No. 18-

In The
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

DANIEL RIVERA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Gerald Pauling
Uma Chandrasekaran
John Drury
SEYFARTH SHAW LLP
233 S. Wacker Drive,
Suite 8000
Chicago, IL 60603
(312) 460-5000

Anneliese Wermuth
COZEN & O'CONNOR
123 N. Wacker Drive,
Suite 1800
Chicago, IL 60606
(312) 382-3100

Rex S. Heinke
Counsel of Record
Jessica Weisel
AKIN GUMP STRAUSS HAUER & FELD LLP
1999 Avenue of the Stars,
Suite 600
Los Angeles, CA 90067
(310) 229-1000
rheinke@akingump.com

Counsel for Petitioner

QUESTION PRESENTED

In a long line of cases, this Court has recognized that federal courts may continue to exercise supplemental jurisdiction over state-law claims when significant proceedings have taken place in the federal court before federal jurisdiction is found to be lacking.

Here, after eight years of litigation, a ten-day trial, and an appeal, the Seventh Circuit found that the plaintiffs failed to prove at trial that they had suffered a concrete injury under the Fair Credit Reporting Act ("FCRA") and, thus, under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), they lacked Article III standing. Therefore, the Seventh Circuit held, it had no jurisdiction over plaintiffs' FCRA claims.

Although in its initial opinion, the Seventh Circuit had held that the plaintiffs' state-law defamation claims failed for the same reason as their FCRA claims – they failed to prove any injury at trial – in its amended opinion the Seventh Circuit did not direct the district court to enter judgment on the defamation claims for Allstate Insurance Company ("Allstate"). Instead, it ordered that the defamation claims be dismissed without prejudice, permitting plaintiffs to refile the claims in state court. The Seventh Court held that because the plaintiffs had no Article III standing to bring their federal FCRA claims, the court could not exercise supplemental jurisdiction over the defamation claims.

The question presented is whether a federal court may exercise supplemental jurisdiction over state-law claims when it determines after trial that a plaintiff' lacks standing to pursue its federal claims.

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant Allstate Insurance Company was the defendant in the district court and the appellant in the court of appeals.

Respondents and Plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock, and Rebecca Scheuneman were the plaintiffs in the district court and appellees in the court of appeals.

RULE 29.6 DISCLOSURE

Allstate Insurance Company is a wholly-owned subsidiary of Allstate Insurance Holdings, LLC, which is a Delaware limited liability company. Allstate Insurance Holdings, LLC is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

In The
Supreme Court of the United States

No. 18-

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

DANIEL RIVERA, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The initial opinion of the court of appeals (App. 30a) is reported at 907 F.3d 1031. The court of appeals amended its opinion on rehearing (App. 1a), which is reported at 913 F.3d 603.

JURISDICTION

The court of appeals entered its judgment on October 31, 2018. Plaintiffs and Respondents Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock, and Rebecca Scheuneman (collectively "Plaintiffs") timely filed a petition for rehearing and rehearing en banc. On January 14, 2019, the court of appeals issued an amended opinion. Allstate then timely filed a petition for rehearing and rehearing en banc, which was denied on February 27, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Article III, § 2 of the United States Constitution provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;— to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1367(a) provides, in relevant part:

> [I]n any civil action of which the district courts have original jurisdiction, the

> district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

INTRODUCTION

This case presents the important question of whether a failure at trial to prove injury for Article III standing divests federal courts of supplemental jurisdiction over state-law claims.

After eight years of litigation and a 10-day trial, the Seventh Circuit held that Plaintiffs had failed to prove injury. This failure of proof meant Plaintiffs lacked standing to pursue their FCRA claims and could not establish special damages for their state-law defamation claims. The Seventh Circuit directed the district court to enter judgment for Allstate.

Having lost the case in its entirety, Plaintiffs argued for the first time on rehearing that because they lacked standing, the federal courts never had jurisdiction over their FCRA claims and, thus, could not exercise supplemental jurisdiction over their defamation claims. Although this argument contradicted their pleadings, which alleged there *was* supplemental jurisdiction, the Seventh Circuit agreed. It therefore amended its opinion, removed the discussion of the defamation claims, and directed the district court to dismiss the defamation claims so they could be refiled in state court, forcing Allstate to relitigate the case it had won.

The Seventh Circuit's amended opinion contravenes a long line of this Court's supplemental jurisdiction precedent, including *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), and *Rosado v. Wyman*, 397 U.S. 397 (1970). These cases and 28 U.S.C. § 1367, which codifies the considerations outlined in those cases, recognize that when the claim providing original jurisdiction in federal courts is dismissed or abandoned, a court may exercise supplemental or, as it was previously known, pendent jurisdiction, over related state-law claims. Supplemental jurisdiction is designed to be flexible and may be employed when considerations of judicial economy, convenience, and fairness are best served by the federal court continuing to hear the case.

This means that in cases like this one – where standing is resolved only after trial and appeal – a defendant cannot win. Either the plaintiff wins or, even if the plaintiff loses in federal court, it can refile the case in state court and litigate it all over again.

The Seventh Circuit's holding not only defies common sense, but also is unfair to litigants that have spent years litigating in federal courts, wastes precious judicial resources, and contravenes this Court's supplemental jurisdiction precedent. It also creates circuit splits on three issues. First, the federal courts are divided on the central issue – whether they can exercise supplemental jurisdiction when the jurisdiction-conferring claim fails due to a lack of standing. The Seventh Circuit precludes supplemental jurisdiction, but the Sixth Circuit has exercised supplemental jurisdiction in such a circumstance.

Second, the federal courts are split on whether, in circumstances where they otherwise would decline supplemental jurisdiction, they can decide a state-law claim for reasons decided as part of the federal claim. The Seventh Circuit declined to decide the defamation claims even though the basis on which it had previously rejected those claims was identical to the grounds on which it found Plaintiffs failed to prove FCRA standing, the absence of injury. This conflicts with prior Seventh Circuit precedent and with decisions of the Fourth and Eighth Circuits that have held a district court does not abuse its discretion in deciding state law claims that turn on grounds that the federal courts decided in rejecting the jurisdiction-conferring federal claim.

Third, the federal courts are split on whether supplemental jurisdiction can be exercised when the plaintiff had asserted a different federal claim that was no longer in the case. The Federal Circuit has held that a pleaded, but abandoned federal claim can provide sufficient original jurisdiction to permit courts to exercise supplemental jurisdiction. The Seventh Circuit did not address this issue, despite Plaintiffs pleading a federal age discrimination claim for which they had standing.

There is no reason why the exercise of supplemental jurisdiction when a plaintiff is found to lack standing should be treated differently from supplemental jurisdiction determinations when the federal claims fail for other reasons. This Court's existing standards for deciding supplemental jurisdiction sufficiently protect against frivolous federal claims being asserted to provide a jurisdictional hook for state-law claims to be litigated in federal court. By contrast, the Seventh Circuit's opinion invites abusive and wasteful litigation. In every case where a plaintiff fails to prove damages or injury at trial on its federal claim, the plaintiff could argue that the court lacked jurisdiction and, thus, is without power to decide any supplemental claims, even those already tried and decided. By giving the Plaintiffs here a "do-over" after so many years of litigation and only after they lost on appeal, the Seventh Circuit encourages this type of abuse and waste. To foreclose such abuse in the future, this Court should grant certiorari or, in the alternative, summarily reverse the Seventh Circuit's opinion.

STATEMENT OF THE CASE

A. Legal Framework

1. 28 U.S.C. § 1367(a) "is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005).

2. Section 1367(a) codified the rule of supplemental jurisdiction or, as the Supreme Court originally called it in its seminal decision *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), pendant jurisdiction. To exercise supplemental jurisdiction, the federal claim "must have substance sufficient to confer subject matter jurisdiction on the court" and there must be a sufficient relationship between the federal and state claim that the plaintiff would "ordinarily be expected to try them all in one judicial proceeding." *Id.*

at 725. If those criteria are met, then "there is *power* in federal courts to hear the whole." *Id.* (emphasis added). Thus, as long as a substantial federal question is raised at the "outset" of the case, "[e]ven if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction." *Osborn v. Haley*, 549 U.S. 225, 244-45 (2007); *see also Rosado v. Wyman*, 397 U.S. 397, 402-05 (1970) (in analogous situation, where primary claim became moot before trial and was dismissed, but significant proceedings had already taken place before the district court, it had discretion to exercise supplemental jurisdiction to decide remaining claim).

3. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), this Court held that a statutory violation alone does not confer Article III standing. Instead, standing requires the plaintiff to allege and prove a "concrete injury" caused by the statutory violation. *Id.* at 1549.

4. The test for standing changes as a case proceeds. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To satisfy the standing requirement throughout the plaintiff's case, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Thus, at the pleading stage, factual allegations of injury suffice; at summary judgment, the plaintiff must offer facts; and at trial, "those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

B. Factual and Procedural History

1. Plaintiffs were employees of Defendant and Petitioner Allstate until December 2009.[1]

2. On March 18, 2010, Plaintiffs filed this action against Allstate, alleging that it had violated the FCRA when it failed to provide them with a summary of the investigation by a third party that formed the basis for their termination as allegedly required by 15 U.S.C. § 1681a(x)(2).

Plaintiffs also asserted several claims under Illinois law, including alleging that they had been defamed by statements Allstate made regarding the reason for their termination. Plaintiffs asserted that the district court had supplemental jurisdiction over the state claims "pursuant to 28 U.S.C. § 1367, as they are so related to Plaintiff's federal claims that they form part of the same case or controversy under Article III of the Constitution of the United States of America."

3. On October 29, 2010, Plaintiffs filed a First Amended Complaint, which added a count for discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and asserted that the district court had original jurisdiction over the federal claims (FCRA and ADEA) pursuant to 28 U.S.C. §§ 1331 and 1343(a). The First Amended Complaint also repeated the prior allegation that the court had supplemental jurisdiction over the state-law claims.

4. The ADEA claims were dismissed in 2012.

---

[1] The factual history is drawn from the record below.

5. Plaintiffs' defamation claims were originally pleaded as claims for defamation per se, for which special damages would be presumed. The trial court granted summary judgment on defamation per se, but allowed the defamation claims to proceed on a theory of defamation per quod. For defamation per quod, Plaintiffs had to prove special damages.

6. Only the FCRA and defamation per quod claims were tried. Trial lasted 10 days and the court heard testimony from 15 witnesses.

7. During trial, Plaintiffs claimed that they were injured because they were unable to obtain new employment after being terminated by Allstate. They maintained that their inability to obtain employment was due to employers learning of the allegedly false reasons for their termination. They also argued that, because they were not given a summary of the reasons for their termination when they were terminated, they were unable to refute those reasons when they sought future employment.

8. At trial, however, Plaintiffs called no witnesses who were involved in hiring decisions at companies to which they submitted resumes. Plaintiffs offered no testimony about: (1) any specific jobs for which they were rejected; (2) whether any prospective employer or other person involved in any hiring decision even read the allegedly defamatory statements; or (3) whether any job rejection was caused by a prospective employer reading the allegedly defamatory statements.

9. The jury returned a verdict for Plaintiffs on both sets of claims. It awarded approximately $27 million in special and punitive damages for defamation for all Plaintiffs combined. Each Plaintiff also was awarded $1,000 in statutory damages under the FCRA, but no actual damages. The District Court subsequently awarded punitive damages on the FCRA claims of $3,000 to each Plaintiff.

10. On July 19, 2016, after the verdict, Plaintiffs filed a Second Amended Complaint to conform to proof. In addition to the FCRA claims, the Second Amended Complaint continued to assert the claims for violation of the ADEA that had previously been dismissed. Plaintiffs repeated the jurisdictional allegations from the First Amended Complaint.

11. Allstate appealed. On October 31, 2018, more than two years after trial and nearly eight years after this case was filed, the Seventh Circuit issued its initial opinion, which reversed the judgment on both claims. The Seventh Circuit held that Plaintiffs' state-law defamation claims failed because Plaintiffs failed to prove they suffered any injury caused by the allegedly defamatory statements. App. 58a. The Seventh Circuit also held that, for the same reason, Plaintiffs did not prove they suffered a concrete injury to give them standing to pursue their FCRA claims. App. 54a (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)). It therefore directed that judgment be entered for Allstate on the defamation claims and that the FCRA claims be dismissed for lack of standing. App. 59a.

12. Plaintiffs then filed a Petition for Rehearing, arguing for the *first time* in the long history of this case, and contrary to their position throughout this litigation, that if they lacked standing under the FCRA, the federal courts had no jurisdiction to decide the defamation claims (App. 15a) – even though: (1)

the Plaintiffs lacked standing only because they failed to prove injury at trial; and (2) they lacked standing for the same reason their defamation claims failed – no proof of injury.

13. On January 14, 2019, the Seventh Circuit denied the Petition for Rehearing (App. 86a), but issued an amended opinion. App. 1a. That opinion contained no analysis of the defamation claims, but reiterated that Plaintiffs lacked standing under the FCRA. App. 22a-27a. Then, in a four-paragraph analysis, the Seventh Circuit held that the absence of standing deprived it of supplemental jurisdiction to decide the defamation claims. App. 27a-29a. It therefore remanded the case with instructions to "dismiss the entire action for lack of subject-matter jurisdiction." App. 29a.

14. Allstate petitioned for rehearing and rehearing en banc. That petition was denied on February 27, 2019. App. 84a-85a.[2]

---

[2] Plaintiffs subsequently filed a Complaint in Illinois State Court for defamation on April 8, 2019. *Rivera v. Allstate Ins. Co.*, Cook County Circuit Ct. Case No. 2019L003757.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND CREATES A DIVIDE OVER WHEN SUPPLEMENTAL JURISDICTION MAY BE EXERCISED.

A. The Seventh Circuit Created A New Test For Supplemental Jurisdiction When A Plaintiff Fails To Prove Standing That Ignores This Court's Established Standards For Deciding Supplemental Jurisdiction.

1. In numerous decisions, this Court has recognized that principles of "judicial economy, convenience and fairness to litigants" permit federal courts to exercise supplemental jurisdiction to decide state-law claims after the dismissal or resolution of the claims that provided the court with original jurisdiction. *Gibbs*, 383 U.S. at 726; *Osborn*, 549 U.S. at 245 (purpose of *Gibbs* is to "make it reasonable and proper for a federal court to proceed to final judgment, once it has invested time and resources to resolve [the claims]").

2. Under this Court's precedent, supplemental jurisdiction may be exercised when the federal and state claims are sufficiently related and the federal claim giving rise to original jurisdiction is "substantial." *Gibbs*, 383 U.S. at 725 ("assuming substantiality of the federal issues, there is power in federal courts to hear the whole").

A case fails the test for substantiality "either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans v. Lavine*, 415 U.S. 528, 537 (1974) (citations omitted). A case is insubstantial due to prior decisions "only if the prior decisions inescapably render the claims frivolous. . . ." *Id.* at 538.

3. Consistent with those decisions, this Court has refused to adopt a strict rule requiring "that once a federal court loses power over the jurisdiction-conferring claim, it may not consider a pendent claim." *Rosado*, 397 U.S. at 404. It has therefore rejected "a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim." *Id.* at 405. Such a prerequisite defies "the commonsense policy of [supplemental] jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation[.]" *Id.*

4. The decision below conflicts with that precedent. The Seventh Circuit adopted a strict rule that if there is no jurisdiction *at any stage of proceedings* due to a lack of standing, federal courts cannot exercise supplemental jurisdiction. App. 15a, 27a-28a.

5. The Seventh Circuit justified its rule by reasoning that when a claim is dismissed for lack of jurisdiction, "'[t]he dismissal means that there never was a valid claim within the court's original jurisdiction to which the state claims may be supplemental.'" App. 28a (quoting 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 106.66[1] (Daniel R. Coquillette et al. eds., 3d ed. 2018)). But that ignores the standards this Court has established for pleading and proving standing. At the pleading stage, an injury merely needs to be pleaded. *Lujan*, 504 U.S. at 561. At trial, however, the injury must be proven. *Id.*

It defies logic to treat the failure to prove standing at trial as if it retroactively abolishes jurisdiction at the outset of the case. Plaintiffs' failure to prove standing at a later-stage of a case should have the same effect on supplemental jurisdiction as any other failure to prove a claim that provides the basis for federal jurisdiction. Just as Article III requires standing, it also requires a case "in law and equity, arising under this Constitution [or] the laws of the United States" for federal question jurisdiction. U.S. CONST. art. III, § 2. A failure to prove injury at trial is no different from a failure to prove the merits of the federal claim. In both situations, the plaintiff fails to prove the basis for Article III jurisdiction.

