No. 18-____

IN THE

Supreme Court of the United States

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO,
Respondent;

MARCUS CHISM,
Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fourteenth Amendment, a state court may not exercise specific personal jurisdiction over a non-resident defendant unless the conduct giving rise to the cause of action occurred in the forum state and caused harm within that state. Here, the courts of California have exercised specific jurisdiction over a defendant in a putative nationwide class action brought under the Fair Credit Reporting Act, even though none of the alleged conduct occurred in California and the plaintiff alleges no harm there (or anywhere else). Given California's rule that defendants who litigate on the merits waive personal-jurisdiction arguments, FCRA defendants are likely to choose settlement rather than seek relief in this Court.

1. May a state court exercise specific jurisdiction over a non-resident defendant facing a federal statutory claim brought as a putative nationwide class action when the claim arises from alleged conduct outside the forum state that did not harm the plaintiff in the forum (or anywhere else)?

2. If not, may the state court presume that the defendant's alleged non-forum activities harmed the plaintiff in the forum state—even if the plaintiff makes no such allegations and offers no proof of such harm—and then place the burden on the defendant to show otherwise?

CORPORATE DISCLOSURE STATEMENT

Petitioner First Advantage Background Services Corp. is wholly owned by STG-Fairway U.S., LLC. No publicly held corporation owns 10% or more of Petitioner's stock, nor does Petitioner own 10% or more of the stock of any publicly owned company.

PARTIES TO THE PROCEEDING

Petitioner First Advantage Background Services Corp. is the defendant in the Superior Court of California, County of San Mateo, and the petitioner who sought and was denied a writ of mandamus in the California Court of Appeal and the Supreme Court of California.

Respondent Superior Court of California, County of San Mateo, denied Petitioner's motion to quash service of process for lack of personal jurisdiction and was respondent to Petitioner's request for a writ of mandamus in the California appellate courts.

Real Party in Interest Marcus Chism is the named plaintiff in a putative nationwide class action in California Superior Court, County of San Mateo, alleging a technical violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.,* by Petitioner.

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The decisions of the Superior Court of California, County of San Mateo, denying Petitioner's motion to quash for lack of personal jurisdiction are reflected in "Coordination Case Management Order #3," entered May 30, 2018, and "Coordination Case Management Order #4," entered June 5, 2018. Those orders are unreported and are reproduced at Appendix ("App.") C and App. D, respectively.

The California Court of Appeal's June 28, 2018 summary denial of a writ of mandamus is unreported and is reproduced at App. B.

The July 25, 2018 decision of the Supreme Court of California summarily denying Petitioner's petition for review is unreported and is reproduced at App. A.

JURISDICTION

The California Supreme Court entered judgment on July 25, 2018; this was a final judgment reviewable by writ of certiorari, and is timely filed under Supreme Court Rule 13. This Court therefore has jurisdiction under 28 U.S.C. § 1257(a). *See Bristol-Myers Squibb Co. v. Super. Court,* 137 S. Ct. 1773, 1779 (2017) (reviewing the California Supreme Court's disposition of a writ petition on jurisdiction); *Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

California Code of Civil Procedure § 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Sections 1681b and 1681n of the Fair Credit Reporting Act are reproduced at App. F and App. G, respectively.

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner First Advantage—a Florida corporation headquartered in Georgia—is one of the world's largest and most trusted providers of background-check reports and conducts millions of background screens annually. App.46a; *First Advantage Background Servs. Corp. v. Super. Ct.*, No. A154542 (Cal. Ct. App. (1st App. Dist.) June 14, 2018), at 11-12. First Advantage does not have any offices in California. *First Advantage*, No. A154542 (Cal. Ct. App. (1st App. Dist.) June 14, 2018), at 11-12.

In 2015, Real-Party-in-Interest Marcus Chism applied for a job in California with Frito-Lay, a Delaware corporation headquartered in Texas. *Id.*; App.46a, 48a. As part of the online job-application process, Chism signed a "Background Check Authorization" form, acknowledging that Frito-Lay disclosed to him that it would obtain his background report for employment purposes and authorizing Frito-Lay to do so. App.46a. Chism does not dispute that that he authorized Frito-Lay to obtain a background report on him. *Id.* at 47a; *Chism v. PepsiCo, Inc.*, Case No. 17-cv-00152-VC (N.D. Cal.), Dkt. 61, 62 ¶ 4, 88 at 11-14, 88-1 ¶ 4.

First Advantage prepared Chism's background report at Frito-Lay's request. *First Advantage*, No. A154542 (Cal. Ct. App. (1st App. Dist.) June 14, 2018),

at 13. First Advantage did not do so in California, and no one on Frito-Lay's background screening team is in California. App.48a. First Advantage did not mail, e-mail, or otherwise send Chism's completed background report to Frito-Lay's facility in California. *Id.* at 47a. Instead, First Advantage used a platform called Enterprise Advantage to process the background report. *Id.* at 46a. The completed report was then hosted on First Advantage's secure, non-public servers in Indiana; Frito-Lay could access the report remotely. *Id.*

Chism's report did not contain any inaccurate information about him, and Frito-Lay hired him. *Chism v. First Advantage Background Servs. Corp.,* No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), Nov. 6, 2017), Declaration of T. Segal, Ex. 1; *Chism*, No. 17-cv-00152-VC (N.D. Cal.), Dkt. 78-2 ¶ 3, 78-3.

