeals filed its order denying rehearing *en banc* on March 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Credit Reporting Act (FCRA) states:

> Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, 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).

It further provides:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000;

* * *

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a).

STATEMENT

In *Spokeo* v. *Robins*, 136 S. Ct. 1540, 1549 (2016), this Court made clear that "Article III standing requires a concrete injury even in the context of a statutory violation." Without a real-world harm flowing directly from the alleged violation, it is a mere technical violation incapable of supporting Article III jurisdiction. *Ibid.*

In this case, the Ninth Circuit directly contravened *Spokeo*—and widened an existing circuit split—by concluding that a statutory violation analytically indistinguishable from the one in *Spokeo* could support standing despite the lack of any allegation of real-world harm. The Ninth Circuit reached this conclusion

based on a theory of "informational injury" that other circuits have explicitly rejected. See, e.g., *Dreher* v. *Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (holding that standing was lacking where plaintiff's claimed injury was solely the denial of "specific information to which [he] w[as] entitled under the [Fair Credit Reporting Act]"). This Court's guidance is needed to resolve the conflict and dispel the confusion about whether so-called "informational injuries" arising from bare procedural violations are sufficient to satisfy *Spokeo*'s real-world-harm requirement.

This Court's review is warranted for the additional reason that the Ninth Circuit's decision conflicts with this Court's precedent in *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), which articulated the legal standard for a "willful" violation of a statute—*i.e.*, a "reckless disregard of statutory duty." *Id.* at 56-57. To rise to the level of willfulness, a defendant's actions must be objectively unreasonable and present a "*high risk of harm*, objectively assessed." *Id.* at 69 (emphasis added). Here, the absence of *any* risk of harm—much less the *high* risk required by *Safeco*—should have precluded any determination of willfulness. The Ninth Circuit's contrary conclusion cannot be squared with *Safeco* and warrants this Court's review for that reason, too.

1. Congress passed the Fair Credit Reporting Act in 1970 to ensure "fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco*, 551 U.S. at 52. The Act expressly allows the use of credit reports for employment

purposes, 15 U.S.C. § 1681a(d), but "imposes a host of requirements concerning the creation and use of consumer reports." *Spokeo*, 136 S. Ct. at 1545.

As relevant here, the Act prohibits an employer from seeking personal consumer information from a potential employee without first making a disclosure to the employee clearly, conspicuously, and in writing. 15 U.S.C. § 1681b(b)(2)(A)(i). The disclosure must appear "in a document that consists solely of the disclosure," and must note that the report "may be obtained for employment purposes." *Ibid*. The potential employer may only proceed if the employee then provides a written authorization to obtain the report. *Id*. § 1681b(b)(2)(A)(ii). The Act expressly permits the written authorization to be contained in the same document as the disclosure (notwithstanding the statute's requirement that the disclosure be contained in its own document). *Ibid.*

2. The Act provides a private right of action for violations of its statutory requirements. 15 U.S.C. §§ 1681n(a) & 1681*o*(a). Actual damages are available for negligent violations, *id.* § 1681*o*, while statutory damages, punitive damages, and attorney's fees and costs are available for willful violations. *Id.* § 1681n.

3. Sarmad Syed applied for and obtained a job with M-I, LLC, which supplies drilling fluid systems to oil and gas companies around the world. ER 4. As part of the application process, M-I sought Syed's permission to obtain background information, including a

credit report. *Ibid.* M-I made the request using a preprinted form created by a consumer reporting agency, PreCheck, which provided:

> Pursuant to the requirements of the Fair Credit Reporting Act, I acknowledge that a credit report, consumer report, and/or investigative report may be made in connection with my application for employment with a prospective employer.
>
> * * *
>
> I understand that the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release, and indemnify prospective employer [*sic*], PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

Id at 19. Syed signed the form. *Ibid.*

At some point over the two next years, Syed reviewed his personnel file and "discovered" that M-I had indeed obtained his credit report. *Id*. at 11. Syed pointed to no intervening events that prompted him to review his file, and no subsequent consequences from his discovery. Nor did he claim to be surprised that M-I followed through on its request to obtain the report pursuant to his authorization.

Nonetheless, Syed filed a class-action complaint under the Act, 15 U.S.C. § 1681, arguing that M-I was required to seek his authorization by using a form that contained solely a disclosure that M-I intended to do so, and not an accompanying release. *Id*. at 1-2. Pleading no actual damages, Syed instead sought statutory and punitive damages (and attorney's fees) for purportedly willful violations of the Act. *Id*. at 10. In support, Syed alleged that M-I's use of the form amounted to a willful violation *per se*. *Id*. at 3-11.

4. The district court dismissed Syed's claims, concluding that M-I's interpretation of the Act was sufficiently reasonable, in light of current authority, to preclude the inference that M-I violated the Act willfully. App. 57-61. The district court observed not only a "dearth of authority" in the Ninth Circuit addressing M-I's interpretation of the Act to allow combining the disclosure with a release of liability in one document, but also that numerous district courts *agreed* with M-I's interpretation allowing such a combination. *Id.* at 60. Given all that, the district court could not conclude that M-I's interpretation was "erroneous, let alone 'objectively unreasonable.'" *Id.* at 61. Hence, even if M-I violated the Act, that violation was not willful and thus Syed had no claim. *Ibid.*

5. Syed appealed to the Ninth Circuit. App. 10; 43. After briefing was complete but before oral argument, this Court handed down its decision in *Spokeo*, holding that "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. Nonetheless, the Ninth Circuit held

that Syed had standing because, in the court's view, Congress had recognized a real-world harm in being denied the statutory right to receive a disclosure form containing only certain information, and a violation of that right necessarily established Article III standing. App. 11-12; 44-45. In the Ninth Circuit's view, a "concrete injury" is inflicted "when applicants are deprived of their ability to meaningfully authorize the credit check." *Id.* at 12; 44.

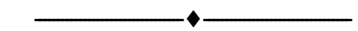
Having found standing, the Ninth Circuit moved on to the merits, holding that the Act was sufficiently clear that M-I's use of the form necessarily amounted to a willful violation, despite the lack of any federal appellate authority and several district-court decisions supporting M-I's position. *Id.* at 20-27; 52-59.

6. M-I filed a petition for rehearing *en banc* or panel rehearing, pointing out that at most the statutory right recognized by the Ninth Circuit was a mere procedural right—ancillary to the harm Congress sought to protect against—and thus failed to establish an injury under *Spokeo*. ECF No. 51, at 5-11. M-I also argued that the Ninth Circuit's holding on willfulness was erroneous and conflicted with both *Safeco* and the decisions of other courts. *Id.* at 12-16.

The Ninth Circuit denied rehearing, but amended its prior opinion by adding a section to further address M-I's argument regarding *Spokeo*. App. 1-33.[1] The

[1] The substantive additions are footnote 4, App. 11, and the majority of the paragraph that begins in the middle of App. 12. Cf. App. 44-45.

court of appeals shifted its focus to the facts alleged in the complaint, holding that those facts allowed it to "infer" that Syed had indeed suffered a concrete injury. *Id.* at 12-13. The court found that his right to information and privacy rights had been violated because Syed was evidently "confused by the inclusion of the liability waiver with the disclosure and would not have signed it had it contained a sufficiently clear disclosure." *Ibid.* Rehearing *en banc* was denied in an order stating that "[n]o further petitions for rehearing or for rehearing *en banc* will be entertained." *Id.* at 3.



REASONS FOR GRANTING THE PETITION

Congress has a role in "identifying and elevating intangible harms," but that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. A plaintiff still must articulate some concrete, real-world harm—as well as legal protection from that harm—to establish an "injury-in-fact," and, in turn, Article III standing. *Id.* at 1548. A concrete injury must be shown "even in the context of a statutory violation." *Id.* at 1549. The Ninth Circuit's decision in this case that it could somehow infer "confusion" sufficient to constitute Article III injury-in-fact based on nothing more than the statutory violation itself cannot be reconciled with *Spokeo*. Indeed, the Ninth Circuit's decision effectively overrules *Spokeo* and would confer

Article III standing virtually any time a plaintiff (or a court) could "infer" some sort of intangible harm from a bare statutory violation of a procedural right.

To be sure, this Court has held that when a statute involves a *substantive* right—such as the inability to obtain public information, see *FEC* v. *Akins*, 524 U.S. 11, 20-25 (1998)—there is standing to sue to obtain that information. But at the same time, this Court has reiterated that "deprivation of a *procedural* right without some concrete interest that is affected by the deprivation * * * is insufficient to create Article III standing." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009). Where, as here, the information at issue is merely related to a procedural mechanism—and not the very thing Congress sought to protect—the deprivation of that procedural right, without more, is insufficient to support standing.

Thus the Fourth Circuit, in an opinion issued the same day as the Ninth Circuit's initial decision in this case, reached the opposite conclusion—holding instead that "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury." *Dreher*, 856 F.3d at 346 (citing *Friends of Animals* v. *Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Just so. The Court should grant the petition, resolve the conflict, and reinforce *Spokeo*'s holding that bare procedural violations cannot support Article III standing.

Even if the Ninth Circuit had not erred in finding standing, this Court's review would still be needed to resolve the serious conflict created with this Court's decision in *Safeco*. That conflict has significant practical consequences—allowing litigants in the Ninth Circuit to seek statutory damages and attorneys' fees based on a "willful"—*i.e.*, "reckless" and "knowing"—violation of a statute with a "high risk" of harm even where, as here, (i) no court of appeals has foreclosed defendant's interpretation of the statute; (ii) multiple district courts have *agreed* with that interpretation; and (iii) plaintiff has not alleged *any* risk of harm by the violation. It is virtually impossible to see how such a combination of events presents an "unjustifiably high risk of harm" amounting to recklessness under *Safeco*, 551 U.S. at 68 (citation omitted). Even courts that *agree* with the Ninth Circuit's interpretation of the Fair Credit Reporting Act in this case have declined to hold violations premised on M-I's contrary interpretation of "willful" under *Safeco*. See, e.g., *Schoebel* v. *Am. Integrity Ins. Co. of Fla.*, No. 8:15-cv-380-T-24 AEP, 2015 WL 3407895, at *10 (M.D. Fla. May 27, 2015).

Further, these issues are exceptionally important and frequently recurring. The impact of the Ninth Circuit's decision will not be limited to the Fair Credit Reporting Act's "sole disclosure" requirement, to the Act itself, or even to the multitude of other statutes that could be construed as entitlements to information. Review is warranted, further percolation is unnecessary, and delay will only further erode Article III limits on federal courts.

The petition should be granted.

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court And Other Circuits On An Exceptionally Important Issue Of Article III Standing.

The Ninth Circuit's decision reflects a fundamental misunderstanding of this Court's decision in *Spokeo*, especially where "informational injuries" are concerned. While this Court noted that "the violation of a procedural right granted by statute *can* be sufficient in *some circumstances* to constitute injury in fact," *Spokeo*, 136 S. Ct. at 1549-50 (emphases added) (citing *Akins*, 524 U.S. at 20-25, and *Public Citizen* v. *Dep't of Justice*, 491 U.S. 440, 449 (1989)), the Ninth Circuit's reliance on an unpled "inference" of "confusion" based solely on the statutory violation does not come close. This Court's guidance is necessary to resolve the conflict between intangible informational injuries that do not confer standing and those that do.

To safeguard "the judiciary's proper role in our system of government," this Court has time and again enforced "the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). To ensure that courts do not venture outside of this limitation, the "irreducible constitutional minimum" of standing to sue in federal court requires that a plaintiff must have a concrete injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To be sure, "'concrete' is not * * * necessarily synonymous with 'tangible.'" *Spokeo*, 136 S. Ct. at 1549. And to define whether an intangible harm may still be concrete, this

Court held that both history and congressional judgment are important. *Ibid.* Yet "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement * * * * Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

In *Spokeo*, the plaintiff alleged injury stemming from a consumer reporting agency's failure to ensure that the information about him being conveyed to the public was accurate. *Id.* at 1546. While acknowledging that the Fair Credit Reporting Act's procedural requirements may not have been fully satisfied, this Court nevertheless held that the plaintiff could not "satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the [Act's] procedural requirements may result in no harm." *Id.* at 1550. An incorrect zip code on a consumer report, for instance, may technically violate the statute but not cause a plaintiff any actual harm. *Ibid.*

Just so here. Syed at most pleads a technical violation of the Act unaccompanied by any allegation of actual harm or even risk of harm—or even any allegation that he would have done anything differently had the authorization request been on a different piece of paper than the release. The Ninth Circuit's "inference" of "confusion" is nothing more than pure speculation—Syed has not alleged any injury (or risk of injury) flowing from the inclusion of the authorization request in the same document as the release. Nor could he. The end result—a signed authorization form—would have

obtained either way. Just as in *Spokeo*, there is nothing more in this case than a bare procedural violation (at most).[2]

The Ninth Circuit's decision is directly contrary not only to this Court's decision in *Spokeo* but also to the Fourth Circuit's decision in *Dreher*, 856 F.3d at 340. There, the Fourth Circuit squarely held that a company's violation of the Fair Credit Reporting Act's statutory right for a consumer to know the sources of information on his credit report could not, on its own, constitute a concrete injury. *Ibid.* Noting *Spokeo*'s acknowledgement of intangible harms, the Fourth Circuit confirmed this Court's recognition that "'[a] violation of one of the [Act's] procedural requirements may result in no harm' * * * * Thus, * * * a technical violation of the FCRA may not rise to the level of an injury in fact for constitutional purposes." *Id.* at 344 (quoting *Spokeo*, 136 S. Ct. at 1549). Because the plaintiff in *Dreher* failed to show how vindicating the statutory right allegedly violated would have made any difference in the fairness or accuracy of his report, or otherwise furthered Congress's purposes in the Act, he could not show an actual injury—only a technical violation. *Id.* at 345. The claimed "informational injury"—"specific information to which [he] w[as] entitled under the [Act]"—failed to "demonstrate a concrete injury" and

[2] If anything, Syed's claim to injury-in-fact is weaker than Robins's claim in *Spokeo*. Robins alleged that the consumer reporting agency's information—which made him appear more successful than he actually was—prevented him from obtaining certain jobs. See *Spokeo*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting). There is nothing even close to such an allegation in this case.

the plaintiff thus lacked standing. *Ibid.* (alteration in original) (citation omitted).

Similarly, the D.C. Circuit would not have granted standing to a plaintiff complaining of informational injury that did not suffer a real-world consequence as a result of that "injury" either. See *Hancock* v. *Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016). Plaintiffs there were asked for personal information in violation of the statute—but, as the D.C. Circuit held, "they assert[ed] only a bare violation of the requirements of D.C. law in the course of their purchases." *Ibid.* The court of appeals went on to underscore that this Court's decision in *Spokeo* ensures that "an asserted injury to even a statutorily conferred right 'must actually exist.'" *Ibid.* (quoting *Spokeo*, 136 S. Ct. at 1548).

The D.C. Circuit recognizes some informational injuries, of course, but only in contexts approved by this Court. In explaining how informational standing works, the D.C. Circuit noted that when a plaintiff is not seeking specific disclosures (such as records from an agency), he "may need to allege that nondisclosure has caused [him] to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations." *Friends of Animals*, 828 F.3d at 992. That is different, of course, from a situation where the information at stake is merely tangential to the harm Congress sought to avoid. In those circumstances, the plaintiff still must show that any information denied him caused a real-world consequence.

The conflict with *Spokeo* (and other cases) is even sharper when the Ninth Circuit's decision is contrasted with the Seventh Circuit's rejection of a similar claim under the Cable Communications Policy Act, 47 U.S.C. § 551(e), which obligates cable companies to destroy customers' personal information after the company no longer needs it. *Gubala* v. *Time Warner Cable, Inc.*, 846 F.3d 909, 911 (7th Cir. 2017). The *Gubala* plaintiff cited the violation of section 551(e) and asserted that it "somehow violated a privacy right or entailed a financial loss."[3] *Id.* at 910. "Gubala's problem," according to Judge Posner, was "that while he might well be able to prove a violation of section 551, he has not alleged any plausible (even if attenuated) risk of harm to himself from such a violation—any risk substantial enough to be deemed 'concrete.'" *Id*. at 911 (citing *Spokeo*, 136 S. Ct. at 1549). Just like Syed.

