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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| ROGER L. CULBERSON II et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>WALT DISNEY PARKS AND RESORTS, etc.,<br><br>Defendant and Respondent. | B289488<br>(Los Angeles County Super. Ct. No. BC526351) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

DHF Law and Devin H. Fok; Girardi | Keese and V. Andre Sherman; Law Office of Martin N. Buchanan and Martin N. Buchanan for Plaintiffs and Appellants.

Paul Hastings, Felicia A. Davis, Paul Grossman and Paul W. Cane, Jr. for Defendant and Respondent.

## INTRODUCTION

Appellants Roger Culberson II and Edward Joseph III brought this class action against respondent, Walt Disney Parks and Resorts (Disney), asserting willful violations of the Fair Credit Reporting Act, codified at 15 U.S.C § 1681 et seq.[1] (the FCRA or the Act). They claim respondent's disclosures to job applicants that they may be subject to a consumer report were not contained in a standalone document, contrary to the FCRA's requirement. They also contend that respondent rejected certain applicants based on information in their consumer reports without first providing the required notice under the Act.

The trial court granted summary judgment for respondent on both claims, concluding that any alleged violation by respondent of the FCRA's provisions was not willful. Appellants challenge this conclusion on appeal, reasserting that respondent engaged in willful violations of the Act. Like the trial court, we do not decide whether respondent violated either of the Act's relevant requirements, but conclude that no triable issue exists whether any alleged violation was willful. We therefore affirm.

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[1] All undesignated statutory references are to Title 15 of the United States Code.

## BACKGROUND

A. *The FCRA*

The FCRA regulates the preparation and procurement of consumer reports[2] and the consideration of such reports in making certain decisions, including employment decisions. As discussed more fully below, the Act requires a prospective employer to disclose to a job applicant, in a standalone document, that it may obtain a consumer report for employment purposes[.] (§ 1681b(b)(2)(A).) The FCRA also dictates that before taking any adverse action based on a consumer report, the prospective employer must provide the applicant a copy of the report and a description of his rights under the Act. (§ 1681b(b)(3)(A)). This required communication is generally referred to as a "pre-adverse-action notice." (See, e.g., *Long v. Southeastern Pennsylvania Transportation Authority* (3d Cir. 2018) 903 F.3d 312, 319 (*Long*); *Moore v. Rite Aid Headquarters Corp.* (E.D. Pa. 2014) 33 F.Supp.3d 569, 573.)

"[The] FCRA provides a private right of action against businesses that use consumer reports but fail to comply. If a violation is negligent, the affected consumer is entitled to actual damages. (§ 1681o(a)). If willful, however, the consumer may have actual damages, or statutory damages

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[2] Under the FCRA, a "consumer report" includes any communication bearing on a consumer's "character, general reputation, personal characteristics, or mode of living" and used to establish eligibility for "employment purposes." (§ 1681a(d).)

ranging from $100 to $1,000, and even punitive damages." (*Safeco Ins. Co. v. Burr* (2007) 551 U.S. 47, 53, citing § 1681n(a).)

B. *Appellants' Lawsuit*

1. *The Conditional Employment Offers and the Disclosures*

During the relevant period, and until September 2015, respondent used the services of Sterling Infosystems, Inc. for background screening and related matters, which included mailing notices to applicants on respondent's behalf. Appellants Culberson and Joseph received conditional offers of employment at respondent's Disneyland Resort in 2011 and 2013, respectively. After making the conditional offers, respondent provided appellants the following disclosure form (the Disney disclosure form):

**[California]**

Re: Notice--Consumer Report, Consumer Credit Report and Investigative and Consumer Report

Dear Applicant:

This is to notify you that The Walt Disney Company and/or one of its affiliated companies (the "Company"), at any time, may obtain consumer reports, and/or investigative consumer reports about you and consider such reports for employment purposes, including when reviewing your application for employment, making a decision whether to offer you employment, deciding whether to continue your employment (if you are hired), and making other employment-related decisions directly affecting you. Such reports may include information as to your character, general reputation, personal characteristics, credit history or mode of living. The information in or a copy of the report may also be communicated to affiliated companies of the Company for any of the employment purposes described above. You have the right to request, in writing, within a reasonable period of time, a disclosure of the nature and scope of any investigation requested.

