SHAUN SETAREH (SBN 204514)
shaun@setarehlaw.com
TUVIA KOROBKIN (SBN 268066)
tuvia@setarehlaw.com
SETAREH LAW GROUP
9454 Wilshire Boulevard, Suite 907
Beverly Hills, California 90212
Telephone: (310) 888-7771
Facsimile: (310) 888-0109

Luis A. Cabassa (*pro hac vice*)
lcabassa@wfclaw.com
Brandon J. Hill (*pro hac vice*)
bhill@wfclaw.com
WENZEL FENTON CABASSA, P.A.
1110 North Florida Avenue, Suite 300
Tampa, Florida 33602
Telephone: (813) 337-7992
Facsimile: (813) 229-8712

Attorneys for Plaintiffs,
KAYONIE COLEMAN and DIANE PEMBERTON

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KAYONIE COLEMAN and DIANE PEMBERTON, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

KOHL'S DEPARTMENT STORES, INC., a Delaware Corporation; and DOES 1 to 100, Inclusive

Defendants.

Case No.: 3:15-cv-02588-JCS

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

The Hon. Joseph C. Spero

Date: September 25, 2015
Time: 9:30 a.m.
Courtroom G, 15th Floor

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUPPORTING FACTS AND PROCEDURAL OVERVIEW 3

A. Defendant's Unlawful Forms 3

B. The Underlying Florida Action and Defendant's Motion to Transfer/Dismiss 4

C. The First Amended Complaint in this Matter 5

III. MEMORANDUM OF POINTS AND AUTHORITIES 6

A. Standard on Review 6

B. Plaintiff's State and Federal Claims are Timely 6

1. Kohl's Cannot Satisfy the "Reasonably Diligent Plaintiff" Standard Established by the Ninth Circuit Because the Court Must Accept as True Plaintiff's Allegations Regarding When She Discovered the Violation 9

2. Defendant Utilizes Its Own Violation of the Law to Argue For a Shorter Limitations Period 10

C. Plaintiff's First, Second, and Third Causes of Actions Properly and Sufficiently Alleges Willfulness 11

D. § 1681b(b)(2)(A)(i) Prohibits Liability Waivers, and the Authorization Form Was Not Clear, Conspicuous and a Document Consisting Solely of the Authorization Form 15

E. Plaintiffs' Has Properly Pled The Third Cause of Action 19

F. The Court Should Reject Defendant's Arguments Seeking Dismissal of Coleman's ICRAA and CCRAA Causes of Actions 20

IV. CONCLUSION AND REQUEST FOR LEAVE TO AMEND 22

TABLE OF AUTHORITIES

Cases

United States v. LSL Biotechnologies,
379 F.3d 672, 698 (9th Cir. 2004).) 6

Avila v. NOW Health Group, Inc.,
2014 U.S. Dist. LEXIS 99178, 2 (N.D. Ill. July 17, 2014) 1, 2, 18, 19

Banga v. Experian Info. Solutions, et al.,
2010 U.S. Dist. LEXIS 25569, *4 (N.D. Cal. Mar. 17, 2010) 13

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 570 (2007) 6

Brown v. Brown,
368 F.2d 992, 933 (9th Cir. 1966) 6

Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt, P.C.,
701 F. Supp. 2d 340 (E.D.N.Y. 2010 9

Caminetti v. United States,
242 U.S. 470, 485 (U.S. 1917 15

Carvalho v. Equifax Info. Services, LLC,
629 F.3d 876, 889 (9th Cir.2010). 21

Cisneros v. U.D. Registry, Inc.,
39 Cal.App.4th 548, 581, 46 Cal.Rptr.2d 233 (1995). 21

Connor v. First Student, Inc.,
2015 Cal. App. LEXIS 695, *2-3 (Cal. App. 2d Dist. Aug. 12, 2015) 21

Cowley v. Burger King Corp.,
2008 WL 8910653, at *4 (S.D. Fla. May 23, 2008) 11

Deaton v. Chevy Chase Bank,
157 F. App'x 23 (9th Cir. 2005) 7

Drew v. Equifax Information Services,
690 F.3d 1100 (9th Cir. 2012) 9

Duncan v. Walker,
533 U.S. 167, 174 (2001).) 10

E.E.O.C. v. Video Only, Inc.,

2008 WL 2433841 at *11 (D. Or. June 11, 2008) 16

Edwards v. Toys "R" Us,
527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007)). 11

Feraro v. Impac Funding Corp.,
(N.D. Cal. Jun. 1, 2012). 7

Gillespie v. Equifax Info. Servs. LLC,..... 14

Gonzalez v. McNary,
980 F.2d 1418, 1420 (11th Cir. 1993). 15

Groshek v. Time Warner Cable, Inc.,
2015 U.S. Dist. LEXIS 100328, *4-5 (E.D. Wis. July 31, 2015) 1

Guillen v. Bank of America Corp.,
2011 WL 4071996 *4 (N.D.Cal. Aug. 31, 2011) 20

Hammer v. JP's SW Foods, L.L.C.,
739 F. Supp. 2d 1155, 1167 (W.D. Mo. 2010) 11

Harris v. Home Depot U.S.A., Inc.,
2015 U.S. Dist. LEXIS 93576, *1 (N.D. Cal. June 30, 2015) 1, 2

Harris v. Home Depot U.S.A., Inc.,
2015 U.S. Dist. LEXIS 93576, *2 (N.D. Cal. June 30, 2015) 8

Kubas v. Standard Parking Corp.,
594 F.Supp.2d 1029, 1031-32 (N.D. Ill. 2009)..... 12

Landers v. Quality Commc'ns, Inc.,
771 F.3d 638, 640-41 (9th Cir. 2014) 6

Ledesma v. Jack Stewart Produce, Inc.,
816 F.2d 482, 484, n.1 (9th Cir. 1987) 8, 11

Lengel v. HomeAdvisor, Inc.,
2015 U.S. Dist. LEXIS 59017, *19-24 (D. Kan. May 5, 2015)..... 1

Milbourne v. JRK Residential Am.,
LLC, 2015 U.S. Dist. LEXIS 29905, 15 (E.D. Va. Mar. 10, 2015) 1, 16

Miller v. Johnson & Johnson,
2015 U.S. Dist. LEXIS 4448, 27 (M.D. Fla. Jan. 14, 2015)..... 11

Miller v. Quest Diagnostics,

2015 U.S. Dist. LEXIS 18552, at *2 (W.D. Mo. Jan. 28, 2015) 1

Moran v. The Screening Pros, LLC,
(C.D. Cal. Sept. 28, 2012)..... 21

Moseian v. Peat, Marwick, Mitchell & Co.,
727 F.2d 873, 877 (9th Cir. 1984) 8

Ortiz v. Lyon Management Group, Inc.
(2007) 157 Cal.App.4th 21

Pemberton v. Kohl's Department Stores, Inc 4

Ramirez v. Midwest Airlines, Inc.,
537 F.Supp.2d 1161, 1169 (D.Kan.2008)..... 13

Ramirez v. Trans Union, LLC,
899 F. Supp. 2d 941, 944-45 (N.D. Cal. 2012)..... 20

Reardon v. Closetmaid Corp.,
No. 2:-8-cv-01730, 2013 WL 6231606 at *10-11 (W.D. Pa. Dec. 2, 2013)..... 16

Robins v. Spokeo, Inc.,
742 F.3d 409, 410 (9th Cir. 2014). 5

Romano v. Active Network, Inc.,
2009 WL 2916838, at *3 (N.D. Ill. Sept. 3, 2009) 12

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47, 56 (U.S. 2007)..... 11

Saindon v. Equifax Information Servs.,
608 F. Supp. 2d 1212, 1215 (N.D. Cal. 2009)..... 7