Chism now claims, on behalf of himself and a putative nationwide class comprising millions of applicants for employment with any of the 100 "John Doe" employers named in the Complaint, that First Advantage violated the FCRA by preparing his background report without first requiring Frito-Lay to *certify* that it had done what it undisputedly did—advise Chism that a background report would be prepared on him and obtain his permission to do so.[1] In other words, while

[1] Chism's claim is based on 15 U.S.C. § 1681b(b)(1), which provides that a consumer reporting agency may furnish a consumer report for employment purposes "only if the [employer] who obtains such report certifies to the agency that the [employer] has complied" with subsection (b)(2). Subsection (b)(2) requires an employer to disclose in writing to a job applicant that the employer intends to obtain a background report on him/her and to obtain the applicant's written authorization to do so. Again, it is undisputed that Frito-Lay provided a (b)(2) disclosure to Chism and that he authorized his report. Chism alleges only that First

Chism does not dispute that he authorized the background report, he nonetheless alleges that he and the millions of "no injury" plaintiffs he purports to represent are each entitled to pursue federal claims for statutory damages of $100 to $1000 in California state court based on an alleged technical failure that occurred outside of California and caused no harm.

B. Relevant Procedural History

1. Federal Court Proceedings

Chism first pursued FCRA class-action claims in the United States District Court for the Northern District of California. *Chism*, No. 17-cv-00152-VC (N.D. Cal.), Dkt. 1. Initially, Chism alleged that he had applied for employment with First Advantage and that it had obtained a consumer report on him without providing proper disclosures or obtaining his written authorization as required by the FCRA and state law. *Id.*

After First Advantage moved to dismiss, Chism filed an amended class-action complaint, alleging that First Advantage had violated the FCRA by failing to have Frito-Lay properly certify the undisputed facts that it had disclosed to Chism that it would obtain his background report and had obtained his written authorization to do so. *Id.*, Dkt. 29, 36.

Although Chism alleged that First Advantage failed to obtain Frito-Lay's certification of compliance, he never claimed that the background check was done without his knowledge or authorization. *Id.*, Dkt. 36. Nor did he claim that the alleged technical violation harmed him. *Id.*

Advantage failed to obtain advance certification of Frito-Lay's compliance.

First Advantage moved to dismiss the claim for lack of standing pursuant to *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).[2] The District Court found that Chism's allegations were "vague with respect to [Article III] standing" and granted First Advantage's motion, but also gave Chism leave to amend. App.20a. Chism did amend, but failed to remedy the shortcomings identified in the District Court's order. *Chism*, No. 17-cv-00152-VC (N.D. Cal.), Dkt. 62 ¶ 4. Soon thereafter, he voluntarily dismissed First Advantage, *id.*, Dkt. 64, and tried his luck in California state court, where his fortunes drastically improved.

2. California Superior Court Proceedings

Chism re-filed the same FCRA claim against First Advantage in the California Superior Court, County of San Francisco. *Chism*, No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), Aug. 2, 2017). He seeks statutory damages of $100 to $1,000 per person—along with punitive damages, penalties, interest, and attorneys' fees—on behalf of a putative nationwide class of current, former, and prospective applicants for employment with any employer on whom First Advantage has ever performed a background check since August 1, 2012. *Id.* ¶ 12. As with the federal complaint, Chism's state complaint does not allege that First Advantage took any actions in California or caused Chism any injury in California (or anywhere else). *Id.* Unlike the District Court, however, the California courts overlooked the infirmities in Chism's FCRA allegations.

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[2] *Spokeo,* 136 S. Ct. at 1548-50 (Article III requires a plaintiff to allege more than a bare procedural violation of the FCRA; the violation must have caused the plaintiff to suffer a "concrete injury" that is "real" and not abstract.).

First Advantage filed a motion to quash service of process for lack of personal jurisdiction. App.42a-60a. In its supporting brief, First Advantage explained that it "is not at home in California" and Chism's "claim does not arise of First Advantage's forum-related activity." *Id.* at 46a. First Advantage argued that Chism must show that the challenged conduct occurred in California or that First Advantage expressly aimed its conduct at California and "caus[ed] harm to the plaintiff in the forum." *Id.* at 52a. First Advantage then explained that its conduct "occurred wholly outside of California," "was not expressly aimed at California," and "did not harm Plaintiff in California." *Id.* at 52a-53a.

Chism did not dispute these facts in his opposition or submit a personal affidavit of the facts relating to his Frito-Lay application and background report. *Chism*, No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), Nov. 6, 2017). Instead, Chism argued that specific jurisdiction exists because: he lives in California; First Advantage does business in California, has defended lawsuits in California, and has a website that California residents can access; and his background report has the word "California" on each page, includes boilerplate statements on California law, and includes California addresses associated with him. *Id.* at 2-4.[3] He also cited a Ninth Circuit decision from

[3] Chism also made false factual assertions, which First Advantage rebutted it its reply. *Compare* Opposition, *id.* at 2-4, to Reply, *Chism*, No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), May 5, 2018), at 5-6. For example, Plaintiff asserted that his report was requested by a Frito-Lay employee at "1743 E. Fairfield Ct Unit 1, Ontario, CA 91761," but that was actually Chism's home address. *Id.* at 5. The Superior Court did not accept these false assertions, which were not supported by evidence or an affidavit as required by California law. Instead,

which that court has since retreated following this Court's ruling on personal jurisdiction in *Walden v. Fiore,* 571 U.S. 277 (2014).