6. Plaintiffs could have satisfied the standing requirement at the pleading stage. Even on appeal, they argued they had proven standing at trial, because they "testified that, if they had the summaries [required by the FCRA], they could defend themselves to potential employers who knew of Allstate's publication" and "[w]ithout a summary, Plaintiffs were hampered from defending themselves before . . . potential employers." It was only because they "failed to identify any prospective employer that refused to hire them" based on the statements regarding their termination that the Seventh Circuit found that Plaintiffs "have not established that they suffered a concrete informational injury." App. 26a. Until the conclusion of trial, however, Plaintiffs' FCRA claims would have survived a standing challenge.

Indeed, Plaintiffs' failure to prove damages could just as easily be characterized as a failure to prove the merits. Jurisdiction should not turn on readily interchangeable labels. In both situations, if the claim is not insubstantial and if a plaintiff "would normally be required to try" the federal and state claims together, supplemental jurisdiction exists.

7. A decision of the Eighth Circuit highlights how ephemeral the distinction is between a "jurisdictional" decision and a "merits" decision. In *Rheuport v. Ferguson*, 819 F.2d 1459 (8th Cir. 1987), the plaintiffs alleged they were denied due process in violation of 42 U.S.C. § 1983 and asserted multiple supplemental state-law claims arising out of an eviction from their trailer home. After trial, the district court granted a motion for judgment notwithstanding the verdict on the due process claim.

Having rejected the basis for federal jurisdiction, the Eighth Circuit considered whether it had supplemental jurisdiction to decide the state-law claims and whether the district court should retain jurisdiction over the state-law claims on remand. It held that supplemental jurisdiction was proper because the plaintiffs had "presented a colorable federal claim" in their pleading that was rejected on appeal "only after complicated legal analysis[.]" *Id.* at 1467 n.13.

The Eighth Circuit's opinion could readily have been couched in "jurisdictional" terminology. The court could have stated that an eviction pursuant to a properly obtained writ does not give rise to a due process violation, so the plaintiffs presented no viable federal claim and, thus, the lack of original jurisdiction precluded the federal courts from exercising supplemental jurisdiction.

Instead, however, the Eighth Circuit recognized that is not how federal courts approach the jurisdictional question. Relying on *Gibbs*, it explained that "[t]he existence of federal jurisdiction generally is determined as of the time the complaint is filed." *Rheuport*, 819 F.2d at 1467 n.13. "When a plaintiff pleads a substantial federal claim, the federal courts may retain jurisdiction over [supplemental] state claims even if the federal claim is dismissed, dropped, or otherwise fails at or before trial, or if the federal claim is rejected after trial, either by the trial or appellate court." *Id.*

This same standard should apply when an absence of standing raises questions about whether a court should exercise supplemental jurisdiction. If a plaintiff asserts a colorable theory of standing at the outset of a case and that theory fails only at or after trial due to insufficient evidence, it should be treated the same for supplemental jurisdictional purposes as a ruling on the merits.

Like the Eighth Circuit's decision in *Rheuport*, Plaintiffs' asserted standing for their FCRA claims was rejected by the Seventh Circuit only after a complicated legal analysis. App. 22a-27a. As the court noted, the relevant subsection of the FCRA, 15 U.S.C. § 1681a(y)(2), was so obscure that no published opinion outside of this case had ever discussed its requirements. App. 19a. To decide the issue, the Seventh Circuit analyzed the difference between the purpose of the post-investigation summary an employer must provide an employee under 15 U.S.C. § 1681a(y)(2) and the pre-investigation notice required by a different subsection of the statute. App. 19a-21a. It then concluded that Plaintiffs failed to allege a concrete and particularized informational injury because "they failed [at trial] to identify any prospective employer that refused to hire them." App. 26a. This, analysis, like the determination in *Rheuport*, did not take place until after trial.

The Eighth and Seventh Circuits' decisions are in irreconcilable conflict.

8. Employing the same test for supplemental jurisdiction regardless of the basis for dismissal or abandonment of the federal claim also is consistent with this Court's holding in *Rosado*. There, the Court was faced with the question of whether mootness of a primary claim prevents the exercise of supplemental jurisdiction under circumstances analogous to those here.

Under this Court's precedent, "[a] case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013)). Yet, in *Rosado*, this Court reasoned that mootness does not preclude supplemental jurisdiction because a case is typically not moot at the outset.

In *Rosado*, the plaintiffs' challenge to a state law became moot before a three-judge panel could decide the constitutionality of the law. After determining the case was moot, the three-judge panel dissolved, but a single judge proceeded to issue an injunction on a pendent claim that the state law violated the Social

Security Act. 397 U.S. at 400. The Second Circuit subsequently held that the single judge lacked jurisdiction to decide the claim because, once the primary constitutional claim became moot, there was no primary claim to which the statutory claim could be pendent. *Id.* at 401.

This Court reversed. Applying the standards for supplemental jurisdiction under *Gibbs*, it held that mooting the constitutional claim did not destroy the federal court's power to adjudicate the statutory claim. *Rosado*, 397 U.S. at 402-405. It refused to adopt a strict rule to "defeat the commonsense policy" of supplemental jurisdiction. *Id.* at 405. Although the respondents argued that a moot claim should be treated the same as a claim that is insubstantial under *Gibbs*, this Court distinguished the two situations. "Unlike insubstantiality, which is apparent at the outset, mootness . . . may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Id.* at 404.

Thus, even though mootness is a jurisdictional defect, the absence of jurisdiction over a federal claim that becomes moot after filing does not preclude supplemental jurisdiction over a related claim.

9. Like mootness, standing is "a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo*, 136 S. Ct. at 1547. And like mootness in *Rosado*, Plaintiffs' lack of standing was not apparent at the outset of this case. Thus, the same rule of supplemental jurisdiction adopted in *Rosado* should control here, where a plaintiff's asserted injury fails as a matter of proof at trial.

10. Applying the same standards for supplemental jurisdiction where the federal claim lacks standing will not flood federal courts with frivolous federal claims asserted only to provide a basis for federal jurisdiction. This Court's supplemental jurisdiction authority provides ample basis to limit such claims.

First, the *Gibbs* substantiality test can winnow out cases where the lack of standing is obvious at the outset of the case. In such cases, a court can reject supplemental jurisdiction because the asserted federal claim was insubstantial.[3]

Second, this Court's precedent encourages dismissing state-law claims when the federal claims are dismissed or abandoned before trial. *See, e.g.*,

[3] The Seventh Circuit cites several cases as support for its holding (App. 27a-29a), but two of those cases turn on the substantiality test. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 804, 806-07 (9th Cir. 2001) (holding that supplemental jurisdiction could not be exercised because the law "is quite clear" that there was no basis for federal jurisdiction over the claim); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1255 (6th Cir. 1996) (holding that, though the claim was not frivolous because no case has previously addressed the plaintiff's theory, the claim was "close to insubstantial"). In two of the other cases, the federal courts could exercise supplemental jurisdiction so any discussion of the consequences of a lack of standing is *dicta*. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996) (finding that the plaintiff's claims were neither immaterial nor insubstantial, so district court's characterization of dismissal as jurisdictional was wrong; instead, dismissal was for failure to state a claim, permitting court to exercise supplemental jurisdiction); *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997) (because district court actually had jurisdiction over federal claim, it could exercise supplemental jurisdiction over the state-law claim).

Gibbs, 383 U.S. 726 ("if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"). Although this is not a mandatory rule, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine– judicial economy, convenience, fairness, and comity– will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon*, 484 U.S. at 350 n.7. The exceptions are cases, like *Rosado*, where courts have "invested substantial time" toward resolving the case. 397 U.S. at 403-04 & n.4; *see also Miller Aviation v. Milwaukee Cty. Bd. of Supervisors*, 273 F.3d 722, 730-32 (7th Cir. 2001) (district court properly exercised supplemental jurisdiction where it had spent more than five years overseeing the litigation during which it considered 22 motions, held 9 hearings, and issued 19 orders). In the Fifth Circuit, it is an abuse of discretion to decline supplemental jurisdiction after "investing a significant amount of judicial resources" in a case. *Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc.*, 554 F.3d 595, 602 (5th Cir. 2009).

Thus, this Court's existing standards for supplemental jurisdiction serve perfectly well to prevent unnecessary litigation of state-law claims in the federal courts. There is no need to create a separate rule prohibiting the exercise of supplemental jurisdiction when a plaintiff fails to prove standing at trial.

B. Courts Are Divided Over Whether Federal Courts May Exercise Supplemental Jurisdiction Over State-Law Claims When Standing Is Found Lacking.

The Seventh Circuit's opinion conflicts with a recent decision of the Sixth Circuit on the issue of whether a federal court may exercise supplemental jurisdiction when a plaintiff lacks standing.

1. *Gucwa v. Lawley*, 731 F. App'x 408 (6th Cir. 2018), involved an appeal from a motion to dismiss the plaintiffs' claims. One plaintiff alleged violations of RICO and the Medicare Secondary Payer Act, but the Sixth Circuit held that he lacked standing to pursue either.[4] *Id.* at 412-15. On appeal, the plaintiffs argued that the district court had no jurisdiction to grant a Rule 12(b)(6) motion on their state claims and should have declined to exercise supplemental jurisdiction over them. *Id.* at 416.

The Sixth Circuit affirmed the dismissal of the state claims, holding that the district court properly exercised supplemental jurisdiction. 731 F. App'x at 416. The court held that the plaintiffs had waived their argument by raising it for the first time on appeal and had invited error by requesting that the district court decide the state law claims. *Id.*

To reach that decision, the Sixth Circuit necessarily could not have found that supplemental jurisdiction can never be exercised when the plaintiff

---

[4] The other plaintiff's claims did not fail due to lack of standing. That plaintiff suffered monetary losses, but those losses were not cognizable under RICO. *Gucwa*, 731 F. App'x at 412-13.

is found to lack standing. If a lack of standing precludes supplemental jurisdiction, waiver and invited error would be impossible. Thus, by affirming the exercise of supplemental jurisdiction, the Sixth Circuit found that a lack of standing does not preclude the exercise of supplemental jurisdiction.

2. Here, Plaintiffs never contested supplemental jurisdictional until after they lost the appeal. And like the *Gucwa* plaintiffs, Plaintiffs asserted that the District Court had supplemental jurisdiction throughout the proceedings. Consequently, the Seventh Circuit's decision conflicts with *Gucwa*'s holding that a party may waive a challenge to supplemental jurisdiction and may invite error, even when the plaintiff is found to lack standing.

C. Courts Are Divided Over Whether They Can Exercise Supplemental Jurisdiction When The Grounds For Rejecting Federal Jurisdiction Are Dispositive Of State-Law Claims.

1. The Seventh Circuit has also held that when a federal court decides an issue that resolves both the federal and state claims, "there is no use leaving the latter to the state court." *Wright v. Associated Ins. Companies Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994); *see also Sellars v. City of Gary*, 453 F.3d 848, 852 (7th Cir. 2006) (supplemental jurisdiction was proper where analysis of federal equal protection claim and state breach of contract claim was "intertwined").

2. Two other circuits – the Fourth and Eighth Circuits – have also concluded that federal courts may resolve state-law claims when an issue dispositive of those claims has been determined as part of the federal claim. *Borzilleri v. Mosby*, 874 F.3d 187, 193 n.2 (4th Cir. 2017) (district court did not abuse its discretion in dismissing with prejudice a state free association claim that was based on same First Amendment issues as her federal claim); *Ivy v. Kimbrough*, 115 F.3d 550, 552–53 (8th Cir. 1997) (though courts should normally decline supplemental jurisdiction when federal claims are dismissed on summary judgment, district court properly exercised supplemental jurisdiction to dismiss with prejudice state-law claim that turned on same issue as federal claim). In *Ivy*, the district court found the Plaintiffs' claims under 42 U.S.C. § 1983 to be "frivolous from the start," 115 F.2d at 552, which would have rendered it insubstantial under *Gibbs*. Nonetheless, the Eighth Circuit held the exercise of supplemental jurisdiction was warranted.

3. The Seventh Circuit's opinion below is inconsistent with its own precedent and with *Borzilleri* and *Ivy*. It reversed the judgment on the FCRA claims because Plaintiffs failed to prove any injury at trial. App. 26a (Plaintiffs "failed to identify any prospective employer that refused to hire them based on the [allegedly defamatory statements], so they have not established that they suffered a concrete informational injury"). That was the same ground that it had previously found to be fatal to Plaintiffs' defamation claims. App. 45a (for defamation claims, "the plaintiffs failed to present the testimony of even a single prospective employer who declined to hire them because of the [allegedly defamatory statements]. . . . That's a failure of proof."). Thus, having decided that Plaintiffs failed to prove injury in its determination that they lacked standing under the FCRA, the Seventh Circuit should have applied that same conclusion to resolve the defamation claims and leave its prior opinion intact.

By refusing to direct a judgment for Allstate on the defamation claims, the Seventh Circuit split with its own precedent and with decisions of the Fourth and Eighth Circuits. Certiorari should be granted to resolve whether a court may exercise supplemental jurisdiction to resolve a state-law claim that turns on an issue the court decided as part of the federal claim.

D. The Seventh Circuit's Decision Conflicts With The Federal Circuit On Whether A Previously Filed But Dismissed Federal Claim Permits The Exercise Of Supplemental Jurisdiction When Any Remaining Federal Claim Fails For A Lack Of Standing.

The Seventh Circuit's decision conflicts with a Federal Circuit opinion holding that when the sole federal claim remaining is rejected due to a lack of standing, a federal court may exercise supplemental jurisdiction if the plaintiff had previously pled a federal claim for which it possessed standing.

1. Here, Plaintiffs asserted claims under the ADEA, alleging that they were terminated due to their age. Although those claims did not reach trial, Plaintiffs alleged that they provided a separate and independent ground for federal question jurisdiction. And there is no question that Plaintiffs had standing to assert the ADEA claims because they alleged that they lost income and benefits when Allstate terminated their employment due to age discrimination.

2. Allstate argued to the Seventh Circuit that the ADEA claims were an independent basis for original jurisdiction, pointing out that Plaintiffs continued to assert those claims as a basis for jurisdiction in the Second Amended Complaint filed after the ADEA claims had been dismissed. The Seventh Circuit did not discuss the ADEA claims.

3. In *Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774 (Fed. Cir. 1996), as amended on rehearing 104 F.3d 1296 (Fed. Cir. 1996), the Federal Circuit held that a nearly identical pleading compelled a different result. Despite stating that the absence of standing on the patent and trademark claims would preclude the exercise of supplemental jurisdiction, the Federal Circuit found that the Plaintiffs' previously filed Lanham Act and civil RICO claims provided a jurisdictional basis that permitted it to exercise supplemental jurisdiction. "Although those claims never reached trial, they were 'sufficient to create federal question jurisdiction in the district court' and, thus, 'the supplemental claims may still be heard by the district court.'" *Gaia Techs.*, 93 F.3d at 781 (citation omitted).

4. Taking the opposite view, the Seventh Circuit reasoned (albeit wrongly) that it could not exercise supplemental jurisdiction because the lack of standing on the FCRA claims meant federal courts never had original jurisdiction over the case. Thus, certiorari should be granted to resolve the conflict between this case and *Gaia Techs.*

II. THE SCOPE OF SUPPLEMENTAL JURISDICTION IN CASES WHERE INJURY IS NOT PROVEN AT TRIAL PRESENTS AN IMPORTANT AND RECURRING QUESTION.

As this case, *Gaia Techs.*, and *Gucwa* demonstrate, whether a federal court can exercise supplemental jurisdiction after finding the plaintiff lacks standing is a recurring issue.

1. The implications of permitting the Seventh Circuit's opinion to stand are quite disturbing. In every case where a plaintiff fails to prove damages or injury at trial on its federal claim, the plaintiff could argue that the court lacked jurisdiction and thus is without power to decide any supplemental claims, even those already tried and decided. Other plaintiffs – like Plaintiffs here – will argue that they should be allowed to retry the case they just lost.[5]

2. Such a result violates the fundamental principles of fairness and judicial economy that are central to this Court's supplemental jurisdiction precedent. A defendant that could not have defeated standing at any preliminary stage in the case could be forced to litigate the state law claims twice, despite prevailing as Allstate did in the Seventh Circuit's initial opinion.

Here the Seventh Circuit originally held that the defamation judgment had to be reversed for the same

---

[5] Of course, if Plaintiffs here had prevailed on their defamation claims on appeal, they would have maintained their long-held position that the federal courts had supplemental jurisdiction.

reason that it found Plaintiffs had failed to establish standing – they failed to prove that any employer refused to hire them because of Allstate's reasons for terminating them. *Compare* App. 58a *with* App. 26a. Forcing Allstate to relitigate that issue could result in inconsistent judgments on the identical issue.