The Eighth Circuit adopted a similar view in *Braitberg* v. *Charter Communications, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016), holding that the plaintiff lacked an injury-in-fact independent from a statutory violation under the Cable Communications Policy Act. So, too, did the Second Circuit, dismissing claims under the Truth In Lending Act based on credit card disclosures that failed to mention certain specific pieces of information. *Strubel* v. *Comenity Bank*, 842 F.3d 181, 190, 192-94 (2d Cir. 2016). Other circuits have

[3] In this respect, Gubala pled *more* than Syed, who has failed even to assert that much anywhere in his complaint. See ER 1-17.

also rejected the Ninth Circuit's position and hold instead that mere proof of a statutory violation does not amount to proof of a concrete injury. See, e.g., *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016); *Nicklaw* v. *Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016).

It is difficult to see how the Act's requirement that the disclosure be contained on its own piece of paper is anything other than procedural. If the *plaintiff* does not allege, at a minimum, that he did not understand the disclosure and would not have signed it if he had, there can be no harm beyond the bare procedural violation—and that is not enough under *Spokeo*.

That gap cannot be filled with inferences of possible harms manufactured by courts. See App. 12. This is not how pleading works and certainly not how standing in federal court is established. See *Spokeo*, 136 S. Ct. at 1545 ("[T]he injury-in-fact requirement requires *a plaintiff* to allege an injury that is both 'concrete *and* particularized.'" (emphasis added) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000))). All Syed alleged here was that federal law entitled him to receive a disclosure on a form containing certain information—and nothing else. ER 1-11.

Syed did not claim to be unaware that he was signing an authorization for the credit check when he signed it; he did not claim that he was confused about the disclosure; and, most importantly, he did not claim

that he would not have signed the form if it had complied with every procedural requirement the statute sets forth. Syed wanted to work for M-I and there is no indication in the record that he would have withheld consent for petitioner to obtain the credit report if the disclosure would have been on a page by itself. Thus the claimed informational injury is the very model of a "bare procedural violation" that under *Spokeo* lacks the concreteness required for standing. 136 S. Ct. at 1549.[4] And the Ninth Circuit's attempt in its amended opinion to manufacture facts to support standing succeeds only in highlighting Syed's failure to allege an Article III injury to begin.

The Ninth Circuit's decision conflicts with *Spokeo* and the decisions of other courts of appeals in determining whether a bare procedural violation can confer standing. The Court should grant the petition, resolve the conflict, and restore the limits of Article III standing.[5]

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[4] The closest Syed comes to alleging injury is his speculation that M-I *intended* to deceive him, ER 10, but he never says (or implies) that he actually *was* deceived, much less that he suffered any harm as a consequence. See ER 3-11.

[5] The Third Circuit has recently noted the conflict without expressly taking sides. See *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638 (3d Cir. 2017) ("It is nevertheless clear from *Spokeo* that there are some circumstances where the mere technical violation of a procedural requirement of a statute cannot, in and of itself, constitute an injury in fact * * * * Those limiting circumstances are not defined in *Spokeo* and we have no occasion to consider them now.").

II. The Ninth Circuit's Breathtaking Expansion Of "Willfulness" Extends Far Beyond This Court's Decision In *Safeco* And Conflicts With Decisions Of Other Courts.

Under the Fair Credit Reporting Act, a plaintiff can pursue actual damages or, for "willful" violations, statutory damages—which carry with them the potential for punitive damages and attorneys' fees. 15 U.S.C. § 1681n. In this case, Syed is seeking statutory damages (and punitive damages and attorneys' fees) on a class-wide basis—arguing that the inclusion of the one-sentence waiver on the same form as the authorization request is a "willful" violation of the Act. As a result, Syed must satisfy the standard for willfulness set out by this Court in *Safeco*. Reversing the district court, the Ninth Circuit concluded that Syed satisfied that standard as a matter of law because (i) M-I's interpretation of the statute was objectively unreasonable, App. 21-23, and (ii) M-I's interpretation was so manifestly incorrect as to rise to a reckless disregard of the Act's obligations. *Id.* at 24-27. Both premises are not only mistaken but also in serious conflict with *Safeco*. This Court's review is warranted to resolve that conflict, too.

Under *Safeco*, Syed was required to show an "unjustifiably high risk of harm" from the alleged statutory violation. *Safeco*, 551 U.S. at 68 (citation omitted). That is, he needed to show not only an unreasonable or deeply flawed interpretation of the statute, but also a substantial and likely *harm* resulting from that interpretation. *Id.* at 69. Syed has not, and cannot, make

that necessary showing. M-I's interpretation of the Act risked harm to none—at least no harm that Syed articulates—and certainly not a "high risk" of harm. M-I merely requested of Syed a release for performing the background check that Syed had just authorized. This inclusion involved so little chance of harm that Syed bothers naming none—and given the close relationship between the authorization and waiver, no harm even seems possible, much less likely. The Ninth Circuit erred in writing that requirement out of *Safeco*. *Safeco* requires not only a violation, but also one that is objectively unreasonable and that poses an unreasonable risk of harm—yet under the Ninth Circuit's decision, employers can be held liable without any such showing. The Ninth Circuit's approach cannot be reconciled with *Safeco*.

Further, as the Ninth Circuit recognized in its opinion (App. 26), the question whether a combined disclosure and liability release violates the Act has divided the district courts—and the Ninth Circuit in this case became the first court of appeals to weigh in on the question. The division of authority in the district courts—and the dearth of authority at the appellate level—is another reason M-I's interpretation of the Act could not possibly have been objectively unreasonable, much less reckless. See App. 60-61 ("The inability of district courts around the country to agree on whether a combined disclosure and liability release violates the FCRA suggests that the statute is 'less than pellucid,' or at least not as clear as plaintiff claims." (quoting

Safeco, 551 U.S. at 70)).[6] This Court's review is warranted to resolve that conflict, too.

III. The Questions Presented Are Exceptionally Important, Frequently Recurring, And Cleanly Presented.

The serious practical consequences of the Ninth Circuit's decision underscore the need for this Court's review. As numerous legal commentators have observed, exposure to statutory damages under the Fair Credit Reporting Act can be "enormous," David N. Anthony & Julie D. Hoffmeister, American Bar Association, *The Fair Credit Reporting Act: Not Just About Credit*, BUSINESS LAW TODAY, June 2016, at 2, and compliance requires navigating the "virtual minefield of technical obligations" that the Act imposes. Ben James, *5 Tips For Employers Worried About FCRA Class Actions*, LAW360 (May 20, 2015).

"In the 40 years since [the Act] was enacted, litigation has skyrocketed." Jonathan D. Jerison & Bradley A. Marcus, *A Brief History of the FCRA*, 14 No. 19 CONSUMER FIN. SERVS. L. REP., at 3, 4 (2011). And as commentators have noted, the class action-friendly provisions of the Act—such as the statutory damages

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[6] Compare *Schoebel*, 2015 WL 3407895, at *6; and *Smith* v. *Waverly Partners, LLC*, No. 3:10-CV-00028-RLV-DSC, 2012 WL 3645324, at *1 (W.D. N.C. Aug. 23, 2012) (concluding that the combination of the disclosure and the authorization does not recklessly violate the Act); with *Reardon* v. *ClosetMaid Corp.*, No. 2:08-cv-01730, 2013 WL 6231606, at *10 (W.D. Pa. Dec. 2, 2013) (concluding that the combination transparently violates it).

provision at issue here—have contributed significantly to the litigation explosion. David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 BUS. LAW. 931, 931 (2006); see also Ashley Steiner Kelly & Theresa Y. Kananen, Spokeo*: One Year Later, How High Did the Case Raise the Bar?*, DAILY REPORT, June 6, 2017 ("Perhaps due to the attorneys' fee provisions, in recent years, employers have been bombarded with class actions alleging FCRA violations. A perennial favorite of the plaintiffs' bar is violation of the 'stand-alone disclosure' requirement." (citing 15 U.S.C. § 1681b(b)(2)(A)(i))), Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 114 (2009) ("What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class.").

Given all this, the practical implications of the Ninth Circuit's decision for employers across the Nation are staggering. It permits an entire class to seek statutory damages—and attorneys' fees—based on nothing more than a technical violation of a statute with no showing of harm or even risk of harm. But in this "era of frequent litigation [and] class actions," this Court has made clear that "courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 146 (2011). This case provides the Court a

straightforward but exceptionally important opportunity to enforce those rules in a crucially important context.

This case is an ideal vehicle for doing so. The issues are purely legal, squarely presented, and sufficiently vetted. Indeed, the conflict with this Court's cases is so clear that this Court may wish to consider summary reversal without the need for full briefing and argument. See, e.g., *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam) (summarily reversing "because the opinion below reflects a clear misapprehension of [the applicable] standards in light of our precedents"); *Fla. Dep't of Health & Rehab. Servs.* v. *Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's jurisprudence).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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2017 WL 1050586
United States Court of Appeals,
Ninth Circuit.

Sarmad SYED, an individual, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,
v.
M-I, LLC, a Delaware Limited Liability Company; PreCheck, Inc., a Texas Corporation,
Defendants-Appellees.

No. 14-17186
|
Argued and Submitted November 17, 2016
San Francisco, California
|
Filed January 20, 2017
|
Amended March 20, 2017

Appeal from the United States District Court for the Eastern District of California, William B. Shubb, District Judge, Presiding, D.C. No. 1:14-cv-00742-WBS-BAM

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Before: Mary M. Schroeder, Kim McLane Wardlaw, and John B. Owens, Circuit Judges.

ORDER

The opinion filed on January 20, 2017 is hereby amended, and an amended opinion is filed concurrently with this order.

With that amendment, the panel has unanimously voted to deny the petition for panel rehearing. Judges Wardlaw and Owens have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, the petition for panel rehearing and the petition for rehearing en banc are **DENIED**. No further petitions for rehearing or for rehearing en banc will be entertained. The mandate shall issue forthwith.

IT IS SO ORDERED.

OPINION

WARDLAW, Circuit Judge:

The modern information age has shined a spotlight on information privacy, and on the widespread use of consumer credit reports to collect information in violation of consumers' privacy rights. This case presents a question of first impression in the federal courts of appeals: whether a prospective employer may satisfy the Fair Credit Reporting Act's ("FCRA") disclosure requirements by providing a job applicant with a disclosure that "a consumer report may be obtained for employment purposes" which simultaneously serves as a liability waiver for the prospective employer and others.[1] *See* 15 U.S.C. § 1681b(b)(2)(A). We hold that a

[1] The statutory provision at issue, 15 U.S.C. § 1681b(b)(2)(A), governs the procurement of consumer reports "for employment purposes with respect to any consumer." Thus, the statute's application is not limited to employer-employee relationships. However, for the sake of brevity, we describe the parties governed by

prospective employer violates Section 1681b(b)(2)(A) when it procures a job applicant's consumer report after including a liability waiver in the same document as the statutorily mandated disclosure. We also hold that, in light of the clear statutory language that the disclosure document must consist "solely" of the disclosure, a prospective employer's violation of the FCRA is "willful" when the employer includes terms in addition to the disclosure, such as the liability waiver here, before procuring a consumer report or causing one to be procured.

I.

A. Fair Credit Reporting Act.

Congress enacted the FCRA in 1970 in response to concerns about corporations' increasingly sophisticated use of consumers' personal information in making credit and other decisions. Fair Credit Reporting Act of 1970, Pub. L. 91-508, § 602, 84 Stat. 1114, 1128. Specifically, Congress recognized the need to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 52 (2007). Congress thus required the use of reasonable procedures in procuring and using a "consumer report," defined as

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit

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the statute as "prospective employers" and "job applicants," while recognizing that the statute in fact applies more broadly.

> worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under [the statute].

15 U.S.C. § 1681a(d).

Congress amended the FCRA in 1996. Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208, § 2403, 110 Stat. 3009-426, 3009-431. It recognized "the significant amount of inaccurate information that was being reported by consumer reporting agencies and the difficulties that consumers faced getting such errors corrected." S. Rep. No. 108-166 at 5-6 (2003) (describing 1996 amendments). Congress was specifically concerned that prospective employers were obtaining and using consumer reports in a manner that violated job applicants' privacy rights. S. Rep. No. 104-185 at 35 (1995). The disclosure and authorization provision codified at 15 U.S.C. § 1681b(b)(2)(A) was intended to address this concern by requiring the prospective employer to disclose that it may obtain the applicant's consumer report for employment purposes and providing the means by which the prospective employee might prevent the prospective employer from doing so—withholding of authorization. S. Rep. No. 104-185 at 35. This provision furthers Congress's overarching

purposes of ensuring accurate credit reporting, promoting efficient error correction, and protecting privacy. *See Safeco*, 551 U.S. at 52. Indeed, in addition to securing job applicants' privacy rights by enabling them to withhold authorization to obtain their consumer reports, the provision promotes error correction by providing applicants with an opportunity to warn a prospective employer of errors in the report before the employer decides against hiring the applicant on the basis of information contained in the report.[2]

Congress prohibited procurement of consumer reports unless certain specified procedures were followed:

> **(2) Disclosure to consumer**
>
> **(A) In general**
>
> Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, 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

[2] This opportunity is particularly important given that, in practice, the FCRA does not otherwise provide an opportunity for a job applicant or employee to dispute his consumer report before adverse action is taken. *See* Richard Fischer, A.S. Pratt & Sons, *Law of Financial Privacy* ¶ 1.04[2][F] (2014).

> 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). Congress amended the statute in 1998 to add language providing that the authorization may be made on the same document as the disclosure. Consumer Reporting Employment Clarification Act of 1998, Pub. L. 105-347, § 2, 112 Stat. 3208, 3208.

The FCRA provides a private right of action against those who violate its statutory requirements in procuring and using consumer reports. The affected consumer is entitled to actual damages for a negligent violation. 15 U.S.C. § 1681*o*. For a willful violation, however, a consumer may recover statutory damages ranging from $100 to $1,000, punitive damages, and attorney's fees and costs. 15 U.S.C. § 1681n.

B. Syed's Lawsuit Against M-I.

Syed applied for a job with M-I in 2011. M-I provided Syed with a document labeled "Pre-employment Disclosure Release." *See* Appendix A. The Disclosure Release informed Syed that his credit history and other information could be collected and used as a basis for the employment decision, authorized M-I to

procure Syed's consumer report, and stipulated that, by signing the document, Syed was waiving his rights to sue M-I and its agents for violations of the FCRA. Syed's signature served simultaneously as an authorization for M-I to procure his consumer report, and as a broad release of liability.

The liability waiver at the heart of the present dispute reads as follows:

> I understand the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release and indemnify prospective employer, PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

Appendix A.

Syed alleges that the Disclosure Release failed to satisfy the disclosure requirements mandated by 15 U.S.C. § 1681b(b)(2)(A). Syed does not contend that M-I's form contained too little information. Instead, he argues that it contained too much. Specifically, he alleges that M-I's inclusion of the liability waiver violated the statutory requirement that the disclosure document consist "solely" of the disclosure. *See* § 1681b(b)(2)(A)(i). Syed alleges that he realized M-I had violated the statute when, upon reviewing his

personnel file, he noticed that M-I had procured his consumer report, in spite of the allegedly deficient disclosure with which it had provided him. He alleges that he filed the complaint within two years of reviewing his file.

On May 19, 2014, Syed filed a putative class action in district court on behalf of himself and any person whose consumer report was obtained by M-I after receiving a disclosure in violation of Section 1681b(b)(2)(A)(i) within the two-year limitations period. He sought statutory damages pursuant to Section 1681n(a)(1)(A), punitive damages pursuant to Section 1681n(a)(2), and attorney's fees and costs pursuant to Section 1681n(a)(3).[3] Syed did not seek actual damages, which would have required proof of actual harm. *See Crabill* v. *Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001) (citing cases).