On reply, First Advantage pointed out that Chism "does not contend that First Advantage's alleged conduct caused him any harm"; "does not argue that any harm occurred in California"; and "certainly has not offered any *proof* of harm."[4] *Chism*, No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), Nov. 6, 2017), at 3-4. First Advantage explained that this failure alone defeated jurisdiction because "California courts do not have jurisdiction 'to entertain claims [against non-residents] involving no in-state injury and no injury to residents of' California." *Id.* at 3 (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1782). First Advantage also argued that mentioning California in a report prepared outside the state does not create jurisdiction, and Chism's other arguments were foreclosed by this Court's decisions and/or related to conduct that was unrelated to his claim. *Id.* at 5-9.

The Superior Court denied the motion to quash. App.3a-18a. The court determined that general jurisdiction was lacking, but that the report's California-specific boilerplate was enough to support specific jurisdiction. *Id.* at 8a. The court reasoned that these disclosures show that First Advantage "expressly aimed [its] conduct at" California. *Id.* The court also ruled that First Advantage's opening argument that the alleged violation did not harm Chism was

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the court relied on Chism's background report to conclude that personal jurisdiction existed.

[4] Chism's decision not to assert harm appears to have been a strategic choice to prevent First Advantage from removing the action to federal court.

"conclusory" and thus waived, and that, in any event, arguments about whether Chism had alleged harm should be raised in merits briefing rather than in a jurisdictional challenge. *Id.* at 8a-9a.

3. Petitions for Mandamus and Discretionary Review

First Advantage timely petitioned the California Court of Appeal for a writ of mandamus. The petition asked the Court of Appeal to vacate the Superior Court's order denying the motion to quash and to direct the Superior Court to enter an order granting the motion for lack of personal jurisdiction. The Court of Appeal summarily denied the petition. App.2a. First Advantage then timely filed a Petition for Review in the California Supreme Court, which was also summarily denied. App.1a.

REASONS FOR GRANTING THE PETITION

State courts need guidance on a pervasive issue: Whether they violate the Fourteenth Amendment by exercising personal jurisdiction over non-residents whose conduct occurred outside the forum and did not cause the plaintiffs any harm in the forum (or anywhere else).

California courts continue to ignore due-process constraints on exercising personal jurisdiction over non-resident defendants under the state's long-arm statute.[5] Many non-resident corporate defendants in California—particularly those facing high-exposure "no injury" class actions for alleged technical violations of federal statutes such as the FCRA—likely

[5] Cal. Code Civ. Proc. § 410.10.

confront the same dilemma that First Advantage faces here. Annual FCRA filings have more than doubled this decade—from about 1,900 filings in 2011 to 4,346 in 2017.[6] As this case shows, the statute's many procedural requirements (and the availability of statutory damages of $100 to $1,000 per person) lend themselves to class actions that improperly assert purely technical violations without any accompanying injuries to the consumers the statute was designed to protect.

Not only do such cases offend this Court's decision in *Spokeo*, *supra*, but state courts violate the Fourteenth Amendment's due-process clause when, as here, they exercise personal jurisdiction over nonresident defendants whose challenged conduct did not occur or cause any harm in the forum state.

Unfortunately, cases like this largely evade this Court's review. They recede into the annals of litigation history as the defendants opt to pursue settlements rather than confront potentially crippling litigation risks and exposure. *See generally AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable [class] claims.").

And while this dilemma will exist whenever a court exercises personal jurisdiction on an insufficient record,

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[6] *See* Greenberg Traurig, *U.S. Supreme Court Decision May Sharply Curtail the Wave of FCRA Employment Litigation* (Oct. 30, 2015), *available at* https://www.gtlaw.com/en/insights/2015/10/us-supreme-court-decision-may-sharply-curtail-the-wave-of-fcra-employment-l (visited Oct. 18, 2018) (describing "Recent Surge" of employment-related FCRA lawsuits, which are often filed as class actions); WebRecon, LLC, *WebRecon Stats for Dec 2017 and Year in Review* (Jan. 26, 2018)https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/ (visited Oct. 18, 2018) (providing statistics).

nowhere is the problem more acute than in California, whose rules often put non-resident defendants in an untenable box. To challenge personal jurisdiction in California courts, a defendant must file a motion to "quash" service of process. Cal. Code Civ. Proc. § 418.10(a)(1). But, if the trial court erroneously denies such a motion (as happened here), the defendant cannot both defend on the merits and attack personal jurisdiction on appeal.