3. Permitting the Seventh Circuit's decision to stand will invite other litigants to pursue their state-law claims in federal court, knowing that if they lose the federal claim, they can then demand that the federal court dismiss the state-law claims, even if those claims have been fully litigated and already decided. As in this case, they can even wait until they lose on appeal and then argue that the federal court lacked jurisdiction to decide the state-law claims.

The colossal waste of judicial resources that would result from such proceedings cannot be squared with the first principles of supplemental jurisdiction. Accordingly, this Court should grant certiorari to foreclose future attempts by plaintiffs to engage in such needless duplicative litigation.

III. SUMMARY REVERSAL IN THIS CASE IS APPROPRIATE.

Where the Court of Appeal's opinion reflects that it misapprehends this Court's precedent, summary reversal is appropriate. *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988); *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (exercise summary reversal procedure "to correct a clear misapprehension" of the controlling legal" standard); *see also Overton v. Ohio*, 534 U.S. 982, 983, 122 S. Ct. 389, 389 (2001) (summary reversal is warranted when lower court fails to apply "well-established Supreme Court case law") (Breyer, J., dissenting from denial of petition for certiorari). As discussed above, the Seventh Circuit's opinion is inconsistent with a long line of this Court's supplemental jurisdiction precedent and is predicated on two fundamental errors: (1) treating a failure to prove standing at trial as if the Plaintiffs could not satisfy the standing requirements at the outset of the case; and (2) ignoring the fact that Plaintiffs also pleaded federal claims for which they plainly had standing. Because the decision below is so clearly wrong, as an alternative to granting a writ of certiorari, this Court should summarily reverse the Seventh Circuit's opinion.

CONCLUSION

The petition for a writ of certiorari should be granted or summary reversal should be ordered.

Respectfully submitted.

Rex S. Heinke
Counsel of Record
Jessica Weisel
AKIN GUMP STRAUSS
HAUER & FELD LLP

Gerald Pauling
Uma Chandrasekaran
John Drury
SEYFARTH SHAW LLP

Anneliese Wermuth
COZEN & O'CONNOR

Counsel for Petitioner

June 27, 2019

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-1310 & 17-1649

DANIEL RIVERA, *et al.*,

Plaintiffs-Appellees.

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 10 C 1733 –
William T. Hart, *Judge*.

ARGUED OCTOBER 25, 2017 –
DECIDED OCTOBER 31, 2018
AS AMENDED ON PETITION FOR
REHEARING JANUARY 14, 2019

Before KANNE and SYKES, *Circuit Judges*, and DARROW, *District Judge*.*

SYKES, *Circuit Judge*. In 2009 Allstate Insurance Company launched an internal investigation into suspicious trading on its equity desk. The initial inquiry unearthed email evidence suggesting that

* Of the Central District of Illinois, sitting by designation.

several portfolio managers might be timing trades to inflate their bonuses at the expense of their portfolios, which included two pension funds to which Allstate owed fiduciary duties. Allstate retained attorneys from Steptoe & Johnson to investigate further, and they in turn hired an economic consulting firm to calculate potential losses. Based on the email evidence, the consulting firm found reason to believe that timed trading had potentially cost the portfolios $8 million and possibly much more. Because actual losses could not be established, the consultants used an algorithm to estimate a potential adverse impact of $91 million on the pension funds. Everyone understood that this estimate was wildly unrealistic, but in an abundance of caution, Allstate poured $91 million into the pension portfolios.

When the investigation wrapped up, Steptoe lawyers delivered oral findings to Allstate. The company thereafter determined that four portfolio managers—Daniel Rivera, Stephen Kensinger, Deborah Meacock, and Rebecca Scheuneman—had violated the company's conflict-of-interest policy by timing trades to improve their bonuses. On December 3, 2009, Allstate fired them for cause.

On February 25, 2010, Allstate filed its annual Form 10-K for 2009. The report explained that: (1) in 2009 the company had received information about possible timed trading and retained counsel to investigate; (2) counsel hired an economic consulting firm to estimate the potential impact on the portfolios; and (3) based on this outside investigation, Allstate paid $91 million into the two pension funds to cover the potential adverse impact. That same day Allstate sent a memo to employees in its Investment Department describing the information disclosed in the

10-K. Neither document mentioned the four fired portfolio managers.

Three weeks later the four former employees sued Allstate in federal court for defamation based on the 10-K and the internal memo. They also alleged that Allstate violated 15 U.S.C. § 1681a(y)(2), a provision in the Fair Credit Reporting Act ("FCRA or the Act"), by failing to give them a summary of Steptoe's findings after they were fired. The defamation claim was the main event in the litigation; the FCRA claim received comparatively little attention. A jury returned a verdict in the plaintiffs' favor, awarding more than $27 million in compensatory and punitive damages, and statutory damages on the FCRA claim (there are no actual damages on that claim). The district judge tacked on additional punitive damages and attorney's fees under the FCRA.

Allstate attacks the defamation awards on multiple grounds and also argues that the FCRA awards must be vacated for lack of standing under *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016). We agree that the plaintiffs lack a concrete injury to support Article III standing on the FCRA claim. So that claim must be dismissed on jurisdictional grounds. And that ends our review. Because the FCRA claim provided the sole basis for federal jurisdiction—and thus the only basis for the district court to exercise supplemental jurisdiction over the state-law claim under 28 U.S.C. § 1367(a)—the district court was without power to adjudicate the defamation claim, and it too must be dismissed for lack of jurisdiction. The parties did not identify the § 1367(a) jurisdictional problem in their initial briefing, but that does not matter; defects in subject-matter jurisdiction must always be addressed. Accordingly, we vacate the judgment and remand with instructions to dismiss the action in its entirety for lack of subject-matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3).

I. Background

Plaintiffs Rivera, Kensinger, Meacock, and Scheuneman were employed as securities analysts in the Equity Division of Allstate's Investment Department. Rivera was the Division director, and Kensinger, Meacock, and Scheuneman were analysts on the growth team. During their time with the company, the Equity Division managed and invested $10 billion in assets on behalf of various funds, including two defined-benefit pension plans. Because the plaintiffs helped manage two pension portfolios, they occupied positions of trust and owed a duty of loyalty to plan beneficiaries under the Employee Retirement Income Security Act. *See* 29 U.S.C. § 1104(a)(1). They were also bound by Allstate's code of ethics, which required them to avoid conflicts of interest.

In addition to their salaries, the plaintiffs were eligible to receive bonus compensation under Allstate's "pay-for-performance" plan. The plan relied on a formula called the "Dietz method" to estimate portfolio returns and evaluate performance accordingly. The Dietz method assumes that all cash flows in a portfolio occur at the same time of day; high transaction volume makes it impractical to use actual trade times. The particular formula in use at Allstate assumed all cash flows occurred at midday.

While practical, Allstate's formula had two drawbacks. First, it distorted a portfolio's actual performance, both positive and negative. The midday Dietz method inflated measured performance for sales on up days and buys on down days; conversely, it understated measured performance when sales were made on down days and buys on up days. Allstate's traders referred to this discrepancy as the "Dietz effect."

Second, the formula could be manipulated. Because it assumed that all cash flows occurred midday, portfolio managers could wait until the end of day to calculate the Dietz effect before deciding to execute a trade. The system consequently rewarded portfolio managers who waited to make trades even if the portfolio suffered as a result. Moreover, Allstate's bonus structure measured performance relative to a daily benchmark; it didn't consider market movement in the preceding days. This feature also pitted the interests of the manager against those of the portfolio. A manager could improve his performance by delaying a sale over several down days before selling on an up day even if the portfolio would have been better off if he sold earlier. In sum, under Allstate's pay-for-performance plan, portfolio managers could boost their bonus pay by timing trades—potentially at the expense of their portfolios.

In mid-2009 Allstate received troubling information that its portfolio managers were doing just that. Peter Hecht, a member of Allstate's Performance Management Group, reported to Chief Compliance Officer Trond Odegaard that members of the Equity Division were delaying trades to maximize their bonuses at the expense of their portfolios. Odegaard passed these concerns along to Chief Investment Officer Judy Greffin, who ordered him to investigate.

Odegaard and a team of Allstate employees soon discovered signs of timed trading. The team noted several trading patterns that suggested portfolio managers had delayed trades to take advantage of the Dietz effect. The investigation also uncovered emails suggesting that the managers were aware of the Dietz effect and actively considered it when trading. Though not conclusive, the investigation raised concerns that personnel in the Equity Division had timed trades to increase bonuses at the expense of their portfolios; as a result, Allstate may have reported inaccurate financial information to the public.

Allstate accordingly retained the law firm Steptoe & Johnson to investigate further. Steptoe attorneys interviewed Rivera and Scheuneman regarding their trading practices and hired NERA Economic Consulting, Inc., an independent economic consulting firm, to determine if timed trading had harmed the portfolios, especially the pension funds. Beginning with the trades mentioned in the suspicious emails and eventually reviewing six years of trading data, NERA preliminarily estimated a potential adverse portfolio impact of $8.2 million.

But NERA had reason to believe that the actual impact may be much higher. Several suspicious emails could not be tied to particular trades, and other evidence suggested that portfolio managers routinely considered Dietz in the course of trading. Based on Allstate's records, however, it was not possible to calculate actual losses with any precision. So NERA devised an algorithm that would capture every Dietz-favorable trade from June 2003 to May 2009 that was executed after a series of days where the Dietz effect would have harmed the trader's performance. Based on these parameters, NERA estimated that over the six years surveyed, the potential adverse impact on the pension plans was $91 million and the potential adverse impact on the company's other portfolios was $116 million. It was clear to everyone that these estimates vastly overstated the potential effect of timed trading. Erring on the side of caution, however, in mid-December Allstate paid $91 million into the two pension plans to compensate for any potential losses.

While the investigation was ongoing, Allstate disbanded the Equity Division and outsourced its work to Goldman Sachs. On October 6, 2009, Greffin met first with Rivera and then the rest of the division and explained that every member, save those who managed convertible portfolios, would be let go effective December 31, 2009. The laid-off employees would, however, receive severance pay. Later that day Steptoe attorneys conducted off-site interviews with Equity Division managers concerning Dietz trading.

The outside investigation soon wrapped up, and Steptoe attorneys orally reported the findings to Allstate. Based on the internal and external investigations, Allstate concluded that Rivera, Meacock, Scheuneman, and Kensinger had violated the company's conflict-of-interest policy by timing trades. On December 3, 2009, Brett Winchell, the Director of Human Resources, informed each of the four analysts that they were fired for cause effective immediately. Winchell delivered the bad news by reading from a short script that reminded the four managers of the investigation into timed trading, noted that each of them had been interviewed by outside counsel, and explained that they were being fired because they violated Allstate's conflict-of-interest policy. All four asked Winchell for additional explanation; they later asked the same questions in writing. No further explanation, oral or written, was forthcoming. Allstate immediately escorted them off the premises and disconnected their phone and email service the next day.

On December 16 Steptoe attorneys met with regulators in the Department of Labor's Employee Benefits Security Administration to discuss the investigation as it related to the pension funds. At the Department's request, Steptoe sent a follow-up letter summarizing the allegations of timed trading and the subsequent investigation. The letter—dated January 29, 2010—advised the Department that the employees in Allstate's Equity Division had denied that they improperly delayed trades but that several emails "could support a contrary conclusion." The letter further explained that NERA's algorithm "estimate[d] potential disadvantage to the plans" but that "there is little question that the algorithm overstate[d] any disadvantages that the plans might have suffered." Finally, the letter explained that "taking into account returns recalculated by NERA," the estimated "increase in the aggregate bonuses for the entire group" was "approximately $1.2 million."

Fast-forward to October 14, 2010. On that day Allstate's in-house counsel sent another letter to the Labor Department clarifying that the $1.2 million figure "roughly approximate[d] the potential increase in bonuses, ... assum[ing] the algorithm used by NERA ... reflected actual trading activity." This letter emphasized that NERA's calculations estimated "a possible maximum impact" and explained that "[n]o one believed, then or now, that this was an accurate description of the activity on the equity desk, nor that any actual impact on the portfolios was anywhere near the result produced by using the NERA algorithm." The October letter also stated that if the analysis had been limited to the trades mentioned in the suspicious emails, "there would have been virtually no effect on bonuses."

Returning now to our chronology, on February 25, 2010, Allstate filed its annual 10-K report for 2009 in which it disclosed the allegations of timed trades and explained in general terms the subsequent investigation and the company's decision to reimburse the two pension plans. As relevant here, the 10-K stated:

> In 2009, we became aware of allegations that some employees responsible for trading equity securities in certain portfolios of two [Allstate Insurance Company] defined benefit pension plans and certain portfolios of [Allstate Insurance Company] and an [Allstate Insurance Company] subsidiary may have timed the execution of certain trades in order to enhance their individual performance under incentive compensation plans, without regard to whether such timing adversely impacted the actual investment performance of the portfolios.
>
> We retained outside counsel, who in turn engaged an independent economic consulting firm to conduct a review and assist us in understanding the facts surrounding, and the potential implications of, the alleged timing of these trades for the period from June 2003 to May 2009. The consulting firm reported that it was unable to determine from our records the precise amounts by which portfolio performance might have been adversely impacted during that period. Accordingly, the economic consultant applied economic modeling techniques and assumptions reasonably designed to estimate the

potential adverse impact on the pension plans and the company accounts, taking into account, among other things, the distinctions between the pension plans and the company portfolios.

Based on their work, the economic consultants estimated that the performance of the pension plans' portfolios could have been adversely impacted by approximately $91 million (including interest) and that the performance of the company portfolios could have been adversely impacted by approximately $116 million (including interest) in the aggregate over the six-year period under review. We believe that our financial statements and those for the pension plans properly reflected the portfolios' actual investment performance results during the entire period that was reviewed.

In December 2009, based on the economic consultant's modeled estimates, we paid an aggregate of $91 million into the two defined benefit pension plans. These payments had no material impact on our reported earnings or shareholders' equity, but reduced our assets, operating cash flows, and unfunded pension liability to the plans. ... At all times during this period, the plans were adequately funded pursuant to applicable regulatory and actuarial requirements. As a result of these additional funds in the plans, our future contributions to the plans, based on actuarial analysis, may be reduced. Using the economic consultant's calculation of the potential adverse impact on the portfolios,

> we currently estimate that the additional compensation paid to all the employees working in the affected group was approximately $1.2 million over the six-year period as a result of these activities. In late 2009, we retained an independent investment firm to conduct portfolio management and trading activity for the specific portfolios impacted by these activities.

That same day Greffin sent a memo to all employees in the Investment Department alerting them to the information in the 10-K filing. In full, the Greffin memo states:

> Allstate released its annual financial report on Form 10–K today. Within that filing, we disclosed details around allegations regarding trading practices within our equity portfolios that came to light in the past year. We took this matter very seriously and launched an investigation as soon as we became aware of the allegations.
>
> Outside counsel was retained to assist us in understanding the facts surrounding, and the potential implications of, these activities. As part of their analysis, an independent economic consulting firm was retained to estimate the potential adverse impact to the performance of our portfolios. The consultant determined that the performance on some of our portfolios, as well as our two pension plan portfolios, could have been adversely impacted by the activities. As a result, Allstate made a contribution to the pension plans during the 4th quarter which is disclosed in the 10–K.

> We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance and the pension plans were adequately funded during this entire period. This matter did not affect the plans' ability to continue to provide benefits to plan participants.
>
> Situations like this can be unsettling and can reflect poorly on our organization. However, I believe organizations are also defined by how they respond to events like this. We were transparent in reporting this matter to the U.S. Department of Labor and the S.E.C., and disclosed it to our investors. We're taking steps to improve our governance, compliance practices and training.
>
> We remain committed to the highest levels of ethics and integrity in the stewardship of Allstate's assets.

Three weeks later the four fired portfolio managers sued Allstate and Greffin in federal court for defamation based on the 10-K and Greffin's internal memo. They also asserted a claim against Allstate for violation of § 1681a(y)(2) of the FCRA and a claim against Greffin for tortious interference with prospective economic advantage. The district judge dismissed the tortious-interference claim, and the plaintiffs then amended their complaint to add an age-discrimination claim against Allstate. They later dismissed the discrimination claim as well as the defamation claim against Greffin.

Lengthy discovery ensued and in due course Allstate moved for summary judgment. Judge Feinerman ruled that the statements in the 10-K and the Greffin memo were not defamatory per se. *Rivera v. Allstate Ins. Co.*, 140 F. Supp. 3d 722, 729–30 (N.D. Ill. 2015). But he permitted the case to go forward on a theory of defamation per quod and on the FCRA claim. *Id.* at 730–37.