Sterling InfoSystems Inc.(www.sterlinginfosystems.com) is the contracted consumer reporting agency that will be performing these services and providing the investigative consumer report on our behalf. Sterling InfoSystems Inc. has locations designated to handle inquiries as follows: 249 West 17th Street, New York, NY 10011, (877) 424-2457; 5750 West Oaks Blvd, Suite 100, Rocklin, CA 95765, (800) 943-2589; 629 Cedar Creek Grade, Winchester, VA 22601, (866) 266-3444.

All candidates for employment are required to successfully complete a background check prior to receiving a final offer of employment.

Respondent also directed appellants to Sterling's Web site, where they received and signed a different disclosure and authorization form (the Sterling disclosure form). This form, which was longer than the Disney disclosure form, contained, among other things: a description of the nature and scope of Sterling's investigation; an acknowledgment of receipt of a summary of rights under the FCRA; information about the applicant's right to receive a copy of the report and dispute its accuracy, and detailed information about the applicant's right under California law to inspect his or her file; Sterling's contact information; and an acknowledgment that "'all employment decisions are based on legitimate non-discriminatory reasons.'" The Sterling disclosure form also included an authorization to conduct a background investigation. Appellants accessed the Sterling disclosure form and signed it electronically.

2. *The Inaccurate Reports and the "Pre-Adverse Action" Notices*

After appellants authorized background investigations, Sterling generated consumer reports that included

inaccurate criminal records for each appellant. Based on this inaccurate information, respondent determined that appellants' background reports were not acceptable and notified Sterling to send out a standard letter titled "'Pre-Adverse Action Notice'" (the Sterling letter) to each appellant on respondent's behalf. The Sterling letter stated: "Based on [the reported] information, subject to you successfully challenging the accuracy of this information, we have decided to revoke your conditional offer of employment. . . . . [¶] [Respondent] is enclosing a copy of the report and a summary of your rights under the [FCRA]. . . . . You also have the right to dispute directly with Sterling . . . the accuracy or completeness of any information provided by it. [¶] If you believe the information listed above is not accurate, please contact Sterling . . . within five business days of receipt of this letter." Enclosed with this letter was a copy of Sterling's report and a summary of rights under the FCRA.

Each appellant contacted Sterling to dispute his report. Sterling later revised Culberson's report, and respondent then placed him on a waitlist for employment based on that revision. The record is unclear on the result of Joseph's challenge to his report.

3. *The Class Action and Summary Judgment*

In 2015, appellants filed the operative complaint on behalf of themselves and a putative class, asserting causes of action for violations of the FCRA's standalone disclosure and

pre-adverse-action notice requirements. The complaint alleged that respondent's FCRA disclosures were not contained in a standalone document and that the Sterling letter itself constituted an adverse action without the required prior notice. Appellants sought statutory and punitive damages but did not seek actual damages.

Appellants later moved for class certification. In July 2017, the trial court granted the motion and certified two classes: (1) a "Defective Disclosure Class," which included individuals "who were the subject of a consumer report obtained by [respondent] for employment purposes" between November 2011 and July 2017 and who signed the Sterling disclosure form; and (2) a "Pre-Adverse Action Notice Class," which included individuals who received the Sterling letter based on information in a report prepared by Sterling between November 2011 and July 2017

Following discovery, respondent moved for summary judgment as to both classes, and the trial court ultimately granted the motion. Without deciding whether respondent violated the FCRA, the court determined that any violation of the Act by respondent was not willful. This appeal followed.