The original complaint alleged that M-I's statutory violation had been "willful," the predicate for Syed's claimed statutory and punitive damages. *See* 15 U.S.C. § 1681n; *see also Safeco*, 551 U.S. at 53. On August 28, 2014, the district court dismissed Syed's complaint for failure to state a claim, with leave to amend. It held that the allegation of willfulness consisted only of "labels and conclusions." *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

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[3] Syed also named PreCheck, the company hired by M-I to obtain his consumer report, as a defendant. Syed has since settled his claims against PreCheck. Thus, only his claims against M-I are at issue in this appeal.

Syed filed his First Amended Complaint ("FAC") on September 2, 2014. The FAC sets forth the same factual and legal allegations as did the original complaint. However, it also includes citations to Federal Trade Commission ("FTC") staff opinion letters and district court opinions that Syed asserts support his position that M-I "knew or should have known about its legal obligations under the FCRA," thus rendering its statutory violation willful.

On October 23, 2014, the district court again dismissed Syed's FAC for failure to state a claim, this time without leave to amend. The district court reasoned that Syed had still not sufficiently pleaded willfulness. The court concluded that the FTC letters could not have "warned [M-I] away from the view it took" because they were informal staff opinions, not authoritative guidance. *See Safeco*, 551 U.S. at 70, 70 n.19. Similarly, the court found that the judicial opinions cited by Syed did not demonstrate that M-I's conduct had been willful because the opinions issued after M-I had provided Syed the Disclosure Release in 2011.

II.

We have jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment dismissing with prejudice Syed's claims against M-I.

We review de novo the grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Fayer* v. *Vaughn*, 649 F.3d 1061, 1063-64 (9th Cir. 2011). In so doing, we accept "all factual allegations in the

complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel* v. *ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). In addition, "the district court's interpretation of a statute is a question of law which we review de novo." *Pakootas* v. *Teck Cominco Metals, Ltd.*, 830 F.3d 975, 980 (9th Cir. 2016) (internal quotation marks omitted).

III.

Syed has established Article III standing.[4] A plaintiff who alleges a "bare procedural violation" of the FCRA, "divorced from any concrete harm," fails to satisfy Article III's injury-in-fact requirement. *Spokeo, Inc.* v. *Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549 (2016). However, Syed alleges more than a "bare procedural violation." The disclosure requirement at issue, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform

[4] In reviewing a Rule 12(b)(6) dismissal by the district court, we "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Nat'l Ass'n for Advancement of Psychoanalysis* v. *Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000). Moreover, at the Rule 12(b)(6) stage, "we presume that 'general allegations embrace those specific facts that are necessary to support a claim.' " *Smith* v. *Pac. Properties and Dev. Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004) (quoting *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Of course, standing "must be supported at each stage of the litigation in the same manner as any other essential element of the case," *Cent. Delta Water Agency* v. *United States*, 306 F.3d 938, 947 (9th Cir. 2002), and what suffices at the Rule 12(b)(6) stage may not suffice at later stages of the proceedings when the facts are tested.

job applicants that they intend to procure their consumer reports as part of the employment application process. The authorization requirement, § 1681b(b)(2)(A)(ii), creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check. By providing a private cause of action for violations of Section 1681b(b)(2)(A), Congress has recognized the harm such violations cause, thereby articulating a "chain [] of causation that will give rise to a case or controversy." *See Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

Syed alleged in his complaint that he "discovered Defendant M-I's violation(s) within the last two years when he obtained and reviewed his personnel file from Defendant M-I and discovered that Defendant M-I had procured and/or caused to be procured a 'consumer report' regarding him for employment purposes based on the illegal disclosure and authorization form." This allegation is sufficient to infer that Syed was deprived of the right to information and the right to privacy guaranteed by Section 1681b(b)(2)(A)(I)-(ii) because it indicates that Syed was not aware that he was signing a waiver authorizing the credit check when he signed it. Drawing all reasonable inferences in favor of the nonmoving party, we can fairly infer that Syed was confused by the inclusion of the liability waiver with the disclosure and would not have signed it had it

contained a sufficiently clear disclosure, as required in the statute. Therefore, Syed did allege a concrete injury and has Article III standing to bring this lawsuit. *See Thomas* v. *FTS USA, LLC*, 193 F. Supp. 3d 623, 628-638 (E.D. Va. 2016) (holding that an improper disclosure under 15 U.S.C. § 1681b(b)(2)(A) causes "a concrete injury sufficient to confer standing").

IV.

A. M-I violated the FCRA by including a liability waiver on the same document as its disclosure.

Neither the Supreme Court nor any circuit court of appeals has addressed whether a prospective employer may satisfy 15 U.S.C. § 1681b(b)(2)(A) by providing a disclosure on a document that also includes a liability waiver. The district court avoided this interpretive question, holding only that M-I's view that it had not violated the FCRA, whether correct or not, was "not objectively unreasonable," and that M-I therefore could not be held liable for statutory or punitive damages. *See Safeco*, 551 U.S. at 69-70. We conclude that the inclusion of the liability waiver did violate the FCRA, and next consider whether that violation was willful.

1. Section 1681b(b)(2)(A) unambiguously requires a document that "consists solely of the disclosure."

We must begin with the text of the statute. Where congressional intent "has been expressed in

reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted). And when "the meaning of the words seems to us to be intelligible upon a simple reading, * * * we shall spend no time upon generalities concerning the principles of [statutory] interpretation." *United States* v. *M.H. Pulaski Co.*, 243 U.S. 97, 106 (1917).

The ordinary meaning of "solely" is "[a]lone; singly" or "[e]ntirely; exclusively." *American Heritage Dictionary of the English Language* 1666 (5th ed. 2011). M-I argues that the statute's requirement that the disclosure appear on a "document that consists solely of the disclosure" is ambiguous because subsection (ii) of the provision provides that the consumer may authorize the procurement of a consumer report on the document containing the disclosure. *See* 15 U.S.C. § 1681b(b)(2)(A). If the statute allows for an authorization on the same document as the disclosure, M-I reasons, then the statute must not really require the document to "consist[] solely of the disclosure." *See* § 1681b(b)(2)(A). M-I thus urges us to find that Section 1681b(b)(2)(A) is internally inconsistent, and to give no effect to Congress's use of the term "solely."

However, contrary to M-I's contention, the statutory allowance for the consumer to "authorize in writing" the procurement of a consumer report on the same document as the disclosure does not undermine the requirement that the document consist "solely of the disclosure." The two clauses are consistent because the

authorization clause is an express exception to the requirement that the document consist "solely of the disclosure." While the statute does not specifically designate it as such, the authorization clause immediately follows the disclosure clause, and makes express reference to it. *See* § 1681b(b)(2)(A)(ii). This is not a case where we must rationalize two plainly inconsistent subsections, or smooth over a "mistake in draftsmanship." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). To the contrary, it is clear that Congress intended the two subsections to work together.

Allowing an authorization on the same document as the disclosure is consistent with the purpose of the statute. Congress passed Section 1681b(b)(2)(A) in order to protect consumers from "improper invasion[s] of privacy," S. Rep. No. 104-185 at 35 (1995), and the disclosure and authorization requirements fit hand in glove to achieve that purpose. Indeed, each would be largely ineffective on its own. Had the statute required disclosure without conditioning the procurement of a consumer report on the job applicant's authorization, it would have failed to give the applicant control over the procurement of the personal information contained in the consumer report. On the other hand, had the statute conditioned the procurement of a report on the job applicant's authorization without mandating clear disclosure by the prospective employer, Congress's purpose would have been frustrated because applicants would not understand what they were authorizing. The disclosure and authorization clauses therefore work in tandem to further the congressional purpose

of protecting consumers from "improper invasion[s] of privacy." *See id.*

Congress reasonably could have concluded that permitting the consumer to provide an authorization on the same page as the disclosure would enhance the effectiveness of each clause. A job applicant may read a disclosure more closely if he understands that the potential employer may obtain his consumer report only if he signs an authorization for it to do so. The decision to authorize or deny the prospective employer's use of his report to accept or reject his employment application may be better informed if the authorization immediately follows the disclosure.

We thus reject M-I's argument that Section 1681b(b)(2)(A) is internally inconsistent. "It is our duty to give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotation marks omitted). M-I's interpretation fails to give effect to the term "solely," violating the precept that "statutes should not be construed to make surplusage of any provision." *Wilshire Westwood Assocs.* v. *Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989) (alterations and internal quotation marks omitted). That other FCRA provisions mandating disclosure omit the term "solely" is further evidence that Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i). *See* 15 U.S.C. §§ 1681d, 1681s-3.

2. The statute does not implicitly authorize the inclusion of a liability waiver in a disclosure document.

Congress's express exception to the "solely" requirement, allowing the disclosure document to also contain the authorization to procure a consumer report, does not mean that the statute contains other implicit exceptions as well. *See United States* v. *Johnson*, 529 U.S. 53, 58 (2000). Indeed, in light of Congress's express grant of permission for the inclusion of an authorization, the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions. *See Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 188 (1978). We therefore reject M-I's contention that a liability waiver is an implicit exception to the "solely" requirement in 15 U.S.C. § 1681b(b)(2)(A)(i).

Moreover, "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Walker* v. *Fairbanks Inv. Co.*, 268 F.2d 48, 53 (9th Cir. 1959). Here, an implied exception permitting the inclusion of a liability waiver on the same document as the disclosure does not comport with the FCRA's basic purpose. To the contrary, it would frustrate Congress's goal of guarding a job applicant's right to control the dissemination of sensitive personal information. *See* 15 U.S.C. § 1681(a)(4); S. Rep. No. 104-185 at 35. An authorization requiring the job applicant's signature focuses the applicant's attention on the nature of the personal information the prospective employer may obtain, and the employer's

inability to obtain that information without his consent. But a liability waiver does just the opposite—it pulls the applicant's attention away from his privacy rights protected by the FCRA by calling his attention to the rights he must forego if he signs the document. Indeed, by reading M-I's Disclosure Release, a job applicant could reasonably conclude that his signature was not consent to the procurement of the consumer report, but to a broad release of the employer from claims arising from the totality of the "investigative background inquiries" referenced in the first sentence of the form. *See* Appendix A. Thus, 15 U.S.C. § 1681b(b)(2)(A) does not contain an implied exception allowing a prospective employer to include a liability waiver on the same document as the statutorily mandated disclosure.

3. The statute's explicit language cannot be interpreted as permitting the inclusion of a liability waiver.

M-I also argues that the statute contains an *explicit* exception allowing for the inclusion of a liability waiver, positing that a liability waiver is one type of authorization. But we need not speculate about how broadly Congress intended us to read the term "authorization," because Congress told us exactly what it meant when it described the authorization as encompassing only "the procurement of [a consumer] report." 15 U.S.C. § 1681b(b)(2)(A)(ii). Further, even assuming the statute were not as clear as it is, M-I's interpretation is inconsistent with the plain meaning of the term

"authorize." To authorize is to "grant authority or power to." *American Heritage Dictionary* 120. To waive is to "give up * * * voluntarily" or "relinquish." *Id.* at 1947. Authorization bestows, whereas waiver abdicates. A consumer may authorize the procurement of a consumer report or waive an employer's liability, but he may not "authorize" a "waiver." We decline to so harry the English language. *See Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 82 (1991). We thus reject M-I's argument that the statute somehow explicitly permits the inclusion of a liability waiver on the disclosure document.[5]

4. Whether the disclosure is "clear and conspicuous" is irrelevant to the analysis.

Next, M-I suggests that its inclusion of a liability waiver was permissible because even with the waiver, the disclosure was still "clear and conspicuous." M-I cites *Smith* v. *Waverly Partners, LLC*, No. 3:10-CV-00028-RLV-DSC, 2012 WL 3645324, at *6 (W.D.N.C. Aug. 23, 2012), for the proposition that a disclosure made pursuant to Section 1681b(b)(2)(A) is valid despite the inclusion of a liability waiver where the waiver is "not so great a distraction as to discount the

[5] M-I's argument that the legislative history supports its interpretation of the statute is also misguided. M-I's reading is in fact inconsistent with Congress's intent, because the inclusion of a liability waiver tends to distract from the disclosure's clarity. In any event, "it is well-settled that 'reference to legislative history is inappropriate when the text of the statute is unambiguous.'" *United States* v. *Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004). Thus, we look no further than the statutory text.

effectiveness of the disclosure." The district court in *Smith* concluded that "in order to give Congress's inclusion of the word 'solely' meaningful effect, * * * inclusion of the waiver provision was statutorily impermissible and * * * the waiver is therefore invalid." *Id.* Only then, analyzing the single, separated sentence releasing the company from liability, did the court hold that the waiver was "not so great a distraction as to discount the effectiveness of the disclosure." *Id.* It is inexplicable to us that a court would find that including a waiver violated the FCRA, but because the disclosure was "clear and conspicuous," an additional requirement under the FCRA, *see* 15 U.S.C. § 1681b(b)(2)(A)(i), the disclosure was nonetheless "adequate." *See Smith*, 2012 WL 3645324, at *6. Because the question of whether a disclosure is "clear and conspicuous" within the meaning of Section 1681b(b)(2)(A)(i) is separate from the question of whether a document consists "solely" of a disclosure, and is not one that is before us here, we decide only that including the waiver violated the statute's "solely" requirement. Further, we question whether the *Smith* court's approach comports with the clear mandate and purpose of the FCRA's disclosure procedures.

B. M-I's statutory violation was willful as a matter of law.

Syed seeks statutory and punitive damages only, not actual damages. Statutory and punitive damages are available under the FCRA only where a defendant "willfully fails to comply" with the statute. 15 U.S.C.

§ 1681n(a). Therefore, we must decide whether M-I willfully failed to comply with Section 1681b(b)(2)(A) by procuring Syed's consumer report after including a liability waiver on the same document as the statutorily mandated disclosure. We may resolve this question as a matter of law, as the parties acknowledge.

The Supreme Court has clarified that, under Section 1681n, willfulness reaches actions taken in "reckless disregard of statutory duty," in addition to actions "known to violate the Act." *Safeco*, 551 U.S. at 56-57. A party does not act in reckless disregard of the FCRA "unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69.

1. M-I's interpretation of the statute was not objectively reasonable.

M-I contends that, even if it violated the statute by procuring Syed's consumer report, its interpretation of 15 U.S.C. § 1681b(b)(2)(A) was not so erroneous that its non-compliance was willful within the meaning of Section 1681n. Indeed, M-I argues that its reading was not "objectively unreasonable" because the statutory text was "less[]than[]pellucid." *See id.* at 70.

M-I's arguments on this score track its contentions as to why its actions did not violate the statute at all. However, for the reasons outlined above, we conclude that the FCRA unambiguously bars a prospective

employer from including a liability waiver on a disclosure document provided a job applicant pursuant to Section 1681b(b)(2)(A).

M-I also contends that its interpretation of the statute is objectively reasonable in light of the dearth of guidance from federal appellate courts and administrative agencies. No court of appeals has spoken to the issue of whether a disclosure document provided pursuant to Section 1681b(b)(2)(A) may permissibly include a liability waiver. Nor has an administrative agency promulgated authoritative guidance on the issue.[6]

A lack of "guidance," however, does not itself render MI's interpretation reasonable. The Supreme Court has analogized the assessment of whether a FCRA violation may give rise to a claim for statutory damages to the determination of whether government employees may be held personally liable in suits for

[6] The FTC has released three informal staff opinion letters relevant to the issue at hand, each supporting Syed's interpretation of Section 1681b(b)(2)(A). *See* FTC, Opinion Letter, 1997 WL 33791227, at *1 (Oct. 21, 1997) ("[The] document should include nothing more than the disclosure and the authorization for obtaining a consumer report."); FTC, Opinion Letter, 1998 WL 34323748, at *2 (Feb. 11, 1998) (disclosure may describe the "nature of the consumer reports" it covers, but otherwise should "not be encumbered with extraneous information"); FTC, Opinion Letter, 1998 WL 34323756, at *1 (June 12, 1998) (inclusion of a waiver in a disclosure form violates Section 1681b(b)(2)(A)). However, informal opinion letters do not constitute authoritative guidance. *See Safeco*, 551 U.S. at 70 n.19. Therefore, we do not rely on them here.

damages. *Safeco*, 551 U.S. at 70. In the qualified immunity context, we have held that "when an officer's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Boyd* v. *Benton Cty*., 374 F.3d 773, 781 (9th Cir. 2004) (internal quotation marks omitted). Similarly, at least one circuit court of appeals has concluded that, in the FCRA context, a "lack of definitive authority does not, as a matter of law, immunize [a party] from potential liability" for statutory damages. *Cortez* v. *Trans Union, LLC*, 617 F.3d 688, 721 (3d Cir. 2010).