As narrowed, the case proceeded to a jury trial with Judge Hart presiding. The jury found for the plaintiffs across the board and awarded more than $27 million in compensatory and punitive damages, broken down roughly as follows:

Rivera:

$7.1 million (defamation compensatory damages)

$4 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Kensinger:

$2.9 million (defamation compensatory damages)

$2 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Meacock:

$3.6 million (defamation compensatory damages)

$3 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Scheuneman:

$3.4 million (defamation compensatory damages)

$1 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Allstate moved for judgment as a matter of law, or alternatively, for a new trial. The plaintiffs separately asked the judge for an award of punitive damages and attorney's fees under the FCRA. 15 U.S.C. § 1681n(a)(2), (3) (authorizing "such amount of punitive damages as the court may allow" and attorney's fees for willful violations of the FCRA).

Judge Hart denied Allstate's motion and granted the plaintiffs' requests, awarding each plaintiff an additional $3,000 in punitive damages under the FCRA and approving their request for $357,716.25 in attorney's fees associated with the statutory claim.

II. Discussion

Allstate attacks this large judgment on many grounds. In brief, the company argues that the defamation awards must be set aside because: (1) the statements in the 10-K and the Greffin memo were substantially true; (2) neither the 10-K nor the Greffin memo identified the plaintiffs, and no evidence supports a finding that these documents could be reasonably understood to refer to them; (3) the statements in the 10-K and the Greffin memo were privileged; and (4) the plaintiffs failed to prove special damages as required for recovery for defamation per quod. Regarding the FCRA awards, Allstate argues that the plaintiffs lack standing under *Spokeo*, and secondarily, that the record does not support the jury's finding of a willful violation of the statute as required for statutory and punitive damages. (There are no actual damages.) Finally, Allstate attacks the award of FCRA attorney's fees as excessive and disproportionate considering the relative insignificance of the statutory claim to this litigation.

The state-law defamation claim predominated over the federal claim in this long-running litigation—both in the district court and here. The FCRA claim occupied very little of the parties' appellate briefing and received only modest attention below. Our initial opinion vacated the defamation awards based on the plaintiffs' failure to prove special damages. We also vacated the FCRA awards for lack of standing under *Spokeo* and remanded with instructions to dismiss the federal claim for lack of jurisdiction.

The plaintiffs petitioned for rehearing, raising for the first time a probable jurisdictional defect under § 1367 if we found—as we did—that they failed to establish an injury in fact sufficient to support Article III standing to litigate the FCRA claim. The petition noted that the FCRA claim provided the only jurisdictional basis for litigating this entire dispute in federal court. The district court's jurisdiction rested solely on federal-question jurisdiction, *see* 28 U.S.C. § 1331; the parties are not diverse, so 28 U.S.C. § 1332 does not apply. And the court's supplemental jurisdiction under § 1367(a) to adjudicate the state-law defamation claim evaporates if the claim on which federal jurisdiction rests is dismissed on jurisdictional grounds.

We accordingly withdraw our original opinion and in its place substitute this amended opinion. Although the parties spent most of their energy on the merits of the defamation claim, our analysis begins and ends with the jurisdictional basis for the FCRA claim.

Relying on *Spokeo*, Allstate maintains that the FCRA awards must be tossed out for lack of standing. A bit of statutory background is required to understand the FCRA claim in this case. We note for starters that the case represents an odd application of the Act. The FCRA regulates the activities of consumer reporting agencies and the permissible uses of consumer reports by third parties. Among many other regulatory requirements, the Act imposes certain procedures for the use of consumer reports for employment purposes.

For example, the Act prohibits an employer from procuring a consumer report about an employee or job applicant without first giving that person a standalone written notice that "clear[ly] and conspicuous[ly]" discloses the employer's request for permission to access the report and the person signs a written consent to release the report to the employer. *See* 15 U.S.C. § 1681b(b)(2)(A) (establishing the disclosure and consent requirements); *see id.* § 1681a(d)(1) (defining "consumer report" to include reports about a consumer's creditworthiness and personal background compiled by a "consumer reporting agency" and "used or expected to be used ... for the purpose of serving as a factor in establishing the consumer's eligibility for" credit, insurance, or "employment purposes").

The Act further requires that before taking any adverse action against an employee or job applicant "based in whole or in part" on such a report, the employer must give the employee or applicant a copy of the report and a written description of the person's rights under the Act. *Id.* § 1681b(b)(3)(A).

The FCRA provision at issue here appears in § 1681a, which contains the Act's definitions and rules of construction. (The statutory scheme is reticulated and complex, so bear with us.) Subsection (d)(2)(D) of § 1681a excludes from the definition of "consumer report" any "communication described in subsection (o) or (x)." The reference to "subsection (x)" is an error; it should read "subsection (y)." The error was introduced in the Dodd–Frank Act of 2010,[1] which redesignated the former subsection (x) as subsection (y) but neglected to update the cross-reference in § 1681a(d)(2)(D). *See* Pub. L. No. 111-203, § 1988(a)(1)(A), 124 Stat. 1376, 2086.

Subsection (y), the cross-referenced provision, was enacted as part of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 611, 117 Stat. 1952, 2010. It reads in pertinent part:

> (1) Communications described in this subsection
>
> A communication is described in this subsection if—
>
> (A) but for subsection (d)(2)(D), the communication would be a consumer report;
>
> (B) the communication is made to an employer in connection with an investigation of—
>
> (i) suspected misconduct relating to employment; or
>
> (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;
>
> (C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

[1] Technically, the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.

(D) the communication is not provided to any person except—

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) Subsequent disclosure

After taking any adverse action based in whole or in part on a communication described in paragraph (1), *the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based*, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed.

15 U.S.C. § 1681a(y) (emphasis added).

So in sum, and to radically simplify: By operation of the cross-reference in subsection (d)(2)(D) of § 1681a (and adjusting for the Dodd–Frank mistake), the effect of subsection (y) is to exclude from the definition of "consumer report"—and thus from the myriad regulatory requirements applicable to consumer reports—any communication that:

(1) otherwise qualifies as a consumer report (but for subsection (d)(2)(D));

(2) was made to an employer in connection with an investigation of employee misconduct;

(3) was not made to the employer for purposes of investigating an employee's creditworthiness; and

(4) is not disclosed to anyone other than the employer, a regulatory agency or authority, or as otherwise required by law.

And although § 1681a simply defines statutory terms and rules of construction, subsection (y) goes on to say that "[a]fter taking any adverse action based in whole or in part on" a communication of this type, the employer "shall disclose to the consumer a summary containing the nature and substance" of the communication. *Id.* § 1681a(y)(2).

Needless to say, this is an odd place to find a regulatory mandate on employer investigations into workplace misconduct. Indeed, the provision is so obscure that in its 15-year existence, subsection (y)(2) of § 1681a appears in *no* published opinion save the district court's decision in this case.

Still, taking § 1681a(y)(2) at face value, we understand it to mean that when an employer procures *what would otherwise qualify as a consumer report* in connection with an investigation into employee misconduct, the report is not considered a consumer report under the Act and thus is not subject to either § 1681b(b)(2)(A) (requiring the employer to give a stand-alone written notice and obtain written consent before procuring the report) or § 1681b(b)(3)(A) (requiring the employer to give the employee or job applicant a copy of the report and a description of his FCRA rights before taking an adverse action based on it). Instead, the employer need only provide a summary—an oral summary apparently suffices (subsection (y)(2) does not require anything in writing)—and then only *after* taking an adverse action based in whole or in part on the report.

The FCRA claim in this case rests on the premise that Allstate was required under subsection (y)(2) to provide a summary of Steptoe's investigation after firing the plaintiffs but failed to do so. It's not at all clear, though, that the Steptoe investigation would otherwise qualify as a "consumer report" but for the subsection (d)(2)(D) exclusion. And if the Steptoe investigation isn't a "consumer report" in the first place, then subsection (y)(2) does not come into play and the FCRA simply does not apply.

Here is the Act's full definition of the term "consumer report":

> The term "consumer report" means any written, oral, or other communication of any information *by a consumer reporting agency* bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or

> (C) any other purpose authorized under section 1681b of this title.

§ 1681a(d)(1) (emphasis added).

The Steptoe investigation thus cannot be a "consumer report" unless Steptoe qualifies under the Act as a "consumer reporting agency." Here, in turn, is how the Act defines a "consumer reporting agency":

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f).

Steptoe & Johnson is a law firm. Nothing in the record suggests that it "regularly engages" in "assembling or evaluating consumer credit information" or "furnishing consumer reports to third parties." The parties have not explained how Steptoe qualifies as a consumer reporting agency or how its investigation into timed trading at Allstate qualifies as a consumer report. That's probably because Allstate never disputed these points, choosing instead to contest the FCRA claim on other grounds.

As we explain in a moment, the plaintiffs' FCRA awards must be vacated on jurisdictional grounds based on the lack of any concrete injury to support Article III standing to sue. This opinion should not be construed as endorsing the position that a law-firm investigation of this type qualifies as a consumer report within the meaning of the Act or that subsection (y)(2) applies in a like situation.

With that reservation out of the way, we move to the question of the plaintiffs' standing. In *Spokeo* the Supreme Court reinforced the principle that the "injury in fact" element of Article III standing requires an injury that is both "concrete and particularized," and that to be "concrete," the injury must be "real" and "not abstract"—"that is, it must actually exist." 136 S. Ct. at 1548. The injury need not be tangible; Congress may identify *intangible* harms and authorize litigants to seek their redress in court. *Id.* at 1549. But a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.*

In *Spokeo* the plaintiff filed a proposed class action alleging violations of the FCRA—specifically, several provisions imposing procedural requirements on consumer reporting agencies. *Id.* at 1545–46. The Court explained that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" of the Act because "[a] violation of one of the FCRA's procedural requirements may result in no harm." *Id.* at 1550. The Court said that "a bare procedural violation [of the Act], divorced from any concrete harm," is not an injury in fact sufficient to confer standing to sue. *Id.* at 1549. On the other hand, the Court observed that some statutory violations present a risk of real harm to a litigant and that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.*

So standing questions in cases of this type sometimes require us to identify the particular interest Congress sought to protect and to determine if the plaintiff has suffered a concrete injury to that interest. Our recent decisions in *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017), and *Robertson v. Allied Solutions, LLC,* 902 F.3d 690 (7th Cir. 2018), are illustrative.

The plaintiff in *Groshek* signed a form authorizing a prospective employer to obtain a consumer report about him in connection with his job application; he alleged that the disclosure form was not a stand-alone document as required by § 1681b(b)(2)(A). 865 F.3d at 885–86. Applying *Spokeo*, we held that this claim rested on "a statutory violation completely removed from any concrete harm or appreciable risk of harm." *Id.* at 887. We explained that the requirement of a stand-alone disclosure "does not seek to protect [the plaintiff] from the kind of harm he claims he has suffered, *i.e.*, receipt of a non-compliant disclosure." *Id.* at 888. That is, "Congress did not enact § 1681b(b)(2)(A)(i) to protect job applicants from disclosures that do not satisfy the require ments of that section; it did so to decrease the risk that a job applicant would unknowingly consent to allowing a prospective employer to procure a consumer report." *Id.* Because the plaintiff acknowledged that he read and signed the employer's disclosure form, he had not suffered an injury to any interest protected by the Act. *Id.* at 888–89.

In *Robertson* the plaintiff applied for a job with the defendant, and the defendant procured a background check in the process of considering her application. The background check qualified as a consumer report under the FCRA, and the employer asked the plaintiff to sign a consent form giving it permission to obtain the report. She did so. The employer initially offered her a job but then rescinded the offer when the background check turned up negative information. 902 F.3d at 693–94. She sued for two FCRA violations: (1) the employer violated § 1681b(b)(2)(A) because the consent form was not a stand-alone document and did not contain "clear and conspicuous" disclosures, and (2) the employer violated § 1681b(b)(3)(A) by failing to give her a copy of the report before rescinding the job offer. *Id.* at 693. We referred to the first claim as a "notice claim" and the second as an "adverse-action claim." *Id.*

The district court dismissed the entire case for lack of standing, and we affirmed in part and reversed in part. The first claim, we said, was squarely controlled by our decision in *Groshek*, which held that "an injury functionally indistinguishable from the one underpinning [the plaintiff's] notice claim was not concrete and did not confer standing." *Robertson*, 902 F.3d at 694. Our conclusion in *Groshek* applied with equal force in *Robertson*, so we affirmed the dismissal of the plaintiff's notice claim. *Id.*

The adverse-action claim, however, was a different matter. Recall that § 1681b(b)(3)(A) states that when an employer procures a consumer report about an employee or job applicant, the employer must disclose a copy of the report to the employee or applicant *before* taking any adverse action against him based on it either in whole or in part. In *Robertson* we held that this disclosure obligation protects the employee's (or applicant's) interest in the information needed to correct mistakes and respond to the employer's potential concerns *before* the adverse action occurs, perhaps averting it altogether. *Id.* at 696–97. Testing the plaintiff's claim against that interest, we held that she suffered a concrete injury because she "was denied information that could have helped her craft a response to [the defendant's] concerns" about the content of her consumer report before the defendant rescinded the job offer. *Id.* at 697.

The question we confront here is whether subsection (y)(2) is sufficiently similar to § 1681b(b)(3)(A) to require the same outcome. The answer is no. Subsection (y)(2) requires only that the employer disclose a "summary" of "the nature and substance" of a "communication" (i.e., a consumer report) obtained from a third party in connection with an investigation into employee misconduct. The summary need not be in writing, and specificity is not required. Finally, the summary is required only *after* the employer takes an adverse action, not before.

A postdecision, summary-only disclosure obligation like this one is a far cry from § 1681b(b)(3)(A), which (to repeat) requires the employer to give an employee or job applicant a *complete copy* of the consumer report and a written explanation of his FCRA rights *before* taking any adverse action against the employee or job applicant. That robust disclosure requirement, we held in *Robertson*, provides *substantive* protection: it gives the employee or applicant important information at a time and in a form that allows him to correct errors and address the employer's concerns before any adverse action is taken. And that, we said, brought the case within the line of Supreme Court precedents dealing with informational injuries. 902 F.3d at 694 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989)).

Subsection (y)(2), in contrast, performs a mere post hoc notice function; it does little more. In that sense this case is closer to *Groshek* than to *Robertson*. Indeed, the disclosure requirement at issue in *Groshek* applies *before* the employer may access an employee's or job applicant's consumer report and thus provides the entire basis for the statutory informed-consent procedure. If anything, the disclosure requirement in *Groshek* serves a far stronger notice purpose than does subsection (y)(2), which operates entirely after the fact.

And the post hoc summary required by subsection (y)(2) may be quite generalized. It does not provide information at a time or in a form that allows the employee to meaningfully respond and possibly avert an adverse employment action. If the employer's failure to provide a compliant disclosure in *Groshek* was a bare procedural violation insufficient to confer standing, then the plaintiffs here have likewise suffered a mere procedural violation unaccompanied by any concrete injury.

The plaintiffs insist that Allstate's failure to comply with subsection (y)(2) left them "hampered in defending themselves before Allstate or potential employers." But subsection (y)(2) doesn't protect a substantive "defense" interest. At most it serves a minimal notice function. And the plaintiffs have not explained how the modest, post hoc summary required by subsection (y)—again, a brief oral summary suffices—could possibly have informed a "defense" against Allstate after the fact. We note, moreover, that they failed to identify any prospective employer that refused to hire them based on the 10-K or the Greffin memo, so they have not established that they suffered a concrete informational injury.

Nor have they identified any other tangible or intangible harm arising from Allstate's failure to comply.

In short, the FCRA claim rests on a bare procedural violation of subsection (y)(2) unaccompanied by any concrete and particularized harm or risk of harm to an interest protected by the statute. The FCRA awards must be vacated and the claim dismissed for lack of standing.

Our ruling on the plaintiffs' standing to sue under the FCRA has implications for the defamation awards. As we've explained, the FCRA claim was the sole basis for federal jurisdiction. The district court adjudicated the defamation claim under the supplemental jurisdiction provision, which provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

By its plain terms, § 1367(a) "makes clear that supplemental jurisdiction may only be invoked when the district court has a hook of original jurisdiction on which to hang it." *Herman Family Revocable Tr. v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001). Because the plaintiffs lack Article III standing to bring the FCRA claim, there is no original jurisdictional "hook" to support an assertion of § 1367(a) supplemental jurisdiction over the defamation claim, and the district court was without power to hear it.

> [I]f the federal claim [is] dismissed for lack of subject matter jurisdiction, a district court has no discretion to retain the supplemental claims for adjudication. The dismissal means that there never was a valid claim within the court's original jurisdiction to which the state claims may be supplemental. Therefore, the district court has no discretion to exceed the scope of its Article III power and must dismiss the state law claims without prejudice.

