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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JACKLYN FEIST and ANGELICA ZIMMER, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

PETCO ANIMAL SUPPLIES, INC., and DOES 1 through 10, inclusive,

Defendants.

Case No. 3:16-cv-01369-H-DHB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT PETCO ANIMAL SUPPLIES, INC.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: August 15, 2016
Time: 10:30 a.m.
Judge: Marilyn L. Huff
Room: 15A

Removal Filed: June 6, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

Defendant Petco Animal Supplies, Inc. ("Defendant") moves to dismiss a portion only of plaintiffs Jacklyn Feist's and Angelica Zimmer's ("Plaintiffs") First Amended Complaint ("FAC"). Defendant argues that Plaintiffs fail to state a claim for violation of the Fair Credit Reporting Act's ("FCRA") stand-alone disclosure requirement (the first and second causes of action), and that Plaintiff Zimmer lacks standing. Defendant does not challenge whether Plaintiff Feist has pled a claim for violation of the FCRA's adverse action requirements (the third cause of action), or her standing to assert all three causes of action alleged in the FAC. Defendant's arguments are contrary to the great weight of authority and should be rejected.

Defendant's purported FCRA disclosure is nearly five single-spaced pages, when reproduced in normal font, and contains reams of extraneous information beyond the required consumer report disclosure, including, *inter alia*, a broad third-party privacy waiver, seven paragraphs of state's rights disclosures and a lengthy FCRA rights summary. The majority of courts have found the inclusion of such extraneous information to violate the stand-alone disclosure requirement. *See Robrinzine v. Big Lots Stores, Inc.*, 156 F. Supp. 3d 920, 926-28 (N.D. Ill. Jan. 19, 2016) (collecting cases). Similarly, the majority of courts have found allegations substantially similar to those pled in the FAC to satisfy the FCRA's willfulness requirement. *See Singleton v. Domino's Pizza, LLC*, 2012 WL 245965, at *4 (D. Md. Jan. 25, 2012) (widely followed holding that "assertions that a defendant was aware of the FCRA, but failed to comply with its requirements, are sufficient to support an allegation of willfulness to avoid dismissal"). Accordingly, Plaintiffs easily satisfy the relevant pleading requirements.

Defendant's argument that Plaintiff Zimmer should be dismissed because she lacks Article III standing under *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) also fails. Defendant does not challenge Plaintiff Feist's standing to allege all three claims in the FAC. This court, therefore, need not consider the issue. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1215 n.1 (9th Cir. 2008) ("[i]n a class action, standing is

satisfied if at least one named plaintiff meets the requirements"). Furthermore, Plaintiff Zimmer ***does*** have standing. *See Thomas v. FTS USA, LLC*, 2016 WL 3653878, at *4-11 (E.D. Va. June 30, 2016) (denying motion for summary judgment as to identical disclosure claim asserted by Plaintiffs here in thoughtful opinion analyzing case law, statutory text and legislative history, on ground that invasion of privacy and informational injuries alleged by plaintiff were firmly rooted in American law and therefore constituted cognizable injuries under *Spokeo*).

For the foregoing reasons, Defendant's Motion should be denied.

II. STATEMENT OF THE CASE

A. The FCRA's Stand-Alone Disclosure Requirement

A consumer report may not be procured for employment purposes unless:

> (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, ***in a document that consists solely of the disclosure,*** that a consumer report may be obtained for employment purposes; and
>
> (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. § 1681b(b)(2)(A) (emphasis added). This is commonly known as the "stand-alone" disclosure requirement. The only item that may be combined with the disclosure is the consumer's written authorization, allowing for the procurement. 15 U.S.C. § 1681b(b)(2). *See Singleton*, 2012 WL 245965 at *8 ("Congress *expressly* permitted employers to include language authorizing the employer to procure the consumer report ... 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, and its 'silence is controlling.'") (emphasis in original).

B. Facts Specific to This Case

Plaintiff Angelica Zimmer is a former employee on whom Defendant procured a consumer report during the application process. FAC, ¶¶ 34-5. Plaintiff Jacklyn Feist applied for work with Defendant and attended two rounds of interviews, after which she

was provided with a work schedule. FAC, ¶ 30. However, when she reported for her first day of work she was told that her background check had not come through and was not allowed to begin working. *Id*., ¶ 32. Plaintiff Feist alleges that she was misinformed, that her background check had been received by Defendant, and that she was not hired because it came back with an adjudication result indicating "Does Not Meet Company Standards" which was based on erroneous information. *Id*., ¶¶31, 33. Plaintiff Feist was never provided with a pre- or post- adverse action notice, a copy of her consumer report or an opportunity to cure any deficiencies therein. *Id.*, ¶ 33.

Both Plaintiffs applied for work online via an application divided into a series of tabs presented as web pages FAC, ¶¶ 30, 34, 36-7. During this process, Plaintiffs were presented with a purported "Background Check Consent" which appears on a screen with small-font wording in the middle that the applicant scrolls through by dragging a scrollbar on the right hand side. *Id*., ¶ 37.

The wording contained within the Background Check Consent scroll down is set forth in ***over thirty separate paragraphs*** that would comprise ***five single-spaced pages*** if reproduced in 12-point font on normal sized paper. FAC, ¶ 37; Declaration of Stephen Whelan in Support of Defendant Petco Animal Supplies, Inc.'s Motion to Dismiss Plaintiffs' Complaint ("Whelan Decl."), Exh. 1 [ECF 7-3]. In addition to an advisement that a background check may be conducted, Defendant's Background Check Consent contains the following extraneous information:

- A broad release authorizing ***any*** person or entity to provide ***any*** and all information regarding the applicant to Defendant's consumer reporting agency ("CRA") or its agents ("Privacy Waiver);
- Seven paragraphs containing various information relating to the laws of seven different states ("State Specific Notices");
- The following acknowledgement: "I promise that all of my personal information on this form is true and correct and understand that dishonesty will disqualify me from consideration for employment with [Defendant], or if I am hired or already

work for [Defendant], that my employment may be terminated."