Despite the apparent dearth of guidance on the issue at the time M-I procured Syed's consumer report, M-I's inclusion of a liability waiver in the statutorily mandated disclosure document comports with no reasonable interpretation of 15 U.S.C. § 1681b(b)(2)(A). Therefore, we conclude that MI's interpretation was "objectively unreasonable."

2. M-I's non-compliance was willful.

The parties appear to assume that, under *Safeco*, an objectively unreasonable interpretation of the FCRA is by definition a reckless one, as well. However, this interpretation improperly conflates recklessness and negligence. In tort law, negligent actions are those which do not meet the standard of objective reasonableness. *See* Restatement (Second) of Torts § 283

comment c (Am. Law Inst. 1965); W. Page Keeton et al., *Prosser and Keaton on The Law of Torts* § 32, at 173-74 (5th ed. 1984). On the other hand, one acts recklessly when he creates an "unreasonable risk of physical harm to another" that is "substantially greater than that which is necessary to make his conduct negligent." *See* Restatement (Second) Torts § 500. The Supreme Court has specifically distinguished recklessness from negligence in the FCRA context, noting that a violation is only reckless (and therefore willful) where an employer adopts a reading of the statute that runs a risk of error "*substantially greater than* the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69 (emphasis added); *see also id.* at 70 ("Safeco's reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability.")

Moreover, equating negligence with recklessness would fail to give effect to the FCRA's allowance of actual damages for negligent violations, on the one hand, and statutory and punitive damages for willful ones, on the other. *See* 15 U.S.C. §§ 1681n, 1681*o*; *Safeco*, 551 U.S. at 69-70; *see also Menasche*, 348 U.S. at 538-39 ("It is our duty to give effect, if possible, to every clause and word of a statute* * * *") (internal quotation marks omitted). Accordingly, if M-I's interpretation of the FCRA is merely objectively unreasonable, it does not follow that Syed is entitled to statutory damages.

We must determine whether M-I's interpretation of 15 U.S.C. § 1681b(b)(2)(A) to permit a liability

waiver in a disclosure document crossed the "negligence/recklessness line." *See Safeco*, 551 U.S. at 69. It is possible to imagine an interpretation of 15 U.S.C. § 1681b(b)(2)(A) that would be objectively unreasonable without rising to the level of recklessness. For instance, the Seventh Circuit has held that a company did not recklessly disregard the FCRA's mandate of "clear and conspicuous" disclosure by using six-point type, even if the company's actions were negligent. *Murray* v. *New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726-27 (7th Cir. 2008) (Easterbrook, J.) (qualifying that such a practice "would be reckless *today*," given intervening legal authority).

Here, however, the term we are called upon to construe is not subject to a range of plausible interpretations. To the contrary, 15 U.S.C. § 1681b(b)(2)(A) unambiguously forecloses the inclusion of a liability waiver in a disclosure document. Thus, we need not consider M-I's subjective interpretation of the FCRA in determining whether it acted in reckless disregard of the statutory language, and therefore willfully. Indeed, M-I concedes that this question may be resolved purely as a matter of law.[7] Because the statute unambiguously bars M-I's interpretation, whether or not

[7] In *Safeco*, the Supreme Court did not foreclose the possibility that a party's subjective interpretation of the FCRA may be relevant in some circumstances. 551 U.S. at 70 n.20; *see also In re Seagate Tech., LLC*, 497 F.3d 1360, 1384 (Fed. Cir. 2007), *abrogated on other grounds by Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, ___ U.S. ___, 136 S. Ct. 1923 (2016) (a FCRA defendant's "subjective beliefs may become relevant * * * if [the plaintiff] successfully makes [a] showing of objective unreasonableness").

M-I actually believed that its interpretation was correct is immaterial. *See Reardon* v. *ClosetMaid Corp.*, No. 2:08-cv-01730, 2013 WL 6231606, at *11 (W.D. Pa. Dec. 2, 2013) (holding that there was "no issue of material fact" about whether defendant violated 15 U.S.C. § 1681b(b)(2)(A) willfully and granting plaintiff summary judgment).[8] Notwithstanding that we are the first federal appellate court to construe Section 1681b(b)(2)(A), this is not a "borderline case." *See Cortez*, 617 F.3d at 722. An employer "whose conduct is first examined under [a] section of the Act should not

---

However, where a party's action violates an unambiguous statutory requirement, that fact alone may be sufficient to conclude that its violation is reckless, and therefore willful. We observe that, in tort law, from which the *Safeco* Court drew its interpretation of willfulness under the FCRA, recklessness may be determined by objective evidence alone. Keeton et al., *supra*, § 34 at 213-14.

[8] We are persuaded by the opinions of a number of other district courts rejecting the argument that a prospective employer's inclusion of a liability waiver in a disclosure made pursuant to 15 U.S.C. § 1681b(b)(2)(A) was not willful as a matter of law. *Harris* v. *Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 870-71 (N.D. Cal. 2015); *Speer* v. *Whole Foods Mkt. Grp., Inc.*, No. 8:14-cv-3035-T-26TBM, 2015 WL 1456981, at *3 (M.D. Fla. March 30, 2015); *Avila* v. *NOW Health Grp., Inc.*, No. 14 C 1551, 2014 WL 3537825, at *3 (N.D. Ill. July 17, 2014); *see also Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1171 (D. Kan. 2008) (holding that defendant could not avoid liability for willful violation as a matter of law under the FCRA, 15 U.S.C. § 1681c(g), because there was "no plausible alternative reading of the statute in the foundation of the statutory text"). For the reasons described in Part IV.A.4, we disagree with the contrary analysis of the court in *Smith*, 2012 WL 3645324, at *6.

receive a pass because the issue has never been decided." *Id.*

M-I ran an "unjustifiably high risk of violating the statute." *See Safeco*, 551 U.S. at 70 (internal quotation marks omitted). In other words, M-I acted in "reckless disregard of statutory duty." Its violation of the FCRA was therefore willful under 15 U.S.C. § 1681n. *See Safeco*, 551 U.S. at 56-57.

C. The complaint's factual allegations preclude dismissal on statute of limitations grounds.

In the alternative, M-I urges us to affirm the district court's dismissal of Syed's complaint on the ground that Syed's claims are barred by the FCRA's two-year statute of limitations. The FCRA requires a plaintiff to bring an action within the earlier of "(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for [the employer's] liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p. The district court dismissed Syed's action because he failed to state a claim under Federal Rule of Civil Procedure 12(b)(6), not because the claim was time-barred. However, we may "affirm on any basis fairly supported by the record." *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

M-I argues that Syed "discovered" the violation within the meaning of 15 U.S.C. § 1681p when he signed M-I's allegedly deficient Disclosure Release form upon applying for a job in 2011. Because Syed

challenges only the disclosure document, and not the manner in which M-I used his consumer report, M-I contends that the date of disclosure is the relevant one here.

However, a prospective employer does not violate Section 1681b(b)(2)(A) by providing a disclosure that violates the FCRA's disclosure requirement. *See Harris* v. *Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015); *Singleton* v. *Domino's Pizza, LLC*, No. DKC 11-1823, 2012 WL 245965, at *7 (D. Md. Jan. 25, 2012). The employer violates the FCRA only where, after violating its disclosure procedures, it "procure[s] or cause[s] to be procured" a consumer report about the job applicant. *See* 15 U.S.C. § 1681b(b)(2)(A)(i).

M-I urges a contrary interpretation, relying on cases construing statutes of limitations involving inadequate disclosures on loan documents under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. 108-159, 111 Stat. 1952, which amended the FCRA, and the Truth in Lending Act of 1968 ("TILA"), Pub. L. 90-321, 82 Stat. 146 (codified at 15 U.S.C. § 1601 *et seq*). M-I is correct that the statutes of limitations under FACTA and TILA generally begin to run when the disclosure is made. However, this is so because the disclosure and transaction usually occur simultaneously in the lending context. *See Ancheta* v. *Golden Empire Mortg., Inc.*, No. 10-CV-05589-LHK, 2011 WL 826177, at *4 (N.D. Cal. March 7, 2011) ("FACTA claims presumptively accrue on the date of the loan transaction, because it should be clear on this date whether or not a credit score disclosure is made.").

Here, Syed does not allege that M-I procured his consumer report at the same time it made its disclosure, which would have meant that he could have discovered the statutory violation when he received the Disclosure Release. To the contrary, he alleges that he was unaware M-I had procured his consumer report until he reviewed his personnel file "within the last two years." Because we must treat this allegation as true at the motion-to-dismiss stage, Syed adequately pleaded that his claim fell within the FCRA's two-year statute of limitations. *See Supermail Cargo, Inc.* v. *United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) ("[A] complaint cannot be dismissed [for untimeliness] unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim."). Therefore, dismissal of Syed's complaint was not warranted on the ground that his claim was time-barred.

V.

The FCRA's employment disclosure provision "says what it means and means what it says." *See Simmons* v. *Himmelreich*, ___ U.S. ___, 136 S. Ct. 1843, 1848 (2016). The statute unambiguously bars the inclusion of a liability waiver on the same document as a disclosure made pursuant to 15 U.S.C. § 1681b(b)(2)(A). M-I willfully violated the statute by procuring Syed's consumer report without providing a disclosure "in a document that consist[ed] solely of the

disclosure." § 1681b(b)(2)(A)(i). Therefore, the district court erred in dismissing Syed's complaint.

REVERSED and REMANDED.

APPENDIX A

PRE-EMPLOYMENT DISCLOSURE & RELEASE

[PLEASE PRINT]

pre
Check inc.
A Background Investigation Company

Tel:
713-861-5959
1-800-999-9861
Fax:
1-800-207-2778

■ APPLICANT'S FULL NAME:
Sarmad Syed
Any Other Name You Have Worked Under: Sam
Social Security No.: Redacted
Date of Birth[1]: Redacted
Current Address:
3702 N. Live Oak Ave
City: Rialto State: CA Zip: 92377
Driver's License No.: Redacted
State: CA
My Present Employer May Be Contacted For a Job Reference:
Yes ☐ No ☑

Pursuant to the requirements of the Fair Credit Reporting Act, I acknowledge that a credit report,

[1] *The Age Discrimination in Employment Act of 1987 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age This information is for consumer purposes only.*

consumer report[2] and/or investigative consumer report[3] may be made in connection with my application for employment with prospective employer (including contract for services). I understand that these investigative background inquiries may include credit, consumer, criminal, driving, prior employment and other reports. These reports may include information as to my character, work habits performance and experience, along with reasons for termination of past employment from previous employers. Further, I understand that prospective employer and PreCheck, Inc., may be requesting information from various Federal, State, and other agencies which maintain records concerning my past activities relating to my driving, credit, criminal, civil and other experiences, as well as claims involving me in the files of insurance companies.

I authorize, without reservation, any party or agency contacted by PreCheck, Inc. to furnish the above mentioned information. I authorize VIE to Provide PreCheck, Inc. or any potential employer of this employment transaction, state records of employment, including information reported by individual employers to the state, including State Employment

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[2] *A consumer report may consist of employment records, educational verification, licensure verification, driving record, previous address and public records relative to criminal charges.*

[3] *An "Investigative Consumer Report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with persons having knowledge.*

Security Agency records. This authorization is for this employment transaction only and continues in effect for 365 days from the date of Applicant's execution of this consent unless limited by state law, in which case the authorization continues in effect for the maximum period, not to exceed 365 days, allowed by law. I understand that my refusal to consent shall not be the basis for the denial of employment and that my decision is voluntary and not required by law. A photocopy of this authorization shall have the same effect as the original.

I understand the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release and indemnify prospective employer, PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained from a third party without verification.

It is expressly understood that the information obtained through the use of this release will not be verified by PreCheck, Inc.

I have read and understood the above information, and assert that all information provided by me is true and accurate.

■ APPLICANT'S SIGNATURE: SS DATE: July 20th, 2011

If you are denied employment, either wholly or partly because of information contained in a consumer report, a disclosure will be made to you of the name and address of the investigative agency making such report. Upon your written request within a reasonable period of time, the investigative agency compiling the report will make a complete and accurate disclosure of the nature and scope of the investigation

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARMAD SYED, an individual, on behalf of himself and all others similarly situated, *Plaintiff-Appellant*, v. M-I, LLC, a Delaware Limited Liability Company; PRECHECK, INC., a Texas Corporation, *Defendants-Appellees.*	No. 14-17186 D.C. No. 1:14-cv-00742-WBS-BAM OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted November 17, 2016
San Francisco, California

Filed January 20, 2017

Before: Mary M. Schroeder, Kim McLane Wardlaw, and John B. Owens, Circuit Judges.

Opinion by Judge Wardlaw

SUMMARY*

Fair Credit Reporting Act

The panel reversed the district court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) of an action under the Fair Credit Reporting Act.

The panel held that a prospective employer violates 15 U.S.C. § 1681b(b)(2)(A) when it procures a job applicant's consumer report after including a liability waiver in the same document as a statutorily mandated disclosure. The panel also held that, in light of the clear statutory language that the disclosure document consist "solely" of the disclosure, a prospective employer's violation of § 1681b(b)(2)(A) is "willful" when the employer includes terms in addition to the disclosure, such as the liability waiver here, before procuring a consumer report or causing one to be procured.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Jason S. Mills (argued) and Alexis M. Gabrielson, Morgan Lewis & Bockius LLP, Los Angeles, California, for Defendant-Appellee M-I, LLC.

E. Michelle Drake and John Albanese, Nichols Kaster PLLP, Minneapolis, Minnesota, for Amici Curiae National Association of Consumer Advocates and National Consumer Law Center.

OPINION

WARDLAW, Circuit Judge:

The modern information age has shined a spotlight on information privacy, and on the widespread use of consumer credit reports to collect information in violation of consumers' privacy rights. This case presents a question of first impression in the federal courts of appeals: whether a prospective employer may satisfy the Fair Credit Reporting Act's ("FCRA") disclosure requirements by providing a job applicant with a disclosure that "a consumer report may be obtained for employment purposes" which simultaneously serves as a liability waiver for the prospective employer and others.[1] *See* 15 U.S.C. § 1681b(b)(2)(A). We hold that a prospective employer violates Section 1681b(b)(2)(A)

[1] The statutory provision at issue, 15 U.S.C. § 1681b(b)(2)(A), governs the procurement of consumer reports "for employment purposes with respect to any consumer." Thus, the statute's application is not limited to employer-employee relationships. However, for the sake of brevity, we describe the parties governed by the statute as "prospective employers" and "job applicants," while recognizing that the statute in fact applies more broadly.

when it procures a job applicant's consumer report after including a liability waiver in the same document as the statutorily mandated disclosure. We also hold that, in light of the clear statutory language that the disclosure document must consist "solely" of the disclosure, a prospective employer's violation of the FCRA is "willful" when the employer includes terms in addition to the disclosure, such as the liability waiver here, before procuring a consumer report or causing one to be procured.

I.

A. Fair Credit Reporting Act.

Congress enacted the FCRA in 1970 in response to concerns about corporations' increasingly sophisticated use of consumers' personal information in making credit and other decisions. Fair Credit Reporting Act of 1970, Pub. L. 91-508, § 602, 84 Stat. 1114, 1128. Specifically, Congress recognized the need to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 52 (2007). Congress thus required the use of reasonable procedures in procuring and using a "consumer report," defined as

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in

> part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under [the statute].