16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 106.66[1] (Daniel R. Coquillette et al. eds., 3d ed. 2018).

In notable contrast, when the court dismisses the federal claim *on the merits*, it has the discretion under § 1367(c)(3) to decline to hear related state-law claims or to retain them, though there is a general presumption that the court will relinquish supplemental jurisdiction and dismiss the state-law claims without prejudice. *RWJ Mgmt. Co. v. BP Prods. N. Am., Inc.*, 672 F.3d 476, 479–80 (7th Cir. 2012). But that's not this case. Here the plaintiffs failed to establish Article III standing to bring the federal claim that supported the exercise of § 1367(a) jurisdiction. "[W]here there is no underlying original federal subject matter jurisdiction, the court has no authority to adjudicate supplemental claims under § 1367." *Herman Family Revocable Tr.*, 254 F.3d at 805; *see also Textile Prods., Inc. v. Mead Corp.*, 134 F.3d 1481, 1485–86 (Fed. Cir. 1998); *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1255 (6th Cir. 1996); *Nowak v. Iron-*

workers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996).

We are not unmindful of the costs of a jurisdictional dismissal at this late stage, after a full trial on the merits and an appeal. Regrettably, the federal courts have sunk considerable resources into resolving the parties' dispute when the case belonged in state court. But the jurisdictional defect leaves us with no choice. Accordingly, the judgment is vacated and the case is remanded with instructions to dismiss the entire action for lack of subject-matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

VACATED AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-1310 & 17-1649

DANIEL RIVERA, *et al.*,

Plaintiffs-Appellees.

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 10 C 1733

William T. Hart, *Judge*.

ARGUED OCTOBER 25, 2017 –
DECIDED OCTOBER 31, 2018

Before KANNE and SYKES, *Circuit Judges*, and DARROW, *District Judge*.*

SYKES, *Circuit Judge*. In 2009 Allstate Insurance Company launched an internal investigation into suspicious trading on its equity desk. The initial

* Of the Central District of Illinois, sitting by designation.

inquiry unearthed email evidence suggesting that several portfolio managers might be timing trades to inflate their bonuses at the expense of their portfolios, which included two pension funds to which Allstate owed fiduciary duties. Allstate retained attorneys from Steptoe & Johnson to investigate further, and they in turn hired an economic consulting firm to calculate potential losses. Based on the email evidence, the consulting firm found reason to believe that timed trading had potentially cost the portfolios $8 million and possibly much more. Because actual losses could not be established, the consultants used an algorithm to estimate a potential adverse impact of $91 million on the pension funds. Everyone understood that this estimate was wildly unrealistic, but in an abundance of caution, Allstate poured $91 million into the pension portfolios.

When the investigation wrapped up, Steptoe lawyers delivered oral findings to Allstate. The company thereafter determined that four portfolio managers—Daniel Rivera, Stephen Kensinger, Deborah Meacock, and Rebecca Scheuneman—had violated the company's conflict-of-interest policy by timing trades to improve their bonuses. On December 3, 2009, Allstate fired them for cause.

On February 25, 2010, Allstate filed its annual Form 10-K for 2009. The report explained that: (1) in 2009 the company had received information about possible timed trading and retained counsel to investigate; (2) counsel hired an economic consulting firm to estimate the potential impact on the portfolios; and (3) based on this outside investigation, Allstate paid $91 million into the two pension funds to cover the potential adverse impact. That same day Allstate sent a memo to employees in its Investment

Department describing the information disclosed in the 10-K. Neither document mentioned the four fired portfolio managers.

Three weeks later the four former employees sued Allstate for defamation based on the 10-K and the internal memo. They also alleged that Allstate violated 15 U.S.C. § 1681a(y)(2), a provision in the Fair Credit Reporting Act ("FCRA or the Act"), by failing to give them a summary of Steptoe's findings after they were fired. A jury returned a verdict in their favor, awarding more than $27 million in compensatory and punitive damages. The district judge tacked on additional punitive damages and attorney's fees under the FCRA.

Allstate's appeal attacks the defamation awards on multiple grounds. We need address only one. The statements in the 10-K and internal memo were not defamatory per se, so they are actionable (if at all) only on a theory of defamation per quod. This type of claim requires proof of special damages causally connected to the publication of the defamatory statements. So the plaintiffs had to prove that prospective employers declined to hire them because of Allstate's defamatory statements and that they suffered damages as a result. The plaintiffs testified that they could not find comparably lucrative work after they were fired, but they presented no evidence that any prospective employer declined to hire them as a consequence of Allstate's statements in the 10-K or the internal memo. That's fatal to the defamation claims.

As for the FCRA claims, we're skeptical that § 1681a(y)(2) applies at all, but Allstate hasn't raised this point. Rather, Allstate argues that the awards must be vacated for lack of standing under *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016). We agree. We therefore vacate the judgment and remand for entry of judgment for Allstate on the defamation claims and dismissal of the FCRA claims.

I. Background

Plaintiffs Rivera, Kensinger, Meacock, and Scheuneman were employed as securities analysts in the Equity Division of Allstate's Investment Department. Rivera was the Division director, and Kensinger, Meacock, and Scheuneman were analysts on the growth team. During their time with the company, the Equity Division managed and invested $10 billion in assets on behalf of various funds, including two defined-benefit pension plans. Because the plaintiffs helped manage two pension portfolios, they occupied positions of trust and owed a duty of loyalty to plan beneficiaries under the Employee Retirement Income Security Act. *See* 29 U.S.C. § 1104(a)(1). They were also bound by Allstate's code of ethics, which required them to avoid conflicts of interest.

In addition to their salaries, the plaintiffs were eligible to receive bonus compensation under Allstate's "pay-for-performance" plan. The plan relied on a formula called the "Dietz method" to estimate portfolio returns and evaluate performance accordingly. The Dietz method assumes that all cash flows in a portfolio occur at the same time of day; high transaction volume makes it impractical to use actual trade times. The particular formula in use at Allstate assumed all cash flows occurred at midday.

While practical, Allstate's formula had two drawbacks. First, it distorted a portfolio's actual performance, both positive and negative. The midday Dietz method inflated measured performance for sales on up days and buys on down days; conversely, it understated measured performance when sales were made on down days and buys on up days. Allstate's traders referred to this discrepancy as the "Dietz effect."

Second, the formula could be manipulated. Because it assumed that all cash flows occurred midday, portfolio managers could wait until the end of day to calculate the Dietz effect before deciding to execute a trade. The system consequently rewarded portfolio managers who waited to make trades even if the portfolio suffered as a result. Moreover, Allstate's bonus structure measured performance relative to a daily benchmark; it didn't consider market movement in the preceding days. This feature also pitted the interests of the manager against those of the portfolio. A manager could improve his performance by delaying a sale over several down days before selling on an up day even if the portfolio would have been better off if he sold earlier. In sum, under Allstate's pay-for-performance plan, portfolio managers could boost their bonus pay by timing trades—potentially at the expense of their portfolios.

In mid-2009 Allstate received troubling information that its portfolio managers were doing just that. Peter Hecht, a member of Allstate's Performance Management Group, reported to Chief Compliance Officer Trond Odegaard that members of the Equity Division were delaying trades to maximize their bonuses at the expense of their portfolios. Odegaard passed these concerns along to Chief Investment Officer Judy Greffin, who ordered him to investigate.

Odegaard and a team of Allstate employees soon discovered signs of timed trading. The team noted several trading patterns that suggested portfolio managers had delayed trades to take advantage of the Dietz effect. The investigation also uncovered emails suggesting that the managers were aware of the Dietz effect and actively considered it when trading. Though not conclusive, the investigation raised concerns that personnel in the Equity Division had timed trades to increase bonuses at the expense of their portfolios; as a result, Allstate may have reported inaccurate financial information to the public.

Allstate accordingly retained the law firm Steptoe & Johnson to investigate further. Steptoe attorneys interviewed Rivera and Scheuneman regarding their trading practices and hired NERA Economic Consulting, Inc., an independent economic consulting firm, to determine if timed trading had harmed the portfolios, especially the pension funds. Beginning with the trades mentioned in the suspicious emails and eventually reviewing six years of trading data, NERA preliminarily estimated a potential adverse portfolio impact of $8.2 million.

But NERA had reason to believe that the actual impact may be much higher. Several suspicious emails could not be tied to particular trades, and other evidence suggested that portfolio managers routinely considered Dietz in the course of trading. Based on Allstate's records, however, it was not possible to calculate actual losses with any precision. So NERA devised an algorithm that would capture every Dietz-favorable trade from June 2003 to May 2009 that was executed after a series of days where the Dietz effect would have harmed the trader's performance. Based on these parameters, NERA estimated that over the six years surveyed, the potential adverse impact on the pension plans was $91 million and the potential adverse impact on the company's other portfolios was $116 million. It was clear to everyone that these estimates vastly overstated the potential effect of timed trading. Erring on the side of caution, however, in mid-December Allstate paid $91 million into the two pension plans to compensate for any potential losses.

While the investigation was ongoing, Allstate disbanded the Equity Division and outsourced its work to Goldman Sachs. On October 6, 2009, Greffin met first with Rivera and then the rest of the division and explained that every member, save those who managed convertible portfolios, would be let go effective December 31, 2009. The laid-off employees would, however, receive severance pay. Later that day Steptoe attorneys conducted off-site interviews with Equity Division managers concerning Dietz trading.

The outside investigation soon wrapped up, and Steptoe attorneys orally reported the findings to Allstate. Based on the internal and external investigations, Allstate concluded that Rivera, Meacock, Scheuneman, and Kensinger had violated the company's conflict-of-interest policy by timing trades. On December 3, 2009, Brett Winchell, the Director of Human Resources, informed each of the four analysts that they were fired for cause effective immediately. Winchell delivered the bad news by reading from a short script that reminded the four managers of the investigation into timed trading, noted that each of them had been interviewed by outside counsel, and explained that they were being fired because they violated Allstate's conflict-of-interest policy. All four asked Winchell for additional explanation; they later asked the same questions in writing. No further explanation, oral or written, was forthcoming. Allstate immediately escorted them off the premises and disconnected their phone and email service the next day.

On December 16 Steptoe attorneys met with regulators in the Department of Labor's Employee Benefits Security Administration to discuss the investigation as it related to the pension funds. At the Department's request, Steptoe sent a follow-up letter summarizing the allegations of timed trading and the subsequent investigation. The letter—dated January 29, 2010—advised the Department that the employees in Allstate's Equity Division had denied that they improperly delayed trades but that several emails "could support a contrary conclusion." The letter further explained that NERA's algorithm "estimate[d] potential disadvantage to the plans" but that "there is little question that the algorithm overstate[d] any disadvantages that the plans might have suffered." Finally, the letter explained that "taking into account returns recalculated by NERA," the estimated "increase in the aggregate bonuses for the entire group" was "approximately $1.2 million."

Fast-forward to October 14, 2010. On that day Allstate's in-house counsel sent another letter to the Labor Department clarifying that the $1.2 million figure "roughly approximate[d] the potential increase in bonuses, ... assum[ing] the algorithm used by NERA ... reflected actual trading activity." This letter emphasized that NERA's calculations estimated "a possible maximum impact" and explained that "[n]o one believed, then or now, that this was an accurate description of the activity on the equity desk, nor that any actual impact on the portfolios was anywhere near the result produced by using the NERA algorithm." The October letter also stated that if the analysis had been limited to the trades mentioned in the suspicious emails, "there would have been virtually no effect on bonuses."

Returning now to our chronology, on February 25, 2010, Allstate filed its annual 10-K report for 2009 in which it disclosed the allegations of timed trades and explained in general terms the subsequent investigation and the company's decision to reimburse the two pension plans. As relevant here, the 10-K stated:

> In 2009, we became aware of allegations that some employees responsible for trading equity securities in certain portfolios of two [Allstate Insurance Company] defined benefit pension plans and certain portfolios of [Allstate Insurance Company] and an [Allstate Insurance Company] subsidiary may have timed the execution of certain trades in order to enhance their individual performance under incentive compensation plans, without regard to whether such timing adversely impacted the actual investment performance of the portfolios.
>
> We retained outside counsel, who in turn engaged an independent economic consulting firm to conduct a review and assist us in understanding the facts surrounding, and the potential implications of, the alleged timing of these trades for the period from June 2003 to May 2009. The consulting firm reported that it was unable to determine from our records the precise amounts by which portfolio performance might have been adversely impacted during that period. Accordingly, the economic consultant applied economic modeling techniques and assumptions reasonably designed to estimate the

potential adverse impact on the pension plans and the company accounts, taking into account, among other things, the distinctions between the pension plans and the company portfolios.

Based on their work, the economic consultants estimated that the performance of the pension plans' portfolios could have been adversely impacted by approximately $91 million (including interest) and that the performance of the company portfolios could have been adversely impacted by approximately $116 million (including interest) in the aggregate over the six-year period under review. We believe that our financial statements and those for the pension plans properly reflected the portfolios' actual investment performance results during the entire period that was reviewed.

In December 2009, based on the economic consultant's modeled estimates, we paid an aggregate of $91 million into the two defined benefit pension plans. These payments had no material impact on our reported earnings or shareholders' equity, but reduced our assets, operating cash flows, and unfunded pension liability to the plans.... At all times during this period, the plans were adequately funded pursuant to applicable regulatory and actuarial requirements. As a result of these additional funds in the plans, our future contributions to the plans, based on actuarial analysis, may be reduced. Using the economic consultant's calculation of the potential adverse impact on the portfolios, we

> currently estimate that the additional compensation paid to all the employees working in the affected group was approximately $1.2 million over the six-year period as a result of these activities. In late 2009, we retained an independent investment firm to conduct portfolio management and trading activity for the specific portfolios impacted by these activities.

That same day Greffin sent a memo to all employees in the Investment Department alerting them to the information in the 10-K filing. In full, the Greffin memo states:

> Allstate released its annual financial report on Form 10–K today. Within that filing, we disclosed details around allegations regarding trading practices within our equity portfolios that came to light in the past year. We took this matter very seriously and launched an investigation as soon as we became aware of the allegations.
>
> Outside counsel was retained to assist us in understanding the facts surrounding, and the potential implications of, these activities. As part of their analysis, an independent economic consulting firm was retained to estimate the potential adverse impact to the performance of our portfolios. The consultant determined that the performance on some of our portfolios, as well as our two pension plan portfolios, could have been adversely impacted by the activities. As a result, Allstate made a contribution to the pension plans during the 4th quarter which is disclosed in the 10–K.

> We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance and the pension plans were adequately funded during this entire period. This matter did not affect the plans' ability to continue to provide benefits to plan participants.
>
> Situations like this can be unsettling and can reflect poorly on our organization. However, I believe organizations are also defined by how they respond to events like this. We were transparent in reporting this matter to the U.S. Department of Labor and the S.E.C., and disclosed it to our investors. We're taking steps to improve our governance, compliance practices and training.
>
> We remain committed to the highest levels of ethics and integrity in the stewardship of Allstate's assets.

Three weeks later the four fired portfolio managers sued Allstate and Greffin for defamation based on the 10-K and Greffin's internal memo. They also asserted FCRA claims against Allstate for violation of § 1681a(y)(2) and claims against Greffin for tortious interference with prospective economic advantage. The district judge dismissed the tortious-interference claims, and the plaintiffs then amended their complaint to add age-discrimination claims against Allstate. They later dismissed the discrimination claims as well as the defamation claims against Greffin.

Lengthy discovery ensued and in due course Allstate moved for summary judgment. Judge Feinerman ruled that the statements in the 10-K and the Greffin memo were not defamatory per se. *Rivera v. Allstate Ins. Co.*, 140 F. Supp. 3d 722, 729–30 (N.D. Ill. 2015). But he permitted the case to go forward on a theory of defamation per quod and on the FCRA claims. *Id.* at 730–37.

As narrowed, the case proceeded to a jury trial with Judge Hart presiding. The jury found for the plaintiffs across the board and awarded more than $27 million in compensatory and punitive damages, broken down roughly as follows:

Rivera:

$7.1 million (defamation compensatory damages)

$4 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Kensinger:

$2.9 million (defamation compensatory damages)

$2 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Meacock:

$3.6 million (defamation compensatory damages)

$3 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Scheuneman:

$3.4 million (defamation compensatory damages)

$1 million (defamation punitive damages)

$1,000 (FCRA statutory damages)

Allstate moved for judgment as a matter of law, or alternatively, for a new trial. The plaintiffs separately asked the judge for an award of punitive damages and attorney's fees under the FCRA. 15 U.S.C. § 1681n(a)(2), (3) (authorizing "such amount of punitive damages as the court may allow" and attorney's fees for willful violations of the FCRA).