Singleton v. Domino's Pizza,
2012 WL 245965, *8 (D. Md. Jan. 25, 2012)..... 1

Singleton v. Domino's Pizza,
No. 11-1823, 2012 WL 245965 at *8 (D. Md. Jan. 25, 2012 16

Smith v. HireRight Solutions, Inc.,
711 F.Supp.2d 426, 435 (E.D. Pa. 2010) 11

Smith v. Under Armour, Inc.,
593 F.Supp.2d 1281, 1287 (S.D. Fla. 2008) 17

Speer v. Whole Food Mkt. Group, Inc.,

2015 U.S. Dist. LEXIS 40462, 8 (M.D. Fla. Mar. 30, 2015)..... 1, 2, 15, 17, 18

Sweitzer v. Am. Express Centurion Bank,
[1278] 554 F. Supp. 2d 788, 794 n.2 (S.D. Ohio 2008)..... 7

Swierkiewicz v. Sorema N.A.,
534 U.S. 506, 514 6

Thomas v. U.S. Bank, N.A.,
No. 05-1725-MO, 2007 WL 764312, at *5 (D.Or. Mar. 8, 2007). 7

Tilley v. Global Payments, Inc.,
603 F. Supp. 2d 1314, 1323 (D. Kan. 2009). 7

TRW Inc. v. Andrews,
534 U.S. 19, 31 (2001)..... 10

Zaun v. Tuttle, Inc.,
(D.Minn. May 4, 2011) 12

Statutes

15 U.S.C. § 1681..... 7, 9, 10

15 U.S.C. § 1681d(a) 20

15 U.S.C. § 1785.34..... 21

15 U.S.C. § 1785.34(a) 21

15 U.S.C. § 1681b(b)(2)(A)(i) 20

15 U.S.C. § 1681b and 1681d..... 9

15 U.S.C. § 1681b(b)(2)(A)..... 16, 17, 18

15 U.S.C. § 1681b(b)(2)(A)(i) 4, 5

15 U.S.C. § 1681b(b)(2)(A)(ii). 4, 5, 20

15 U.S.C. § 1681o(a)(1)..... 11

15 U.S.C. § 1681p..... 7

Cal. Civ. Code § 1785.3..... 4, 8

Cal. Civ. Code § 1786.52..... 9, 20

I.

INTRODUCTION

Plaintiffs have timely and within the applicable statute of limitations filed this proposed class action alleging that Kohl's violated various state and federal laws that pertain to the authorization and procurement of pre-employment "background checks". The disclosure document that Kohl's made Plaintiffs sign did not consist "solely of the disclosure" but rather included language by which Coleman and Pemberton released Kohl's of any liability that it might incur in connection with the background check, along with other superfluous and improper information. The liability release is included on the second page of both Coleman's and Pemberton's Employment Applications. (*Attached as Exhibit A is Coleman's and Pemberton's "Employment Application"*). The Applications make it clear that those documents are also serving as "authorization forms" to perform an investigative consumer report and that the applicants must agree to release Defendant from any liability related thereto:

> "Unless I noted otherwise, I authorize the Company to contact all my employment references and personal references, as well as the education institutions I have attached. I further authorize the company to inquire about, investigate and obtain copies of any records which relate to me from my former employers and educational institutions. **I hereby release Kohl's and all affiliated persons and entities, as well as any person or institution that provides Kohl's with any lawful information about me, from any and all liability whatsoever resulting from any such lawful inquiry, investigation or communication**." (*See* Exhibit A).

Put simply, Defendant's Motion to Dismiss should be denied because it advances a legal standard that completely ignores § 1681b(b)(2)(A) and well-established case law. Courts throughout the country, including this Court in *Harris v. Home Depot U.S.A., Inc*., 2015 U.S. Dist. LEXIS 93576, *1 (N.D. Cal. June 30, 2015) have denied motions to dismiss premised on the same argument. *See also Groshek v. Time Warner Cable, Inc*., 2015 U.S. Dist. LEXIS 100328, *4-5 (E.D. Wis. July 31, 2015); *Speer v. Whole Food Mkt. Group, Inc*., 2015 U.S. Dist. LEXIS 40462, 8 (M.D. Fla. Mar. 30, 2015); *Miller v. Quest Diagnostics*, 2015 U.S. Dist. LEXIS 18552, at *2 (W.D. Mo. Jan. 28, 2015); *Lengel v. HomeAdvisor, Inc.*, 2015 U.S. Dist. LEXIS 59017, *19-24 (D. Kan. May 5, 2015); *Milbourne v. JRK Residential Am., LLC*, 2015 U.S. Dist. LEXIS 29905, 15 (E.D. Va. Mar. 10, 2015); *Avila v. NOW Health Group, Inc.*, 2014 U.S. Dist. LEXIS 99178, 2 (N.D. Ill. July 17, 2014); *Singleton v. Domino's Pizza*, 2012 WL 245965, *8 (D. Md. Jan. 25, 2012).

These cases, coupled with the statutory text of the FCRA and FTC Advisory Opinions cited herein, supports that an employer violates the FCRA by including a liability release in a disclosure document. Defendant utilized such a release. Thus, Defendant violated the FCRA.

To avoid liability under the FCRA, Defendant claims to have used two different forms when obtaining authorization to procure Plaintiffs' consumer reports, including both an "Employment Application" (*see* Exhibit A), and a "Consent and Disclosure" form (*see* Exhibit B). Whether the Court determines that there are two separate authorization forms; or that both forms is one document package, their arguments fail.

Similar Motions to Dismiss were rejected in at least two other "dual-form" FCRA class action cases, including in *Avila v. NOW Health Group, Inc.*, 2014 U.S. Dist. LEXIS 99178, 2 (N.D. Ill. July 17, 2014), and more recently in *Speer v. Whole Food Mkt. Group, Inc.*, 2015 U.S. Dist. LEXIS 40462, 8 (M.D. Fla. Mar. 30, 2015) (denying motion to dismiss and rejecting same willfulness arguments raised by Defendant here). As explained below, this case is nearly identical to *Speer*. In fact, this Court relied, in part, on *Speer* case when denying the Motion to Dismiss in *Harris v. Home Depot U.S.A., Inc.*, 2015 U.S. Dist. LEXIS 93576, *1 (N.D. Cal. June 30, 2015). The same result should follow here.

Additionally, contrary to Defendant's Motion, Plaintiffs' First Amended Complaint sufficiently alleges willfulness. A defendant acts willfully in violation of the FCRA by either knowingly or recklessly disregarding its statutory duty. Relying upon this definition, courts have found assertions that a defendant repeatedly violated the FCRA sufficient to allege reckless – and, therefore, willful – misconduct. In each count of the Amended Complaint Plaintiff alleges that Defendant acted "willfully" in violating the FCRA, including because "Defendants knew they were required to provide a stand-alone form (separate from the employment application) prior to obtaining and then utilizing a consumer report on the Background Check Class members." (*See, e.g.,* Amended Complaint, ¶¶ 48-52). Plaintiff's allegations of willfulness are, therefore, sufficient to survive a motion to dismiss.

Defendant's Motion also asks the Court to dismiss Plaintiff Coleman's FCRA claims based on an erroneous interpretation of the FCRA's statute of limitations as two years, rather than the correct limitations period of five years. Simply put, Plaintiff Coleman could not have discovered the violations underlying her FCRA claims until she learned that Defendant had actually procured a consumer report on her. It's not obvious from the face of the complaint that Coleman's FCRA claim is barred by the statute of limitations. But Kohl's did not necessarily

violate the FCRA on the date Coleman signed the disclosure/release form. The FCRA simply makes it unlawful to 'procure' a report without first providing the proper disclosure and receiving the consumer's written authorization, so Kohl's could not have violated the statute until it procured a report on Coleman. The Amended Complaint does not make clear when that happened. Accordingly, the motion to dismiss on statute of limitations grounds should denied. Regardless, Kohl's does not argue (nor can it) that Pemberton's claims are time-barred.