## DISCUSSION

"We review the ruling on a motion for summary judgment de novo, applying the same standard as the trial court." (*Manibog v. MediaOne of Los Angeles, Inc.* (2000) 81 Cal.App.4th 1366, 1369.) "Summary judgment is

appropriate only "where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.'" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618, quoting *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

Because appellants seek statutory and punitive damages, they must establish that respondent willfully violated the FCRA's requirements. (§ 1681n(a)). To be willful, a defendant's violation of the Act must be either knowing or reckless. (*Safeco*, *supra*, 551 U.S. at pp. 57-60.) A reckless violation is one that shows the defendant "ran a risk of violating the law substantially greater than the risk associated" with a "merely careless" reading of the statute's terms. (*Id.* at p. 69.)

In *Safeco*, the Supreme Court of the United States held that the defendant's violation of the FCRA was not reckless as a matter of law, because the statutory text was "less[]than[]pellucid" and the defendant lacked "the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took."[3] (*Safeco, supra,* 551 U.S. at pp. 69, 70.)

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[3] The FTC is the agency charged with enforcing the provisions of the FCRA. (See § 1681s(a).)

Although the determination of willfulness will often involve questions of fact, when the issue turns on the state of the law, summary judgment may be appropriate. (See *id.* at p. 71 [holding as a matter of law that defendant's violation of FCRA was not willful]; *Pedro v. Equifax, Inc.* (11th Cir. 2017) 868 F.3d 1275, 1282 ["District courts may, and often do, determine on the pleadings that a plaintiff failed to plead willfulness when the [defendant's] interpretation of the relevant statute . . . was not objectively unreasonable"].)

Appellants challenge the trial court's grant of summary judgment for respondent, asserting triable issues existed whether respondent willfully violated both the FCRA's disclosure and pre-adverse-action notice requirements. We address each of their claims in turn.

A. *The Disclosure*

Under the FCRA, before procuring a consumer report for employment purposes, an employer must disclose in writing, "in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes." (§ 1681b(b)(2)(A)(i).) The Act contains one express exception to the requirement that the disclosure be in a standalone document, permitting the applicant to "authorize[] in writing" the procurement of a consumer report on the same document as the disclosure. (§ 1681b(b)(2)(A)(ii).)

Appellants maintain respondent failed to provide compliant standalone disclosures before obtaining consumer

reports because both the Disney and the Sterling disclosure forms contained extraneous information that the FCRA does not permit. They further contend that triable issues exist whether respondent's alleged violation was willful. We need not decide whether respondent's disclosures complied with the FCRA's standalone-disclosure requirement, as we conclude that appellants have failed to establish a triable issue on the willfulness of any such violation.

We focus our analysis on the Disney disclosure form, the shorter and simpler of the forms respondent provided appellants.[4] Appellants note the Disney form included: a description of the scope of the report; a disclosure that respondent may share the information with affiliated companies; an explanation of the applicant's right to request disclosure of the nature and scope of any investigation; and an explanation that Sterling would produce the report, along with Sterling's contact information. They argue the Act is clear that the disclosure document may contain only the disclosure itself and the consumer's authorization. Although we agree that is what the statute instructs (see

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[4] As respondent notes, and appellants do not dispute, an employer need only provide one compliant disclosure before obtaining a consumer report; thus, whether additional disclosures were also compliant is irrelevant. (See § 1681b(b)(2)(A)(i); *Reardon v. ClosetMaid Corp.* (W.D.Pa. Dec. 2, 2013, No. 2:08-cv-01730) 2013 U.S. Dist. LEXIS 169821 at *17 [granting summary judgment to defendant on one plaintiff's disclosure claim where one of two disclosures was compliant].)

§ 1681b(b)(2)(A)(i) [disclosure must be "in a document that consists solely of the disclosure," but an authorization may be made on the same document]), the question remains what information may constitute the disclosure itself.