15 U.S.C. § 1681a(d).

Congress amended the FCRA in 1996. Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208, § 2403, 110 Stat. 3009-426, 3009-431. It recognized "the significant amount of inaccurate information that was being reported by consumer reporting agencies and the difficulties that consumers faced getting such errors corrected." S. Rep. No. 108-166 at 5-6 (2003) (describing 1996 amendments). Congress was specifically concerned that prospective employers were obtaining and using consumer reports in a manner that violated job applicants' privacy rights. S. Rep. No. 104-185 at 35 (1995). The disclosure and authorization provision codified at 15 U.S.C. § 1681b(b)(2)(A) was intended to address this concern by requiring the prospective employer to disclose that it may obtain the applicant's consumer report for employment purposes and providing the means by which the prospective employee might prevent the prospective employer from doing so—withholding of authorization. S. Rep. No. 104-185 at 35. This provision furthers Congress's overarching purposes of ensuring accurate credit reporting, promoting efficient error correction, and protecting privacy. *See Safeco*, 551 U.S. at 52. Indeed, in addition to securing job applicants' privacy rights by enabling

them to withhold authorization to obtain their consumer reports, the provision promotes error correction by providing applicants with an opportunity to warn a prospective employer of errors in the report before the employer decides against hiring the applicant on the basis of information contained in the report.[2]

Congress prohibited procurement of consumer reports unless certain specified procedures were followed:

> **(2) Disclosure to consumer**
>
> **(A) In general**
>
> Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, 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

[2] This opportunity is particularly important given that, in practice, the FCRA does not otherwise provide an opportunity for a job applicant or employee to dispute his consumer report before adverse action is taken. *See* Richard Fischer, A.S. Pratt & Sons, *Law of Financial Privacy* ¶ 1.04[2][F] (2014).

> **(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). Congress amended the statute in 1998 to add language providing that the authorization may be made on the same document as the disclosure. Consumer Reporting Employment Clarification Act of 1998, Pub. L. 105-347, § 2, 112 Stat. 3208, 3208.

The FCRA provides a private right of action against those who violate its statutory requirements in procuring and using consumer reports. The affected consumer is entitled to actual damages for a negligent violation. 15 U.S.C. § 1681*o*. For a willful violation, however, a consumer may recover statutory damages ranging from $100 to $1,000, punitive damages, and attorney's fees and costs. 15 U.S.C. § 1681n.

B. Syed's Lawsuit Against M-I.

Syed applied for a job with M-I in 2011. M-I provided Syed with a document labeled "Pre-employment Disclosure Release." *See* Appendix A. The Disclosure Release informed Syed that his credit history and other information could be collected and used as a basis for the employment decision, authorized M-I to procure Syed's consumer report, and stipulated that, by signing the document, Syed was waiving his rights to sue M-I and its agents for violations of the FCRA.

Syed's signature served simultaneously as an authorization for M-I to procure his consumer report, and as a broad release of liability.

The liability waiver at the heart of the present dispute reads as follows:

> I understand the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release and indemnify prospective employer, PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

Appendix A.

Syed alleges that the Disclosure Release failed to satisfy the disclosure requirements mandated by 15 U.S.C. § 1681b(b)(2)(A). Syed does not contend that M-I's form contained too little information. Instead, he argues that it contained too much. Specifically, he alleges that M-I's inclusion of the liability waiver violated the statutory requirement that the disclosure document consist "solely" of the disclosure. *See* § 1681b(b)(2)(A)(i). Syed alleges that he realized M-I had violated the statute when, upon reviewing his personnel file, he noticed that M-I had procured his consumer report, in spite of the allegedly deficient disclosure with which it had provided him. He alleges

that he filed the complaint within two years of reviewing his file.

On May 19, 2014, Syed filed a putative class action in district court on behalf of himself and any person whose consumer report was obtained by M-I after receiving a disclosure in violation of Section 1681b(b)(2)(A)(i) within the two-year limitations period. He sought statutory damages pursuant to Section 1681n(a)(1)(A), punitive damages pursuant to Section 1681n(a)(2), and attorney's fees and costs pursuant to Section 1681n(a)(3).[3] Syed did not seek actual damages, which would have required proof of actual harm. *See Grabill* v. *Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001) (citing cases).

The original complaint alleged that M-I's statutory violation had been "willful," the predicate for Syed's claimed statutory and punitive damages. *See* 15 U.S.C. § 1681n; *see also Safeco*, 551 U.S. at 53. On August 28, 2014, the district court dismissed Syed's complaint for failure to state a claim, with leave to amend. It held that the allegation of willfulness consisted only of "labels and conclusions." *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

Syed filed his First Amended Complaint ("FAC") on September 2, 2014. The FAC sets forth the same

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[3] Syed also named PreCheck, the company hired by M-I to obtain his consumer report, as a defendant. Syed has since settled his claims against PreCheck. Thus, only his claims against M-I are at issue in this appeal.

factual and legal allegations as did the original complaint. However, it also includes citations to Federal Trade Commission ("FTC") staff opinion letters and district court opinions that Syed asserts support his position that M-I "knew or should have known about its legal obligations under the FCRA," thus rendering its statutory violation willful.

On October 23, 2014, the district court again dismissed Syed's FAC for failure to state a claim, this time without leave to amend. The district court reasoned that Syed had still not sufficiently pleaded willfulness. The court concluded that the FTC letters could not have "warned [M-I] away from the view it took" because they were informal staff opinions, not authoritative guidance. *See Safeco*, 551 U.S. at 70, 70 n.19. Similarly, the court found that the judicial opinions cited by Syed did not demonstrate that M-I's conduct had been willful because the opinions issued after M-I had provided Syed the Disclosure Release in 2011.

II.

We have jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment dismissing with prejudice Syed's claims against M-I.

We review de novo the grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Fayer* v. *Vaughn*, 649 F.3d 1061, 1063-64 (9th Cir. 2011). In so doing, we accept "all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel*

v. *ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). In addition, "the district court's interpretation of a statute is a question of law which we review de novo." *Pakootas* v. *Teck Cominco Metals, Ltd.*, 830 F.3d 975, 980 (9th Cir. 2016) (internal quotation marks omitted).

III.

Syed has established Article III standing. A plaintiff who alleges a "bare procedural violation" of the FCRA, "divorced from any concrete harm," fails to satisfy Article III's injury-in-fact requirement. *Spokeo, Inc.* v. *Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549 (2016). However, Syed alleges more than a "bare procedural violation." The disclosure requirement at issue, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. The authorization requirement, § 1681b(b)(2)(A)(ii), creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check. By providing a private cause of action for violations of Section 1681b(b)(2)(A), Congress has recognized the harm such violations cause, thereby articulating a "chain[] of causation that will give rise to a case or controversy." *See Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)). Therefore, Syed has Article III standing to

bring this lawsuit. *See Thomas* v. *FTS USA, LLC*, ___ F. Supp. 3d ___, No. 3:13-cv-825, 2016 WL 3653878, at *4-12 (E.D. Va. June 30, 2016) (holding that an improper disclosure under 15 U.S.C. § 1681b(b)(2)(A) causes "a concrete injury sufficient to confer standing").

IV.

A. *M-I violated the FCRA by including a liability waiver on the same document as its disclosure.*

Neither the Supreme Court nor any circuit court of appeals has addressed whether a prospective employer may satisfy 15 U.S.C. § 1681b(b)(2)(A) by providing a disclosure on a document that also includes a liability waiver. The district court avoided this interpretive question, holding only that M-I's view that it had not violated the FCRA, whether correct or not, was "not objectively unreasonable," and that M-I therefore could not be held liable for statutory or punitive damages. *See Safeco*, 551 U.S. at 69-70. We conclude that the inclusion of the liability waiver did violate the FCRA, and next consider whether that violation was willful.

1. Section 1681b(b)(2)(A) unambiguously requires a document that "consists solely of the disclosure."

We must begin with the text of the statute. Where congressional intent "has been expressed in reasonably plain terms, that language must ordinarily be

regarded as conclusive." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted). And when "the meaning of the words seems to us to be intelligible upon a simple reading, * * * we shall spend no time upon generalities concerning the principles of [statutory] interpretation." *United States* v. *M.H. Pulaski Co.*, 243 U.S. 97, 106 (1917).

The ordinary meaning of "solely" is "[a]lone; singly" or "[e]ntirely; exclusively." *American Heritage Dictionary of the English Language* 1666 (5th ed. 2011). M-I argues that the statute's requirement that the disclosure appear on a "document that consists solely of the disclosure" is ambiguous because subsection (ii) of the provision provides that the consumer may authorize the procurement of a consumer report on the document containing the disclosure. *See* 15 U.S.C. § 1681b(b)(2)(A). If the statute allows for an authorization on the same document as the disclosure, M-I reasons, then the statute must not really require the document to "consist[] solely of the disclosure." *See* § 1681b(b)(2)(A). M-I thus urges us to find that Section 1681b(b)(2)(A) is internally inconsistent, and to give no effect to Congress's use of the term "solely."

However, contrary to M-I's contention, the statutory allowance for the consumer to "authorize in writing" the procurement of a consumer report on the same document as the disclosure does not undermine the requirement that the document consist "solely of the disclosure." The two clauses are consistent because the authorization clause is an express exception to the

requirement that the document consist "solely of the disclosure." While the statute does not specifically designate it as such, the authorization clause immediately follows the disclosure clause, and makes express reference to it. *See* § 1681b(b)(2)(A)(ii). This is not a case where we must rationalize two plainly inconsistent subsections, or smooth over a "mistake in draftsmanship." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). To the contrary, it is clear that Congress intended the two subsections to work together.

Allowing an authorization on the same document as the disclosure is consistent with the purpose of the statute. Congress passed Section 1681b(b)(2)(A) in order to protect consumers from "improper invasion[s] of privacy," S. Rep. No. 104-185 at 35 (1995), and the disclosure and authorization requirements fit hand in glove to achieve that purpose. Indeed, each would be largely ineffective on its own. Had the statute required disclosure without conditioning the procurement of a consumer report on the job applicant's authorization, it would have failed to give the applicant control over the procurement of the personal information contained in the consumer report. On the other hand, had the statute conditioned the procurement of a report on the job applicant's authorization without mandating clear disclosure by the prospective employer, Congress's purpose would have been frustrated because applicants would not understand what they were authorizing. The disclosure and authorization clauses therefore work in tandem to further the congressional purpose

of protecting consumers from "improper invasion[s] of privacy." *See id.*

Congress reasonably could have concluded that permitting the consumer to provide an authorization on the same page as the disclosure would enhance the effectiveness of each clause. A job applicant may read a disclosure more closely if he understands that the potential employer may obtain his consumer report only if he signs an authorization for it to do so. The decision to authorize or deny the prospective employer's use of his report to accept or reject his employment application may be better informed if the authorization immediately follows the disclosure.

We thus reject M-I's argument that Section 1681b(b)(2)(A) is internally inconsistent. "It is our duty to give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotation marks omitted). M-I's interpretation fails to give effect to the term "solely," violating the precept that "statutes should not be construed to make surplusage of any provision." *Wilshire Westwood Assocs.* v. *Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989) (alterations and internal quotation marks omitted). That other FCRA provisions mandating disclosure omit the term "solely" is further evidence that Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i). *See* 15 U.S.C. §§ 1681d, 1681s-3.

2. The statute does not implicitly authorize the inclusion of a liability waiver in a disclosure document.

Congress's express exception to the "solely" requirement, allowing the disclosure document to also contain the authorization to procure a consumer report, does not mean that the statute contains other implicit exceptions as well. *See United States* v. *Johnson*, 529 U.S. 53, 58 (2000). Indeed, in light of Congress's express grant of permission for the inclusion of an authorization, the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions. *See Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 188 (1978). We therefore reject M-I's contention that a liability waiver is an implicit exception to the "solely" requirement in 15 U.S.C. § 1681b(b)(2)(A)(i).

Moreover, "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Walker* v. *Fairbanks Inv. Co.*, 268 F.2d 48, 53 (9th Cir. 1959). Here, an implied exception permitting the inclusion of a liability waiver on the same document as the disclosure does not comport with the FCRA's basic purpose. To the contrary, it would frustrate Congress's goal of guarding a job applicant's right to control the dissemination of sensitive personal information. *See* 15 U.S.C. § 1681(a)(4); S. Rep. No. 104-185 at 35. An authorization requiring the job applicant's signature focuses the applicant's attention on the nature of the personal information the prospective employer may obtain, and the employer's

inability to obtain that information without his consent. But a liability waiver does just the opposite—it pulls the applicant's attention away from his privacy rights protected by the FCRA by calling his attention to the rights he must forego if he signs the document. Indeed, by reading M-I's Disclosure Release, a job applicant could reasonably conclude that his signature was not consent to the procurement of the consumer report, but to a broad release of the employer from claims arising from the totality of the "investigative background inquiries" referenced in the first sentence of the form. *See* Appendix A. Thus, 15 U.S.C. § 1681b(b)(2)(A) does not contain an implied exception allowing a prospective employer to include a liability waiver on the same document as the statutorily mandated disclosure.

3. The statute's explicit language cannot be interpreted as permitting the inclusion of a liability waiver.

M-I also argues that the statute contains an *explicit* exception allowing for the inclusion of a liability waiver, positing that a liability waiver is one type of authorization. But we need not speculate about how broadly Congress intended us to read the term "authorization," because Congress told us exactly what it meant when it described the authorization as encompassing only "the procurement of [a consumer] report." 15 U.S.C. § 1681b(b)(2)(A)(ii). Further, even assuming the statute were not as clear as it is, M-I's interpretation is inconsistent with the plain meaning of the term

"authorize." To authorize is to "grant authority or power to." *American Heritage Dictionary* 120. To waive is to "give up * * * voluntarily" or "relinquish." *Id.* at 1947. Authorization bestows, whereas waiver abdicates. A consumer may authorize the procurement of a consumer report or waive an employer's liability, but he may not "authorize" a "waiver." We decline to so harry the English language. *See Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 82 (1991). We thus reject M-I's argument that the statute somehow explicitly permits the inclusion of a liability waiver on the disclosure document.[4]

4. Whether the disclosure is "clear and conspicuous" is irrelevant to the analysis.

Next, M-I suggests that its inclusion of a liability waiver was permissible because even with the waiver, the disclosure was still "clear and conspicuous." M-I cites *Smith* v. *Waverly Partners, LLC*, No. 3:10-CV-00028-RLV-DSC, 2012 WL 3645324, at *6 (W.D.N.C. Aug. 23, 2012), for the proposition that a disclosure made pursuant to Section 1681b(b)(2)(A) is valid despite the inclusion of a liability waiver where the waiver is "not so great a distraction as to discount the

[4] M-I's argument that the legislative history supports its interpretation of the statute is also misguided. M-I's reading is in fact inconsistent with Congress's intent, because the inclusion of a liability waiver tends to distract from the disclosure's clarity. In any event, "it is well-settled that 'reference to legislative history is inappropriate when the text of the statute is unambiguous.'" *United States* v. *Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004). Thus, we look no further than the statutory text.

effectiveness of the disclosure." The district court in *Smith* concluded that "in order to give Congress's inclusion of the word 'solely' meaningful effect, * * * inclusion of the waiver provision was statutorily impermissible and * * * the waiver is therefore invalid." *Id.* Only then, analyzing the single, separated sentence releasing the company from liability, did the court hold that the waiver was "not so great a distraction as to discount the effectiveness of the disclosure." *Id.* It is inexplicable to us that a court would find that including a waiver violated the FCRA, but because the disclosure was "clear and conspicuous," an additional requirement under the FCRA, *see* 15 U.S.C. § 1681b(b)(2)(A)(i), the disclosure was nonetheless "adequate." *See Smith*, 2012 WL 3645324, at *6. Because the question of whether a disclosure is "clear and conspicuous" within the meaning of Section 1681b(b)(2)(A)(i) is separate from the question of whether a document consists "solely" of a disclosure, and is not one that is before us here, we decide only that including the waiver violated the statute's "solely" requirement. Further, we question whether the *Smith* court's approach comports with the clear mandate and purpose of the FCRA's disclosure procedures.

B. M-I's statutory violation was willful as a matter of law.

Syed seeks statutory and punitive damages only, not actual damages. Statutory and punitive damages are available under the FCRA only where a defendant "willfully fails to comply" with the statute. 15 U.S.C.

§ 1681n(a). Therefore, we must decide whether M-I willfully failed to comply with Section 1681b(b)(2)(A) by procuring Syed' s consumer report after including a liability waiver on the same document as the statutorily mandated disclosure. We may resolve this question as a matter of law, as the parties acknowledge.