As a preliminary matter, the defendant's only avenue for review of such an error is to seek a discretionary writ of mandamus. Cal. Code Civ. Proc. § 418.10(c). But if the appellate court denies relief (or, as is far more likely, declines to entertain the petition at all, as happened here[7]), the defendant faces a grim choice: either defend the case on the merits—which according to some California decisions forever waives the previously-asserted jurisdictional objections—or opt not to appear at all, thereby risking a default

[7] As in most (if not all) jurisdictions, very few petitions for writs of mandamus in California make it past the preliminary stages. *See Brown, Winfield & Canzoneri, Inc. v. Super. Ct.*, 47 Cal. 4th 1233, 1241 n. 3 (2010) (noting that in 2010 "approximately 94 percent of the petitions seeking writ relief in the Courts of Appeal [were] denied summarily"); *accord Omaha Indem. Co. v. Super. Ct.,* 209 Cal. App. 3d 1266, 1271 (1989) ("Approximately 90 percent of petitions seeking extraordinary relief are denied . . . [and] [o]nly rarely does the court give detailed reasons for its rejection of a petition."). Under California law, denials of petitions for writs of mandate, including merits-based denials, may be by summary order. *Powers v. City of Richmond,* 10 Cal. 4th 85, 114, n.19 (1995) ("[A]n appellate court may deny an extraordinary writ petition summarily—that is, without issuing an alternative writ or order to show cause, without affording the parties an opportunity for oral argument, and without issuing a written opinion—and that this power of summary denial distinguishes writ review from direct appeal.").

judgment, including as to class liability. *See*, *e.g.*, *Am. Express Centurion Bank v. Zara*, 199 Cal. App. 4th 383, 387 (2011) ("A defendant who seeks review of an order denying a motion to quash must ordinarily petition the appellate court for a writ of mandate" or "may reserve his jurisdictional objection on appeal if, after the denial of his motion to quash, he makes no general appearance but suffers a default judgment.") (internal quotation marks omitted); *Roy v. Super. Ct.*, 127 Cal. App. 4th 337, 341 (2005) ("[I]t has long been the rule in California that a party waives any objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action," which includes answering or demurring.); *Kass v. Young*, 67 Cal. App. 3d 100, 109 (1977) (plaintiff may obtain entry of default in a putative class action, and court may then certify a class and enter a default judgment).

This inability to preserve jurisdictional arguments without incurring a default makes it particularly likely that corporate defendants wrongly haled into California court to defend bet-the-company class actions will simply capitulate and settle, thus allowing California courts to evade the Court's review. This Petition thus provides a rare opportunity—and the ideal vehicle—to remedy a problem festering in California and, most likely, elsewhere.

A. The California courts violated the Fourteenth Amendment when they improperly exercised personal jurisdiction even though no relationship existed between the forum state and the alleged activity giving rise to the claim.

California has purported to exercise *specific* personal jurisdiction over First Advantage. This exercise violates the Fourteenth Amendment's due-process

guarantee because First Advantage's alleged conduct occurred outside of California and caused no harm within California (or anywhere else). Even the conduct the Superior Court relied upon—preparing a document that includes references to California law—did not occur in California. The only connection this case has to California is Chism's residency. But that is patently insufficient to support personal jurisdiction.

To satisfy due-process requirements, specific jurisdiction requires a link between the forum and the controversy—"principally, activity or an occurrence that *takes place in the forum State* and is therefore subject to the state's regulation." *Goodyear Dunlop Tires Ops. v. Brown,* 564 U.S. 915, 918 (2011) (emphasis added). The relationship among the defendant, the forum, and the claim at issue "must arise out of contacts that the defendant *himself* creates with the forum State." *Walden,* 571 U.S. at 283 (emphasis in original; internal quotation marks omitted). Specific jurisdiction does not exist if the defendant's conduct occurred entirely in another forum, even if the conduct affected a plaintiff connected to the forum. *Id.* at 1126.

Rather, the proper inquiry is whether the claim arises from activities allegedly *occurring and causing harm* within the state. Even if the non-resident defendant has engaged in activity within the forum, the state court still cannot exercise specific jurisdiction unless that conduct, however extensive, relates to the plaintiff's claim. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

Consequently, "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 571 U.S. at 285. Focusing on the plaintiff's residence "improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive'

in the jurisdictional analysis." *Id.* at 1124. Likewise, "'a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.'" *Bristol-Myers Squibb,* 137 S. Ct. at 1781 (quoting *Walden,* 571 U.S. at 286).

These requirements derive not only from the Constitution, but also from the FCRA itself. Courts have repeatedly held that "the situs of the material events [for FCRA claims] . . . is generally the place where the defendant credit reporting agency conducted its business." *Smith v. HireRight Sols., Inc.,* No. 09-6007, 2010 WL 2270541, at *4 (E.D. Pa. June 7, 2010) (transferring FCRA case from state of plaintiff's residence to state of defendant's principal place of business); *see also Mullins v. Equifax Info. Servs., LLC,* No. Civ. A. 3:05CV888, 2006 WL 1214024, at *2 (E.D. Va. Apr. 28, 2006) (same).[8]

For this reason, courts routinely hold that specific personal jurisdiction does not exist over a FCRA defendant whose activities were conducted outside the forum state. *E.g., Zellerino v. Roosen,* 118 F. Supp. 3d 946, 948, 952 (E.D. Mich. 2015) (California defendants' conduct of accessing plaintiff's credit report in California "cannot furnish a basis for them to be sued in a Michigan court, even though the plaintiff felt the impact of that privacy breach in Michigan"); *Gillison v. Lead Express, Inc.,* No. 3:16-cv-41, 2017 WL 1197821, at *11 (E.D. Va. Mar. 30, 2017) ("Obtaining information on Virginia consumers from a third-party without any direct interaction with those Virginia

[8] Although these cases involved motions to transfer presented by corporate defendants under the federal venue rule, that statute is coterminous with personal-jurisdiction rules. *See* 28 U.S.C. § 1391(c) (defining corporate venue as any district where the defendant is "subject to the court's personal jurisdiction").

consumers does not establish purposeful availment."). These FCRA rulings make clear that the act of preparing a credit report on a resident of the would-be forum state, when done outside that state, does not justify exercising specific personal jurisdiction.