- An advisement that background reports are obtained "[i]n the interest of maintaining the safety and security of our customers, employees and property";
- An advisement that Defendant "may rely on this authorization to order additional background reports without asking me for my authorization again";
- An advisement that "if you are hired, or if you already work for [Defendant]" that Defendant "may order additional background reports on you for employment purposes";
- An advisement that Defendant "may order an 'investigative consumer report'";
- An advisement that "[a]n 'investigative consumer report' is a background report that includes information from personal interviews (except in California, where that term includes background reports with or without personal interviews)";
- The identity, phone number and address of the consumer reporting agency that will prepare the report; and,
- An advisement that "[y]ou have the right to request more information about the nature and scope of an investigative consumer report, if any, by contacting Petco's Employee Relations department…"

FAC, ¶¶ 40-43; Whelan Decl., Exh. 1.

Notably, the Privacy Waiver—appearing in the second paragraph immediately following a purported "Background Check Authorization"—***expressly acknowledges*** that it is an additional authorization beyond that required by the FCRA, providing:

> ***I also authorize all of the following to disclose*** to the CRA and its agents all information about or concerning me, including but not limited to: my past or present employers; learning institutions, including colleges and universities; law enforcement and all other federal, state and local agencies; federal, state and local courts; the military; credit bureaus; testing facilities; motor vehicle records agencies; all other private and public sector repositories of information; and any other person, organization, or agency with any information about or concerning me. The information that can be disclosed to the CRA and its agents includes, but is not limited to, information concerning my employment

> and earnings history, education, credit history, motor vehicle history, criminal history, military service, professional credentials and licenses. I promise that all of my personal information on this form is true and correct and understand that dishonesty will disqualify me from consideration for employment with Petco, or if I am hired or already work for Petco, that my employment may be terminated. I also agree that a copy of this form is valid like the signed original.

FAC, ¶ 40.

Defendant's inclusion of this broad Privacy Waiver was clearly self-interested. As discussed below, state and federal agencies, financial institutions, health care providers, and other entities, all of which fall within the broad release language in the Privacy Waiver, are subject to specific privacy laws which regulate nonpublic information. The Privacy Waiver purported to operate as a waiver of these important rights.

On the final web page, applicants are presented with an "eSignature" which contains over ten separate paragraphs on various topics, including a three sentence paragraph approximately mid-way down with a background check authorization that concludes: "I hereby release all parties from any liability in connection with the provision and use of such information." FAC, ¶ 44; Whelan Decl., Exh. 2 [ECF 7-4].

Defendant used professional CRAs Hireright and Lexis Nexis to process tens of thousands of consumer reports during the class period. FAC, ¶¶ 29, 49-50. Defendant was aware of the FCRA's requirements based on communications with these CRAs and also had access to legal advice through its own General Counsel's office and outside employment counsel. *Id.*, ¶ 65(b) & (d). Founded in 1986, Defendant has had 30 years to become compliant with the FCRA. *Id.*, ¶ 65(a). Defendant ***chose*** to violate the clear statutory mandate and, thereby, voluntarily ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless. *Id.*, ¶ 65(g).

III. ARGUMENT

A. Legal Standard

A complaint need only "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). On a motion to dismiss, the court

construes the complaint in the light most favorable to the non-moving party, accepts all well-pled facts as true, and draws all inferences in the non-moving party's favor. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. The FAC Adequately Alleges a Violation of the FCRA

1. The FAC Adequately Alleges Defendant Violated the Stand-Alone Disclosure Requirement

The FCRA requires that an employer provide a clear and conspicuous disclosure, "***in a document that consists solely of the disclosure***," that a consumer report may be procured for employment purposes. 15 U.S.C. §1681b(b)(2)(A). Defendant's web-based disclosure consists of over 30 paragraphs of fine print that would fill almost five single spaced pages and goes far beyond this limited purpose. FAC, ¶ 37; Whelan Decl., Exh. 1. Among other things, Defendant's disclosure includes a broad Privacy Waiver authorizing third parties to provide ***any and all*** information relating to applicants to Defendant's CRA and its agents; seven paragraphs of State Specific Notices; a multi-page FCRA rights summary; and a host of other advisements. FAC, ¶¶ 40-43. It is self-evident that such a document does not consist "solely" of the disclosure that a consumer report may be procured and thus violates the FCRA.

Over 15 years ago, the FTC warned employers, as to the disclosure required under the FCRA, that "such a document should include nothing more than the disclosure and the authorization for obtaining a consumer report." *Advisory Opinion to Steer*, 1997 WL 33791227 (Oct. 21, 1997). Consistent with this guidance, the vast majority of courts considering disclosures with the type of extraneous information contained in Defendant's disclosure have routinely found a violation of the FCRA.

For example, in *Jones v. Halstead Mgmt. Co., LLC*, 81 F. Supp. 3d 324, 333 (S.D.N.Y. Jan. 27, 2015), the court considered a disclosure form that contained, in addition to the disclosure and authorization, information regarding the time frames in which the applicant must challenge the accuracy of any report, an acknowledgement that "all employment decisions are based on legitimate non-discriminatory reasons," the

name, address and telephone number of the nearest CRA designated to handle inquiries, "and all sorts of state-specific disclosures." In denying defendant's motion to dismiss, the court held that "[a]ll of those extraneous additions to the form stretched what should be a simple disclosure into two full pages of eye-straining tiny typeface writing" in violation of the stand-alone disclosure requirement. The extraneous information included by Defendant here has the ***exact same*** effect. *See* Whelan Decl., Exh. 1. Other courts have come to the same conclusion. *See e.g.*; *Robrinzine*, 156 F. Supp. 3d at 222-29 (plaintiff sufficiently pled claim for violation of stand-alone disclosure requirement where form contained multiple state's rights notices and other extraneous information) (collecting cases); *Rawlings v. ADS Alliance Data Sys., Inc.,* 2015 WL 3866885, at *6 (W.D. Mo. June 23, 2015) (denying motion to dismiss where twelve page form contained extraneous state law disclosures, lengthy FCRA rights summary and other information); *Martin v. Fair Collections & Outsourcing, Inc.,* 2015 WL 4064970, at *4 (D. Md. June 30, 2015) (denying motion to dismiss where five page form contained extraneous information substantially similar to that considered in *Jones*); *Lagos v. The Leland Stanford Junior University*, 2015 WL 7878129, at *2 (N.D. Cal. Dec. 4, 2015) (denying motion to dismiss because both the inclusion of seven state law notices and sentence stating "I also understand that nothing herein shall be construed as an offer of employment or contract for services" plausibly violated stand-alone disclosure requirement).