The Supreme Court has clarified that, under Section 1681n, willfulness reaches actions taken in "reckless disregard of statutory duty," in addition to actions "known to violate the Act." *Safeco*, 551 U.S. at 56-57. A party does not act in reckless disregard of the FCRA "unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69.

1. M-I's interpretation of the statute was not objectively reasonable.

M-I contends that, even if it violated the statute by procuring Syed's consumer report, its interpretation of 15 U.S.C. § 1681b(b)(2)(A) was not so erroneous that its non-compliance was willful within the meaning of Section 1681n. Indeed, M-I argues that its reading was not "objectively unreasonable" because the statutory text was "less[]than[]pellucid." *See id.* at 70.

M-I's arguments on this score track its contentions as to why its actions did not violate the statute at all. However, for the reasons outlined above, we conclude that the FCRA unambiguously bars a prospective

employer from including a liability waiver on a disclosure document provided a job applicant pursuant to Section 1681b(b)(2)(A).

M-I also contends that its interpretation of the statute is objectively reasonable in light of the dearth of guidance from federal appellate courts and administrative agencies. No court of appeals has spoken to the issue of whether a disclosure document provided pursuant to Section 1681b(b)(2)(A) may permissibly include a liability waiver. Nor has an administrative agency promulgated authoritative guidance on the issue.[5]

A lack of "guidance," however, does not itself render M-I's interpretation reasonable. The Supreme Court has analogized the assessment of whether a FCRA violation may give rise to a claim for statutory damages to the determination of whether government employees may be held personally liable in suits for

[5] The FTC has released three informal staff opinion letters relevant to the issue at hand, each supporting Syed's interpretation of Section 1681b(b)(2)(A). *See* FTC, Opinion Letter, 1997 WL 33791227, at *1 (Oct. 21, 1997) ("[The] document should include nothing more than the disclosure and the authorization for obtaining a consumer report."); FTC, Opinion Letter, 1998 WL 34323748, at *2 (Feb. 11, 1998) (disclosure may describe the "nature of the consumer reports" it covers, but otherwise should "not be encumbered with extraneous information"); FTC, Opinion Letter, 1998 WL 34323756, at *1 (June 12, 1998) (inclusion of a waiver in a disclosure form violates Section 1681b(b)(2)(A)). However, informal opinion letters do not constitute authoritative guidance. *See Safeco*, 551 U.S. at 70 n.19. Therefore, we do not rely on them here.

damages. *Safeco*, 551 U.S. at 70. In the qualified immunity context, we have held that "when an officer's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Boyd* v. *Benton Cty.*, 374 F.3d 773, 781 (9th Cir. 2004) (internal quotation marks omitted). Similarly, at least one circuit court of appeals has concluded that, in the FCRA context, a "lack of definitive authority does not, as a matter of law, immunize [a party] from potential liability" for statutory damages. *Cortez* v. *Trans Union, LLC*, 617 F.3d 688, 721 (3d Cir. 2010).

Despite the apparent dearth of guidance on the issue at the time M-I procured Syed's consumer report, M-I's inclusion of a liability waiver in the statutorily mandated disclosure document comports with no reasonable interpretation of 15 U.S.C. § 1681b(b)(2)(A). Therefore, we conclude that M-I's interpretation was "objectively unreasonable."

2. M-I's non-compliance was willful.

The parties appear to assume that, under *Safeco*, an objectively unreasonable interpretation of the FCRA is by definition a reckless one, as well. However, this interpretation improperly conflates recklessness and negligence. In tort law, negligent actions are those which do not meet the standard of objective reasonableness. *See* Restatement (Second) of Torts § 283

comment c (Am. Law Inst. 1965); W. Page Keeton et al., *Prosser and Keaton on The Law of Torts* § 32, at 173-74 (5th ed. 1984). On the other hand, one acts recklessly when he creates an "unreasonable risk of physical harm to another" that is "substantially greater than that which is necessary to make his conduct negligent." *See* Restatement (Second) Torts § 500. The Supreme Court has specifically distinguished recklessness from negligence in the FCRA context, noting that a violation is only reckless (and therefore willful) where an employer adopts a reading of the statute that runs a risk of error "*substantially greater than* the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69 (emphasis added); *see also id.* at 70 ("Safeco's reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability.")

Moreover, equating negligence with recklessness would fail to give effect to the FCRA's allowance of actual damages for negligent violations, on the one hand, and statutory and punitive damages for willful ones, on the other. *See* 15 U.S.C. §§ 1681n, 1681*o*; *Safeco*, 551 U.S. at 69-70; *see also Menasche*, 348 U.S. at 538-39 ("It is our duty to give effect, if possible, to every clause and word of a statute* * * *") (internal quotation marks omitted). Accordingly, if M-I's interpretation of the FCRA is merely objectively unreasonable, it does not follow that Syed is entitled to statutory damages.

We must determine whether M-I's interpretation of 15 U.S.C. § 1681b(b)(2)(A) to permit a liability

waiver in a disclosure document crossed the "negligence/recklessness line." *See Safeco*, 551 U.S. at 69. It is possible to imagine an interpretation of 15 U.S.C. § 1681b(b)(2)(A) that would be objectively unreasonable without rising to the level of recklessness. For instance, the Seventh Circuit has held that a company did not recklessly disregard the FCRA's mandate of "clear and conspicuous" disclosure by using six-point type, even if the company's actions were negligent. *Murray* v. *New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726-27 (7th Cir. 2008) (Easterbrook, J.) (qualifying that such a practice "would be reckless *today*," given intervening legal authority).

Here, however, the term we are called upon to construe is not subject to a range of plausible interpretations. To the contrary, 15 U.S.C. § 1681b(b)(2)(A) unambiguously forecloses the inclusion of a liability waiver in a disclosure document. Thus, we need not consider M-I's subjective interpretation of the FCRA in determining whether it acted in reckless disregard of the statutory language, and therefore willfully. Indeed, M-I concedes that this question may be resolved purely as a matter of law.[6] Because the statute unambiguously bars M-I's interpretation, whether or not

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[6] In *Safeco*, the Supreme Court did not foreclose the possibility that a party's subjective interpretation of the FCRA may be relevant in some circumstances. 551 U.S. at 70 n.20; *see also In re Seagate Tech., LLC*, 497 F.3d 1360, 1384 (Fed. Cir. 2007), *abrogated on other grounds by Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, ___ U.S. ___, 136 S. Ct. 1923 (2016) (a FCRA defendant's "subjective beliefs may become relevant * * * if [the plaintiff] successfully makes [a] showing of objective unreasonableness"). However,

M-I actually believed that its interpretation was correct is immaterial. *See Reardon* v. *ClosetMaid Corp.*, No. 2:08-cv-01730, 2013 WL 6231606, at *11 (W.D. Pa. Dec. 2, 2013) (holding that there was "no issue of material fact" about whether defendant violated 15 U.S.C. § 1681b(b)(2)(A) willfully and granting plaintiff summary judgment).[7] Notwithstanding that we are the first federal appellate court to construe Section 1681b(b)(2)(A), this is not a "borderline case." *See Cortez*, 617 F.3d at 722. An employer "whose conduct is first examined under [a] section of the Act should not receive a pass because the issue has never been decided." *Id.*

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where a party's action violates an unambiguous statutory requirement, that fact alone may be sufficient to conclude that its violation is reckless, and therefore willful. We observe that, in tort law, from which the *Safeco* Court drew its interpretation of willfulness under the FCRA, recklessness may be determined by objective evidence alone. Keeton et al., *supra*, § 34 at 213-14.

[7] We are persuaded by the opinions of a number of other district courts rejecting the argument that a prospective employer's inclusion of a liability waiver in a disclosure made pursuant to 15 U.S.C. § 1681b(b)(2)(A) was not willful as a matter of law. *Harris* v. *Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 870-71 (N.D. Cal. 2015); *Speer* v. *Whole Foods Mkt. Grp., Inc.*, No. 8: 14-cv-3035-T-26TBM, 2015 WL 1456981, at *3 (M.D. Fla. March 30, 2015); *Avila* v. *NOW Health Grp., Inc.*, No. 14 C 1551, 2014 WL 3537825, at *3 (N.D. Ill. July 17, 2014); *see also Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1171 (D. Kan. 2008) (holding that defendant could not avoid liability for willful violation as a matter of law under the FCRA, 15 U.S.C. § 1681c(g), because there was "no plausible alternative reading of the statute in the foundation of the statutory text"). For the reasons described in Part IV.A.4, we disagree with the contrary analysis of the court in *Smith*, 2012 WL 3645324, at *6.

M-I ran an "unjustifiably high risk of violating the statute." *See Safeco*, 551 U.S. at 70 (internal quotation marks omitted). In other words, M-I acted in "reckless disregard of statutory duty." Its violation of the FCRA was therefore willful under 15 U.S.C. § 1681n. *See Safeco*, 551 U.S. at 56-57.

C. The complaint's factual allegations preclude dismissal on statute of limitations grounds.

In the alternative, M-I urges us to affirm the district court's dismissal of Syed's complaint on the ground that Syed's claims are barred by the FCRA's two-year statute of limitations. The FCRA requires a plaintiff to bring an action within the earlier of "(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for [the employer's] liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p. The district court dismissed Syed's action because he failed to state a claim under Federal Rule of Civil Procedure 12(b)(6), not because the claim was time-barred. However, we may "affirm on any basis fairly supported by the record." *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

M-I argues that Syed "discovered" the violation within the meaning of 15 U.S.C. § 1681p when he signed M-I's allegedly deficient Disclosure Release form upon applying for a job in 2011. Because Syed challenges only the disclosure document, and not the manner in which M-I used his consumer report, M-I

contends that the date of disclosure is the relevant one here.

However, a prospective employer does not violate Section 1681b(b)(2)(A) by providing a disclosure that violates the FCRA's disclosure requirement. *See Harris* v. *Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015); *Singleton* v. *Domino's Pizza, LLC*, No. DKC 11-1823, 2012 WL 245965, at *7 (D. Md. Jan. 25, 2012). The employer violates the FCRA only where, after violating its disclosure procedures, it "procure[s] or cause[s] to be procured" a consumer report about the job applicant. *See* 15 U.S.C. § 1681b(b)(2)(A)(i).

M-I urges a contrary interpretation, relying on cases construing statutes of limitations involving inadequate disclosures on loan documents under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. 108-159, 111 Stat. 1952, which amended the FCRA, and the Truth in Lending Act of 1968 ("TILA"), Pub. L. 90-321, 82 Stat. 146 (codified at 15 U.S.C. § 1601 *et seq*). M-I is correct that the statutes of limitations under FACTA and TILA generally begin to run when the disclosure is made. However, this is so because the disclosure and transaction usually occur simultaneously in the lending context. *See Ancheta* v. *Golden Empire Mortg., Inc.*, No. 10-CV-05589-LHK, 2011 WL 826177, at *4 (N.D. Cal. March 7, 2011) ("FACTA claims presumptively accrue on the date of the loan transaction, because it should be clear on this date whether or not a credit score disclosure is made.").

Here, Syed does not allege that M-I procured his consumer report at the same time it made its disclosure, which would have meant that he could have discovered the statutory violation when he received the Disclosure Release. To the contrary, he alleges that he was unaware M-I had procured his consumer report until he reviewed his personnel file "within the last two years." Because we must treat this allegation as true at the motion-to-dismiss stage, Syed adequately pleaded that his claim fell within the FCRA's two-year statute of limitations. *See Supermail Cargo, Inc.* v. *United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) ("[A] complaint cannot be dismissed [for untimeliness] unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim."). Therefore, dismissal of Syed's complaint was not warranted on the ground that his claim was time-barred.

V.

The FCRA's employment disclosure provision "says what it means and means what it says." *See Simmons* v. *Himmelreich*, ___ U.S. ___, 136 S. Ct. 1843, 1848 (2016). The statute unambiguously bars the inclusion of a liability waiver on the same document as a disclosure made pursuant to 15 U.S.C. § 1681b(b)(2)(A). M-I willfully violated the statute by procuring Syed's consumer report without providing a disclosure "in a document that consist[ed] solely of the

disclosure." § 1681b(b)(2)(A)(i). Therefore, the district court erred in dismissing Syed's complaint.

REVERSED and **REMANDED.**

APPENDIX A

PRE-EMPLOYMENT
DISCLOSURE & RELEASE

(PLEASE PRINT)

pre
Check inc.
A Background
Investigation
Company

Tel:
713-861-5959
1-800-999-9861
Fax:
1-800-207-2778

■ APPLICANT'S FULL NAME:
Sarmad Syed
Any Other Name You Have
Worked Under: Sam
Social Security No.: **Redacted**
Date of Birth[1]: **Redacted**
Current Address:
3702 N. Live Oak Ave
City: Rialto State: CA Zip: 92377
Driver's License No.: **Redacted**
State: CA
My Present Employer May Be
Contacted For a Job Reference:
Yes ☐ No ☑

Pursuant to the requirements of the Fair Credit Reporting Act, I acknowledge that a credit report,

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[1] *The Age Discrimination in Employment Act of 1987 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age. This information is for consumer purposes only.*

consumer report[2] and/or investigative consumer report[3] may be made in connection with my application for employment with prospective employer (including contract for services). I understand that these investigative background inquiries may include credit, consumer, criminal, driving, prior employment and other reports. These reports may include information as to my character, work habits performance and experience, along with reasons for termination of past employment from previous employers. Further, I understand that prospective employer and PreCheck, Inc., may be requesting information from various Federal, State, and other agencies which maintain records concerning my past activities relating to my driving, credit, criminal, civil and other experiences, as well as claims involving me in the files of insurance companies.

I authorize, without reservation, any party or agency contacted by PreCheck, Inc. to furnish the above mentioned information. I authorize VIE to Provide PreCheck, Inc. or any potential employer of this employment transaction, state records of employment, including information reported by individual employers to the state, including State Employment

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[2] *A consumer report may consist of employment records, educational verification, licensure verification, driving record, previous address and public records relative to criminal charges.*

[3] *An "Investigative Consumer Report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with persons having knowledge.*

Security Agency records. This authorization is for this employment transaction only and continues in effect for 365 days from the date of Applicant's execution of this consent unless limited by state law, in which case the authorization continues in effect for the maximum period, not to exceed 365 days, allowed by law. I understand that my refusal to consent shall not be the basis for the denial of employment and that my decision is voluntary and not required by law. A photocopy of this authorization shall have the same effect as the original.

I understand the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release and indemnify prospective employer, PreCheck, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained from a third party without verification.

It is expressly understood that the information obtained through the use of this release will not be verified by PreCheck, Inc.

I have read and understood the above information, and assert that all information provided by me is true and accurate.

■ APPLICANT'S SIGNATURE: SS DATE: July 20th, 2011

If you are denied employment, either wholly or partly because of information contained in a consumer report, a disclosure will be made to you of the name and address of the investigative agency making such report. Upon your written request within a reasonable period of time, the investigative agency compiling the report will make a complete and accurate disclosure of the nature and scope of the investigation

2014 WL 7328463 (E.D.Cal.)
(Verdict, Agreement and Settlement)
United States District Court, E.D. California.

Sarmad SYED,
v.
M-I, LLC, et al.

No. 1:14-CV-00742-WBS-BAM.
November 4, 2014.

Verdict

***XX*—Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 11/4/14

Marianne Matherly

Clerk of Court

ENTERED: **November 4, 2014**

by: */s/ A Kastilahn*

Deputy Clerk

2014 WL 7670302 (E.D.Cal.)
(Verdict, Agreement and Settlement)
United States District Court, E.D. California.

Sarmad SYED, an individual, on behalf of himself and all others similarly situated, Plaintiff,

v.

M-I LLC, a Delaware Limited Liability Company, PreCheck, Inc., a Texas Corporation, and Does 1 through 10, Defendants.

No. 14-CV-00742-WBS-BAM.
November 4, 2014.