Finally, Kohl's Motion to Dismiss erroneously argues that Plaintiff Coleman's state law claims under ICRAA and CCRAA are somehow preempted by the FCRA, and that the ICRAA is "unconstitutionally vague." Both arguments are contrary to case law and, as a result, fail as a matter of law.

II.

SUPPORTING FACTS AND PROCEDURAL OVERVIEW

A. Defendant's Unlawful Forms

Defendant's application process required all applicants, like Plaintiffs, to execute two separate documents (see Exhibits A and B) which individually and/or collectively violate the FCRA. In fact, these two documents violate the most basic and fundamental tenement of the FCRA's stand-alone document requirement: so applicants can understand what their rights are under the FCRA ***before*** authorizing an employer to obtain a consumer report on them.

Defendant's application process is an attempted end-run around the FCRA's stand-alone disclosure require. Specifically, as evidenced by Exhibit A, Defendant attempts to have every applicant first release any rights he or she may under the FCRA, or any other law, related to Defendant's background check investigation. Then, with Exhibit B in hand, having already obtained the liability release as to any potential FCRA claims, Defendant allegedly attempts to comply with the FCRA's stand-alone disclosure requirement by having applicants execute a second background check authorization form that does not contain a release.

The two forms, Exhibit A and Exhibit B, were both signed by Plaintiffs on the same day; Coleman signed her forms on October 15, 2012, and Pemberton signed her forms on June 11, 2013. Both forms purport to authorize Defendant to procure background checks on Plaintiff and the putative class members. Both forms include a space for Plaintiff's signature. Both forms also disclose what the forms may be used for, and provide to Plaintiff information on how to

dispute information in the reports. And, perhaps most importantly, both forms are part of the same employment packet. Thus, they must be read and analyzed together.

Defendant is arguing that it is entitled to ignore the FCRA stand-alone requirement by simply issuing multiple FCRA forms that release it of any liability under the statute. By its Motion Defendant basically asks the Court to ignore Exhibit A, namely because it contains the FCRA prohibited liability release. Such an argument plainly contradicts any logical interpretation of the FCRA. If an employer were permitted to implement such a practice, § 1681b(b)(2)(A)(i) would be rendered meaningless because employers could simply do precisely what Defendant did here: issue one form with a release, and a second form without a release. In doing so Defendant deprived Plaintiff and the putative class of their right to receive an FCRA disclosure form free from distractions.

B. The Underlying Florida Action and Defendant's Motion to Transfer/Dismiss

Plaintiff Kayonie Coleman filed her original Complaint in this Court on June 10, 2015. Count I alleges violation of 15 U.S.C. 1681b(b)(2) of the FCRA. Count II alleges violation of both 15 U.S.C. 1681d(a)(1) and 1681g(c) of the FCRA, while Counts III and IV allege violation of California Civil Code § 1785 *et seq*. and § 1786 *et seq*.

However, unbeknownst to Plaintiff Coleman and her counsel, six weeks before the filing of Plaintiff's Complaint in this matter, another FCRA class action lawsuit was filed against Kohl's. That case was styled *Pemberton v. Kohl's Department Stores, Inc*., Case No.: 8:15-cv-1037-EAK-AEP, and was filed in the Middle District of Florida, Tampa Division.

The original Pemberton case was limited exclusively to FCRA claims brought under 15 U.S.C. § 1681b(b)(2)(A)(i) and 15 U.S.C. § 1681b(b)(2)(A)(ii).

On July 2, 2015, Defendant filed a Motion to Transfer this case to the Florida Court where the *Pemberton* matter was pending. (Doc. 13). However, just fifteen days later, on July 17, 2015, Defendant then moved to dismiss the entire *Pemberton* matter by arguing that the Plaintiff in *Pemberton* lacked Article III standing in the *Pemberton* case. Specifically, in *Pemberton*, Defendant argued as follows: "Even if Plaintiff alleged a statutory violation of the FCRA (she has not), the Amended Complaint should be dismissed pursuant to Rule 12(b)(1) because Plaintiff has not alleged an injury in fact and, therefore, lacks standing under Article III." (*See* Exhibit C, Defendant's Motion to Dismiss from *Pemberton* case, p. 10).

The crux of Defendant's Motion to Dismiss in the *Pemberton* case was that statutory damages alone under the FCRA are not sufficient to confer Article III standing upon which Plaintiff and the putative class could rely to pursue their claims against Kohl's. But, the Ninth Circuit Court of Appeals disagreed with Defendant's argument in *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014). In *Robins* the Ninth Circuit held that statutory damages are, in fact, sufficient to confer Article III standing.[1]

Rather than put her claims at risk, and those claims of the entire class, Pemberton voluntarily dismissed her Florida lawsuit without prejudice on July 21, 2015. She then became a Named Plaintiff in this lawsuit by virtue of the filing of the Amended Complaint in this matter. Defendant has argued that Plaintiff Pemberton is somehow forum shopping by dismissing her Florida case and then joining this case. But, this argument should be rejected entirely.

It was Defendant who forced Plaintiff's hand when it sought to simultaneously transfer this case to a court thousands of miles away in Florida so the putative class could be represented by a Lead Plaintiff whom Defendant claimed lacked Article III standing. This is comparable to asking for a judicial transfer to a court without subject matter jurisdiction, and then asking the transferee court to dismiss the case for lack of subject matter jurisdiction. Such litigation tactics should not be condoned.

C. The First Amended Complaint in this Matter

The First Amended Complaint includes five claims. The first claim in the Amended Complaint is brought against Defendant under 15 U.S.C. § 1681b(b)(2)(A)(i). It alleges that Defendant procured Plaintiffs' consumer reports without first providing Plaintiffs with the required FCRA documentation, namely a "stand-alone" document that does not include a liability release.

The second claim in the Amended Complaint is brought under 15 U.S.C. § 1681b(b)(2)(A)(ii). It alleges that Defendant procured Plaintiff's consumer report without lawful authorization to do so.

The third claim the Amended Complaint asserts a claim under § 1681d alleging that Defendants violated the FCRA by procuring "investigative consumer reports" on Plaintiff and the other putative class members without proper authorization.

[1] *Spokeo* is now being briefed at the Supreme Court.

The fourth and fifth claims are brought exclusively by Coleman and allege violation of the ICRAA and CCRAA.

On August 7, 2015 Defendant filed its pending Motion to Dismiss the Amended Complaint. (Doc. 32). Plaintiff respectfully submits that Defendant's Motion should be denied based upon the authority and arguments set forth below.

III.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Standard of Review

Federal Rule of Civil Procedure 8(a)(2) requires that each claim in a pleading be supported by "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." (*Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 640-41 (9th Cir. 2014), as amended (Jan. 26, 2015) (quoting Fed. R. Civ. P. 8(a)(2).) The Supreme Court has made clear that to satisfy Rule 8(a)(2), a complaint must contain sufficient factual content "to state a claim to relief that is plausible on its face." (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).) "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514.) "[I]n passing on a motion to dismiss for failure to state a claim, the facts set forth in the complaint must be assumed to be true." (*Brown v. Brown*, 368 F.2d 992, 933 (9th Cir. 1966).) Additionally, all reasonable inferences must be drawn in favor of the plaintiff. (*United States v. LSL Biotechnologies*, 379 F.3d 672, 698 (9th Cir. 2004).)

B. Plaintiff's State and Federal Claims are Timely

Defendant's argument contends that Plaintiff's FCRA, CCRA, and ICRAA claims must be dismissed as time-barred because she did not file suit within two years of the time she completed Defendant's authorization forms which were purportedly non-compliant.