These principles are well established and have been repeatedly confirmed. Yet, the California judiciary in this case has nonetheless exercised personal jurisdiction based entirely on facts that fail to establish any relationship between California and the conduct that allegedly gave rise to the claim (and indeed fail to show any actual harm). Those uncontroverted facts are that Chism, a California resident, applied for a job with Frito-Lay; that Frito-Lay then asked First Advantage to compile and provide a background report; that First Advantage prepared the report and made it available to Frito-Lay; that First Advantage allegedly failed to require Frito-Lay to properly certify its compliance with the FCRA; and that the ensuing report contained boilerplate California-specific disclosures unrelated to Chism's certification claim. App.42a-60a.

None of this conduct occurred in California. First Advantage is a Florida corporation headquartered in Georgia. Frito-Lay is a Delaware corporation headquartered in Texas. The background report at issue was prepared outside California, hosted on First Advantage's secure, non-public servers in Indiana, and made electronically available to Frito-Lay from there.

The California courts—from the Superior Court all the way up to the California Supreme Court—have therefore departed from the requirements of the Fourteenth Amendment and the FCRA by allowing this case to proceed against First Advantage even though the record is devoid of any facts that would establish personal jurisdiction. As noted above, this

puts First Advantage in an untenable situation that only this Court can remedy.

B. The California courts violated the Fourteenth Amendment when they improperly exercised personal jurisdiction even though Chism did not allege any harm in California or elsewhere.

Chism did not suffer any harm—indeed, despite many opportunities, he has never alleged any harm that occurred anywhere, let alone in California. Without any harm in California, there is no constitutional basis for specific jurisdiction. Yet the California courts have taken a different view, and now purport to exercise jurisdiction absent any local harm. This view violates the Fourteenth Amendment and ignores this Court's decisions in *Spokeo* and *Bristol-Myers Squibb*.

Reversing the California courts in *Bristol-Myers Squibb*, this Court concluded that exercising specific jurisdiction over non-residents requires an in-state injury or an injury to an in-state resident. 137 S. Ct. at 1782; *see also Calder v. Jones,* 465 U.S. 783, 789 (1984) (non-residents may be subject to specific jurisdiction when the forum is "the focal point both of the [tort] and of the harm suffered"). Here, the California courts did not require any evidence—or even any allegation—that First Advantage's conduct caused any harm whatsoever to Chism, either in California or anywhere else.[9] And, indeed, such

[9] *See J. M. Sahlein Music Co. v. Nippon Gakki Co.,* 197 Cal. App. 3d 539, 545 (1987) ("While it is true that the issue on a motion to quash is not whether the ultimate issues of liability will be resolved in the plaintiff's favor . . . nevertheless, when the plaintiff seeks to predicate jurisdiction on causing tortious effects in the forum state and when the record tends unequivocally to

allegations do not exist. At no point in this litigation has Chism ever alleged that he suffered any harm whatsoever flowing from First Advantage's alleged technical violation of the FCRA's certification requirement. Nor could he do so: he *authorized* the background report, it contained *no negative information*, Frito-Lay *hired* him, and the report *never had any adverse impact on his employment*.

A state's interest in providing a forum to remedy harm suffered by its residents through the actions of a non-resident has led to outcomes where the Fourteenth Amendment's due-process protections sometimes allow one state to hale a citizen of another state before it to answer allegations of wrongdoing. But here, California courts do not have a constitutionally valid and permissible interest in adjudicating an alleged technical violation of federal law that caused no harm to its residents, did not arise out of any claim-related conduct occurring in California, and was previously rejected by the federal courts. Again, this case provides an ideal vehicle for the Court to address a problem that actually exists and is likely to worsen without this Court's guidance as FCRA lawsuits continue to proliferate.

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establish that the defendant's conduct did not cause such effects, the plaintiff 'cannot demand that we judge the question of jurisdiction in the light of a claim he apparently does not have.'") (citations omitted).

C. The California courts violated the Fourteenth Amendment when they improperly exercised personal jurisdiction without requiring Chism to establish a basis for exercising personal jurisdiction, but rather shifted the burden to First Advantage.