Judgment Dismissing with Prejudice First Amended Complaint as to Defendant M-I, LLC Pursuant to Rule 54(b)

CLASS ACTION

Pursuant to the Stipulation of the Parties, good cause appearing, and the Court expressly finding that there is no just reason for delay, IT IS SO ORDERED AND ADJUDGED that:

For the reasons set forth in the Court's October 23, 2014 Memorandum and Order Re: Motion to Dismiss, Defendant M-I, LLC's motion to dismiss is granted without leave to amend and with prejudice.

Final judgment in the above-captioned action is entered in favor of Defendant M-I, LLC and against Plaintiff Sarmad Syed.

Dated: November 3, 2014

<<signature>>

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

Judgment of Dismissal Pursuant to Rule 54(b) Dismissing First Amended Complaint as to Defendant M-I, LLC

2014 WL 5426862
United States District Court,
E.D. California.

Sarmad SYED, an individual, on behalf of himself and all others similarly situated, Plaintiffs,

v.

M-I LLC, a Delaware Limited Liablity Company; Precheck, Inc., a Texas Corporation; and Does 1-10, Defendants.

Civ. No. 1:14-742 WBS BAM.
|
Signed Oct. 22, 2014.
|
Filed Oct. 23, 2014.

Attorneys and Law Firms

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Alexander M. Chemers, Jason S. Mills, Morgan, Lewis & Bockius, LLP, Raymond Joseph Muro, Thomas Joseph Griffin, Nelson Griffin, LLP, Los Angeles, CA, George Alan Stohner Morgan, Lewis & Bockius LLP, Chicago, IL, for Defendants.

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

WILLIAM B. SHUBB, District Judge.

Plaintiff Sarmad Syed brought this putative class-action lawsuit against defendants M-I, LLC ("M-I")

and PreCheck, Inc. ("PreCheck"), in which he alleges that defendants failed to comply with federal credit reporting laws while conducting preemployment background checks. The court dismissed plaintiff's initial Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (Aug. 8, 2014 Order (Docket No. 34).) Plaintiff has filed a First Amend[ed] Complaint ("FAC"), (Docket No. 36), and defendants again move to dismiss the FAC pursuant Rule 12(b)(6) for failure to state a claim, (Docket Nos. 38, 39).

I. *Factual and Procedural History*

Plaintiff applied for a job with M-I on July 20, 2011. (FAC ¶ 14.) During the application process, plaintiff filled out and signed a one-page form entitled "Pre-Employment Disclosure and Release." (*Id.*) That form, which PreCheck allegedly prepared and provided to M-I, included the following language:

> I understand that the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release, and indemnify prospective employer, PreCheck, Inc., their agents, servants, and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.

> It is expressly understood that the information obtained through the use of this release will not be verified by PreCheck, Inc.

(*Id.*)

At some point "within the last two years," plaintiff allegedly obtained and reviewed his personnel file. (*Id.* ¶¶ 34, 50.) He discovered that defendants had procured a consumer credit report about him. (*Id.*) Based on this report, plaintiff alleges two violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq*. First, plaintiff alleges that M-I procured this report unlawfully because the disclosure form he signed included the extra language set forth above, and thus appeared in a form that did not consist "solely of the disclosure," as required by the FCRA. (*Id.* ¶ 17.) Second, plaintiff alleges that PreCheck violated the FCRA by furnishing M-I with a consumer report on plaintiff without first obtaining a certification from M-I stating that M-I "has complied" with its statutory obligations "with respect to the consumer report." (*Id.* ¶ 42.)

II. *Legal Standard*

On a motion to dismiss under Rule 12(b)(6), the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by Davis* v. *Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Cruz* v. *Beto*, 405 U.S. 319,

322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a plaintiff pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 557).

Plaintiff seeks statutory and punitive damages for violations of the FCRA, (FAC ¶¶ 31, 47), which requires him to allege that defendants "*willfully* fail[ed] to comply with the requirements of [the FCRA]." 15 U.S.C. § 1681n(a) (emphasis added). In *Safeco Insurance Company of America* v. *Burr*, the Supreme Court held that the FCRA's use of the term "willfully" requires a plaintiff to show that the defendant's conduct was intentional or reckless. 551 U.S. 47, 57, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007). Recklessness consists of "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 68 (citation and internal quotation marks omitted). In other words, "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater

than the risk associated with a reading that was merely careless." *Id.* at 69. A defendant's violation of the FCRA is not reckless simply because its understanding of a statutory obligation is "erroneous"; instead, a plaintiff must allege, at a minimum, that the defendant's reading of the FCRA is "objectively unreasonable." *Id.*

In applying this standard, the Supreme Court considered whether the defendant's interpretation "has a foundation in the statutory text" and whether the defendant had "guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took." *Id.* at 69-70. Noting "a dearth of guidance and * * * less-than-pellucid statutory text," the Court declined to find the defendant's interpretation objectively unreasonable. *Id.* at 70. Finally, the Court observed that the presence or absence of subjective bad faith made no difference "where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Id.* at 70 n. 20.

Safeco's analysis strongly suggests that the issue of whether a defendant's reading of the FCRA was "objectively unreasonable" is a question of law.[1] *See Van*

[1] Some courts have treated the question of whether a defendant's conduct was "willful" as a factual inquiry, *see, e.g.*, *Edwards* v. *Toys "R" Us*, 527 F. Supp. 2d 1197, 1210 (C.D.Cal. 2007) (citing cases treating willfulness as a question of fact), but these cases either predate Safeco or are distinguishable from the situation in

Straaten v. *Shell Oil Prods. Co.*, 678 F.3d 486, 490-01 (7th Cir. 2012) (stating that the *Safeco* Court "treated willfulness as a question of law"). The Court held that there was no need to remand the case for further factual development because, as a matter of law, "Safeco's misreading of the statute was not reckless." *Safeco*, 551 U.S. at 71. And perhaps most tellingly, the Court analogized this inquiry to the "clearly established" inquiry required under its qualified immunity precedents-an inquiry that is legal in nature. *See id.* at 70 (citing *Saucier* v. *Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

Accordingly, courts may consider whether a particular interpretation was "objectively unreasonable" upon a motion to dismiss. *See, e.g.*, *Goode* v. *LexisNexis Risk & Info. Analytics Grp.*, Inc., 848 F. Supp. 2d 532, 543-46 (E.D.Pa.2012) (considering court cases and FTC guidance on the question of willfulness for purposes of a motion to dismiss); *see also Long* v. *Tommy Hilfiger U.S.A.*, *Inc*., 671 F.3d 371, 378 (3d Cir. 2012) (affirming dismissal upon a motion to dismiss because a defendant's interpretation "although erroneous, was at least objectively reasonable"); *Shlahtichman* v. *1-800 Contacts, Inc.*, F.3d 794, 803 (7th Cir. 2010) (same).

Safeco and the one here because the relevant statute they addressed was "not ambiguous or susceptible to conflicting interpretations," *see id.* at 1209.

III. *M-I's Motions to Dismiss Plaintiff's Disclosure Claim*

Plaintiff alleges that M-I's interpretation of the FCRA to permit the inclusion of release and indemnity language in the disclosure form was "objectively unreasonable," (FAC ¶ 18), and supports this allegation by pointing to the "plain and clearly ascertainable" statutory language as well as three FTC opinion letters and several district court opinions on the subject, (FAC ¶¶ 19-23).

This court previously rejected plaintiff's contention that the FCRA's language is as clear as he claims. (Aug. 8, 2014 Order at 6-7.) The relevant portion of § 1681b(b) requires that the document "consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i). But the immediately following subsection allows the consumer's authorization to "be made on the document referred to in clause (i)"—that is, the same document as the disclosure. 15 U.S.C. § 1681b(b)(2)(A)(ii). Thus, the statute itself suggests that the term "solely" is more flexible than at first it may appear. This "less-than-pellucid" statutory language weighs in favor of finding that M-I's interpretation was objectively reasonable. *Safeco*, 551 U.S. at 70.

The next relevant question becomes whether, at the time M-I used the form, "guidance from the courts of appeals or the Federal Trade Commission * * * warned it away from the view it took." *Id.* But direction from the FTC must be "authoritative guidance." *Id.* For instance, the *Safeco* Court rejected the use of

an informal letter written by an FTC staff member because it "did not canvass the issue" and "explicitly indicated it was merely 'an informal staff opinion * * * not binding on the Commission.'" *Id.* at 70 n. 19.

Just like the letter rejected by the Supreme Court in *Safeco*, all three letters cited for support by plaintiff explicitly indicate they are informal staff opinions. *See* Letter from William Haynes, Att'y, Div. of Credit Practices, Fed. Trade Comm'n, to Richard W. Hauxwell, CEO, Accufax Div. (June 12, 1998), 1998 WL 34323756 (F.T.C.), at *3 ("The views that are expressed above are those of the Commission's staff and not the views of the Commission itself."); Letter from William Haynes, Att'y, Div. of Credit Practices, Fed. Trade Comm'n, to Harold Hawkey, Employers Ass'n of N .J. (Dec. 18, 1997), 1997 WL 33791224 (F.T.C.), at *3 ("The above views constitute informal staff opinions and are advisory in nature and not binding upon the Commission."); Letter from Cynthia Lamb, Investigator, Div. of Credit Practices, Fed. Trade Comm'n, to Richard Steer, Jones Hirsch Connors & Bull, P.C. (Oct. 21, 1997), 1997 WL 33791227 (F.T.C.), at *2 ("The opinions set forth in this letter are those of the staff, and are not binding on the Commission."). These letters lack the authority needed to support plaintiff's allegation post-*Safeco*.

The district court opinions cited by plaintiff also cannot support his position because all of the decisions were issued after M-I used its form in 2011. *See Reardon* v. *Closetmaid Corp.*, Civ. No. 2:08-1730, 2013 WL 6231606 (W.D.Pa. Dec.2, 2013); *Singleton* v. *Domino's Pizza*, Civ. No. 11-1823, 2012 WL 245965 (D.Md. Jan.

25, 2012); *Waverly Partners*, Civ. No. 3:10-28, 2012 WL 3645324 (W.D.N.C. Aug.23, 2012). These cases could not have warned M-I away from the view it took under the *Safeco* standard if they had not yet come into existence.

None of the legal authority cited by plaintiff suffices to make M-I's understanding of its obligation under the FCRA at the relevant time objectively unreasonable. Given this "dearth of authority" and the "less-than-pellucid" statutory text, the court finds no support for plaintiff's allegation of willfulness and it must grant M-I's motion to dismiss.

* * *

While leave to amend must be freely given, the court is not required to permit futile amendments. *See DeSoto* v. *Yellow Freight Sys.*, Inc., 957 F.2d 655, 658 (9th Cir. 1992); *Klamath-Lake Pharm. Ass'n* v. *Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983); *Reddy* v. *Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990); *Rutman Wine Co.* v. *E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller* v. *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

Having already given plaintiff leave to amend his Complaint once, the parties have had ample opportunity to brief this court on the issue of willfulness. Because the court finds that M-I's interpretation of the FCRA is not objectively unreasonable as a matter of

law, no set of facts will allow plaintiff to plausibly allege that M-I "willfully" violated the FCRA under the *Safeco* standard. Accordingly, any proposed amendment would be futile, and the court will not grant plaintiff further leave to amend.

IV. *PreCheck's Motion to Dismiss Plaintiff's Certification Claim*

A. *Plaintiff Alleges a Willful Violation of the FCRA*

Plaintiff alleges that PreCheck "intentionally or recklessly" breached its obligation under § 1681b(b)(1) of the FCRA. (FAC ¶¶ 42-43.) This obligation, plaintiff argues, required PreCheck to obtain a specific certification from M-I *after* M-I had provided a disclosure form to plaintiff and received plaintiff's authorization but *before* it furnished M-I with the consumer report. (*See* FAC ¶ 49.) Plaintiff's understanding relies on § 1681b(b)(1)'s use of the phrase "has complied with paragraph (2) with respect to the consumer report." 15 U.S.C. § 1681b(b)(1)(A)(i).[2]

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[2] Section 1681b(b)(1) provides in relevant part:

> A consumer reporting agency may furnish a consumer report for employment purposes only if—
>
> (A) the person who obtains such report from the agency certifies to the agency that—
>
> (i) the person *has complied with paragraph (2) with respect to the consumer report*, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable * * * "

15 U.S.C. § 1681b(b)(1) (emphasis added).

PreCheck argues it interpreted § 1681b(b)(1) as allowing it to obtain a one-time "prospective, blanket certification" from M-I. (PreCheck's Mem. at 9 (Docket No. 38-1).) It points to a document purportedly provided by M-I to PreCheck in June 2002 that promised M-I would "preform legal obligations [under the FCRA]," including that it would "make a clear and conspicuous written disclosure to the consumer before the report is obtained, in a document that consists solely of the disclosure, that a report may be obtained." (*See id.* at 12; Do Decl. Ex. A (Docket No. 10-4).)

Unlike the interpretation analyzed in *Safeco*, however, the court sees no apparent foundation in the text of § 1681b(b)(1) for PreCheck's belief that it could rely on M-I's prospective certification of compliance with paragraph (2). *See Safeco* 551 U.S. at 69-70 ("While we disagree with Safeco's analysis, we recognize that its reading has a foundation in the statutory text and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor." (internal citations omitted)). Prospective certification actually runs counter to § 1681b(b)(1)'s use of the phrase "has complied," which clearly appears to refer retrospectively to an action already taken. 15 U.S.C. § 1681b(b)(1) ("the person *has complied* with paragraph (2)" (emphasis added)). It makes no sense for M-I to certify that it "has complied" with the FCRA before having done so; M-I must wait until it actually "has complied" to certify its actions. Even if the statute's language is not entirely "pellucid,"

it is clear enough to foreclose the use of a prospective certification as to compliance with paragraph (2).

This understanding is reinforced by the statute's next clause, which requires certification that "the person *will comply* with paragraph (3) * * * if paragraph (3) becomes applicable"—a sharp contrast of language suggesting that Congress contemplated prospective certification as to paragraph (3), but not paragraph (2). 15 U.S.C. § 1681b(b)(1)(A)(i). Accordingly, whether or not PreCheck received a prospective certification from M-I in 2002, the plain language of § 1681b(b)(1) supports plaintiff's allegation that PreCheck intentionally or recklessly violated the FCRA by failing to secure a certification that M-I "has complied" with paragraph (2).

PreCheck's actions might be objectively reasonable if it could point to some court decision or "authoritative guidance" from the FTC that it relied upon when deciding to use a prospective, blanket certification. That is, PreCheck must show that it had some "sufficiently convincing justification" for thinking that a prospective certification fulfilled its obligation under the FCRA. *Safeco* 551 U.S. at 69-70. But PreCheck has not provided, and the court cannot find, any court decision addressing the use of prospective certifications under § 1681b(b)(1).

PreCheck does offer two FTC opinion letters, (Precheck's Mem. at 9-10 (Docket No. 39)), but these letters do not authorize, or even directly address, the use of prospective certification. The first letter only confirms

that a consumer reporting agency "is not required to maintain a record of the consumer's underlying written authorization" so long as it "receive[s] the employer's certification before furnishing a consumer report for employment purposes." (*See* Letter from Shoba Kammula, Fed. Trade Comm'n, to Stephen Kilgo, President, Intelnet Inc. (July 28, 1998), Muro Decl. Ex. A (Docket No. 39-3).) The second letter states that a consumer reporting agency must obtain certification "that the client obtaining the report is in compliance" with 15 U.S.C. § 1681b(b)(2). (*See* Letter from William Haynes, Att'y, Div. of Credit Practices, Fed. Trade Comm'n, to John Beaudette, Operations Manager, Employment Screenings Servs. (June 9, 1998), Muro Decl. Ex. B.) When read in context, the use of the phrase "in compliance" does not authorize prospective certification. And even if it did, neither letter contains the level of "authoritative guidance" required by *Safeco*. (*See* Letter from Shoba Kammula, Fed. Trade Comm'n, to Stephen Kilgo, President, Intelnet Inc. (July 28, 1998), Muro Decl. Ex. A ("This is an informal staff opinion and is not binding on the Commission."); Letter from William Haynes, Att'y, Div. of Credit Practices, Fed. Trade Comm'n, to John Beaudette, Operations Manager, Employment Screenings Servs. (June 9, 1998), Muro Decl. Ex. B ("The statements contained in this letter represent the opinions of the Commission's staff and are advisory in nature.").)