This argument ultimately fails because it misconstrues the plain language of § 1681b(b)(2). Plaintiff Coleman's action was timely filed within two year after she discovered Defendant's violations of the FCRA discussed above, and within five years after the date on which those violations occurred. Defendant's limitations argument erroneously assumes that the FCRA violations giving rise to Plaintiff's claims occurred when Plaintiff completed the deficient FCRA form. This assumption, however, neglects to consider that the violation was not complete

until Defendant actually obtained Plaintiff's consumer report and Plaintiff had knowledge that the consumer report had been obtained.

The FCRA includes both a two-year and a five-year statute of limitations:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than 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.

As explained above, Congress amended the limitations section of the FCRA in 2003 to include the discovery provision and the amendment went into effect in 2004. *See* P.L. 108-159 § 2; 15 U.S.C. § 1681p (1998; Supp. 2007); *Sweitzer v. Am. Express Centurion Bank,* [1278] 554 F. Supp. 2d 788, 794 n.2 (S.D. Ohio 2008). Before the amendment, § 1681p required that a claim be brought "within two years from the date on which the liability ar[ose]." *Deaton v. Chevy Chase Bank*, 157 F. App'x 23 (9th Cir. 2005). At least one court, in considering the 2003 amendment, has found that "the prior version is more restrictive of what conduct can form the basis for plaintiff's claims." *Tilley v. Global Payments, Inc.*, 603 F. Supp. 2d 1314, 1323 (D. Kan. 2009).

Indisputably, the plain language of the FCRA now turns upon the date that a plaintiff acquires knowledge of the alleged violation--not the date of the alleged violation itself. *See, e.g., Saindon v. Equifax Information Servs*., 608 F. Supp. 2d 1212, 1215 (N.D. Cal. 2009) ("[I]t is not enough to say the 'violations' occurred before March 31, 2006. The statute clearly states that the clock begins to run when plaintiff 'discovers' the violations.").

Moreover, "the statute provides for a grace period of up to three years to allow aggrieved parties to discover any violation…the existence of that grace period demonstrates that the five-year limit is intended to be absolute." *Feraro v. Impac Funding Corp*., No. 5:12-CV-00322-EJD, 2012 WL 1980347 (N.D. Cal. Jun. 1, 2012). Thus, until Plaintiff discovered that Defendant had actually procured a consumer report on her pursuant to a defective disclosure, there was no claim to assert and the statute of limitations did not begin to run. *See Thomas v. U.S. Bank*, N.A., No. 05-1725-MO, 2007 WL 764312, at *5 (D.Or. Mar. 8, 2007).

The Court here cannot resolve any dispute of fact regarding when Plaintiff was on "inquiry notice" of her claims because the operative Complaint is silent on that issue. There is nothing in the Complaint stating when Plaintiff was on inquiry notice. In fact, Plaintiff was not

provided a copy of the defective forms when she applied for employment; she was simply handed the forms, told to sign them, and then was instructed to return the forms to Kohl's immediately thereafter, which she did. Plaintiff only became aware of the defective nature of the forms on August 2, 2013, when she received her personnel file from Defendant pursuant to her attorneys' request for same. This action was filed less than two years thereafter.[2] Plaintiff could not have discovered the FCRA violations any sooner because Defendant did not provide her with a copy of the Disclosure.

Only when the relevant facts are not in dispute may the effect of a statute of limitations be decided as a question of law. (*See Moseian v. Peat, Marwick, Mitchell & Co*., 727 F.2d 873, 877 (9th Cir. 1984) (when an alleged wrongdoing should have been discovered "may be decided as a matter of law only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct").) In the case at bar, the dispute of fact is clear: Defendant claims that Plaintiff Coleman discovered its violations of the FCRA simply because she signed the Disclosure, while Plaintiff affirmatively avers that she did not discover the violation until she could review her personnel file later produced.

Because the running of the statute is not apparent from the face of the Amended Complaint, Defendant's motion to dismiss this action as time-barred must be denied. *Harris v. Home Depot U.S.A., Inc.*, 2015 U.S. Dist. LEXIS 93576, *2 (N.D. Cal. June 30, 2015) (rejecting same argument and holding that "[i]t's not obvious from the face of the complaint that Harris's FCRA claim is barred by the statute of limitations."); *see also Ledesma v. Jack Stewart Produce, Inc*., 816 F.2d 482, 484, n.1 (9th Cir. 1987)

Similarly, the CCRAA provides an alternative two-year or seven-year SOL:

> An action to enforce any liability created under this chapter may be brought in any appropriate court of competent jurisdiction within two years from the date the plaintiff knew of, or should have known of, the violation of this title, but not more than seven years from the earliest date on which liability could have arisen…

Cal. Civ. Code § 1785.33

Accordingly, Plaintiff had until two years after she discovered the violation, and up to seven years after the violation occurred, to bring suit against Defendant under the CCRAA. As explained above, Plaintiff's lawsuit was filed within these time periods.

Similarly, the ICRAA's SOL is "two years from the date of discovery:"

[2] Although these factual allegations are not specifically pled in the Complaint, Plaintiff can add these allegations to an amended complaint.

> An action to enforce any liability created under this title may be brought in any appropriate court of competent jurisdiction within two years from the date of discovery.
>
> Cal. Civ. Code § 1786.52

Accordingly, the SOL on Plaintiff's ICRAA claim also began to run from when Plaintiff *discovered* the violation. As stated, Plaintiff's suit was filed within two years of her discovery of the violation, i.e. within two years of her receipt of her personnel file which alerted Plaintiff to the unlawful nature of Defendant's disclosures.

Moreover, the confusing nature of the forms, including the fact that Plaintiff was required to sign multiple forms at the same time, only compounded Plaintiff's confusion surrounding the forms and their resultant unlawful nature.

1. Kohl's Cannot Satisfy the "Reasonably Diligent Plaintiff" Standard Established by the Ninth Circuit Because the Court Must Accept as True Plaintiff's Allegations Regarding When She Discovered the Violation

Defendant presents the unsupported contention that Plaintiff's claim accrued when she was presented with the non-compliant Disclosure in October 2012 because her signing it constituted "discovery" for purposes of triggering the two-year limitations period in § 1681p(1). The Ninth Circuit in *Drew v. Equifax Information Services*, 690 F.3d 1100 (9th Cir. 2012) stated that "The harder question centers around *when* [Plaintiff's] cause of action arose. . . . '[T]he ultimate burden is on the defendant to demonstrate that a reasonably diligent plaintiff would have *discovered* the facts constituting the violation…. [Defendant must] demonstrate how a reasonably diligent plaintiff … would have discovered the violations.' [Citation.]" (*Id.* at 1109-10, emphasis in original.)

Kohl's makes no attempt to satisfy this burden. The court in *Drew*, as well as in *Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt, P.C.*, 701 F. Supp. 2d 340 (E.D.N.Y. 2010), refused to dismiss the plaintiffs' FCRA claims on statutes of limitations grounds because there were factual disputes regarding when the plaintiffs knew or should have known of the violation. (*See Drew*, *supra*, 60 F.3d at 1110-11; *see also Caldwell*, *supra*, 701 F. Supp. 2d at 354.)

Likewise here, this Court cannot resolve any dispute of fact regarding when Plaintiff, acting reasonably diligent, would have discovered the violations of §§ 1681b and 1681d alleged here. This Court must accept as true Plaintiff's allegations that she did not discover the violation until Defendant produced a copy of Plaintiff's personnel file, including a copy of the

Disclosures, in August 2013." This action was filed less than two years thereafter, on June 10, 2015. Plaintiff could not have discovered the FCRA violations any sooner because, as stated, Kohl's did not provide her with a copy of the Disclosure.