To give life to constitutional due-process limits on exercising specific personal jurisdiction by state courts, the law requires that plaintiffs prove a basis for exercising jurisdiction. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985) ("jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent"); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1069 (10th Cir. 2008) (Gorsuch, J.) ("plaintiffs bear the burden of establishing personal jurisdiction").[10] Only when the plaintiff presents competent affidavits or other evidence does the burden shift to the defendant "to demonstrate that the exercise of jurisdiction would be unreasonable." *Vons Cos., Inc. v. Seabest Foods, Inc.*, 4 Cal. 4th 434, 444 (1996); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1778 (holding that state court could not exercise personal jurisdiction where plaintiffs "did not allege" that that they were injured or treated for their injuries in California or that the conduct giving rise to their claims occurred in California).

Here, the California courts flipped this allocation of burdens when they willfully ignored the significance of Chism's failure to allege or demonstrate harm—and

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[10] California law is in accord. *See Pavlovich v. Super. Ct.*, 29 Cal. 4th 262, 273 (2002).

instead required First Advantage to prove that harm *did not* occur. First Advantage argued in its opening papers that the California courts lacked specific jurisdiction over it—asserting among other things that it did not engage in any conduct within California that related to Chism's claim, and that "it did not harm Plaintiff in California." App.8a, 52a-53a. Once this challenge was raised, Chism assumed the burden of establishing personal jurisdiction, including harm, and, if he failed in that burden, the court would have to quash service and end the case. *See Burger King,* 471 U.S. at 476-78; *Vons,* 4 Cal. 4th at 444. On this count, Chism failed: his response contained no evidence (or even any argument) that First Advantage's purported technical FCRA violation harmed him in any way. *Chism*, No. CGC-17-560531 (Cal. Super. Ct. (San Francisco Cty.), Nov. 6, 2017). Upon seeing this predicted failure come to fruition, First Advantage further highlighted it in its reply brief.

But the Superior Court did not hold Chism to his burden—to the contrary, it improperly shifted that burden to First Advantage. Focusing wrongly on summary-judgment briefing rules rather than on the constitutional issues at stake, *see* App.6a-18a, the court ruled that First Advantage—despite its express contention that it did not harm Chism in California, and Chism's total failure to meet his burden of proving that very thing—had waived any argument concerning harm. The court then compounded this error by ruling that Chism, despite all the shortcomings in his case, had nonetheless met his burden of proof because First Advantage did not prove a negative—i.e., that Chism was *not* harmed. *Id.* at 14a.

In so doing, the California courts got it exactly backwards, ignoring binding precedent and violating

First Advantage's Fourteenth Amendment due-process rights. Under the California formulation, any time a defendant moves to quash service of process on personal-jurisdiction grounds, the defendant must correctly prophesy how the plaintiff will respond, and fully brief any future failures—or else risk waiving the argument altogether. Such a requirement is not only patently unfair and impractical, but it turns the due-process inquiry on its head.

Further, when personal jurisdiction and a defendant's due-process rights are at issue, application of the general rule against new argument or evidence on reply is manifestly unjust. Where the burden of proof is on the plaintiff to establish constitutionally sufficient minimum contacts, a defendant cannot be denied its due-process right to respond to the plaintiff's proffer, or otherwise to show why the exercise of jurisdiction would be unreasonable. Again, this case presents a perfect opportunity for this Court to guide state courts on how to allocate burdens in the personal-jurisdiction context.

CONCLUSION

The Due Process Clause of the Fourteenth Amendment protects a non-resident defendant who does not engage in any claim-related conduct within the forum state, and whose alleged conduct does not harm anyone in that state, from being called into the forum's courts to defend a nationwide no-injury class action. These cases are on the rise, and the situation will likely worsen without this Court's intervention. For these reasons, the Court should grant the petition for a writ of certiorari to address the important and pervasive constitutional due-process issues presented.

Respectfully submitted,

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October 23, 2018

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA
En Banc

S249871

Court of Appeal, First Appellate District,
Division Four - No. A154542

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,

Petitioner,

v.

SUPERIOR COURT OF SAN MATEO COUNTY,

Respondent;

MARCUS CHISM,

Real Party in Interest.

The request for judicial notice filed by real party in interest is granted. The petition for review and application for stay are denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

[Filed: June 28, 2018]

A154542
San Mateo Super. Ct. No. 4961

FIRST AVANTAGE BACKGROUND SERVICES CORP.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO,
Respondent;

MARCUS CHISM,
Real Party in Interest.

THE COURT:

The petition for writ of mandamus is denied. The request for a stay is denied.

(Streeter, Acting P.J., Reardon, J., and Schulman, J.* participated in the decision.)

Date: JUN 28 2018

STREETER, ACTING P.J. Acting P.J.

* Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO
CIVIL COMPLEX DEPARTMENT

[Filed: May 30, 2018]

FIRST ADVANTAGE CREDIT CASES

Coordination Proceeding Special Title
(CRC Rule. 3.550)

Judicial Council Coordination Proceedings
No. JCCP 4961

Department 2, Hon. Marie S. Weiner Assigned
Coordination Motion Judge

COORDINATION CASE MANAGEMENT ORDER #3

On May 29, 2018, a Case Management Conference and Discovery Conference were held in this Coordinated Proceedings in Department 2 of this Court before the Honorable Marie S. Weiner. Lonnie Blanchard III of The Blanchard Law Group APC appeared on behalf of Plaintiff Elizabeth Larroque; Shaun Setareh of Setareh Law Group appeared on behalf of Plaintiff Marcus Chism; and G. Daniel Newland and Eric Michael Lloyd of Seyfarth Shaw LLP appeared on behalf of Defendants First Advantage LNS Screening

Solutions Inc. and First Advantage Background Services Corp.