Judge Hart denied Allstate's motion and granted the plaintiffs' requests, awarding each plaintiff an additional $3,000 in punitive damages under the FCRA and approving their request for $357,716.25 in attorney's fees associated with the statutory claims.

II. Discussion

Allstate attacks this large judgment on many grounds. In brief, the company argues that the defamation awards must be set aside because: (1) the statements in the 10-K and the Greffin memo were substantially true; (2) neither the 10-K nor the Greffin memo identified the plaintiffs, and no evidence supports a finding that these documents could be reasonably understood to refer to them; (3) the statements in the 10-K and the Greffin memo were privileged; and (4) the plaintiffs failed to prove special damages as required for recovery for defamation per quod. Regarding the FCRA awards, Allstate argues that the plaintiffs lack standing under *Spokeo*, and secondarily, that the record does not support the jury's finding of a willful violation of the statute as required for statutory and punitive damages. (There are no actual damages.) Finally, Allstate attacks the award of FCRA attorney's fees as excessive and disproportionate considering the relative insignificance of the statutory claims to this litigation.

A. Defamation Per Quod

Though Allstate raises several challenges to the defamation awards, we need consider only one. In

Illinois a claim for defamation per quod requires proof of special damages. *Maag v. Ill. Coalition for Jobs, Growth & Prosperity*, 858 N.E.2d 967, 975 (Ill. App. Ct. 2006). Special damages are "actual damages of a pecuniary nature," *id.*, that are "a necessary and proximate consequence of the publication involved," *Cont'l Nut Co. v. Robert L. Berner Co.*, 393 F.2d 283, 286 (7th Cir. 1968). To prove special damages, the plaintiff generally must present direct, rather than merely circumstantial, evidence that the defendant's defamatory statement caused pecuniary harm. *See id.* at 286–87. Put in more concrete terms, the plaintiff must identify a third party who refused to do business with him based on the defendant's defamatory statements. *See Barry Harlem Corp. v. Kraff,* 652 N.E.2d 1077, 1082–83 (Ill. App. Ct. 1995); *Taradash v. Adelet/ScottFetzer Co.*, 628 N.E.2d 884, 888 (Ill. App. Ct. 1993).

Our decision in *Continental Nut Co. v. Robert L. Berner Co.* is instructive on this element of the claim. Continental Nut Company and Robert L. Berner Company both sold Brazilian nuts through separate broker networks. 393 F.2d at 284. The Berner Company sent a letter to its brokers disparaging Continental's nuts, and Continental sued for defamation per quod. *Id.* at 284–85. To prove special damages, Continental presented broker testimony that a few of its customers had seen the defamatory letter and others had declined to purchase Continental's nuts over the following two years. *Id.* at 285. Continental also presented evidence that its sales and profits had decreased while the Berner Company's had increased during this same time period. *Id.* at 285–86. But this evidence was highly generalized; Continental did not present testimony from even a single customer that the defamatory letter prompted it to take its business elsewhere. *Id.* at 286–87.

That, we explained, was fatal to the claim for defamation per quod. Although circumstantial evidence implied that the letter harmed Continental's business, Continental did not "produce[] the testimony of a single customer or former customer," so "the jury was left to speculate as to ... whether the libel caused the losses." *Id.* at 286. Because the evidence "implied" rather than "specifically proved" special damages, Continental failed to carry its burden to establish defamation per quod as a matter of law. *Id.*

So too here. The plaintiffs testified that they were unable to find comparably compensated employment after Allstate fired them. One of their experts opined that a for-cause termination can stigmatize a professional and limit career prospects. Another expert testified that professionals with the plaintiffs' credentials likely would have been employed in a comparable position within a short period of time. So circumstantial evidence *implies* that Allstate's statements harmed the plaintiffs' careers.

But that's not enough to prove special damages. Here, as in *Continental Nut*, the plaintiffs failed to present the testimony of even a single prospective employer who declined to hire them because of the statements in the 10-K or the Greffin memo. As a result the jury was "left to speculate" based on circumstantial evidence alone whether the defamatory statements actually caused the claimed harm. *Id.* That's a failure of proof.

The plaintiffs respond that Illinois law doesn't *always* require direct testimony from a third party who refused to do business with the plaintiff as a result of the defendant's defamatory statement. For support they cite *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 853 N.E.2d 770 (Ill. App. Ct. 2006), *rev'd on other grounds*, 882 N.E.2d 381 (Ill. 2008). In that case a discount clothing retailer, Imperial Apparel, sued its competitor, Cosmo's Designer Direct, for publishing a defamatory advertisement in the *Chicago Sun-Times*. *Id.* at 774. Imperial alleged that its sales had decreased following the publication. Cosmo moved to dismiss, arguing that because a claim for defamation per quod requires the plaintiff to plead and prove special damages, Imperial needed to "allege with particularity which potential customers were deterred from purchasing Imperial's merchandise" because of the advertisement. *Id.* at 780.

The Illinois Appellate Court disagreed, noting that because Imperial sold goods "to the general public" and Cosmo's advertisement was "wide[ly] disseminat[ed] ... to persons unknown," it was "obviously impossible" for Imperial to "specifically identify the potential customers" who were swayed by the advertisement. *Id.* at 781. The court went on to explain that although special damages in a claim for defamation per quod must be pleaded with specificity, "a plaintiff is only obligated to be as specific as it is reasonable to require." *Id.* Accordingly, the court concluded that Imperial was not required to identify particular customers who were deterred by Cosmo's advertisement from purchasing its wares; alleging a decline in sales was sufficient.

It's easy to see why *Imperial Apparel* does not apply here. Our plaintiffs are not mass-market retailers; they are highly specialized investment portfolio managers. They did not offer their services to the general public; rather, they were seeking replacement employment in the investment community, which, according to their own testimony, is small and close-knit. The pool of potential substitute employers did not comprise "persons unknown." Quite the opposite: the plaintiffs obviously know to which companies and firms they applied after Allstate fired them. So although there may be cases in which a plaintiff may rely solely on circumstantial evidence to prove special damages, this is not one of them. We therefore vacate the defamation awards and remand with instructions to enter judgment for Allstate.

B. Fair Credit Reporting Act

Relying on *Spokeo*, Allstate maintains that the FCRA awards must be tossed out for lack of standing. Alternatively, Allstate argues that the trial evidence doesn't support the jury's finding that it violated the statute *willfully*, a necessary predicate for statutory and punitive damages. 15 U.S.C. § 1681n(a). Finally, Allstate contends that the award of attorney's fees under the statute is excessive given the relative unimportance of the FCRA claims to the overall litigation.

A bit of statutory background is required to understand the FCRA claims in this case. We note for starters that the claims represent an odd application of the Act. The FCRA regulates the activities of consumer reporting agencies and the permissible uses of consumer reports by third parties. Among many other regulatory requirements, the Act imposes certain procedures for the use of consumer reports for employment purposes.

For example, the Act prohibits an employer from procuring a consumer report about an employee or job applicant without first giving that person a stand-alone written notice that "clear[ly] and conspicuous[ly]" discloses the employer's request for permission to access the report and the person signs a written consent to release the report to the employer. *See id.* § 1681b(b)(2)(A) (establishing the disclosure and consent requirements); *see id.* § 1681a(d)(1) (defining "consumer report" to include reports about a consumer's creditworthiness and personal background compiled by a "consumer reporting agency" and "used or expected to be used ... for the purpose of serving as a factor in establishing the consumer's eligibility for" credit, insurance, or "employment purposes").

The Act further requires that before taking any adverse action against an employee or job applicant "based in whole or in part" on such a report, the employer must give the employee or applicant a copy of the report and a written description of the person's rights under the Act. *Id.* § 1681b(b)(3)(A).

The FCRA provision at issue here appears in § 1681a, which contains the Act's definitions and rules of construction. (The statutory scheme is reticulated and complex, so bear with us.) Subsection (d)(2)(D) of § 1681a excludes from the definition of "consumer report" any "communication described in subsection (o) or (x)." The reference to "subsection (x)" is an error; it should read "subsection (y)." The error was introduced in the Dodd–Frank Act of 2010,[1] which redesignated the former subsection (x) as subsection (y) but neglected to update the cross-

[1] Technically, the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.

reference in § 1681a(d)(2)(D). *See* Pub. L. No. 111-203, § 1988(a)(1)(A), 124 Stat. 1376, 2086.

Subsection (y), the cross-referenced provision, was enacted as part of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 611, 117 Stat. 1952, 2010. It reads in pertinent part:

> (1) Communications described in this subsection
>
> A communication is described in this subsection if–
>
> (A) but for subsection (d)(2)(D), the communication would be a consumer report;
>
> (B) the communication is made to an employer in connection with an investigation of—
>
> (i) suspected misconduct relating to employment; or
>
> (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;
>
> (C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and
>
> (D) the communication is not provided to any person except–
>
> (i) to the employer or an agent of the employer;
>
> (ii) to any Federal or State officer, agency, or department, or any officer,

agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) Subsequent disclosure

After taking any adverse action based in whole or in part on a communication described in paragraph (1), *the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based*, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed.

15 U.S.C. § 1681a(y) (emphasis added).

So in sum, and to radically simplify: By operation of the cross-reference in subsection (d)(2)(D) of § 1681a (and adjusting for the Dodd–Frank mistake), the effect of subsection (y) is to exclude from the definition of "consumer report"—and thus from the myriad regulatory requirements applicable to consumer reports—any communication that:

(1) otherwise qualifies as a consumer report (but for subsection (d)(2)(D));

(2) was made to an employer in connection with an investigation of employee misconduct;

(3) was not made to the employer for purposes of investigating an employee's creditworthiness; and

(4) is not disclosed to anyone other than the employer, a regulatory agency or authority, or as otherwise required by law.

And although § 1681a simply defines statutory terms and rules of construction, subsection (y) goes on to say that "[a]fter taking any adverse action based in whole or in part on" a communication of this type, the employer "shall disclose to the consumer a summary containing the nature and substance" of the communication. *Id.* § 1681a(y)(2).

Needless to say, this is an odd place to find a regulatory mandate on employer investigations into workplace misconduct. Indeed, the provision is so obscure that in its 15-year existence, subsection (y)(2) of § 1681a appears in *no* published opinion save the district court's decision in this case.

Still, taking § 1681a(y)(2) at face value, we understand it to mean that when an employer procures *what would otherwise qualify as a consumer report* in connection with an investigation into employee misconduct, the report is not considered a consumer report under the Act and thus is not subject to either § 1681b(b)(2)(A) (requiring the employer to give a stand-alone written notice and obtain written consent before procuring the report) or § 1681b(b)(3)(A) (requiring the employer to give the employee or job applicant a copy of the report and a description of his FCRA rights before taking an adverse action based on it). Instead, the employer need only provide a summary—an oral summary apparently suffices (subsection (y)(2) does not require anything in writing)—and then only *after* taking an adverse action based in whole or in part on the report.

The FCRA claims in this case rest on the premise that Allstate was required under subsection (y)(2) to provide a summary of Steptoe's investigation after firing the plaintiffs but failed to do so. It's not at all clear, though, that the Steptoe investigation would otherwise qualify as a "consumer report" but for the subsection (d)(2)(D) exclusion. And if the Steptoe investigation isn't a "consumer report" in the first place, then subsection (y)(2) does not come into play and the FCRA simply does not apply.

Here is the Act's full definition of the term "consumer report":

> The term "consumer report" means any written, oral, or other communication of any information *by a consumer reporting agency* bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 1681b of this title.

Id. § 1681a(d)(1) (emphasis added).

The Steptoe investigation thus cannot be a "consumer report" unless Steptoe qualifies under the Act as a "consumer reporting agency." Here, in turn, is how the Act defines a "consumer reporting agency":

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Id. § 1681a(f).

Steptoe & Johnson is a law firm. Nothing in the record suggests that it "regularly engages" in "assembling or evaluating consumer credit information" or "furnishing consumer reports to third parties." The parties have not explained how Steptoe qualifies as a consumer reporting agency or how its investigation into timed trading at Allstate qualifies as a consumer report. That's probably because Allstate never disputed these points, choosing instead to contest the FCRA claims on other grounds.

As we explain in a moment, the plaintiffs' FCRA awards must be vacated on jurisdictional grounds based on the lack of any concrete injury to support Article III standing to sue. This opinion should not be construed as endorsing the position that a law-firm investigation of this type qualifies as a consumer report within the meaning of the Act or that subsection (y)(2) applies in a like situation.

With that reservation out of the way, we move to the question of the plaintiffs' standing. In *Spokeo* the Supreme Court reinforced the principle that the "injury in fact" element of Article III standing requires an injury that is both "concrete and particularized," and that to be "concrete," the injury must be "real" and "not abstract"—"that is, it must actually exist." 136 S. Ct. at 1548. The injury need not be tangible; Congress may identify *intangible* harms and authorize litigants to seek their redress in court. *Id.* at 1549. But a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.*

In *Spokeo* the plaintiff filed a proposed class action alleging violations of the FCRA—specifically, several provisions imposing procedural requirements on consumer reporting agencies. *Id.* at 1545–46. The Court explained that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" of the Act because "[a] violation of one of the FCRA's procedural requirements may result in no harm." *Id.* at 1550. The Court said that "a bare procedural violation [of the Act], divorced from any concrete harm," is not an injury in fact sufficient to confer standing to sue. *Id.* at 1549. On the other hand, the Court observed that some statutory violations present a risk of real harm to a litigant and that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.*

So standing questions in cases of this type sometimes require us to identify the particular interest

Congress sought to protect and to determine if the plaintiff has suffered a concrete injury to that interest. Our recent decisions in *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017), and *Robertson v. Allied Solutions, LLC,* 902 F.3d 690 (7th Cir. 2018), are illustrative.

The plaintiff in *Groshek* signed a form authorizing a prospective employer to obtain a consumer report about him in connection with his job application; he alleged that the disclosure form was not a stand-alone document as required by § 1681b(b)(2)(A). 865 F.3d at 885–86. Applying *Spokeo*, we held that this claim rested on "a statutory violation completely removed from any concrete harm or appreciable risk of harm." *Id.* at 887. We explained that the requirement of a stand-alone disclosure "does not seek to protect [the plaintiff] from the kind of harm he claims he has suffered, *i.e.,* receipt of a non-compliant disclosure." *Id.* at 888. That is, "Congress did not enact § 1681b(b)(2)(A)(i) to protect job applicants from disclosures that do not satisfy the requirements of that section; it did so to decrease the risk that a job applicant would unknowingly consent to allowing a prospective employer to procure a consumer report." *Id*. Because the plaintiff acknowledged that he read and signed the employer's disclosure form, he had not suffered an injury to any interest protected by the Act. *Id*. at 888–89.

In *Robertson* the plaintiff applied for a job with the defendant, and the defendant procured a background check in the process of considering her application. The background check qualified as a consumer report under the FCRA, and the employer asked the plaintiff to sign a consent form giving it permission to obtain the report. She did so. The employer initially offered her a job but then rescinded the offer when the background check turned up negative information. 902 F.3d at 693–94. She sued for two FCRA violations: (1) the employer violated § 1681b(b)(2)(A) because the consent form was not a stand-alone document and did not contain "clear and conspicuous" disclosures, and (2) the employer violated § 1681b(b)(3)(A) by failing to give her a copy of the report before rescinding the job offer. *Id.* at 693. We referred to the first claim as a "notice claim" and the second as an "adverse-action claim." *Id.*

The district court dismissed the entire case for lack of standing, and we affirmed in part and reversed in part. The first claim, we said, was squarely controlled by our decision in *Groshek*, which held that "an injury functionally indistinguishable from the one underpinning [the plaintiff's] notice claim was not concrete and did not confer standing." *Robertson*, 902 F.3d at 694. Our conclusion in *Groshek* applied with equal force in *Robertson*, so we affirmed the dismissal of the plaintiff's notice claim. *Id.*

The adverse-action claim, however, was a different matter. Recall that § 1681b(b)(3)(A) states that when an employer procures a consumer report about an employee or job applicant, the employer must disclose a copy of the report to the employee or applicant *before* taking any adverse action against him based on it either in whole or in part. In *Robertson* we held that this disclosure obligation protects the employee's (or applicant's) interest in the information needed to correct mistakes and respond to the employer's potential concerns *before* the adverse action occurs, perhaps averting it altogether. *Id.* at 696–97. Testing the plaintiff's claim against that interest, we held that she suffered a concrete injury because she "was denied information that could have helped her craft a response to [the defendant's] concerns" about the content of her consumer report before the defendant rescinded the job offer. *Id.* at 697.

The question we confront here is whether subsection (y)(2) is sufficiently similar to § 1681b(b)(3)(A) to require the same outcome. The answer is no. Subsection (y)(2) requires only that the employer disclose a "summary" of "the nature and substance" of a "communication" (i.e., a consumer report) obtained from a third party in connection with an investigation into employee misconduct. The summary need not be in writing, and specificity is not required. Finally, the summary is required only *after* the employer takes an adverse action, not before.