2. Defendant Utilizes Its Own Violation of the Law to Argue For a Shorter Limitations Period

Defendant's argument that Plaintiff was required to file her FCRA action within two years of signing the Disclosures also does not logically follow because it would mean that every time an employer violates the FCRA's disclosure requirements, then an employer like Kohl's could take advantage of its own non-compliance of the law of failing to provide a clear and conspicuous disclose to argue for the shorter statute of limitations. Kohl's attempts to hide behind its own unlawful conduct, thereby incentivizing employers to not comply with the disclosure requirements of the FCRA, to the detriment of job applicants and employees presented with multiple employment-related forms to sign on a take-it-or-leave-it basis. Because Plaintiff could not even keep a copy of the Disclosures giving rise to her claims, Kohl's argument here presupposes that employees like Plaintiff, uneducated about the FCRA, will memorize complicated forms (devoid in clarity and conspicuousness) to discover the violation *on the spot*. This eviscerates the intent behind the FCRA of protecting consumers, including job applicants, by providing clear statements of their rights.

Moreover, Defendant's proposition would render the five-year limitations period in § 1681p(2) wholly inapplicable. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant. [Citations.]" (*TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).) Courts are "reluctant to treat statutory terms as surplusage in any setting." (*Duncan v. Walker*, 533 U.S. 167, 174 (2001).) To accept Defendant's construction of § 1681p, the five-year period would be rendered "insignificant, if not wholly superfluous" because, according to Defendant's argument, every time an employee was presented with a disclosure that violates the FCRA, the employee is deemed to have discovered the violation that moment as a matter of law. (*See id.*)

Hence, because the running of the statute is not apparent from the face of the FAC, Defendant's motion to dismiss this action as time-barred must be denied. (*See Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484, n.1 (9th Cir. 1987).)

C. Plaintiff's First, Second, and Third Causes of Actions Properly and Sufficiently Alleges Willfulness.

The FCRA permits a plaintiff to recover damages when a defendant acted either negligently or willfully in violating the statute's requirements. *See* 15 U.S.C. § 1681o(a)(1) (providing that a plaintiff may recover actual damages in cases of negligent noncompliance); *id.* § 1681n(a)(1)(A) (providing for statutory damages in cases of willful noncompliance). Here, because Plaintiff has alleged only statutory damages, the applicable standard is willfulness.

The second argument raised in Defendant's Motion suggests that Plaintiffs somehow did not sufficiently allege that Defendant willfully violated the FCRA. However, whether an employer acted willfully or negligently under the FCRA "is understood to be a question of fact for the jury." *Miller v. Johnson & Johnson*, 2015 U.S. Dist. LEXIS 4448, 27 (M.D. Fla. Jan. 14, 2015) (*citing to Cowley v. Burger King Corp*., 2008 WL 8910653, at *4 (S.D. Fla. May 23, 2008); *see also Hammer v. JP's SW Foods, L.L.C*., 739 F. Supp. 2d 1155, 1167 (W.D. Mo. 2010); *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007)).[3]

A defendant acts willfully under the FCRA by either knowingly or recklessly disregarding its statutory duty. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56 (U.S. 2007). Relying upon this definition, courts have found assertions that a defendant repeatedly violated the FCRA sufficient to allege reckless – and, therefore, willful - misconduct. *See Smith v. HireRight Solutions, Inc*., 711 F.Supp.2d 426, 435 (E.D. Pa. 2010) (finding that a plaintiff had sufficiently alleged willfulness where the complaint indicated that the defendant had repeatedly engaged in "objectionable conduct" by reporting a single criminal history incident multiple times on a consumer report – an assertion that could, "at minimum, rise to the level of reckless

[3] *See also Smith v. Hireright Solutions, Inc*., 711 F. Supp. 2d 426, 429 (E.D. Pa. 2010) ("[Plaintiff's] allegations satisfy the *Twombly/ Iqbal* standards for pleading a willful violation of . . . the Fair Credit Report Act. … While [plaintiff's] allegations would not necessarily withstand summary judgment scrutiny, the Court remains mindful of the fundamental tenet that a plaintiff, having set forth a legally and factually viable cause of action is entitled to the benefits of discovery before being put to his or her proofs."). In the absence of discovery, Plaintiffs cannot be expected to produce a "smoking gun" internal memo or other similar documentation. Moreover, even if the parties were at the summary judgment stage (which they are not) and had the benefit of a full record (which they do not), "[w]illfulness under the FCRA is generally a question of fact for the jury." *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1210 (C.D.Cal. 2007); *Romano v. Active Network, Inc.*, No. 09-C-1905, 2009 WL 2916838, at *3 (N.D. Ill. Sept. 3, 2009) ("The willfulness issue cannot always be resolved at the motion to dismiss stage since it may involve facts beyond the pleadings.").

disregard"); *Romano v. Active Network, Inc*., 2009 WL 2916838, at *3 (N.D. Ill. Sept. 3, 2009) (citing the plaintiff's assertion that the defendant had repeatedly violated FACTA when concluding that the complaint's allegations of willfulness were sufficient to survive a motion to dismiss).

In addition, assertions that a defendant was aware of the FCRA, but failed to comply with its requirements, are sufficient to support an allegation of willfulness and to avoid dismissal. *See Kubas v. Standard Parking Corp.*, 594 F.Supp.2d 1029, 1031-32 (N.D. Ill. 2009) (denying a motion to dismiss where a plaintiff alleged that a defendant acted willfully by failing to comply with FACTA after credit card issuers had informed it of the law's requirements); *see also Zaun v. Tuttle, Inc*., 2011 WL 1741912, at *2 (D.Minn. May 4, 2011) (concluding that a plaintiff had sufficiently alleged willfulness by asserting that the defendant was aware of FACTA's requirements, via information provided by a trade association, had the ability to comply with those requirements, and simply decided not to do so).

Here, in the Amended Complaint Plaintiff alleges that Defendant acted "willfully" in violating the FCRA, and supports this assertion with allegations analogous to those set forth in the cases above. Specifically, in the Amended Complaint Plaintiff alleged that Defendant engaged in a practice of willfully violating the FCRA by:

> "Defendants' conduct in violation of Section 1681b(b)(2)(A) of the FCRA was and is willful. Defendants acted in deliberate or reckless disregard of their obligations and the rights of applicants and employees, including Plaintiff and class members. Defendants' willful conduct is reflected by, among other things, the following facts:
>
> (a) Defendants are a large corporation with access to legal advice;
> (b) Defendants required a purported authorization to perform credit and background checks in the process of employing the class members which, although defective, evidences Defendants' awareness of and willful failure to follow the governing laws concerning such authorizations;
> (c) The plain language of the statute unambiguously indicates that inclusion of a liability release and other extraneous information in a disclosure form violates the disclosure and authorization requirements;
> (d) The FTC's express statements, pre-dating Defendants' conduct, which state that it is a violation of Section 1681b(b)(2)(A) of the FCRA to include a liability waiver in the FCRA disclosure form;
> (e) Due to Defendants' placement of a release of liability within Exhibit A, Defendants knew of their potential FCRA liability (which is precisely why they tried to avoid it);
> (f) The consumer reporting agency that provided Plaintiffs' consumer report information to Defendants (LexisNexis) has published numerous FCRA-related articles and compliance self-help materials available both online, and through LexisNexis, and provided them to Defendants."

(Amended Complaint, ¶¶ 37-39); *see also* ¶¶ 48-52).