The authorities cited by Defendant to the contrary are either inapposite or outliers or, upon examination, support Plaintiffs' position.

Quite amazingly, Defendant cites FTC opinions which demonstrate that Defendant's disclosure is non-complaint. For example, Defendant cites the *Advisory Opinion to Willner*, 1999 WL 33932153 (Mar. 25, 1999) ("*Willner Opinion*"), for the proposition that information beyond the disclosure and authorization may be included. *See Def's Mem.* at 8. In the *Willner Opinion*, the FTC considered the extent to which an employer may include information regarding its intent to obtain an investigative

consumer report, required under Section 1681d, subsections (a) and (b), in the stand-alone disclosure required under Section 1681b(b)(2). The FTC noted that a ***very limited*** Section 1681d(a) disclosure regarding the intent to procure an investigative consumer report may be included in the 1681b(b)(2)(A) disclosure because it would enhance the disclosure, and provided the following example:

> A consumer report may be obtained on you for employment purposes. It may be an "investigative consumer report" that includes information as to your character, general reputation, personal characteristics and mode of living. You have a right to request disclosure of the nature and scope of the report, which involved personal interviews with sources such as your neighbors, friends, or associates.

Willner Opinion at *2. The opinion contains a footnote that even this statement should ***only*** include applicable examples of information that may be obtained, and exclude the rest. *Id.*, n. 1. The opinion further cautions: "However, a [Section 1681d(b)] notice setting for the nature and scope of the investigation would of necessity be much more detailed and would likely be held to overshadow [the Section 1681b(b)] disclosure in violation of [Section 1681b(b)(2)(A)]." *Id*. Defendant's 30-plus paragraph disclosure is a far cry indeed from the three sentence example provided in the *Willner Opinion*, and clearly would not have been approved of by its author.[1]

The case law relied upon by Defendant is largely inapposite.

[1] Defendant also cites the *Advisory Opinion to Coffey*, 1998 WL 34323748, at *2 (Feb. 11, 1998) ("*Coffey Opinion*"). This opinion is consistent with other FTC opinions emphasizing that a Section 1681b(b)(2)(A) disclosure may not be encumbered by extraneous information, explaining "[i]t is our view that Congress intended that the disclosure not be encumbered with extraneous information." *Id*. Defendant seizes upon the *Coffey Opinion's* acknowledgement that "some additional information, such as a brief description of the nature of consumer reports covered by the disclosure, may be included." *Id*. However, this acknowledgment does not authorize the wholesale inclusion of any and all information related to the consumer report process. Moreover, the *Coffey Opinion* pre-dates the *Willner Opinion* and must be understood in light of that later opinion's clear mandate that any such information be extremely brief.

Defendant quotes a passage from *Newton v. Bank of Am.*, 2015 WL 10435907, at *8 (C.D. Cal. May 12, 2015) in which the court noted that the "FCRA does not prohibit an employer from providing an FCRA disclosure as part of the employer's job application process. Nor does the FCRA prohibit an employee from providing an FCRA disclosure at the same time the employer provides other employment documents." However, unlike the plaintiff in *Newton*, Plaintiffs here do not argue that the disclosure violated the FCRA because it was provided "as part of" the application process or "at the same time" as the application. Rather, it is Plaintiffs' contention that Defendant's disclosure violates the law because of the extraneous information contained within it, a topic to which *Newton* does not speak.[2] Defendant similarly cites *Coleman v. Kohl's Dep't Stores, Inc.*, 2015 WL 5782352, *5 (N.D. Cal. Oct. 5, 2015), in which the plaintiff argued that the defendant's one-page disclosure and a separate employment application were "part of the same employment packet" and, therefore, that defendant's disclosure violated the FCRA. Once again, Defendant misrepresents Plaintiffs' position to set it up for failure. Plaintiffs do not argue that Defendant's disclosure violates the law because it was presented as part of Defendant's application process among electronic tabs with other information.

Defendant relies upon *Burghy v. Dayton Racquet Club, Inc.*, 695 F.Supp.2d 689 (S.D. Ohio 2010), in which the court held that a one-page disclosure containing extraneous information did not violate the stand-alone disclosure requirement. *Burghy* was an individual action decided in 2010 which involved a much shorter disclosure than the present case. Moreover, as discussed above, the authority since that time weighs strongly in Plaintiffs' favor. Defendant also cites *Smith v. Waverly Partners, LLC*, 2012 WL 3645324, at *6, an individual action in which the court held that the presence of a liability waiver did not violate the stand-alone disclosure requirement.

[2] At issue in *Newton* were two separate single-page forms, both of which were brief and which the Court found consisted solely of the disclosure without analysis. 2015 WL 5782352 at *5-6.

Like *Burghy*, *Smith* is an outlier; it is well-accepted that inclusion of a liability release violates the statute.[3]

Defendant also includes a misleading citation to *Williams v. Telespectrum, Inc.*, 2006 WL 7067107 (E.D. Va. Nov. 7, 2006), which Defendant implies held that inclusion of an FCRA summary of rights did not violate the stand-alone disclosure requirement. *See Def's Mem.* at 8. However, the court in *Williams* held that inclusion of a *notification* in the disclosure that a summary of rights would *accompany* the disclosure did not violate the statute, *not* that inclusion of the summary itself within the disclosure (as Defendant has done) was permissible. 2006 WL 7067107 at *6.

Defendant goes on to argue that its analysis is consistent with the Ninth Circuit Court of Appeals interpretation of the meaning of "disclosure" in other contexts, citing *King v. State of Cal.*, 784 F.2d 910, 915. (9th Cir. 1986). However, in *King* the Ninth Circuit merely noted that through the Truth In Lending Act Congress sought to protect consumers through "full disclosure" and to guard against uninformed consent. This passing reference, provided as way of background in the course of deciding another issue (the statute of limitations), offers no analysis of what it means to provide a "disclosure" in the present context or any other analysis remotely relevant here.