A postdecision, summary-only disclosure obligation like this one is a far cry from § 1681b(b)(3)(A), which (to repeat) requires the employer to provide a *complete copy* of the consumer report and a written explanation of his FCRA rights *before* taking any adverse action against an employee (or job applicant). That robust disclosure requirement, we held in *Robertson*, provides *substantive* protection: it gives the employee or applicant important information at a time and in a form that allows him to correct errors and address the employer's concerns before any adverse action is taken. And that, we said, brought the case within the line of Supreme Court precedents dealing with informational injuries. 902 F.3d at 694 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989)).

Subsection (y)(2), in contrast, performs a mere post hoc notice function; it does little more. In that sense this case is closer to *Groshek* than to *Robertson.* Indeed, the disclosure requirement at issue in *Groshek* applies *before* the employer may access an employee's or job applicant's consumer report and thus provides the entire basis for the statutory informed-consent procedure. If anything, the disclosure requirement in *Groshek* serves a far stronger notice purpose than does subsection (y)(2), which operates entirely after the fact.

And the post hoc summary required by subsection (y)(2) may be quite generalized. It does not provide information at a time or in a form that allows the employee to meaningfully respond and possibly avert an adverse employment action. If the employer's failure to provide a compliant disclosure in *Groshek* was a bare procedural violation insufficient to confer standing, then the plaintiffs here have likewise suffered a mere procedural violation unaccompanied by any concrete injury.

The plaintiffs insist that Allstate's failure to comply with subsection (y)(2) left them "hampered in defending themselves before Allstate or potential employers." But subsection (y)(2) doesn't protect a substantive "defense" interest. At most it serves a minimal notice function. And the plaintiffs have not explained how the modest, post hoc summary required by subsection (y)—again, a brief oral summary suffices—could possibly have informed a "defense" against Allstate after the fact. We reiterate, moreover, that they failed to identify any prospective employer that refused to hire them based on the 10-K or the Greffin memo, so they have not established that they suffered a concrete informational injury. Nor have they identified any other tangible or intangible harm arising from Allstate's failure to comply.

In short, the FCRA claims rest on a bare procedural violation of subsection (y)(2) unaccompanied by any concrete and particularized harm or risk of harm to an interest protected by the statute. We therefore vacate the FCRA awards and remand with instructions to dismiss these claims for lack of standing.

VACATED AND REMANDED WITH INSTRUCTIONS.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed 1/20/17]

Case No. 10 C 1733

DANIEL RIVERA, STEPHEN KENSINGER, DEBORAH JOY MEACOCK, AND REBECCA SCHEUNEMAN,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

Before the court are post-trial motions after the return of jury verdicts totaling $27,114,848 in favor of four plaintiffs based on claims of defamation and violations of the Fair Credit Reporting Act ("FCA"), 15 U.S.C. § 1681a(y)(2). Jurisdiction of the court is based on the FCA. The defamation claims are governed by Illinois law.

Plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Meacock, and Rebecca Scheuneman, formerly employed by defendant Allstate Insurance Company ("Allstate") as professional security analysts, each claim that Allstate made false statements in a 10-K public report to the Securities and Exchange Commission and in a memorandum issued to its employees. Each plaintiff also claims that Allstate violated the FCA by failing to provide a summary of the communication on which it based its decision to terminate each of them for violation of its code of ethics.

A tortuous interference claim was previously dismissed. *See Rivera v. Allstate Ins. Co.*, 2010 WL 4024873 (N.D. Ill. Oct. 13, 2010) (Grady, J.). Plaintiffs voluntarily dismissed claims against defendant Judy Greffin and dismissed an age discrimination claim against Allstate. Defendant's subsequent motion for summary judgment was denied. *Rivera v. Allstate Ins. Co.*, 140 F. Supp. 3d 722 (N.D. Ill. 2015) (Feinerman, J.).

The jury was instructed[1] with respect to the defamation claims that each plaintiff was required to prove that any published statement identified and pertained to such plaintiff. In recognition of Allstate's qualified privilege of publication, the jury was instructed that malice—defined as with knowledge that the statement was false or in reckless disregard of whether it was false—must be proven by clear and convincing evidence. Because the case was submitted as *per quod* claims, plaintiffs were required to prove actual damages.

Also, the jury was instructed that to prove a violation of the FCA, each plaintiff was required to prove that, at the time of termination, Allstate, "having received a communication in connection with an investigation of suspected misconduct relating to employment," "failed to disclose the nature and substance of the communication" when each plaintiff was fired. The jury was told that to award statutory damages, the failure must be found to be willful.

The motions before the court are Allstate's motions for judgment as a matter of law, or for a new trial and

[1] The jury instructions are Entry 303 on the docket.

for a remittitur. Plaintiffs' motions, pursuant to the FCRA, are for punitive damages and for attorney fees.

The Evidence

Allstate is engaged in the property, casualty, life insurance, retirement and investment products business. It is the second largest company in the United States engaging in such business, having assets in excess of $132 billion. Plaintiffs are professional security analysts who were employed as buy-side portfolio managers in the equity division of the Allstate investment department. During the relevant time period, the equity division was managing and investing approximately $10 billion in capital-growth and capital-value portfolios, including two pension security portfolios.

Each of the plaintiffs has attained a C.F.A. designation, Chartered Financial Analyst or Charterholder. All of the plaintiffs have undergraduate degrees and each, other than Deborah Meacock, has an M.B.A. degree. Stephen Kensington is also a C.P.A. and a Certified Market Technician. According to the C.F.A. Society, which gathers such information, plaintiffs were compensated in the top quadrille of professional security analysts.

Daniel Rivera joined Allstate in 2004. At the time of his termination, he was managing director of the 19-employee equity division and reported to Judy Greffin, Allstate's chief investment officer. Rebecca Scheuneman joined Allstate in 1999. She became an equity portfolio manager and was assigned to the growth team. Deborah Meacock joined Allstate in 2006. At the time of her termination, she was a senior equity portfolio manager on the growth team. Stephen Kensinger joined Allstate in 2007. At the time of his termination, he was an equity portfolio manager on the growth team.

Plaintiffs were paid an annual salary and eligible to earn additional bonus compensation under Allstate's "pay-for-performance" plan. Rivera and Scheuneman earned a bonus in 2005, 2006, and 2007; Meacock in 2006 and 2007; and Kensinger in 2007. The plan included a cap. In certain years the bonuses also included a subjective amount, at the discretion of senior management. All pay-for-performance compensation was suspended in 2008. Bonuses were discretionary in that year. Starting in 2009, Allstate changed its pay-for-performance measure from a relative return to an absolute return on portfolio values.

In June 2009, Allstate's chief risk and investment compliance officer received an anonymous report that equity division employees might be timing trades to inflate their bonuses. Suspicions focused on an algorithm called the "Dietz method," which had been used by Allstate since the mid-1990s to estimate daily portfolio returns. Owners of security portfolios that have multiple daily cash flows use this formula because it is impractical to use a true time-weighted return to recalculate a portfolio's value when there is a high volume of cash flows.[2] The formula was also used to calculate security analysts' bonuses.

Implementing the Dietz formula requires the selection of a factor, which establishes an assumption regarding the point during the day when cash flows occur or peak. The Dietz factor used by Allstate assumed that the portfolio's net cash flow occurred at

---

[2] Peter O. Dietz created this formula in 1966, as explained in his book on performance measurement, *Pension Funds, Measuring Investment Performance.*

mid-day, to provide a rough average of cash flows occurring throughout the day. The Dietz formula used by Allstate was as follows:

Return = (EMV - BMV) - (P - S) / BMV + DF(P - S).

EMV is the market value of the portfolio at the end of the day; BMV is the market value of the portfolio at the beginning of the day; P is purchases; S is sales; and, DF is the Dietz factor. In Allstate's formula, the Dietz factor was .5, which produces a mid-day return value. A Dietz factor of .0, for example, will measure return at the end of the day.

It was speculated that, when the mid-day Dietz formula is used, analysts had the ability to do better than the daily measurement by waiting to know whether the market will end up or down. Delaying trading is a market technique used by all professional security analysts, and it is not alone improper conduct. If the market is going down, they may execute buy transactions and if the market is going up, they may execute sell transactions which may be more favorable than the daily calculation. While it is reasonably assumed that all portfolio managers seek to sell on an up day and buy on a down day, if that timing calculation does not take into account the adverse effects in the market of waiting through several down days to sell or several up days to buy in order to obtain a performance bump, the portfolio could be disadvantaged. However, when it was adopted Allstate considered that the way the bonus system worked, realized gains or losses on a particular day would offset over time.

When the report of possible improper timing of trades occurred, Allstate became concerned that its public reports to the Securities and Exchange Commission could be inaccurate and that its fiduciary obligations to the pension funds governed by the Employee Retirement Income Security Act, under the oversight of the Department of Labor ("DOL"), could have been violated. Allstate hired the law firm of Steptoe & Johnson LLP to conduct an investigation of trading practices. The law firm hired NERA Economic Consulting ("NERA"), an economic consulting firm to aid in the investigation. An attorney for Allstate testified that the results of the investigation were not submitted to Allstate in writing but reported only orally. However, after meeting with DOL attorneys in December 2009, Steptoe & Johnson submitted a letter and memorandum to the DOL providing details of the investigation.[3]

It was reported to the DOL that none of the anecdotal information provided the parameters of potential disadvantage to the pension plans. A search was made through almost two million e-mails from or to 26 individuals working in Allstate's equity investment management and trading group for the period from May 2003 to May 2009. Only a half dozen e-mails were uncovered which seemed problematic. NERA then analyzed 1,511 trading days during this period which consisted of over 110,000 trades for the pension plans. The report states that there was no evidence that e-mails captured all trading instructions.

NERA used the e-mails to identify 24 instances of delayed trading for one pension plan and 25 instances of delayed trading for the other plan. NERA calculated that the plans' disadvantage from these e-mails indicated delays costing as much as $8.2 million. However,

---

[3] The letter was ordered produced during discovery over the objection of Allstate.

some delays produced gains to the plans of about $6.8 million, resulting in an estimate of a possible net disadvantage of approximately $1.4 million. In addition, for four of the e-mails, tracking the data showed that the trades were made on the same day as the e-mail, which eliminated the trade from the problematic trade group.

The equities group personnel and their supervisors were interviewed by Steptoe & Johnson lawyers. No interviews were reduced to writing. The equities group understood how the Dietz factor affected its bonuses. No one suggested that the Dietz effect was the only reason or even the primary reason for the timing of a trade. It was, apparently, only one of a few factors used to determine when to execute a trade. Information from the interviews was reported to Allstate's inside counsel orally.

Allstate wanted to be sure that other violations of the law did not occur, such as cross trading, or principal trading. NERA searched for trades where a security with the same identifier would have been bought and sold in the same amount in the same day. No such trades were discovered. Tests were run to determine if the equities group was engaging in any "round trip" transactions—selling a security, only to buy it back, in order to obtain a performance "bump," or buying a security and then selling it out promptly. No such trades were uncovered.

NERA created an algorithm, an analysis assuming that any sale executed on a market up day (if it was preceded by a down day) and all purchases occurring on a market down day (if preceded by an up day) could have been improperly delayed trades. Looking back to the next preceding day it was assumed that if the instruction had been received on that day, the trade would have been executed on that day. Based on these assumptions, a calculation was made to determine what a purchase would have cost the plan had it been executed on the first down day after the next preceding up day. If the amount was greater than the actual trade results, it was assumed that the difference should be reimbursed. (The converse analysis was made for sales.)

Using the stated assumptions, it was reported that the disadvantage to one plan was $61.5 million and for the other about $17 million. Adding DOL underpayment rates brought the total possible reimbursement to approximately $91 million for the two plans. However, this calculation ignored all delayed trades that produced gains to the portfolios which would have reduced the $91 million figure to at least $53 million.

The conclusion of the report states:

> We believe that this amount, which assumes that nearly every trade was inappropriately delayed, overstates any actual economic disadvantage suffered by the plans for several reasons. It is unlikely, based on the interviews, that small trades were delayed. Nonetheless, no de minimis exclusion was used. The figures do not exclude the trades made prior to midday, even though the Dietz motivation would have assumed late afternoon trading. No time related exclusion was used. In addition, during the past several years of equity market volatility, a very large amount of trading throughout the markets occurred near the end of the day and it is not unreasonable to assume that the Allstate traders were acting in a similar manner, regardless of any Dietz factor motivation.

> And, as noted above, there was no netting of "gain days" against "loss days." That netting would have reduced the $91 million to about $53 million. Finally, as discussed earlier, the economic disadvantage calculation was not limited to those trades for which we had clear e-mail indication of Dietz motivation. If we limited the reimbursement to the trades for which we had e-mails showing such motivations the reimbursement would have been $8.2 million and with netting, $1.4 million.
>
> We want to emphasize that the effect of this trading on the total bonuses paid to this group was minimal over the six-year period. Allstate, taking account returns recalculated by NERA, estimated the impact of this trading to the 25 employees who were in the equity group for some or all of 2003 through 2008 as an increase in the aggregate bonuses for the entire group of 25 employees over those years of approximately $1.2 million.

On October 14, 2010, the Vice President, Secretary, and Deputy General Counsel of Allstate wrote, in response to an inquiry from DOL, as follows:

> [T]he NERA algorithm was a way for counsel and Allstate to estimate a possible maximum impact of any potential "Dietz" motivated equity trading. No one believed, then or now, that this was an accurate description of the activity on the equity desk, nor that any actual impact on portfolios was anywhere near the result produced by using the NERA algorithm. Just as we wanted to see a possible maximum portfolio impact, we wanted to estimate the corresponding impact

> on bonuses. If one looked only at the actual e-mails that arguably could demonstrate bad motivation, there would have been virtually no effect on bonuses

The letter also states, in part:

> Bonuses for the year 2008 were discretionary, and not a result of a formulaic calculation based on equity returns.
>
> * * *
>
> Again, as noted above, the NERA algorithm is not reality; we have no proof that the returns resulting from the algorithm would ever have been realized. Thus, while we asked NERA to rerun the bonus calculations as if the algorithm actually reflected trading activity, the revised bonus calculations are speculative and may be vastly overstated as is the case with the calculation of potential portfolio impact.

Plaintiffs testified at trial of their intent to sell securities when the market was up and to buy securities when the market was down. They denied that their transactions were motivated by an intent to obtain a bonus bump. They did not deny that they were aware of whether or not the Dietz effect was favorable to their bonuses. Plaintiffs stated that their ability to time trades was limited. With the exception of Rivera, plaintiffs did not control the trading desk. Plaintiffs could select securities for purchase and sale, but the trading desk specialists decided the time for the trades. Rivera had the authority to decide when to go into or out of the market, but he denied he used the authority, leaving that judgment to the trading specialists.

There is no evidence in the record that contradicts plaintiffs testimony. No specific transaction has been traced to any plaintiff to show that a trade was timed or delayed which benefitted a bonus but caused a loss to a portfolio.

On October 6, 2009, Greffin called a meeting of the equity division to announce that Allstate had decided to close the division and outsource the management of the equity portfolios, other than the convertible portfolios managed by two employees, to Goldman Sachs. Seventeen employees, including plaintiffs, were told that they were redundant. The employees were told that severance payments would be made; they could remain in the Allstate office until the end of 2009; and Allstate would provide assistance to them in obtaining new employment.

Immediately after the termination announcement, plaintiffs hired an executive recruiter and also turned to the sell-side brokers, who had been calling on Allstate buy-side brokers, for information about security analyst opportunities. There is evidence that the members of the C.F.A. community of top professional security analysts are acquainted and that the group is not large. Also, there is a C.F.A. Society information network available to prospective employers. Among other annual questions asked of each C.F.A. member is if the member has been accused of any ethics violation and, if so, how it was resolved.

On December 3, 2009, while plaintiffs were in their offices at Allstate, each was called to an individual meeting with the human resources director Winchell and immediately terminated for cause, without severance benefits, for violation of Allstate's ethics code. No details of any specific violation was provided. Plaintiffs were immediately escorted from the premises and told that would not be allowed to return to the premises without a company escort. Plaintiffs' removals from the premises were immediately obvious and known to the employees of the staff of over 300 in the investment division as well as by sell-side brokers calling on Allstate. Plaintiffs' phones and communication systems were stopped.