Plaintiffs also asserted in the Amended Complaint as follows: "Defendants were previously sued in a non-employment context for willful violations of the FCRA in a case styled *Banga v. Experian Info. Solutions, et al*., 2010 U.S. Dist. LEXIS 25569, *4 (N.D. Cal. Mar. 17, 2010). Thus, Defendants were clearly aware of their obligations under the FCRA, including with respect to keeping themselves informed of the FCRA's obligations, and as to their potential exposure for willful FCRA violations." (Amended Complaint, ¶ 41). Based upon the above allegations, Plaintiff has clearly supported his assertion that Defendant acted willfully.

In fact, the willfulness allegations in Plaintiff's Amended Complaint are "typical" of those raised in other FCRA cases:

Defendants argue that plaintiffs have not alleged willful violations of [FCRA][4] because mere knowledge of the statute and other retailers' compliance with its terms are not sufficient to show knowing or reckless noncompliance. This argument is unpersuasive. The complaint alleges that defendants recognized their statutory duty to limit the information which appeared on customer receipts, but intentionally ignored that duty and refused to take steps to comply with [FCRA]

> regulations. The complaint suggests that defendants' noncompliance was the result of more than a mere careless reading of [FCRA]. When taken as true, plaintiffs' allegations state a plausible claim for willful violations of [FCRA]. *See Ramirez v. Midwest Airlines, Inc.*, 537 F.Supp.2d 1161, 1169 (D.Kan.2008) (citing *Safeco Ins. Co.*, 127 S.Ct. at 2208) (reckless disregard of statutory duties renders [FCRA] violation willful). In fact, plaintiffs' allegations are typical of
>
> [FCRA] claims, and courts have almost uniformly rejected the argument that such allegations do not sufficiently allege willful violations of the statute.

In re The TJX Companies, Inc., 2008 WL 2020375, at *2 (D.Kan. May 9, 2008) (internal footnote omitted).

Although Defendant contends that its conduct not willful, it does not deny that it was aware of case law or the FTC advisory opinion letters cited herein, which state that (1) employers should not include a FCRA disclosure in an employment application, and (2)

[4] The FCRA claims at issue in *TJX* were brought under the Fair and Accurate Credit Transactions Act ("FACTA"), which was enacted in 2003 as an amendment to the FCRA.

employers should not include a release in their FCRA disclosures. Further, Defendant does not deny that it acted inconsistently with these cases and/or with the advisory opinion letters. Rather, Defendant contends that the cases cited by Plaintiff and FTC Advisory Opinions are either wrong or distinguishable, and that Defendant was entitled to interpret the FCRA in a different manner.

Yet, there is no evidence that it actually did interpret the FCRA in a different manner. *See Gillespie v. Equifax Info. Servs. LLC*, No. 05-C-138, 2008 WL 4316950, at *7 (N.D. Ill. Sept. 15, 2008) ("[T]he Court notes that there is another problem with Equifax's attempt to analogize this case to *Safeco* and others holding a company's interpretation of a less-than-clear FCRA provision to be objectively reasonable. The argument assumes that [Defendant] actually adopted a particular construction of section 1681[.] No such evidence appears in the record in this case; Defendant has elected not to offer evidence[.]"). There is no contemporaneous evidence that Defendant determined that its conduct was lawful. It has not produced a legal opinion letter blessing its approach, and it has not identified any case (that is on point) rejecting the FTC's approach. Defendant either failed to make any effort to determine whether its FCRA forms were lawful, or it did analyze the lawfulness of its forms and consciously disregarded the statutory text, case law, and FTC guidance. Either way, its conduct was reckless, which is sufficient to establish liability for a willful violation of the Act. *See Safeco*, 551 U.S. at 56-57 (liability for willfully failing to comply with FCRA includes "reckless disregard of statutory duty").

Defendant's attempt to utilize the Supreme Court's decision in *Safeco* in support of its willfulness argument (or lack thereof) also falls short. In *Safeco*, the Court expressly stated that "[t]his is not a case in which the business subject to the Act had the benefit of guidance from . . . the Federal Trade Commission (FTC) that might have warned it away from the view it took." *Safeco*, 551 U.S. at 70. Although the Court observed that one staff opinion letter may have touched upon the issues in that case, here Defendant's conduct was clearly inconsistent with the statutory text of the FCRA, case law, and at least three published opinion FTC Opinion letters. Further, unlike in this case, the defendant in *Safeco* at least made an effort to ascertain the lawfulness of its conduct by obtaining a contemporaneous opinion letter on the subject. *Safeco*, 551 U.S. at n.20. Based on this opinion letter, the defendant in *Safeco* thought that it was in compliance with the statute. *Id*. at 68. Here, by contrast, there is no contemporaneous evidence that Defendant determined that its conduct was lawful.

Finally, as recently pointed out by United States District Court Judge Lazzarra in his well-reasoned Order from *Speer* denying a similar motion to dismiss and rejecting a similar

defense argument on willfulness, unlike this case *Safeco* was decided on a full record in the context of a motion for summary judgment:

> *Safeco*, unlike the case at hand, was decided in the context of a review of a grant of summary judgment. It is the reckless disregard of the statutory duties that renders FCRA violations willful. *See In re TJX* Cos., No. 07-md-1853-KHV, 2008 U.S. Dist. LEXIS 38258, 2008 WL 2020375, at *2 (D. Kan. May 9, 2008) (*citing Safeco*). Plaintiff's allegation that Defendant "knew it was required to provide a stand-alone form (separate from the employment application) prior to obtaining and then utilizing a consumer report" dovetails with its allegations that the forms used by Defendant were in fact combined as one. The allegations that Defendant had access to legal advice and guidance from the Federal Trade Commission yet it knew that its conduct was inconsistent with that guidance and the plain terms of the statute, are sufficient to withstand attack at this stage of the proceedings on a motion to dismiss. *See, e.g., Avila*, 2014 U.S. Dist. LEXIS 99178, 2014 WL 3537825, at *3; *Singleton*, 2012 U.S. Dist. LEXIS 8626, 2012 WL 245965, at *9-10. *Speer v. Whole Food Mkt. Group, Inc*., 2015 U.S. Dist. LEXIS 40462, 8 (M.D. Fla. Mar. 30, 2015);

Based upon the arguments and authority set forth above, Plaintiff respectfully submits that the Court should deny Defendant's Motion to Dismiss.

D. **§ 1681b(b)(2)(A)(i) Prohibits Liability Waivers, and the Authorization Form Was Not Clear, Conspicuous and a Document Consisting Solely of the Authorization Form**

In interpreting a statute, like the FCRA here, the starting point is the language of the statute itself. *Caminetti v. United States*, 242 U.S. 470, 485 (U.S. 1917); *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993). As a general rule, if the language of a statute is plain, then a court's interpretive function ceases, and it should enforce the statute according to its own terms. *Gonzalez*, at 1420 ("The meaning of the statute must, in the first instance, be sought in the language in which the action is framed, and if that is plain … the sole function of the courts is to enforce it according to its terms.")