Finally, relying on *Harris v. Home Depot U.S.A., Inc.*, 114 F.Supp.3d 868 (N.D. Cal. 2015), Defendant argues that because the extraneous information it included

[3] *See, e.g.*, *Lengel v. HomeAdvisor, Inc.,* 2015 WL 2088933, at *8 (D. Kan. May 6, 2015) ("[I]t may be plausibly asserted that the standalone disclosure provision was recklessly violated by the use of the Release form because it did not consist solely of the disclosure"); *Avila v. NOW Health Group, Inc.*, 2014 WL 3537825, at *2 (N.D. Ill. July 17, 2014) (denying motion to dismiss because liability release violated "express language of the FCRA"); *Reardon v. Closetmaid Corp*., 2013 WL 6231606, at *8-9 (W.D. Pa. Dec. 2, 2013) (granting summary judgment for plaintiffs because liability waiver was "facially contrary" to FCRA's stand-alone disclosure requirement); *Singleton*, 2012 WL 245965 at *9 (denying motion to dismiss because "both the statutory text and FTC advisory opinions indicate that an employer violates the FCRA by including a liability release in a disclosure document").

offered it no benefit, it did not violate the statute. *See Def's Memo.* at 9. Defendant is wrong, *Harris* supports Plaintiffs. While Defendant's Background Check Consent form does not contain liability release as did the form in *Harris*, it does contain a blanket Privacy Waiver, which gave Defendant's CRA and its agents access to far more information than they would have been entitled in the absence of such language. In fact, state and federal agencies, financial institutions, health care providers, and other entities, all of which fall within the broad release language included in the Authorization Form for Consumer Reports, are all subject to specific privacy laws which regulate nonpublic information.[4] By including this broad Privacy Waiver in its forms, Defendant placed its own interests ahead of those of consumers.

2. The FAC Adequately Alleges Defendant Acted Willfully

Willfulness may be alleged generally. *See* Fed. R. Civ. P. 9(b). Further, it is clear that a willful violation of the FCRA encompasses ***either*** a knowing ***or*** a reckless violation. *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 57 (2007) ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."). The FAC easily satisfies both alternate requirements with the specificity called for by Rule 9(b).

[4] For example, the Family Educational Rights & Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99, protects school records from disclosure absent consent from the student. Similarly, the Gramm-Leach-Bliley Act requires financial institutions to safeguard nonpublic information at 15 U.S.C. §§ 6801-6809, and the Health Insurance Portability and Accountability Act, which sets forth its Privacy Rule at 45 CFR Part 160, and Subparts A and E of Part 164, requires covered institutions to keep medical records private. Most states' government data laws are even more restrictive, and prohibit the disclosure of information on individuals held by many state agencies. *See, e.g.*, Russom, Miriam B., Robert H. Sloan, and Richard Warner, *Legal Concepts Meet Technology: A 50 State Survey of Privacy Laws*, Proceedings of The 2011 Workshop on Governance of Technology, Information, and Policies-GTIP '11 (2011), (available at https://www.acsac.org/2011/workshops/gtip/p-Russom.pdf).

(a) The FAC Alleges a Knowing Violation

Defendant argues the FAC does not adequately allege willfulness solely on the ground that Defendant's interpretation of the FCRA was not "objectively unreasonable"." *See Def's Memo.* at 10-12. Defendant completely ignores Plaintiffs' allegations that it knowingly violated the statute, which suffice to establish willfulness.

Plaintiffs allege that: during the class period Defendant processed tens of thousands of applications using professional CRAs; Defendant was aware of the FCRA's requirements based on communications with its CRAs and also had access to advice from its own General Counsel's office and outside employment counsel; was founded in 1986 and had thirty years to become compliant with the FCRA; and, notwithstanding the foregoing, voluntarily ran the risk of violating the law substantially greater that the risk associated with a reading that was merely careless by choosing to systematically violate the statute. FAC, ¶¶ 29, 49-50; 65(a), (b), (d), (f) & (g). Plaintiffs also allege that Defendant included an FCRA rights summary within its disclosure, which also raises a plausible inference that Defendant was aware of the FCRA's requirements.[5] These allegations are sufficient to allege a willful violation. *See Singleton,* 2012 WL 245965 at *5 (allegations that defendant was aware of FCRA's requirements through its in-house and outside counsel but repeatedly violated stand-alone disclosure requirement sufficient to plead willfulness); *Avila,* 2014 WL 3537825

[5] Plaintiff has also pled that Defendant's eSignature purported to release Defendant from liability. FAC, ¶44; Willner Decl., Exh. 2. Notwithstanding that Defendant included a separate background check disclosure tab in its online application, the fact that Defendant attempted to secure a benefit for itself through a liability release in the eSignature release raises a plausible inference that Defendant was aware its disclosure violated the FCRA (hence, the need for a release). *Cf Harris*, 114 F.Supp.3d at 870 ("But the employer does have something to gain (separate from the successful performance of a background check) by inserting a provision by which the applicant releases the employer from liability. So in this situation, it's plausible that Home Depot inserted this language into the disclosure form despite knowing that to do so would violate the FCRA, or at least with reckless disregard for the FCRA's requirements").

at *3 (holding that it could be "reasonably inferred" from defendant's reference to the FCRA in disclosure statement that defendant was aware of its disclosure requirements and acted willfully in violating stand-alone disclosure requirement); *Miller v. Quest Diagnostics,* 85 F. Supp. 3d 1058, 1060-61 (W.D. Mo. 2015) (allegations that defendant included extraneous information even though it knew the form should consist solely of disclosure, satisfied willfulness, citing *Singleton* and *Avila*); *Lavery v. RadioShack Corp.*, 2014 WL 2819037, at *2 (N.D. Ill. June 23, 2014) (allegations that amendment to FCRA gave merchants three years to comply with new requirements, which were widely publicized, and merchants were advised by credit card companies of the requirements, were sufficient to allege willfulness).

Because Plaintiffs have alleged a knowing violation of the statute, the "objectively unreasonable" test to show reckless disregard does not apply. *See Fuges v. Sw. Fin. Servs., Ltd.,* 707 F3d. 241, 249 at n. 13-14 (3d Cir. 2012) (stating "knowing noncompliance also, of course, constitutes a willful FCRA violation" and that "[e]vidence of knowing violations of FCRA is relevant to a claim of willfulness, but then *Safeco* 's recklessness analysis would not apply") (internal citation omitted)); *Taylor v. Screening Reports, Inc.,* 294 F.R.D. 680, 687 (N.D. Ga. 2013).