In their opening brief, appellants suggest, without citation to authority, that the FCRA permits only the "simple 10-word disclosure 'that a consumer report may be obtained for employment purposes.'" (Quoting § 1681b(b)(2)(A)(i).) However, the statutory text does not clearly indicate that an employer may use only those ten words in making the required disclosure. (See *Just v. Target Corporation* (D.Minn. 2016) 187 F.Supp.3d 1064, 1069 -1070, quoting *Lengel v. HomeAdvisor, Inc.* (D.Kan. 2015) 102 F.Supp.3d 1202, 1211 ["'disclosure' 'is not defined in every possible aspect,' and 'there may be some gray area' about what constitutes a disclosure"].) Appellants have not identified, and we have not found, any case adopting such a holding or finding a disclosure form comparable to the Disney or Sterling forms noncompliant. Instead, authority dating back two decades and extending to as recently as 2018 (long after respondent provided its disclosures to appellants in 2011 and 2013), supports that the required disclosure may consist of additional information like that in the Disney disclosure form.[5]

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[5] Although the class period extended beyond the time of appellants' receipt of respondent's disclosures, to maintain a class

(*Fn. is continued on the next page*.)

For example, a 1998 FTC informal staff opinion letter regarding the FCRA's standalone-disclosure requirement stated: "It is our view that Congress intended that the disclosure not be encumbered with extraneous information. However, some additional information, such as a brief description of the nature of the consumer reports covered by the disclosure, may be included if the information does not confuse the consumer or detract from the mandated disclosure."[6] (Fed. Trade Com., Staff Op. Letter to Karen

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action as the named plaintiffs, appellants must have a personal cause of action against respondent. (See *General Motors Corp. v. Superior Court* (1983) 141 Cal.App.3d 966, 969 (*General Motors*) ["Unless [the named plaintiff] has a personal cause of action against [the defendant], he may not represent a class in a suit against [the defendant]"]; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 664 [where named plaintiff was not "misled in the manner the class was allegedly deceived, the court could not 'decide the issue of the rights of such individuals that might possibly exist'"].) Appellants must therefore establish that respondent's alleged violation of their own rights was willful, based on the state of the law at the time. (See *Safeco*, *supra*, 551 U.S. at p. 70 [no willful violation in part because of lack of guidance from courts and FTC at time of violation]; *General Motors*, *supra*, at p. 969.)

[6] The FTC's informal staff opinion letters are not authoritative agency guidance that could establish the willfulness of a defendant's violation. (See *Safeco*, *supra*, 551 U.S. at p. 70 & fn. 19 [rejecting plaintiff's argument that informal staff opinion letter constituted authoritative agency guidance].) But such letters "may be considered for their persuasive value." (*Owner-Operator Indep. Drivers Ass'n v. USIS Commer.*

(*Fn. is continued on the next page*.)

Coffey (Feb. 11, 1998) https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-coffey-02-11-98 at 2.)

In *Coleman v. Kohl's Department Stores, Inc.*, decided in 2015, a federal district court granted a defendant's motion to dismiss the plaintiff's claim of an FCRA standalone-disclosure violation. (*Coleman v. Kohl's Department Stores, Inc.* (N.D.Cal., Oct. 5, 2015, Case No. 15-cv-02588-JCS) 2015 U.S. Dist. LEXIS 135746, at *18 (*Coleman*.) Like the Disney form here, the disclosure form in *Coleman* contained a description of the nature and potential scope of the report, contact information for the reporting agency, and information about the applicant's right to review and dispute the report. (*Id.* at *8-9, *17.) Yet the court found these facts insufficient to establish a violation of the standalone-disclosure requirement. (*Id.* at *17-18.)

Relying on *Coleman*, in 2018, another district court found a disclosure form compliant with the FCRA even though it contained information about the nature and scope of the report, the contact information for the reporting agency, and an explanation of the applicant's right to review the agency's files and obtain information about the investigation. (*Walker v. Fred Meyer, Inc.* (D.Or., May 7, 2018, Case No. 3:17-cv-01791-YY) 2018 U.S. Dist. LEXIS

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*Serv.* (10th Cir. 2008) 537 F.3d 1184, 1192). Here, the staff opinion letter tends to show that respondent's reading of the statute was not without foundation.