Finally, PreCheck points to several court cases allowing "blanket certifications" under a different subsection of the FCRA—15 U.S.C. § 1681e—and argues

that these cases support its conclusion that prospective, blanket certifications can be used under § 1681b(b)(1) as well. (*See* Pl.'s Mem. at 10-11 (citing *Boothe* v. *TRW Credit Data*, 557 F. Supp. 66, 71 (S.D.N.Y.1982); *Hiemstra* v. *TRW, Inc.*, 195 Cal.App.3d 1629, 1634, 241 Cal.Rptr. 564 (2d Dist. 1987).) However, § 1681e contains significantly different language from § 1681b(b)(1). It contains concurrent—and prospective-looking language, while § 1681b(b)(1) contains retrospective language. *Compare* 15 U.S.C. § 1681e (requiring a user of consumer reports to "certify the purposes for which the information *is sought*, and certify that the information *will be* used for no other purpose" (emphasis added), with 15 U.S.C. § 1681b(b)(1) (requiring that a user certify that "the person *has complied* with paragraph (2)" (emphasis added)). This distinction defeats the idea that PreCheck could have reasonably relied on cases interpreting § 1681e.

Unlike with M-I, the dearth of authority interpreting § 1681b(b)(1) works against PreCheck because PreCheck cannot justify its non-compliance with the plain meaning of the statutory text. Accordingly, the court finds dismissal for failure to state a claim against PreCheck inappropriate.[3]

[3] Any language in the court's August 8, 2014 Order that appears inconsistent with this determination shall be disregarded.

B. *The Statute of Limitations Does Not Preclude Plaintiff's Claim*

An action under the FCRA must be filed within the earlier of: "(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p.

In *Merck & Co., Inc.* v. *Reynolds*, 559 U.S. 633, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010), the Supreme Court made clear that, when a federal statute of limitations incorporates a "discovery" rule, "the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation.'" *Id.* at 648 (quoting 28 U.S.C. § 1658(b)(1)). Notably, the defendant in *Merck & Co.* attempted to argue that the limitations period runs from the date the plaintiff gains so-called "inquiry notice," which the defendant took to mean "the point at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry." *Id.* at 650. The Supreme Court rejected this view. *Id.* at 650-53. The Court held that the statute of limitations does not necessarily run from the point a plaintiff has "inquiry notice." *Id.* at 653 ("We consequently find that the 'discovery' of facts that put a plaintiff on 'inquiry notice' does not automatically begin the running of the limitations period."); *see also Strategic Diversity, Inc.* v. *Alchemix Corp.*, 666 F.3d 1197, 1206 (9th Cir.

2012) (explaining that *Merck & Co.* "held that the ultimate burden is on the defendant to demonstrate that a reasonably diligent plaintiff would have *discovered* the facts constituting the violation").

With regard to the claim against PreCheck, the facts allegedly constituting the violation are PreCheck's furnishing of a consumer report on plaintiff without first receiving § 1681b(b)(1) certification from M-I. Nothing on the disclosure and authorization form signed by plaintiff necessarily alerts plaintiff to a lack of § 1681b(b)(1) certification or otherwise constitutes "discovery by the plaintiff of the violation." 15 U.S.C. § 1681p. To the contrary, any alleged violation of § 1681b(b)(1)on the part of PreCheck would have had to occur *after* plaintiff signed the form. Further, PreCheck advances no reason, and the court can see no reason, why a reasonably diligent plaintiff would have necessarily discovered the § 1681b(b)(1) violation on September 19, 2011—the date plaintiff stopped working for M-I. Because the court must accept the truth of plaintiff's allegation that he discovered the violation "within the last two years" for purposes of this motion, (FAC ¶ 50), the court will deny PreCheck's motion to dismiss on this ground.[4]

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[4] PreCheck also moves to strike plaintiff's class allegation pursuant to Federal Rule of Civil Procedure 12(f) on the basis that it defines an impermissible "fail-safe" class. *See Young* v. *Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) ("[A] 'fail-safe' class is one that includes only those who are entitled to relief * * * [and] allow[s] putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound.")

IT IS THEREFORE ORDERED that:

(1) the motion of defendant M-I LLC to dismiss this action as against it be, and the same hereby is, GRANTED, without leave to amend;

(2) the motion of defendant PreCheck, Inc. to dismiss this action as against it be, and the same hereby is, DENIED; and

(3) the motion of defendant PreCheck to strike be, and the same hereby is, DENIED without prejudice.

(internal quotation marks and citations omitted). Because the issue of class certification is not presently before it, the court will deny PreCheck's motion to strike without prejudice. PreCheck may assert its fail-safe arguments in opposition to a motion for class certification or, if plaintiff fails to move for certification, renew its motion to strike prior to trial.

2014 WL 4344746
United States District Court,
E.D. California.

Sarmad SYED, an individual, on behalf of himself and all others similarly situated,
Plaintiffs,
v.
M-I LLC, a Delaware Limited [Liability] Company; Precheck, Inc., a Texas Corporation; and Does 1-10,
Defendants.

Civ. No. 1:14-742 WBS BAM.
|
Signed Aug. 28, 2014.

Attorneys and Law Firms

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Alexander M. Chemers, Jason S. Mills, Morgan, Lewis & Bockius, LLP, Raymond Joseph Muro, Nelson Griffin, LLP, Los Angeles, CA, George Alan Stohner, Morgan, Lewis & Bockius LLP, Chicago, IL, for Defendants.

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

WILLIAM B. SHUBB, District Judge.

Plaintiff Sarmad Syed brought this putative class action against defendants M-I, LLC ("M-I") and PreCheck, Inc. ("PreCheck"), in which he alleges that

defendants failed to comply with state and federal credit reporting laws while conducting pre-employment background checks. Defendants now move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

I. *Factual and Procedural History*

Plaintiff applied for a job with M-I on July 20, 2011. (Compl. ¶ 17 (Docket No. 1).) During the application process, plaintiff filled out and signed a one-page form entitled "Pre-Employment Disclosure and Release." (*Id.* ¶ 18.) That form, which PreCheck allegedly prepared and provided to M-I, included the following language:

> I understand that the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release, and indemnify prospective employer, PreCheck, Inc., their agents, servants, and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.
>
> It is expressly understood that the information obtained through the use of this release will not be verified by PreCheck, Inc.

(*Id.*)

At some point "within the last two years," plaintiff allegedly obtained and reviewed his personnel file. (*Id.* ¶ 26, 43.) Upon doing so, he discovered that defendants had procured a consumer credit report about him. (*Id.*) Plaintiff alleges that defendants procured this report unlawfully because the disclosure appeared in a form that did not consist "solely of the disclosure," as required by state and federal law. (*Id.* ¶¶ 15, 39.)

Plaintiff filed this putative class action on May 19, 2014, and asserts that defendants' failure to provide disclosures on a separate form violates both the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, and the California Investigative Consumer Reporting Agencies Act ("ICRAA"), Cal. Civ.Code §§ 1786 *et seq*. Defendants now move to dismiss plaintiff's Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Docket Nos. 10, 14.)

II. *Discussion*

On a motion to dismiss under Rule 12(b)(6), the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by Davis* v. *Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Cruz* v. *Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell*

Atl. Corp. v. *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a complaint pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 557).

A. *Fair Credit Reporting Act*

The elements of an FCRA claim depend on the relief that a plaintiff seeks. When a plaintiff only seeks actual damages sustained as a result of an FCRA violation, he need only allege that the defendant was negligent. 15 U.S.C. § 1681***o***(a). But when a plaintiff seeks statutory and/or punitive damages, he must allege that the defendant "willfully fail[ed] to comply" with the FCRA. *Id.* § 1681n(a). Because plaintiff seeks only statutory and punitive damages under § 1681n(a), (*see* Compl. ¶ 24), he must allege that defendants' violation of the FCRA was willful in order to state a claim for relief.

In *Safeco Insurance Company of America* v. *Burr*, the Supreme Court held that the FCRA's use of the term "willful" requires a plaintiff to show that the defendant's conduct was intentional or reckless. 551 U.S. 47, 57, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007). Recklessness, in turn, consists of "action entailing an unjustifiably high risk of harm that is either known or so

obvious that it should be known." *Id.* at 68 (citation and internal quotation marks omitted). In other words, "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. Applying this standard, the Court held that a defendant's violation of the FCRA is not reckless simply because its understanding of its statutory obligations is "erroneous"; instead, a plaintiff must allege, at a minimum, that the defendant's reading of the FCRA is "objectively unreasonable."[1] *Id.*

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[1] As a general rule, whether a defendant's conduct was "willful" is a fact-intensive inquiry. *See, e.g.*, *Edwards* v. *Toys "R" Us*, 527 F.Supp.2d 1197, 1210 (C.D.Cal.2007) ("Willfulness under the FCRA is generally a question of fact for the jury." (citations omitted)). However, *Safeco* strongly suggests that the issue of whether a defendant's reading of the FCRA was "objectively unreasonable" is a question of law. For instance, the Court held that there was no need to remand the case for further factual development because, as a matter of law, "Safeco's misreading of the statute was not reckless." 551 U.S. at 71. It suggested that courts should consider whether a plaintiff had "guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took." *Id.* at 70. It emphasized that courts should not consider the presence or absence of subjective bad faith in conducting this analysis. *Id.* at 70 n. 20. And perhaps most tellingly, it analogized this inquiry to the "clearly established" inquiry required under the Court's qualified immunity precedents – an inquiry that is legal in nature. *See id.* at 70 (citing *Saucier* v. *Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

Here, plaintiff alleges that defendants' conduct was reckless because they "knew or should have known about their legal obligations under the FCRA," that "[t]hese obligations are well established in the plain language of the FCRA and in the promulgations of the Federal Trade Commission," and that "any reasonable employer or consumer reporting agency knows or easily can discover these obligations." (Compl. ¶ 22.) Plaintiff has not cited any opinion of the FTC to support this contention – perhaps because the FTC's opinion letters suggest that the FCRA may not be so clear-cut. *See* Letter from William Haynes, Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Richard W. Hauxwell, CEO, Accufax Div. (June 12, 1998), 1998 WL 34323756 (F.T.C.), at *1 (opining that "it is our position that the disclosure notice and the authorization may be combined" under certain circumstances); Letter from Cynthia Lamb, Investigator, Div. of Credit Practices, Fed. Trade Comm'n, to Richard Steer, Jones Hirsch Connors & Bull, P.C. (Oct. 21, 1997), 1997 WL 33791227 (F.T.C.), at *1 ("We believe that including an authorization in the same document with the disclosure * * * will not distract from the disclosure itself; to the contrary, a consumer who is required to authorize procurement of the report on the same document will be more likely to focus on the disclosure.").

Plaintiff's allegation that the "plain language of the FCRA" should have apprised defendants of their obligations to provide a disclosure on a separate form – and to certify that the disclosure form complied with the FCRA – founders for similar reasons. The parties

have not cited, and the court cannot identify, any decision of the Ninth Circuit or a district court within the Ninth Circuit construing the phrase "consisting solely of the disclosure." The "dearth of authority" from the Ninth Circuit suggests that defendant's reading of the FCRA is not objectively unreasonable. *Safeco*, 551 U.S. at 70.

In addition, those district courts that have considered whether a combined disclosure and release form violates the FCRA have reached varying conclusions. *Compare Reardon* v. *Closetmaid Corp.*, Civ. No. 2:08-1730, 2013 WL 6231606, at *10-11 (W.D.Pa. Dec.2, 2013) (holding that combined disclosure and liability waiver violated FCRA), *and Singleton* v. *Domino's Pizza*, Civ. No. 11-1823, 2012 WL 245965, at *9 (D.Md. Jan. 25, 2012) (same) *with Burghy* v. *Dayton Racquet Club, Inc.*, 695 F.Supp.2d 689, 696 (S.D.Ohio 2009) (holding that combined disclosure and liability waiver did not violate FCRA because the waiver was "not so great a distraction as to discount the effectiveness of the disclosure and authorization statements") *and Smith* v. *Waverly Partners*, Civ. No. 3:10-28, 2012 WL 3645324, at *5-6 (W.D.N.C. Aug.23, 2012) (same); *see also Avila* v. *NOW Health Grp., Inc.*, Civ. No. 14-1551, 2014 WL 3637825, at *2 (N.D.Ill. July 17, 2014) (noting split in authority on this issue). The inability of district courts around the country to agree on whether a combined disclosure and liability release violates the FCRA suggests that the statute is "less than pellucid," *Safeco*, 551 U.S. at 70, or at least not as clear as plaintiff claims. And in light of the divergent positions

taken by courts on this issue, the court cannot conclude that defendants' interpretation of the requirement that the disclosure appear on a form consisting "solely of the disclosure" is erroneous, let alone "objectively unreasonable." *See id.*

Absent plaintiff's allegation that defendant's conduct was objectively unreasonable, he is left with only bare allegations that defendants' conduct was "willful" and "reckless." But these allegations, which consist only of "labels and conclusions" without factual content, are not sufficient to state a claim that defendants' conduct was willful. *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 686-87 (emphasizing that allegations related to a defendant's state of mind must be based on sufficient factual allegations to state a plausible claim for relief). Even if plaintiff's allegations might be sufficient to state a claim for actual damages, *see* 15 U.S.C. § 1681***o***(a), he does not seek actual damages and has therefore has not stated a plausible claim to relief under § 1681n(a). Accordingly, the court must grant defendants' motion to dismiss.[2]

B. *Supplemental Jurisdiction*

Plaintiff asserts his ICRAA claim pursuant to 28 U.S.C. § 1367, which authorizes federal courts to exercise supplemental jurisdiction over state-law claims

[2] Because the court dismisses this claim on alternate grounds, it need not and does not reach the question of whether plaintiff's FCRA and/or ICRAA claims are barred by the applicable statutes of limitations.

that are sufficiently related to those claims over which they have original jurisdiction. 28 U.S.C. § 1367(a); *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). A district court "may decline to exercise supplemental jurisdiction over a claim * * * if * * * the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *see also Acri* v. *Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir.1997) ("[A] federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in § 1367(c).").

Factors courts consider in deciding whether to dismiss supplemental state-law claims include judicial economy, convenience, fairness, and comity. *City of Chicago* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 172-73, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997). "[I]n the usual case in which federal law claims are eliminated before trial, the balance of factors * * * will point toward declining to exercise jurisdiction over the remaining state law claims." *Reynolds* v. *County of San Diego*, 84 F.3d 1162, 1171 (9th Cir.1996), *overruled on other grounds* by *Acri*, 114 F.3d at 1000.

Because the court will dismiss plaintiff's FCRA claim, only his state-law ICRAA claim remains. None of the parties identify any extraordinary or unusual circumstances suggesting that the court should retain jurisdiction over plaintiff's ICRAA claim in the absence of any claim over which the court has original

jurisdiction.[3] The court therefore declines to exercise supplemental jurisdiction over plaintiff's ICRAA claim pursuant to 28 U.S.C. § 1367(c)(3).

IT IS THEREFORE ORDERED that defendants' motion to dismiss be, and the same hereby is, GRANTED. Plaintiff has twenty days from the date this Order is signed to file an amended Complaint, if he can do so consistent with this Order.

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[3] Plaintiff's Complaint alleges only that the court "has jurisdiction under 15 U.S.C. [§] 1681p" and does not allege any other basis for jurisdiction. For instance, it does not allege that the parties are from different states and that there is over $75,000 in controversy. *See* 28 U.S.C. § 1332(a). It also does not allege that the putative class of which plaintiff is a member contains at least one member who is diverse from at least one defendant and that there is over $5,000,000 in controversy. *See* 28 U.S.C. § 1332(d). Because plaintiff is the party invoking the court's jurisdiction, he bears the burden of showing that the court has original jurisdiction over at least one of his claims. *Scott* v. *Breeland*, 792 F.2d 925, 927 (9th Cir.1986). In the absence of any allegation to this effect, the court will not exercise jurisdiction over his state-law claim.