The status of discovery was discussed. Larroque and Defendants are having fruitful discussions regarding narrowing of the putative class and claims, attempting to resolve discovery disputes as to the members of the class and the ascertainability (and other requirements) of class certification.

The Court made the following rulings at the Conference, which are set forth herein as the formal order of this Court.

IT IS HEREBY ORDERED as follows:

1. Discovery in *Chism* is not stayed. The parties shall engage in an informal exchange of documents pertaining to Plaintiff Chism, without awaiting any formal discovery requests (although the parties are welcome to propound discovery). Counsel for the parties shall meet and confer and set the deposition of Plaintiff Chism for a mutually convenience date.

2. Defendants' Motion to Quash for Lack of Personal Jurisdiction in the Chism case is DENIED. Defendants shall file and serve their Answer to the *Chism* complaint on or before June 8, 2018.

3. A Discovery Conference is set for Tuesday, July 31, 2018 at 2:00 p.m. in Department 2 of this Court, to discuss ALL outstanding discovery disputes. Counsel for the parties shall directly submit to Department 2, and serve upon counsel for all parties, a short letter brief on outstanding issues, *after meet and confer,* with supporting information for the Court, on or before July 24, 2018. If there are no discovery disputes, counsel should so notify the Court and the Discovery Conference will be taken off calendar.

4. Plaintiffs shall file and serve any Motion for Class Certification on or before January 8, 2019. Any opposition shall be filed and served on or before February 5, 2019. Any reply shall be filed and served on or before February 26, 2019. Hearing on the Plaintiffs' Motion for Class Certification is set for Thursday, March 7, 2019 at 2:00 p.m. in Department 2 of this Court.

DATED: May 29, 2018

/s/ Hon. Marie. S. Weiner
HON. MARIE S. WEINER
COORDINATION MOTION JUDGE

APPENDIX D

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO
CIVIL COMPLEX DEPARTMENT

[Filed: June 5, 2018]

FIRST ADVANTAGE CREDIT CASES

Coordination Proceeding Special Title
(CRC Rule. 3.550)

Judicial Council Coordination Proceedings
No. JCCP 4961

Department 2, Hon. Marie S. Weiner Assigned
Coordination Motion Judge

COORDINATION CASE MANAGEMENT ORDER #4

On May 29, 2018, hearing was held on Defendant's Motion to quash for Lack of Personal Jurisdiction in Department 2 of this Court before the Honorable Marie S. Weiner. Lonnie Blanchard III of The Blanchard Law Group APC appeared on behalf of Plaintiff Elizabeth Larroque; Shaun Setareh of Setareh Law Group appeared on behalf of Plaintiff Marcus Chism; and G. Daniel Newland and Eric Michael Lloyd of Seyfarth Shaw LLP appeared on behalf of Defendants First Advantage LNS Screening Solutions Inc. and First Advantage Background Services Corp.

IT IS HEREBY ORDERED as follows:

As set forth in Coordination CMC Order #3, Defendants' Motion to Quash for Lack of Personal Jurisdiction in the Chism case is DENIED. Defendants shall file and serve their Answer to the *Chism* complaint on or before June 8, 2018.

Plaintiff Chism did not demonstrate that Defendant First Advantage Background Services Corporation is subject to general jurisdiction, but Plaintiff Chism did demonstrate that the Court has specific jurisdiction over Defendant.

The unopposed requests for judicial notice are GRANTED, but not for the truth of the matters asserted therein.

THE COURT FINDS as follows:

Overview of Ruling

In regard to specific jurisdiction:

> [C]ourts have interpreted the effects test as having an express aiming requirement and requiring the plaintiff to show (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm caused by that tort in the forum state such that the forum state was the focal point of the plaintiffs injury; and
>
> (3) the defendant expressly aimed the tortious conduct at the forum state such that the forum state was the focal point of the tortious activity.

(*Burdick v. Superior Court* (2015) 233 Cal.App.4th 8, 19-20.) "[I]t must be shown that defendant purposefully directed its activities at California with

knowledge that its conduct would cause harm in this state." (Weil & Brown, *Civil Procedure Before Trial* TRG 2017) ¶ 3:271.)

Plaintiff Chism has demonstrated specific personal jurisdiction of this California court over Defendant. Defendant acknowledges it prepares background reports. (O'Connor Dec, ¶¶ 8 — 15.) Plaintiff proffered his background report, which includes two specific disclosures intended only for California residents. (Segal Dec., Ex. 1, p. 1, 2.) This evidence is sufficient to demonstrate that Defendant "expressly aimed the tortious conduct at the forum state," California. (*Burdick*, 233 Cal.App.4th at p. 20.) Furthermore, Defendant's argument in reply in not supported by citation to legal authority. (Reply, p. 7:22-25. See *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, superseded by statute on other grounds in *Union Bank v. Sup.Ct.* (1995) 31 Cal.App.4th 573, 583 ("A point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion").)