(b) The FAC Alleges a Reckless Violation

Even if Plaintiffs were required to plead that Defendant's conduct was objectively unreasonable, Defendant's arguments would still fail.

First, Defendant cannot escape liability for a reckless violation by showing that it relied on an objectively reasonable statutory interpretation, because it has not shown that it *had* a pre-litigation interpretation of the FCRA. This is a factual issue which is inappropriate for resolution on a motion to dismiss. *See Dunford v. Am. DataBank, LLC,* 64 F. Supp. 3d 1378, 1394-95 (N.D. Cal. 2014) (denying motion for summary judgment and finding defendant's understanding of the law "at the relevant time" to be critical in determining willfulness); *Manuel v. Wells Fargo Bank, Nat'l Ass'n,* 123 F.Supp.3d 810, 829 (denying motion for summary judgment and stating, "while Wells

Fargo has pointed to several cases that support its position, there is no evidence that anyone at Wells Fargo ever relied upon those opinions in drafting its disclosure and waiver form"). In other words, in order to determine whether a defendant can escape liability because it relied on an objectively reasonable interpretation of the FCRA, there must *first* be a fact determination of what the defendant's interpretation actually was at the time of the violation. There has been no such determination here.

Second, the ***overwhelming majority*** of cases have held that the type of allegations made by Plaintiffs are sufficient to support a claim that the defendant willfully violated the FCRA.[6] Indeed, the facts alleged in the FAC are the precise types of facts found by other courts to satisfy the pleading requirements. For example, in *Rawlings,* 2015 WL 3866885, at *4-6, the court found that the defendant's use of a form with multiple state's rights disclosures, an FCRA rights summary and other extraneous information supported a claim of willfulness under the objectively unreasonable test. The court noted the form's similarity to that at issue in *Jones*, in which dismissal was denied. *Id*. at *6. Here, too, Defendant's purported disclosure contains multiple forms of extraneous information, which range from state-specific disclosures to a sweeping Privacy Waiver to an FCRA rights summary, and a host of other extraneous advisements, all included on a scroll-down web page with five single-spaced pages of information. FAC, ¶ 37; Wheelan Decl., Exh. 1. All of these allegations—along with the allegation that Defendant knew that it was required to use a form consisting solely of the disclosure—certainly make it plausible that Defendant acted with reckless disregard.

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[6] *See Robrinzine,* 156 F. Supp. 3d at 929-30; *Lagos*, 2015 WL 7878129, at *2; *Groshek v. Great Lakes Higher Education Corp.*, 2015 WL 7294548, at *3 (W.D. Wis. 2015); *Martin*, 2015 WL 4064970, at *4-5; *Harris*, 114 F.Supp.3d at 870-71; Rawlings, 2015 WL 3866885, at *4-6; *Moore v. Rite Aid Hdqtrs Corp*., 2015 WL 344227, at *11-12; *Jones*, 2015 WL 366244, at *6; *Avila*, 2014 WL 3537825, at *13; *Reardon v. ClosetMaid Corp.,* 2013 WL 6231606, at *9-10 (E.D. Cal. Oct. 23, 2014); *Singleton*, 2012 WL 245965, at *10.

Third, the administrative guidance and statutory text are clear. For this reason, courts have rejected attempts to invoke *Safeco* as a defense for violations of the stand-alone disclosure provision. *See Reardon*, 2013 WL 6231606, at *9-11 & n.8 (rejecting defendant's asserted *Safeco* defense because defendant's interpretation was "legally insupportable" and "objectively unreasonable" as it was "facially contrary to the statute at hand, and all of the administrative guidance on the questions").

Defendant attempts to undercut the foregoing by arguing that the FTC has identified only one type of provision as specifically prohibited from inclusion in the disclosure document, a liability release. *See Def's Mem.* at 11-12, citing *Advisory Opinion to Hauxwell*, 1998 WL 34323756 (June 12, 1998) (*Hauxwell Opinion*). Defendant also notes that the *Willner Opinion* and the *Coffey Opinion* sanction the inclusion of extraneous information, such as a description of the background check the employer may perform. Respectfully, Defendant twists the meaning of the FCT's opinions, which go to great lengths to emphasize that the disclosure form " should not contain any extraneous information." *Hauxwell Opinion* at *1. As discussed above, the *Willner Opinion* sanctions a brief two-sentence description of the investigative consumer report disclosure called for by Section 1681d(a), advising that the inclusion of more information would violate the FCRA. *Willner Opinion* at *2 & n.1. Read fairly, the letters serve as a clear warning that a form such as Defendant's ***violates*** the stand-alone disclosure requirement.

Fourth, Defendant relies on the decisions in *Syed* and *Schoebel,* which are wrongly decided outliers that should not be followed by this Court. *Schoebel* points out that "[a]t the time that Plaintiff signed the BIA form in July of 2012, there was very little guidance regarding this FCRA provision." *Schoebel v. Am. Integrity Ins. Co. of Fla., 2*015 WL 3407895, at *3 (M.D. Fla. May 27, 2015). *Schoebel* is wrong, particularly in light of the case law and longstanding FTC guidance discussed above. What is more, the portion of the *Schoebel* opinion on willfulness follows *Syed v. M-I LLC,* 2014 WL 4344746, at *2-3 (E.D. Cal. Aug. 28, 2014) and *Syed v. M-I LLC*, 2014

WL 5426862 (E.D. Cal. Oct. 23, 2014), closely block-quoting a full six paragraphs of the opinion. *See Schoebel,* 2015 WL 3407895, at *9. The *Syed* (and thus *Schoebel)* courts concluded that because FCRA mandates that the disclosure be provided in a document consisting solely of the disclosure, but also allows for the inclusion of an authorization for the employer to procure the report, the statute is ambiguous. These courts reasoned, that, as a result of that ambiguity, the plaintiff had not adequately alleged willfulness. This conclusion is incorrect: the exception highlights the ***rule*** that extraneous information is otherwise prohibited and enhances the clarity of the statute. For this reason courts routinely decline to follow *Syed* and *Schoebel. See Milbourne v. JRK Residential Amer., LLC, 2016 WL 4265741*, at *8-9 (E.D. Va. 2016).

Based on the foregoing, Plaintiff has adequately alleged willfulness.