In this case, the language of § 1681b(b)(2)(A)(i) could not be clearer. Section 1681b(b)(2)(A)(i) mandates that the disclosure that a consumer report may be procured for employment purposes be made "in a document that consists ***solely*** of the disclosure, that a consumer report may be obtained for employment purposes." (Emphasis added). Merriam-

Webster's Online Dictionary defines "solely" as "to the exclusion of all else." http://www.merriam-webster.com/dictionary/solely. The synonyms of "solely" are "alone, exclusively, just, only, purely, simply." *Id*. Thus, an FCRA disclosure -- like Exhibit A to Plaintiff's Amended Complaint in this case -- that contains a release of liability is not one that "consists solely of the disclosure that a consumer report may be obtained for employment purposes." In fact, Defendant's own consumer reporting agency, ADP, has emphasized to its clients that "[t] The FCRA requires this notice to be a separate, clear and conspicuous document."[5]

Multiple District Courts have agreed with this interpretation. *Milbourne v. JRK Residential Am., LLC*, 2015 U.S. Dist. LEXIS 29905, 15 (E.D. Va. Mar. 10, 2015)("Thus, judging by the text of the statute alone, inclusion of a waiver within the document containing the disclosure would violate § 1681b(b)(2)(A)(i)."); *Singleton v. Domino's Pizza*, No. 11-1823, 2012 WL 245965 at *8 (D. Md. Jan. 25, 2012), ("Had Congress intended for employers to include additional information in these documents, it could easily have included language to that effect in the statute. It did not do so, however, and its 'silence is controlling.'"); *Reardon v. Closetmaid Corp*., No. 2:-8-cv-01730, 2013 WL 6231606 at *10-11 (W.D. Pa. Dec. 2, 2013) (FCRA disclosure with liability waiver was "facially contrary to the statute at hand, and all of the administrative guidance") (granting summary judgment against the defendant employer); *E.E.O.C. v. Video Only, Inc*., 2008 WL 2433841 at *11 (D. Or. June 11, 2008) (granting summary judgment against the defendant employer who made disclosure "as part of its job application which is not a document consisting solely of the disclosure").

Lest there be any doubt, in 1998, the FTC stated that the disclosure form "should not contain any extraneous information" and specifically advised that "[t]he inclusion of [a waiver of rights and release of liability] in a disclosure form will violate Section 604(b)(2)(A) of the FCRA [15 U.S.C. § 1681b(b)(2)(A)]." *FTC Staff Opinion Letter to Richard W. Hauxwell* (June 12, 1998).[6] The FTC reaffirmed this guidance in its 2011 Staff Report, 40 Years of Experience with the Fair Credit Reporting Act, an FTC Staff Report with Summary of Interpretations, pg. 51 (July 2011).[7]

[5] *Available at* https://www.adpselect.com/pdf/ADPFairCreditReportingActWhitePaper.pdf.
[6] *Available at* https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-hauxwell-06-12-98.
[7] *Available at* www.ftc.gov/os/2011/07/110720fcrareport.pdf.

In *Singleton*, the plaintiff asserted a claim against Domino's Pizza almost identical to that asserted by Plaintiff herein - that Domino's had violated § 1681b(b)(2)(A)(i) by including a release of liability within its disclosure form. Regarding the term "solely," the court commented:

> [D]ictionary definitions of the word "solely" indicate that a document disclosing that an employer planned to obtain a consumer report would not "consist[] solely of the disclosure" if the document also contained a liability release. . . . The [Background Investigation Information and Consent] form runs contrary to these definitions because, by containing a liability release, the form includes information that extends beyond the disclosure itself.

Singleton, supra, 2012 U.S. Dist. LEXIS 8626 at * 30-31.

The *Singleton* court further noted that two FTC Staff Opinions supported its reading of the "stand-alone" requirement of § 1681b(b)(2)(A). One was the FTC Staff Opinion Letter to Hauxwell cited above. The other was FTC Staff Opinion Letter to H. Roman Leathers (Sept. 9, 1988),[8] wherein the FTC explained that "[t]he reason for requiring that the disclosure be in a stand-alone document is to prevent consumers from being distracted by other information side-by-side with the disclosure." The *Singleton* court then concluded:

> "Ultimately, both the statutory text and FTC advisory opinions indicate that an employer violates the FCRA by including a liability release in a disclosure document. Because the BIIC form contains such a release, Domino's has not shown, as a matter of law, that the form complies with the FCRA. Its attempt to have counts two and three dismissed on this ground must, therefore, fail." Id. at * 33-34.

The same outcome should follow here. Indeed, when mandating that an employer use a document that "consists solely of the disclosure," Congress expressly permitted employers to include language authorizing the employer to procure the consumer report. 15 U.S.C. § 1681b(b)(2)(A)(ii). Had Congress intended for employers to include additional information in these documents, it could easily have included language to that effect in the statute. It did not do so, however, and its "silence is controlling." *Smith v. Under Armour, Inc.*, 593 F.Supp.2d 1281, 1287 (S.D. Fla. 2008) (finding Congress's failure to include language regarding e-commerce in one FCRA section instructive in determining whether that section applied to ecommerce).

As explained above, the *Speer* Court recently denied a nearly identical motion to dismiss premised on the same flawed argument set forth in Defendant's Motion to Dismiss here. In *Speer v. Whole Food Mkt. Group, Inc.*, 2015 U.S. Dist. LEXIS 40462, 7 (M.D. Fla. Mar. 30, 2015), this Court opined as follows:

[8] *Available at* http://www.ftc.gov/policy/advisory-opinions/advisory-opinion-leathers-09-09-98.

> "In the instant case, Plaintiff alleges that the disclosure form and the consent form were in fact one document or application that was read and signed by the applicant at the same time. Thus, alleges Plaintiff, the inclusion of the waiver along with the disclosure violated the FCRA. While Defendant asks this Court to consider on a motion to dismiss that the documents are free-standing, with the waiver appearing in a separate document, this Court cannot consider facts outside the complaint or its attachments. Based on the allegations, with all inferences drawn in favor of Plaintiff, if both the disclosure and the consent forms combined and read as one document with the waiver and release included simultaneously with the disclosure, the complaint states a claim for relief. *See Avila* (denying motion to dismiss where plaintiff signed two documents, one including a statement that the employer will obtain a background report and the other containing both an authorization to obtain background and a liability release). As such, the complaint withstands dismissal." *Speer v. Whole Food Mkt. Group, Inc*., 2015 U.S. Dist. LEXIS 40462, 8 (M.D. Fla. Mar. 30, 2015)

The same outcome should follow in this case. In fact, Defendant's argument that its "dual" forms are somehow permissible under the FCRA was also rejected by the Court in *Avila v. NOW Health Group, Inc*., 2014 U.S. Dist. LEXIS 99178, 2 (N.D. Ill. July 17, 2014). Similar to in *Speer,* in *Avila* as part of the application process, the plaintiff was asked to sign two documents, just as Plaintiff was required to do here. The first was called the "NOW Foods Statement," which contained two sections, one captioned "Equal Opportunity Statement" and the other captioned "Pre-Employment Statement." The "Pre-Employment Statement" portion contained several paragraphs and, among other things, includes a statement that will obtain a background report on the applicant. The second document, a Background Report Authorization Form, included both authorization for the NOW defendant to obtain a background report as well as other information, including a ***liability release***. Obviously, the dual form scenario from *Avila* is on point and comparable with the dual forms Defendant presented to Plaintiff in this case; just like in *Avila* only one of the two forms actually contained a liability release.

The *Avila* plaintiff's background check raised some issues and he filed suit under 15 U.S.C. § 1681b(b)(2)(A) alleging that the two pre-employment forms he was required to sign by NOW, the NOW Foods Statement and the Background Report and Authorization Form, did not constitute the stand alone disclosure required by the FCRA. The *Avila* defendant moved to dismiss arguing that both forms complied with the FCRA. The Court denied the Motion to Dismiss, holding that "[a]t the motion to dismiss stage, where all inferences are made in favor of the nonmovant, the Court is unwilling to conclude that Avila has not stated a claim." *Avila v.*

NOW Health Group, Inc., 2014 U.S. Dist. LEXIS 99178, 6 (N.D. Ill. July 17, 2014). The same outcome should follow here.

Section 1681b(b)(2)(A)(i) provides that the disclosure must be "in a document that consists solely of the disclosure," that a consumer report may be obtained for employment purposes. . . ." Thus, this provision is explicit is providing that only one document can be used. This rule of course makes complete sense because the use of multiple documents would engender confusion and make it unclear to the prospective employee as to exactly what is being authorized to be procured. That, of course, is the argument Defendant's Motion is premised on.