On February 25, 2010, Allstate filed its 2009 annual report on Form 10-K with the Securities and Exchange Commission. Under the topic Pension Plans, it was reported, in part, as follows:

> PENSION PLANS
>
> In 2009, we became aware of allegations that some employees responsible for trading equity securities in certain portfolios of two AIC [Allstate Insurance Company] defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary may have timed the execution of certain trades in order to enhance their individual performance under incentive compensation plans, without regard to whether such timing adversely impacted the actual investment performance of the portfolios.
>
> We retained outside counsel, who in turn engaged an independent economic consulting firm to conduct a review and assist us in understanding the facts surrounding, and the potential implications of, the alleged timing of these trades for the period from June 2003 to May 2009 The consulting firm reported that it was unable to determine from our records the precise amounts by which portfolio performance might have been adversely impacted

during that period. Accordingly, the economic consultant applied economic modeling techniques and assumptions reasonably designed to estimate the potential adverse impact on the pension plans and the company accounts, taking account among other things, the distinctions between the pension plans and the company portfolios.

Based on their work, the economic consultants estimated that the performance of the pension plans' portfolios could have been adversely impacted by approximately $91 million (including interest) and that the performance of the company portfolios could have been adversely impacted aby approximately $116 million (including interest) in the aggregate over the six-year period under review. We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance results during the entire period that was reviewed.

In December 2009, based on the economic consultant's modeled estimates, we paid an aggregate of $91 million into the two defined benefit pension plans. These payments had no material impact on our reported earnings or shareholders' equity, but reduced our assets, operating cash flows, and unfunded pension liability to the plans. At December 31, 2009, our total assets, operating cash flows and shareholders' equity were $132.65 billion, $4.30 billion and $16.69 billion, respectively. At all times during this period, the plans were adequately funded pursuant to applicable

> regulatory and actuarial requirements. As a result of these additional funds in the plans, our future contributions to the plans, based on actuarial analysis, may be reduced. Using the economic consultant's calculation of adverse impact on the portfolios, we currently estimate that the additional compensation paid to all the employees working in the affected group was approximately $1.2 million over the six-year period as a result of these activities. In late 2009 we retained an independent investment firm to conduct portfolio management and trading activity for the specific portfolios impacted by these activities. We have reported this matter to the U.S. Department of Labor and the U.S. Securities and Exchange Commission and have advised both agencies that we will respond to any questions they might have.

The same day that Allstate filed its 10-K, Greffin sent a memorandum to the investment department, consisting of over 300 employees, stating:

> Allstate released its annual financial report on Form 10-K today. Within that filing, we disclosed details around allegations regarding trading practices within our equity portfolios that came to light in the past year. We took this matter very seriously and launched an investigation as soon as we became aware of the allegations.
>
> Outside counsel was retained to assist us in understanding the facts surrounding, and the potential implications of, these activities. As part of their analysis, an independent economic consulting firm was retained to estimate

> the potential adverse impact to the performance of our portfolios. The consultants determined that the performance on some of our portfolios, as well as our two pension plan portfolios could have been adversely impacted by the activities. As a result, Allstate made a contribution to the pension plans during the 4th quarter which is disclosed in the 10-K.
>
> We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance and the pension plans were adequately funded during the entire period. This matter did not affect the plans' ability to continue to provide benefits to plan participants.
>
> Situations like this can be unsettling and can reflect poorly on our organization. However, I believe organizations are also defined by how they respond to events like this. We were transparent in reporting this matter to the U. S. Department of Labor and the S.E.C., and disclosed to our investors. We're taking steps to improve our governance practices and training.
>
> We remain committed to the highest levels of ethics and integrity in the stewardship of Allstate's assets.

10-K reports are read by the financial community as well as by professional security analysts. After the issuance of the February 10-K report, the recruiter that plaintiffs hired stopped looking for new positions for them. Since then, none of the plaintiffs have been able to find positions comparable to their positions at Allstate. Meacock and Rivera began looking for lower-paying work outside the United States. Scheuneman and Kensinger could not do that. Scheuneman took a much lower paying unrelated position and Kensinger is still unemployed as a security analyst.

Motion for Judgment as a Matter of Law

Judgment as a matter of law in favor of a defendant is appropriate only when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). The court must construe the evidence strictly in favor of the party who prevailed before the jury and examine the evidence only to determine whether the jury's verdict could reasonably be based upon the evidence. *Passananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012). The court does not make credibility determinations and must disregard evidence favorable to the moving party that the jury was not required to believe.

Allstate argues that plaintiffs have not proven that any statement identified the plaintiffs; denies that any statement was false and defamatory; states that there was no clear and convincing evidence that Allstate acted with malice so as to overcome the defense of qualified privilege; and states that plaintiffs have not proved damages.

Defamation can occur even if the name of the person defamed is not mentioned if it is clear that the persons to whom the statement is published would reasonably understand that the statement identified the plaintiff. *Bryson v. News Am. Publ'ns, Inc.*, 672 N.E.2d 1207, 1218 (Ill. 1996). *See also* Jury Instr. at 19.

The jury had before it abundant evidence that the 10-K and the Greffin memorandum referred to the plaintiffs. The open termination of plaintiffs from the equity division was followed by the reference in the 10-

K to "employees responsible for trading equity positions in certain portfolios of two AIC defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary." The 10-K described the transfer of portfolios to an "independent investment firm to conduct portfolio management and trading activity for the specific portfolios impacted by these activities." The Greffin memorandum to the investment department calls attention to the 10-K and repeats the information. This conduct and the publications provided substantial support for the jury to find that the 10-K and the Greffin memorandum identified and referred to the plaintiffs.

To overcome the defense of qualified privilege to publish the 10-K, plaintiffs were required to prove that the statement was made with knowledge of its falsity or in reckless disregard of whether it was false or true. *Mittelman v. Witous*, 552 N.E.2d 973, 981 (Ill. 1989) (adopting Restatement (Second) of Torts § 600, cmts. a, b (1977)). *See also* Jury Instr. at 22. Reckless disregard is defined as proceeding to publish defamatory matter despite having an awareness of probable falsity, or serious doubts as to the truth of the publication. *Id.* (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U. S. 657, 667 (1989)).

The 10-K asserts that responsible employees "may have timed the execution of certain trades to enhance their individual performance under incentive compensation plans without regard to whether such timing adversely impacted the actual investment performance of the portfolios." It is stated that losses to the pension plans were estimated to be as much as $91million. The performance of the company portfolio "could have been adversely impacted by approximately $116 million." Additional bonus compensation from timed trades was estimated to be approximately $1.2 million over a six year period. It is further stated in the 10-K that an investigation was undertaken, the portfolios were transferred to an investment firm, and the SEC and DOL were informed of serious misconduct.

The 10-K recited a serious charge of timed trading resulting in substantial losses and unearned bonuses. However, based on the evidence, the jury could find the loss statements to be false, unproven as to the plaintiffs and, because of their nature, seriously defamatory as to plaintiffs.

The plaintiffs testified that they did not time trades to enhance their bonuses. No specific documentary or testimonial evidence was offered to dispute their testimony as to any trade. The $91 million loss to the funds was admittedly incorrect if not unfounded. It was not adjusted for, among other things, instances in which the funds benefitted by delayed trades. Such adjustment, or the acknowledgment of the propriety of such adjustment, would have significantly reduced the alleged estimate of loss to the funds and would have eliminated the $1.2 million bonus overcompensation estimate.

Counsel for Allstate told the DOL that "[i]f one looked only at the actual e-mails that arguably could demonstrate bad motivation, there would have been virtually no effect on bonuses." The jury could well find that there was knowledge of the falsity of the 10-K.

There is clear and convincing evidence that the statements in the 10-K were false and made in reckless disregard of their defamatory affect on the reputations of the plaintiffs.

That plaintiffs were unable to obtain comparable re-employment was shown by the evidence. There was ample evidence of damage to plaintiffs' reputation which provided proof of damages.

Allstate's motion for judgment as a matter of law must be denied.

The Motion for a New Trial

Allstate seeks a new trial pursuant to Fed. R. Civ. P. 59, claiming that plaintiffs improperly introduced evidence and arguments surrounding the unfairness of their terminations; that the court erred in refusing to instruct the jury concerning plaintiffs' failure to make timely production of job search documents; and testimony concerning the conduct of a job search recruiter should have been excluded.

Allstate's argument that the evidence relating to terminations of plaintiffs was not proper proof overlooks that the proof was appropriate to show that readers of the 10-K would know of the circumstances surrounding their firing when reading the 10-K, and know that the 10-K referred to them. Moreover, the related FCRA claims in this case had to do with circumstances of plaintiffs' terminations. An abrupt termination was a factor to be considered when deciding whether there has been a willful failure to provide a summary of the investigation on which the action was taken at the time of the termination.

Plaintiffs failed to make a timely production of job search documents. As a consequence, it was ruled that neither plaintiffs nor their expert could rely on the material. Defendant claims that their untimely production prevented an investigation of the validity of the material. The delay of production did not impact the trial or have any impact on any of the proof.

Plaintiff Meacock testified that executive recruiter Cathy Graham stopped looking for positions for the plaintiffs after the 10-K was issued. Meacock was not allowed to testify to any conversations with Graham, who was on the plaintiffs' witness list. Ultimately, plaintiffs were unable to call Graham. Meacock's statement that Graham stopped looking for employment for plaintiffs was allowed to stand as non-verbal conduct not considered to be hearsay within the meaning of Fed. R. Evid. 801.

Allstate's motion for a new trial will be denied.

Remittitur

Allstate argues that the compensatory and punitive damages awarded are excessive and must be reduced. Both sides introduced damages evidence. The court's analysis is guided by three factors: whether the award is monstrously excessive; whether there is no rational connection between the award and the evidence; and whether the award is roughly comparable to awards in similar cases. The court must review the record in the light most favorable to the verdict. *G. G. v. Grindle*, 665 F.3d 795, 798 (7th Cir. 2011); *Farfaras v. Citizens Bank & Trust*, 433 F.3d 558, 566-67 (7th Cir. 2006); *Adams v. City of Chicago*, 798 F.3d 539, 543 (7th Cir. 2015).

The jury verdict entered against Allstate was as follows: Daniel Rivera $7,156,972 defamation damages, $4,000,000 punitive damages, and $1,000 FCRA damages; Deborah Meacock $3,602,317 defamation damages, $3,000,000 punitive damages, and $1,000 FCRA damages; Stephen Kensinger $2,913,531 defamation damages, $2,000,000 punitive damages, and $1,000 FCRA damages; and Rebecca Scheuneman

$3,438,028 defamation damages, $1,000,000 punitive damages, and $1,000 FCRA damages.

Both sides in this case introduced expert damages evidence which included the experts' reports as joint exhibits. The jury awarded approximately $17.1 million in compensatory damages to the four plaintiffs. Plaintiffs' expert computed damages of approximately $21 million. Allstate's expert found that, if liability existed, damages would be in the range of $11.1 million.

The jury was not without guidance from the parties, and it did not deviate from the range of damages found by the experts. Also, there has been no showing by Allstate that the awards exceed damages in similar cases. Accordingly, there is no basis to set aside the compensatory damage verdicts.

With respect to punitive damages, the jury was instructed, in part, that it may assess punitive damages if it found that the "defendant was malicious or in reckless disregard of a particular plaintiff's rights." Jury Instr. at 33. On this record, the jury could make such a finding. The amount of punitive damages awarded, $10 million, approximately 60% of the compensatory damages, was not out of proportion with appropriate standards for the award of such damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-85 (1996); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

Allstate's motion for a remittitur of compensatory and punitive damages will be denied.

FCRA Punitive Damages and Attorney Fees

Plaintiffs have moved for a determination by the court of punitive damages under 15 U.S.C. § 1681n(a)(2), which provides for punitive damages for willful noncompliance with the FCRA.

The jury made a separate determination that Allstate's violations of the FCRA were willful. Allstate opposed the submission to the jury of the issue of the amount of punitive damages. The language of the statue—"such amount of punitive damages as the court may allow"—is open to the interpretation that the issue is for the court and not for the jury. The issue was reserved and is now before the court.

Allstate argues that it complied with § 1681a(y)(2) which requires, after taking any adverse action based on "a communication made to an employer in connection with an investigation of suspected misconduct," the employer shall disclose "the nature and substance of the communication." Alternatively, it contends that the statute is unclear as to what is required and, because it has not been construed, Allstate should not be liable.

Brett Winchell, the director of human resources for the investment division of Allstate, notified each plaintiff of termination. He was not involved in the trading investigation and did not speak to the lawyers or consultants who made oral reports to Allstate counsel.

Winchell testified that his conversations with plaintiffs were based on a script which included five bullet points. The first was to remind them that there had been an investigation of the pay-for-performance plan; second, that they had been interviewed once or several times by attorneys; third, the decision had been made to terminate the employee for cause immediately, without severance benefits, for violation of the conflict-of-interest policy of the Allstate Code of Ethics; fourth, that the decision was probably not what the employee expected; and fifth, an apology was made for the length of time it took to provide this information. No mention was made to any plaintiff of a specific delayed trade timed to enhance a bonus. No mention was made of any specific adverse affect from any trade. It is doubtful whether Winchell was aware of a summary of the investigation.

Later, when counsel for the plaintiffs requested a summary of the investigation, counsel for Allstate replied that there was no written summary and, accordingly, there was nothing to provide.

Allstate argues that there is no requirement in the statute for a written summary and it isn't clear what is required by the statute. The argument is unreasonable. The statue is clear without construction. It is intended to provide an employee with the information, oral or written, when an "adverse action," (firing) is based, on a "communication made to an employer in connection with an investigation of suspected misconduct relating to employment." That is what happened in this case. Compliance in this case would have revealed that, after an extensive investigation, Allstate did not have proof that any delayed trade by any of the plaintiffs was a timed trade intended to enhance a bonus at the expense of a portfolio security. Had there been compliance with the statute, the termination conversation, as intended by the statute, would not have been only one-way. There is ample evidence to support the jury finding of a willful violation of the statutory duty.

The FCRA provides for the imposition of punitive damages for willful noncompliance of any requirement of the act. On the facts of this case, it is appropriate to observe that the jury awarded full compensatory and significant punitive damages to the plaintiffs on the defamation claims, and plaintiffs are allowed to claim costs and attorney fees. Accordingly, the court will award each plaintiff, as punitive damages, triple the $1,000 statutory damages awarded by the jury. The plaintiffs' claims for punitive damages of greater sums are denied.

In the event of willful noncompliance of the FCRA, a defendant is liable for the costs of the action together with reasonable attorney fees as determined by the court. 15 U.S.C. § 1681n(a)(3). Plaintiffs' motion for the allowance of costs and attorney fees will be granted.

IT IS THEREFORE ORDERED AS FOLLOWS:

(1) Defendant's motions for judgment as a matter of law [296, 310], for a new trial [313], and for remittitur [316] are denied.

(2) Plaintiffs' motions for FCRA punitive damages [320] and costs and attorney fees [322] are granted.

(3) The Clerk of the Court is directed to enter a supplemental judgement in favor of plaintiffs Rivera, Kensinger, Meacock, and Scheuneman in the amount of $3,000 each against defendant Allstate Insurance Company as punitive damages imposed as a result of wilful violations the Fair Credit Reporting Act.

(4) By January 30, 2017, plaintiffs shall submit their bill of costs. Consolidated answer to fee and cost petitions is to be filed by February 13, 2017. Reply is due February 21, 2017.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: JANUARY 20, 2017

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Nos. 17-1310 & 17-1649

DANIEL RIVERA, et al.,

Plaintiffs-Appellees,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 10 C 1733

William T. Hart, *Judge.*

February 27, 2019

Before
MICHAEL S. KANNE, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
SARA DARROW, *District Judge*[*]

---

[*] Of the Central District of Illinois, sitting by designation.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing.[†] It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

[†] Circuit Judge Joel M. Flaum did not participate in the consideration of the petition for rehearing en banc.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Nos. 17-1310 & 17-1649

DANIEL RIVERA, *et al.*,

Plaintiffs-Appellees,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 10 C 1733

William T. Hart, *Judge*.

Before

MICHAEL S. KANNE, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
SARA DARROW, *Circuit Judge**

January 14, 2019

---

* Of the Central District of Illinois, sitting by designation.

ORDER

On December 5, 2018, plaintiffs-appellees filed a petition for panel rehearing and rehearing en banc, and on December 20 defendant-appellant filed an answer to the petition.

No judge in regular active service requested a vote on the petition for rehearing en banc.[1] The judges on the original panel voted to deny the petition for panel rehearing and to issue an amended opinion.

Accordingly, IT IS HEREBY ORDERED that this court's opinion dated October 31, 2018, is amended in a separately filed opinion released today.

IT IS FURTHER ORDERED that the petition for panel rehearing and rehearing en banc is DENIED.

---

[1] Circuit Judge Joel M. Flaum did not participate in the consideration of the petition for rehearing en banc.