C. Plaintiff Zimmer Should Not Be Dismissed for Lack of Standing

1. Only One Plaintiff Need Establish Standing

Defendant does not challenge the standing of Plaintiff Feist—who alleges the loss of a job—and who, along with Plaintiff Zimmer, alleges claims for violation of the FCRA's disclosure and authorization requirements (causes of action one and two) in addition to an adverse action claim (cause of action three). Thus, Defendant does not challenge the standing of one named plaintiff as to all three claims in the FAC.

The Supreme Court has repeatedly held that where the standing of one plaintiff is established, it is not necessary to inquire as to the standing of other plaintiffs. *Village of Arlington Heights v. Metro. Housing Dev't. Corp.*, 429 U.S. 252, 264 n.9 (1977) (standing requirement in discrimination case met where at least one plaintiff demonstrated standing); *Watt v Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (declining to consider standing of other plaintiffs once standing of a single plaintiff in multi-plaintiff action established) (citing *Arlington Heights*). The Ninth Circuit has followed this precedent. *See, e.g.*, *Guam Soc. of Obstetricians and Gynecologists v. ADA*, 962 F.2d 1366, 1369 (9th Cir. 1992) ("Because some of the plaintiffs have standing, it is not necessary to determine whether the others do");

Lowden, 512 F.3d at 1215 n.1 (9th Cir. 2008) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements").

District courts around the country have also followed suit. *See Sierra Club v. El Paso Properties, Inc.*, 2007 WL 45985 (D. Colo. 2007) (rejecting argument that "gatekeeper" function of a district court obligates it to assess the individual standing of each plaintiff); *Crowell v. Ionics, Inc.,* 343 F. Supp. 2d 1, 14 (D. Mass. 2004) (in denying motion to dismiss securities class action, holding that "[standing] concern is obviated if there is *any one* plaintiff before the court raising the claim in question") (emphasis in original).[7]

Because Defendant does not challenge the standing of Plaintiff Feist, the standing inquiry need go no further and Plaintiff Zimmer should not be dismissed. *Lowden*, 512 F.3d at 1215 n.1 (9th Cir. 2008).

2. In Any Event, Plaintiff Zimmer Has Standing

Prior to Spokeo numerous courts held that a violation of the FCRA's statutory requirements, as well as the requirements of other similar consumer protection statutes, without more, constituted a cognizable injury. *See Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 705-707 (6th Cir. 2009) (plaintiff who alleges statutory damages for a willful violation of the FCRA has standing in the absence of actual damages); *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 499 (8th Cir. 2014) (holding plaintiff suing for statutory damages under the FCRA has standing, even in the absence of claim for actual damages); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (in reversing denial of class certification in FCRA case, holding statutory damages available under FCRA "without proof of injury"); *Edwards v. First Amer. Fin. Corp.*,

[7] *See also Thorsted v. Gregoire,* 841 F.Supp. 1068, 1073 (W.D. Wash. 1994) ("[i]f one plaintiff has standing, it does not matter whether the others do."); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1185 n.6 (D. Utah 2004) (declining to analyze standing of one plaintiff on motion to dismiss where standing of other plaintiff conceded by defendant).

610 F.3d 514, 517-18 (9th Cir. 2010) (homeowner suing under Real Estate Settlement Procedures Act for violation of anti-kickback provisions had standing regardless of whether she was overcharged); *Robey v. Shapiro, Marianas & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (l0th Cir. 2006) (plaintiff had standing to sue under FDCPA for improper attempt to collect a debt even though plaintiff never paid debt).

Subsequent* to *Spokeo, multiple courts have confirmed that these same types of injuries remain sufficient to confer standing, including the following:

- ***Thomas v. FTS USA, LLC,* 2016 WL 3653878 (E.D. Va. June 30, 2016)**: As explained above, in a thorough opinion examining the legislative history, statutory text and case law, the Court held that the FCRA disclosure provisions at issue in this case provide a substantive right to a stand-alone disclosure, the violation of which constitutes a concrete injury under *Spokeo*.
- ***Church v. Accretive Health, Inc.*, --- Fed. Appx. ----, 2016 WL 3611543, *3 n.2 (11th Cir. July 6, 2016)**: Failure to provide requisite disclosure under the Fair Debt Collection Practices Act ("FDCPA") was not a "bare procedural violation" under *Spokeo* because Congress had provided the plaintiff "with a substantive right to receive certain disclosures," and therefore, the alleged violation was a violation of a substantive, rather than procedural, right.
- ***In re Nickelodeon Consumer Privacy Litig.*, — F.3d —, 2016 WL 3513782 (3d Cir. June 27, 2016)**: The Third Circuit's decision in *Nickelodeon* confirmed that *Spokeo* did not alter the traditional standing analysis. 2016 WL 3513782 at *6. The Third Circuit also recognized that the unauthorized disclosure of information that "in Congress's judgment, ought to remain private" constitutes a concrete injury-in-fact that "has traditionally been regarded as providing a basis for a lawsuit." *Id.*
- ***Guarisma v. Microsoft Corp.*, 2016 WL 4017196 (S.D. Fla. July 26, 2016)**: In enacting the Fair and Accurate Credit Transactions Act ("FACTA") amendment to FCRA, Congress created a substantive right for consumers to have their

personal credit card information truncated on printed receipts. *Id.*, *3-4. Notably, the Court specifically relied upon the Eighth Circuit's opinion in *Hammer*, among other pre- and post- *Spokeo* cases. *Id*. at *4.