92976, at *1, report and recommendation adopted in part and rejected in part on other grounds by *Walker v. Fred Meyer, Inc.* (D.Or., June 21, 2018, Case No. 3:17-cv-1791-YY) 2018 U.S. Dist. LEXIS 103776.) The existence of authority tending to support respondent's position suggests that its reading of the statute was not reckless. (See *Safeco*, *supra*, 551 U.S. at p. 70, fn. 20 ["an interpretation that could reasonably have found support in the courts" cannot constitute willful violation].)

In sum, the statutory text does not make clear precisely what information the required disclosure may contain. Moreover, at least some authority tended to support respondent's reading of the statute and contradict appellant's argument that the FCRA permits only a "10-word disclosure." Finally, no contrary authoritative guidance by the federal courts of appeals or the FTC existed at the time of the alleged violations. Under these circumstances, no reasonable trier of fact could find that respondent willfully violated the Act. (See *Safeco*, *supra*, 551 U.S. at pp. 69-70 [no willful violation as a matter of law, given "dearth of guidance and the less-than-pellucid statutory text"].)

Appellant cites two recent cases in which the Ninth Circuit found violations of the FCRA's standalone-disclosure requirement: *Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492 and *Gilberg v. California Check Cashing Stores, LLC* (9th

Cir. 2019) 913 F.3d 1169 (*Gilberg*).[7] These cases share two common features that render them inapplicable to establish that respondent willfully violated that requirement. First, each was decided long after respondent provided its disclosures to appellants in 2011 and 2013. These cases therefore could not have "warned [respondent] away from the view it took." (*Safeco*, *supra*, 551 U.S. at pp. 69-70.)

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[7] Appellants also cite several federal district court rulings, in which the courts found violations of the FCRA's standalone-disclosure requirement: *Robrinzine v. Big Lots Stores, Inc.* (N.D.Ill. 2016) 156 F.Supp.3d 920 (*Robrinzine*); *Martin v. Fair Collections & Outsourcing, Inc.* (D.Md., June 30, 2015, Case No.: GJH-14-3191) 2015 U.S. Dist. LEXIS 86129; *Jones v. Halstead Mgmt. Co. LLC* (S.D.N.Y. 2015) 81 F.Supp.3d 324 (*Jones*); *Case v. Hertz Corporation* (N.D. Cal., Feb. 26, 2016, Case No. 15-cv-02707-BLF) 2016 U.S. Dist. LEXIS 41210; *Hargrett v. Amazon.com DEDC, LLC* (M.D.Fla. 2017) 235 F.Supp.3d 1320. As respondent notes, each of these cases involved disclosure forms much longer than the Disney form here. (See, e.g., *Robrinzine*, *supra*, at pp. 926-927 [form included "implied liability waiver" and "over a page and a half of state-specific exceptions that are inapplicable to [the plaintiff]"]); *Jones*, *supra*, at p. 333 [form contained "two full pages of eye-straining tiny typeface writing" and included liability waiver and "and all sorts of state-specific disclosures that had nothing to do with [the plaintiff]"].) More importantly, however, these trial court rulings, all issued after the alleged violations here, could not provide the kind of authoritative guidance "that might have warned [respondent] away from the view it took," and thus cannot establish the willfulness of any FCRA violation. (*Safeco*, *supra*, 551 U.S. at p. 70 [no willful violation in part because "no court of appeals had spoken" on the relevant issue at the time of the violation].)

Second, neither case addresses what information may constitute the required FCRA disclosure.

In *Syed*, the court held that an employer violated the Act when it included a liability waiver in the same document as the disclosure. (*Syed*, *supra*, 853 F.3d at p. 496.) The employer contended that while a liability waiver was not part of the statutory disclosure itself, the FCRA did not "really require the document to 'consist[] solely if the disclosure'" because it expressly allowed for an authorization on the same document. (*Syed*, *supra*, at p. 500.) Rejecting this invitation to ignore the statutory text, the Ninth Circuit concluded that, with the exception of an authorization, the Act "unambiguously require[d] a document that 'consists solely of the disclosure.'" (*Syed*, at pp. 500-501.) Because the statute "unambiguously bar[red]" the employer's interpretation, the court found the employer's decision to include a liability waiver reckless, and the violation therefore willful. (*Id.* at pp. 503-506.)