As demonstrated by Exhibits A and B to Plaintiff's Amended Complaint, both of Defendant's forms include background check disclosures about the nature and scope of reports to be obtained. Both forms have separate blanks for obtaining prospective employee signatures for obtaining authorization. Both forms were given to Plaintiffs by Defendant at the time each applied for a job, and signed and dated by Plaintiff on the same day they received their respective forms. Thus, Defendant's FCRA forms are a cohesive set of documents that must be read and analyzed together, forms which include a waiver of liability prohibited by the FCRA. Simply put, these forms violate the FCRA. Defendant's Motion should be denied accordingly.

E. Plaintiffs' Has Properly Pled The Third Cause of Action

Finally, Count Three of the Amended Complaint asserts a claim under § 1681d alleging that Defendant violated the FCRA by procuring "investigative consumer reports" on Plaintiff and the other putative class members without proper authorization. "Investigative consumer reports" under the FCRA are defined in Section § 1681a(e) as "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 neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information." Because of the intrusive nature of the "investigative consumer reports," the FCRA requires additional disclosures by an employer to a potential applicant, none of which Defendants followed. *See* § 1681d(a).

Plaintiffs' Amended Complaint alleges that Defendant's background check process also constitutes an "investigative consumer report" as defined by the FCRA (*see* Amended Complaint, ¶¶26, 46, 40, 56-62) violated their rights under Section § 1681d(a) by failing to

comply with the FCRA's disclosure requirements for investigative consumer reports. Notably, Defendant does not appear to actually deny that an investigative consumer report was obtained on either Plaintiff. Instead, Defendant simply argues that Plaintiff's claims fail for the same reasons cited in opposition to Plaintiff's §§ 15 U.S.C. §§ 1681b(b)(2)(A)(i) and 1681b(b)(2)(A)(ii) claims. However, Defendant's arguments as to Plaintiff's Section § 1681d(a) claim should be rejected for the reasons set forth at length above as to Plaintiff's §§ 15 U.S.C. §§ 1681b(b)(2)(A)(i) and 1681b(b)(2)(A)(ii). Defendant lacks a foundation in either fact, or law, to dismiss any of Plaintiffs' FCRA claims, including Plaintiffs' § 1681d(a) claims. The illegal liability waiver included in its Employment Application (*see* Exhibit A), coupled with Plaintiff's plethora of facts on Defendant's willful violations of the FCRA, preclude dismissal.[9]

F. The Court Should Reject Defendant's Arguments Seeking Dismissal of Coleman's ICRAA and CCRAA Causes of Actions

Defendant's Motion first seeks substantive dismissal of Plaintiff Coleman's ICRAA and CCRAA claims by incorporating by reference Defendant's FCRA dismissal arguments. For the sake of brevity, Plaintiff, therefore, does the same. Plaintiff Coleman's ICRAA and CCRAA arguments withstand Defendant's Motion to Dismiss and are sufficiently pled for the same reasons argued *supra*.

Defendant's Motion next argues that Cal.Civ. Code § 1786.52 prohibits Plaintiff Coleman's ICRAA claim because they are based on the same act or omission. In other words, according to Defendant's erroneous interpretation, the FCRA preempts Plaintiff Coleman's ICRAA claim. Put simply, Defendant is wrong. The ICRAA and CCRAA are nearly identical statutes, with the ICRAA governing investigative consumer reports and the CCRAA governing less intrusive consumer reports. In *Ramirez v. Trans Union, LLC*, 899 F. Supp. 2d 941, 944-45 (N.D. Cal. 2012) the Court dealt with -- and rejected -- a nearly identical preemption argument as to the CCRAA; *see also Guillen v. Bank of America Corp*., 2011 WL 4071996 *4 (N.D.Cal. Aug. 31, 2011) (same). The same outcome should follow here. Below is the Court's holding from *Ramirez*:

> Defendant argues that Plaintiff's CCRAA claims are barred because the FCRA claims "are pending" by virtue of having been filed in this case, or, in the alternative, were

[9] Finally, it should be noted that Plaintiff's Third Count in the Amended Complaint also included a claim for violation of 1681g(c)), which Defendant's Motion fails to address. Thus, Defendant's have waived any arguments related thereto.

pending when Plaintiff filed a FCRA action in the Eastern District of Pennsylvania which he dismissed without prejudice before filing this action.

The only California appellate court to address § 1785.34(a) held that it does not bar simultaneously filed claims. *Cisneros v. U.D. Registry, Inc*., 39 Cal.App.4th 548, 581, 46 Cal.Rptr.2d 233 (1995). The court "agree[d] with the trial court's assessment" that the "plain meaning" of § 1785.34(a) applies to "a circumstance where there is a prior action pending under the federal law, and someone brings a later action under the state law." Id. (internal quotation marks and citation omitted). This Court is required to follow *Cisneros* absent "convincing evidence" the California Supreme Court would hold otherwise. *Carvalho v. Equifax Info*. Services, LLC, 629 F.3d 876, 889 (9th Cir.2010).

This Court should apply the *Ramirez* holding and deny reject Defendant's arguments on Plaintiff Coleman's state law claims.

Defendant's Motion takes a parting shot at Plaintiff Coleman's ICRAA claim by relying on outdated case law and calling the claim unconstitutionally vague. Specifically, Defendant relies upon *Moran v. The Screening Pros, LLC,* No. 2:12-cv-05808, 2012 WL 10655744 (C.D. Cal. Sept. 28, 2012) and *Ortiz v. Lyon Mgmt. Grp., Inc.,* 157 Cal. App. 4th 604, 612-19 (2007) for the proposition that the ICRAA is somehow "unconstitutionally vague" as a matter of law. However, this interpretation of the ICRAA was recently rejected outright by *Connor v. First Student, Inc*., 2015 Cal. App. LEXIS 695, *2-3 (Cal. App. 2d Dist. Aug. 12, 2015), which expressly disagreed with the holding from *Ortiz*.

Connor involved investigative consumer reports—background checks—made on employees of defendants First Student, Inc., and First Transit, Inc. by defendants HireRight Solutions, Inc., and HireRight, Inc. Plaintiff Eileen Connor's lawsuit against First alleging violations of the ICRAA was dismissed after the trial court granted First's motion for summary judgment based upon the holding of *Ortiz v. Lyon Management Group, Inc*. (2007) 157 Cal.App.4th. In *Ortiz*, a case cited and relied upon in Defendant's Motion to Dismiss, the appellate court held that the ICRAA was unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information because unlawful detainer information relates to both creditworthiness and character. In the *Ortiz* court's view, the ICRAA and the CCRAA present a statutory scheme that requires information in consumer reports to be categorized as

either character information (governed by the ICRAA) or creditworthiness information (governed by the CCRAA); when the information can be categorized as both, the statutory scheme cannot be constitutionally enforced because it does not give adequate notice of which act governs that information.

The *Connor* Court rejected the holding in *Ortiz* and held that "[t]here is nothing in either the ICRAA or the CCRAA that precludes application of both acts to information that relates to both character and creditworthiness. Therefore, we conclude the ICRAA is not unconstitutionally vague as applied to such information." This Court should do the same. There is nothing unconstitutionally vague about Plaintiff Coleman's ICRAA claims. Defendant's Motion should be denied accordingly.

IV.

CONCLUSION AND REQUEST FOR LEAVE TO AMEND

If for any reason this Honorable Court is inclined to grant any part of Defendant's Motion to Dismiss, Plaintiffs respectfully request they be given leave to file a Second Amended Complaint.

Dated: August 28, 2015

SETAREH LAW GROUP
By: */s/ Shaun Setareh*
Shaun Setareh
Attorneys for Plaintiffs
KAYONIE COLEMAN and
DIANE PEMBERTON