- ***Hawkins v. S2Verify,* 2016 WL 3999458 (N.D. Cal. July 26, 2016)**: Certifying class even though Plaintiff provided no evidence defendant's reporting of criminal records in violation of FCRA caused actual damage. Publication of information which defendant was statutorily prohibited from publishing, ***in-and-of-itself***, was concrete harm under *Spokeo* because Congress had chosen to "bestow a degree of privacy on that information." *Id*. at *5.
- ***Dickens v. GC Servs. Ltd. Partnership, 2016 WL 3917530, *2***: In denying motion to dismiss action for failure to make required disclosures under FDCPA, holding that "'an alleged failure to comply with federal law,' as CG Services [defendant] describes Dickens's [plaintiff] complaint, may indeed be enough to confer standing. *Spokeo* in no way stands for the proposition that it is not."
- ***Altman v. White House Black Market, Inc.,* 2016 WL 3946780, *6 (W.D. Ga. July 13, 2016)**: Similar to *Guarisma*, above, held that FACTA amendment to FCRA provided plaintiff substantive right to credit card receipt containing no more than last five digits of plaintiff's credit card, the violation of which constituted a concrete injury under *Spokeo*.
- ***Lane v. Bayview Loan Serv'g, LLC,* 2016 WL 3671467 (N.D. Ill. July 11, 2016)16)**: Similar to the Eleventh Circuit's decision in *Church*, above, held that the denial of statutorily required information under the FDCPA is "a sufficiently concrete injury" under *Spokeo*. *Id.* at *5. The court also noted that cases pre-dating *Spokeo* were still good law because *Spokeo* "did not contain a holding specific enough to overrule" prior case law. *Id*
- ***Mey v. Got Warranty, Inc.,* 2016 WL 3645195 (N.D.W.V. June 30, 2016)**: Plaintiff had standing to pursue claims under Telephone Consumer Protection Act ("TCPA"), in part, because calls were an invasion of privacy. Court noted

privacy interests were "foremost in Congress's mind" when it enacted the TCPA and that Congress's judgment that unwanted phone calls are privacy invasions that constitute concrete injuries is entitled to "great weight." *Id.* at *4-5.

- ***Bona Fide Conglomerate, Inc. v. SourceAmerica*, 2016 WL 3543699, *7-8 (S.D. Cal. June 29, 2016)**: Violation of statutory procedures intended to protect privacy interests constitutes "a concrete and particularized injury" sufficient to confer standing under *Spokeo*.

The above cases were correctly decided. *Spokeo* did not change the law, and did not deprive Plaintiff Zimmer of standing here.

3. Spokeo Did Not Change the Law of Article III Standing

To have standing to bring a claim in federal court, the plaintiff must have first suffered an injury in fact. This requirement has two components: the injury must be (1) particularized; and (2) concrete. *Spokeo*, 136 S. Ct. at 1548. Defendant does not contest that Plaintiff's injuries are sufficiently particularized. Instead, Defendant argues that under *Spokeo*, Plaintiff has not suffered "concrete" injury. But *Spokeo* did not change the law of standing nor overrule any relevant precedent. Rather, *Spokeo* simply reiterated that an injury must not only be particularized, but also concrete. *Id.*

Elaborating on the meaning of concreteness, the Court in *Spokeo* distilled several "general principles" from its prior cases, but established no new law. *Spokeo*, 136 S. Ct. at 1549-50. First, the Court acknowledged that, although tangible injuries (like physical or economic harm) are "perhaps easier to recognize" than other concrete injuries, "intangible injuries can nevertheless be concrete," as can injuries based on a "risk of harm." *Id.* at 1549. Second, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* As to "history," if the "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts"—or, put in fewer words, if "the common law permitted suit"—the plaintiff will have suffered a concrete injury that can be redressed by a federal court.

Id.; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (explaining that Article III encompasses "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process").

The Court noted that a "bare procedural violation, divorced from any concrete harm" is not enough to confer standing, but that has long been the rule. *Spokeo*, 136 S. Ct. at 1549 (citation omitted). And, consistent with existing precedent, *Spokeo* explained 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. *Spokeo* cited as examples two cases involving informational injury; *i.e.*, the deprivation of information to which an individual is statutorily entitled. *Id.* Thus, *Spokeo* has not changed the law. *Spokeo* instead summarizes injury in fact doctrine and provides examples of injuries that might or might not constitute sufficiently concrete harm.

4. Plaintiff Zimmer Suffered Concrete Injury-In-Fact

Defendant's violations of the FCRA caused Plaintiff Zimmer (and Feist) two forms of well-established concrete injury—invasion of privacy and informational injury—either one of which would alone be sufficient to confer Article III standing.

(a) Plaintiff Zimmer Suffered an Invasion of Privacy

The FCRA provision at issue here provides that a company "***may not*** procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, ***unless***" it complies with the statutory requirements. 15 U.S.C. § 1681b(b)(2) (emphasis added). Hence, it is the ***procurement*** of a consumer report containing confidential personal information ***without*** proper disclosure and authorization that constitutes the violation on which Plaintiff's claims are based.

Plaintiff clearly alleges that Defendant's purported disclosure contains extraneous information and is not a stand-alone document. FAC, ¶¶ 40-43. Plaintiff also clearly alleges that Defendant did not obtain a proper authorization. *Id.*, ¶ 70. And, Plaintiff alleges that Defendant procured her consumer report in connection with the application process notwithstanding its failure to provide a proper disclosure or

obtain proper authorization. *Id*., ¶ 35. Thus, Plaintiff effectively alleges that Defendant's acquisition of Plaintiff's consumer report was itself unlawful under standards set by Congress to protect consumer privacy. *See* 15 U.S.C. § 1681b(b)(2).

The invasion of privacy suffered by Plaintiff when Defendant obtained her report is a clear form of concrete harm that Defendant simply ignores. Indeed, invasions of privacy were the very harm that drove the passage of the Consumer Reporting Reform Act ("CRRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), which added the stand-alone disclosure requirement. In introducing the bill, House Speaker Henry Gonzalez explained that "the current Fair Credit Reporting Act does not go far enough to prevent . . . incursions into consumers' privacy from occurring." 141 Cong. Rec. E121-05 (1995), 1995 WL 18909. The CRRA was thus introduced to provide additional layers of protections and rights to consumers, given that "the implications for errors and invasions of privacy are staggering." *Id.*[8]

As the Supreme Court explained in *Spokeo*, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" 136 S.Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578). Here, Congress recognized that employers' procurement of consumer reports without adequate disclosure and authorization inherently harmed individuals' privacy interests, and elevated that invasion of privacy to the status of a legally cognizable injury.