In *Gilberg*, the court held that an employer violated the Act by including "extraneous information in the form of various state disclosure requirements" along with its FCRA disclosure. (*Gilberg*, *supra*, 913 F.3d at p. 1171.) The employer argued that the FCRA permitted inclusion of extraneous information if that information furthered the Act's purpose. (See *id.* at p. 1175.) Citing *Syed*, the Ninth Circuit rejected that argument as inconsistent with the statute's plain instruction that the relevant document

consist "'solely'" of the FCRA disclosure. (*Gilberg, supra,* at p. 1171.)

Both cases confirm that an FCRA-compliant disclosure document can contain only the disclosure itself and an authorization; it cannot contain a liability waiver (*Syed*, *supra*, 853 F.3d at p. 496) or state disclosures that are not within the scope of the FCRA disclosure (*Gilberg*, *supra*, 913 F.3d at p. 1171). Neither case considered information similar to that in the Disney disclosure form or opined on what information may constitute the FCRA disclosure itself.[8] Accordingly, these cases do not change our conclusion that any violation by respondent of the FCRA's standalone-disclosure requirement was not willful.

B. *The Pre-Adverse-Action Notice*

In addition to the disclosure requirement, the FCRA requires prospective employers to provide job applicants notice before taking any adverse action based on a consumer report. The relevant provision of the Act provides: "[I]n using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the

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[8] As noted, the Disney disclosure form included: (1) information about the potential nature and scope of the investigation, (2) a disclosure that information may be shared with affiliated companies, (3) an explanation of the applicant's right to request information about the nature and scope of the investigation, and (5) Sterling's contact information.

report, the person intending to take such adverse action shall provide to the consumer to whom the report relates-- [¶] (i) a copy of the report; and [¶] (ii) a description in writing of the rights of the consumer under [the FCRA], as prescribed by the Bureau [of Consumer Financial Protection] . . . ."[9] (§ 1681b(b)(3)(A).) Federal district courts have generally agreed that "an adverse action occurs when the decision is carried out, when it is communicated or [when it] actually takes effect, and an actor has until that time to take the necessary steps to comply with the FCRA's requirements." (*Burghy v. Dayton Racquet Club, Inc.* (S.D. Ohio 2010) 695 F.Supp.2d 689, 703; accord, e.g., *Moore v. Rite Aid Hdqtrs Corp.*, *supra,* 33 F.Supp.3d at p. 574; *Goode v. LexisNexis Risk & Information Analytics Group, Inc.* (E.D.Pa. 2012) 848 F.Supp.2d 532, 540; *Magallon v. Robert Half Internat., Inc.* (D.Or. 2015) 311 F.R.D. 625, 633.)

As noted, the Sterling letter sent to relevant applicants on behalf of respondent stated: "Based on [the reported] information, subject to you successfully challenging this information, we have decided to revoke your conditional offer of employment." The letter also advised recipients that they could dispute the content of their consumer report by contacting Sterling. Enclosed with this letter was a copy of

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[9] Under the Act, an "adverse action" includes "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." (§ 1681a(k)(1)(B)(ii).)

Sterling's report and the prescribed summary of rights under the FCRA.

Appellants argue that, rather than provide the required pre-adverse-action notice to relevant applicants, the Sterling letter communicated a final decision by respondent, and thus constituted an adverse action, with no prior notice. Here, too, we conclude that regardless of whether respondent's conduct violated the FCRA, there is no triable issue whether any violation of the FCRA's pre-adverse-action notice requirement was willful.

Appellants offer three main arguments in support of their position. First, they highlight the portion of the Sterling letter stating, "we have decided to revoke [the recipient's] conditional offer of employment," and argue this language showed respondent had already made its adverse decision before it notified Sterling to send the letter. In support, they cite *Jones*, *supra*, 81 F.Supp.3d 324. There, the court found, largely based on this language, that an employer's delivery of the same Sterling letter potentially constituted an adverse action, and thus denied a motion to dismiss the plaintiff's adverse-action claim under the FCRA. (*Jones*, *supra*, at pp. 334-336.) According to the *Jones* court, the letter conveyed that the plaintiff's conditional offer "*had been* revoked," and thus provided sufficient basis for the plaintiff's allegation that it constituted an adverse action. (*Id.* at p. 335, fn. 17.)

This analysis, however, fails to consider the entirety of the Sterling letter, which provided that the decision to

revoke the conditional offer of employment was "subject to" a successful dispute of the consumer report and gave the applicant time to contact Sterling for that purpose.[10] The conditional nature of the decision and the time provided before any final action would be taken tend to support that delivery of the Sterling letter did not constitute an adverse action. (See *Branch v. Government Employees Insurance Company* (E.D. Va. 2017) 286 F.Supp.3d 771, 783 ["where it is undisputed that an applicant has a legitimate opportunity to cure inaccuracies in a report," employer's initial decision to disqualify applicant "does not necessarily cause any adverse effect"].)

Second, appellants argue that the Sterling letter constituted an adverse action because absent a timely dispute, respondent would reject the relevant applicant without further review. They contend the Sterling letter therefore constituted an adverse action despite the contingent nature of respondent's decision.

Although one federal district court has adopted this reasoning (see *Manuel v. Wells Fargo Bank, Nat. Ass'n*

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[10] Beyond the apparent insufficiency of the analysis in *Jones*, and as noted in the discussion of appellants' disclosure claim, this trial court ruling was issued after the alleged violations here and thus cannot establish the willfulness of any FCRA violation by respondent. (See *Safeco*, *supra*, 551 U.S. at p. 70 [no willful violation in part because "no court of appeals had spoken" on the relevant issue at the time of the violation].)

(E.D.Va. 2015) 123 F.Supp.3d 810, 823 (*Manuel*) [reasonable jury could find employer's adverse decision was final when first relayed because employer was comfortable adhering to it without review if applicant did not file dispute]), others have rejected it (see *Dahy v. FedEx Ground Package System, Inc.* (W.D.Pa., Aug. 3, 2018, Civil Action No. 17-1633) 2018 U.S. Dist. LEXIS 131732, at *29, report and recommenddation adopted (W.D.Pa., Sept. 10, 2018, Case No. 2:17-cv-1633) 2018 U.S. Dist. LEXIS 153343 [initial determination of ineligibility was not adverse action despite lack of additional review absent dispute; criticizing *Manuel*: "There is nothing in the FCRA that requires an employer who makes a pre-adverse determination to revisit the decision again if the applicant does not dispute the information"]; *Johnson v. ADP Screening & Selection Services* (D.Minn. 2011) 768 F.Supp.2d 979, 984 (*Johnson*) [initial determination was not adverse action despite refusal to overturn decision after applicant's successful dispute of report; "[n]othing in the FCRA requires an employer to consider any correction that a reporting agency might make"]; see also *Williams v. First Advantage LNS Screening Solutions, Inc.* (N.D.Fla. 2015) 155 F.Supp.3d 1233, 1247, fn. 15 (*Williams*) [dicta] ["It is not improper for an employer to fully intend to carry out the adverse action absent a dispute by the consumer, or even to intend to carry out the adverse action notwithstanding the

result of any dispute a consumer might initiate"], italics omitted).[11] This conflict of authorities suggests that respondent's reading of the statute was, at the very least, reasonable and thus that respondent did not willfully violate the FCRA. (See *Safeco*, *supra*, 551 U.S. at p. 70, fn. 20 ["an interpretation that could reasonably have found support in the courts" cannot constitute willful violation].)

Finally, appellants note that the Sterling letter advised its recipients only of their right to dispute the accuracy of their report, without also offering them an opportunity to contest the relevance of the information or explain any extenuating circumstances. Thus, according to appellants, the Sterling letter communicated a decision that was final for most applicants, who did not contest the accuracy of their reports.