The invasion of privacy that Plaintiff suffered and that motivated the CRRA's passage is also a quintessential example of an injury that bears "a close relationship to a

[8] The legislative record in the Senate demonstrates that privacy concerns also motivated the Senate's passage of the stand-alone disclosure requirement: the Senate noted that "the FCRA permits employers to obtain consumer reports pertaining to current and prospective employees" and expressed "concern[s], however, that this provision ***may create an improper invasion of privacy***." S. Rep. 104-185, at 35 (1995) (emphasis added); *see also Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 435 (M.D. Pa. 2004) (FCRA "sought to protect the privacy interests of employees and potential employees by narrowly defining the proper usage of these reports and placing strict disclosure requirements on employers"), *aff'd*, 135 F.App'x 499 (3d Cir. 2005).

harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," which also make it a legally cognizable injury for standing purposes. *Id.* For more than a century, American courts have recognized that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts § 652A (1977); *see id.* cmt. a ("[T]he existence of a right of privacy is now recognized in the great majority of the American jurisdictions . . . ."). Courts at the turn of the twentieth century identified the right to privacy as "derived from natural law," and traced it back to Roman and early English legal traditions. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905). And courts have a long tradition of hearing privacy claims with no actual damages. *Id.* at 73; *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 198 (Cal. Ct. App. 1955) (listing cases and noting that "[t]he fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery," and "general damages may be recovered without a showing of specific loss").[9]

Thus, history and the judgment of Congress show that Defendant's infringement on Plaintiff's privacy interests is a concrete injury. *Spokeo*, 136 S.Ct. at 1549.

(b) Plaintiff Zimmer Suffered an Informational Injury

Plaintiff has also suffered an informational injury—which *Spokeo* explicitly recognizes as an example of an injury that is sufficient to confer standing without any additional allegations of harm. As authority for the statement that, in certain kinds of cases, the "plaintiff need not allege any *additional* harm beyond the one which Congress has identified," the Court in *Spokeo* cited two cases where statutory violations, without more, constituted injury in fact: *Federal Election Comm'n v. Akins*,

[9] Similarly, it is well-settled that Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law. *See, e.g.*, 18 U.S.C. § 2707(c) (statutory damages for violations of the Electronic Communications Privacy Act of 1986 ("ECPA")); 12 U.S.C. § 3417 (statutory damages available under the Right to Financial Privacy Act ("RFPA")); 18 U.S.C. § 2710(c)(1) (private right of action under the Video Privacy Protection Act ("VPPA")).

524 U.S. 11, 20-25 (1998) and *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 449 (1989). *Spokeo*, 136 S. Ct. at 1549 (1989). Both of those cases involved the failure to provide information to which an individual is statutorily entitled. As such, *Spokeo* establishes that informational injuries such as Plaintiff's are concrete injuries in fact.

Defendant nevertheless suggests Plaintiff Zimmer suffered no injury because she received the information required under the FCRA. *Def's Memo* at 15 ("Here, Zimmer admits she received the disclosure and consented to the background check"). Defendant misses the point.

Informational injury suffices to establish injury in fact ***regardless of whether the plaintiff already knew about the information***. In *Havens Realty Corp. v. Coleman*, the Court held that a housing discrimination "tester" had standing based on a violation of his "statutorily created right to truthful housing information." 455 U.S. 363, 373-74 (1982). The tester, who was black, inquired regarding the availability of apartments and was told none were available, even though a white individual employed by the same organization was told the opposite. Id. at 368. Thus, the tester was fully aware that he was receiving false information. Although the tester had no "intention of buying or renting a home" and "fully expect[ed] that he would receive false information," the Court held that "[a] tester who has been the object of a misrepresentation made unlawful under [the statute] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." Id. at 373-74.

Indeed, an individual suffers an informational injury if he or she is statutorily entitled to information ***but does not receive it in the statutorily prescribed format***. In *Charvat v. Mut. First Fed. Credit Union,* 725 F.3d 819 (8th Cir. 2013), the plaintiff alleged that the defendant's ATMs did not include an "on machine" notice disclosing ATM transaction fees, contrary to the requirements of the Electronic Fund Transfer Act ("EFTA"). 725 F.3d at 821. Nevertheless, the ATM ***did*** contain an "on screen" notice, which the plaintiff accepted—meaning the plaintiff was informed that the ATM would charge a transaction fee. *Id.* In other words, even though the plaintiff had received the

statutorily mandated information, he did not receive it in the format the EFTA prescribed. The Eighth Circuit held that, like the injury in *Akins*, this was an informational injury sufficient to confer standing. *Id.* at 823-24 (citing *Akins*, 524 U.S. at 21). The tester in Havens expected that the defendant landlord had apartments available but would not disclose that fact. Nevertheless, by being deprived of the statutorily mandated disclosure, he "suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." *See* Havens, 455 U.S. at 373. As the Court explained in *Thomas*:

> In the wake of *Havens*, *Akins*, and *Public Citizen*, it is well-settled that Congress may create a legally cognizable right to information, the deprivation of which will constitute a concrete injury. By extension, it is well within Congress' power to specify the form in which that information must be presented. Many courts, including this one, have explicitly or implicitly recognized this point. *See, e.g., Charvat v. Mutual First Fed. Credit Union*, 725 F.3d 819, 824 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014) (finding that deprivation of the proper form of information required by the Electronic Fund Transfer Act ("EFTA") confers standing); *Manuel v. Wells Fargo Bank, Nat. Ass'n*, 123 F. Supp. 3d 810, 817-18 (E.D. Va. 2015) (same, under the FCRA); *Amason v. Kangaroo Express*, 2013 WL 987935, at *3-*4 (N.D. Ala. Mar. 11, 2013) (same, under the Fair and Accurate Credit Transactions Act ("FACTA")).

Thomas, 2016 WL 3653878, *9.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion be denied. Alternatively, Plaintiffs respectfully request leave to amend.

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Dated: August 29, 2016

GLANCY PRONGAY & MURRAY LLP

By: *s/ Mark S. Greenstone*

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PROOF OF SERVICE VIA ELECTRONIC POSTING PURSUANT TO SOUTHERN DISTRICT OF CALIFORNIA LOCAL RULES

I, the undersigned, say:

I am a citizen of the United States and am employed in the office of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action. My business address is 1925 Century Park East, Suite 2100, Los Angeles, California 90067.

On August 29, 2016, I caused to be served the following document:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT PETCO ANIMAL SUPPLIES, INC.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

By posting the document to the ECF Website of the United States District Court for the Southern District of California, for receipt electronically by the parties as listed on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 29, 2016, at Los Angeles, California.

s/ Mark S. Greenstone
Mark S. Greenstone

Mailing Information for a Case 3:16-cv-01369-H-DHB Feist et al v. Petco Animal Supplies, Inc. et al

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)