This argument suffers from at least two deficiencies. First, appellants, the named plaintiffs in this action, did contest the accuracy of their reports. Because they cannot assert a cause of action unique to class members who did not do so, they cannot represent those class members in this action. (See *General Motors*, *supra*, 141 Cal.App.3d at p. 969 ["Unless [the named plaintiff] has a personal cause of action

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[11] Here, too, we note that because it is a trial court ruling and because it was issued after the events in question, *Manuel* could not establish the willfulness of any FCRA violation by respondent, even absent a conflict of authorities. (See *Safeco*, *supra*, 551 U.S. at p. 70.)

against [the defendant], he may not represent a class in a suit against [the defendant]"]; *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th at p. 664 [where named plaintiff was not "misled in the manner the class was allegedly deceived, the court could not 'decide the issue of the rights of such individuals that might possibly exist'"].)

Second, it is not clear that the FCRA entitles applicants to try to persuade employers to disregard accurate information in their reports. Appellants cite no provision of the Act that states employers must permit applicants to explain negative information in their reports. At least one court has rejected a contention that employers must be open to changing their intent to take adverse action when providing a pre-adverse-action notice. (See *Johnson*, *supra*, 768 F.Supp.2d at p. 984 ["[n]othing in the FCRA requires an employer to consider any correction that a reporting agency might make"]; see also *Williams*, *supra*, 155 F.Supp.3d at p. 1247, fn. 15 [dicta] ["It is not improper for an employer to fully intend to carry out the adverse action absent a dispute by the consumer, or even to intend to carry out the adverse action notwithstanding the result of any dispute a consumer might initiate"].)

Appellants cite *Long, supra,* 903 F.3d 312 for the proposition that an employer must give applicants an opportunity to change its mind about the intended adverse action by contesting the relevance of the report or explaining any extenuating circumstances. *Long* does not stand for that proposition.

In *Long*, the plaintiffs, job applicants, alleged that the defendant employer violated the FCRA by rejecting them based on their consumer reports without providing notice or copies of the reports. (*Long, supra*, 903 F.3d at pp. 316-317.) The district court dismissed the complaint for lack of jurisdiction, concluding the plaintiffs had failed to allege an injury in fact, in part because they did not allege that their reports were inaccurate. (*Id.* at p. 317.) Reversing this jurisdictional ruling, without reaching the merits, the Third Circuit explained that the statute required pre-adverse-action notice regardless of whether the report was accurate, and thus held that plaintiffs need not allege inaccuracies in their reports to establish an injury under the Act. (*Long, supra,* at pp. 319, 324-325.)

In so holding, the court noted that "[t]he required pre-adverse-action copy of an individual's consumer report allows him to ensure that the report is true, and may also enable him to advocate for it to be used fairly—such as by explaining why true but negative information is irrelevant to his fitness for the job." (*Long, supra,* 903 F.3d. at p. 319.) Thus, the *Long* court did not hold that an employer must allow applicants to advocate for fair use of their reports, but merely stated that the statutory notice might benefit the applicant in this way. (See *ibid.*) And as is by now a common refrain, even if *Long* did support appellants' position, it was decided years after they received the Sterling

letters from respondent, and thus could not establish that any violation by respondent was willful.[12] (*Safeco*, *supra*, 551 U.S. at p. 70.) Accordingly, regardless of whether respondent violated the FCRA's pre-adverse action notice requirement, we conclude that any such violation was not willful.

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[12] We recognize, as did the court in *Syed*, that a lack of guidance does not immunize all interpretations of the statute from a finding of a willful violation. We merely follow the holding of the United States Supreme Court, that in the face of "less-than-pellucid statutory text" *and* a "dearth of guidance," an employer's interpretation -- even an erroneous one -- cannot be deemed objectively unreasonable and thus "falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability." (*Safeco*, *supra*, 551 U.S. at p. 70.)

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.