For the first time in reply, Defendant raises the argument that Plaintiff does not allege Defendant's conduct harmed him. (Reply, p. 3:6 – 4:9.) New argument on reply is not permitted. (Weil & Brown, at ¶ 9:106.1.) In its moving papers, Defendant did assert that "it did not harm Plaintiff in California," but that assertion is conclusory and no evidence is cited. (MPA, p. 5:3-4.) There is a significant distinction between Defendant first arguing in its moving papers that "it did not harm Plaintiff *in California"* and in reply that "Plaintiff does not contend that First Advantage's alleged conduct caused him any harm." To the extent that Plaintiff has not pled harm or injury, Defendant

may challenge the Complaint in its responsive pleading.

Each party's respective request for judicial notice is GRANTED, but not for the truth of the matters asserted therein.

Nature of Case

This is a coordinated class action involving First Advantage's violation of the FCRA in generating background reports on consumers.

Plaintiff Marcus Chism filed his class action, *Chism v. First Advantage Background Services Corporation* (SF Sup. Ct. case no. CGC-17-560531) against Defendant First Advantage Background Services Corporation for violation of the Fair Credit Reporting Act, 18 U.S.C. Section 1681(b)(b)(1). It is now part of the coordinated proceedings.

Defendant is a Consumer Reporting Agency that assembles consumer reports for third parties. (*Chism* Complaint, ¶ 21.) Defendant issued a consumer report on plaintiff Marcus Chism when he applied for employment with PepsiCo and Frito Lay. (¶ 22.) It is alleged that Defendant did not obtain the legally required certification prior to issuing the consumer report as reflected in the consumer report he obtained per Labor Code section 1198.5. (¶ 24.) Defendant has failed to provide a copy of that certification. (¶ 25.)

Plaintiff Has Not Demonstrated General Personal Jurisdiction

Defendant is correct that Plaintiff Chism has not established general personal jurisdiction over this Defendant. "The 'paradigm' forums in which a corporation will be considered 'at home' and thus subject to general jurisdiction are (1) its place of incorporation;

and (2) its principal place of business." (Weil & Brown, ¶ 3:217.)

Plaintiff conceded this point at oral argument.

Plaintiff Chism Has Demonstrated Specific Jurisdiction Over Defendant

By proffering his Background Report generated by Defendant, Plaintiff Chism appears to have established that Defendant has purposely directed itself on California. In regards to specific jurisdiction:

> [C]ourts have interpreted the effects test as having an express aiming requirement and requiring the plaintiff to show (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm caused by that tort in the forum state such that the forum state was the focal point of the plaintiffs injury; and
>
> (3) the defendant expressly aimed the tortious conduct at the forum state such that the forum state was the focal point of the tortious activity.

(*Burdick v. Superior Court* (2015) 233 Cal.App.4th 8, 19-20.) "[I]t must be shown that defendant purposefully directed its activities at California with knowledge that its conduct would cause harm in this state." (Weil & Brown, *Civil Procedure Before Trial* TRG 2017) ¶ 3:271.)

Here, Defendant's argument that it has nothing to do with California is belied by its California-specific disclosures in its background report. (See MPA, p. 1:15-23, 4:24 – 5:8; O'Connor Dec, ¶¶ 8 – 15.) Defendant admits it "prepares background reports on individuals applying for employment with Frito-Lay,

Inc." (*Id.* at ¶ 9.) Plaintiff proffered his background report, which includes California-specific disclosures. (Segal Dec., ¶ 3, Ex. 1.) Specifically,

> IMPORTANT NOTICE UNDER CALIFORNIA LAW
>
> First Advantage does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records. Information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of this report. In Cailfornia, First Advantage shall provide a consumer seeking to obtain a copy of a report or making a request to review a file, a written notice in simple, plain English *and* Spanish setting forth the *terms and* conditions *of* his or her right to receive all disclosures.

(Segal Dec., Ex. 1, p. 1.) Further, in caution to First Advantage customers, Defendant added,

> For California based Clients or Clients obtaining reports on California residents: In California, and investigative consumer reporting agency shall provide a consumer seeking to obtain a copy of a report or making a request to review a file, a written notice in simple, plain English and Spanish setting the forth terms and conditions of his or her right to receive all disclosures.

(Segal Dec., Ex. 1, p. 2.) If Defendant was not purposely directing its actions at California, it would not have included the California specific disclosures.

This evidence appears sufficient to meet Plaintiffs burden.

In reply, Defendant argues unconvincingly that this is insufficient, but Defendant does not cite to any legal authority supporting that argument. (See Reply p.7:25 to 8:2.) Although Defendant cites to *Burdick*, its holding is distinguishable, because Defendant here provided California-required disclosures, which demonstrates Defendant expressly directed its conduct at California. *Burdick* involved an interne Facebook posting having no nexus to California:

> Burdick declared he made the allegedly defamatory posting on his personal Facebook page while he was in Illinois. *Neither Burdick's Facebook page nor the allegedly defamatory posting had a California focus like the defamatory article in Calder.* The posting was about NeriumAD – a product sold throughout the country – and its critics. No evidence was presented that Burdick's Facebook page had its widest circulation, i.e., the greatest number of Facebook friends, in California, *that Burdick expressly aimed his intentional conduct at California,* or that Burdick knew the posting would cause harm connecting his conduct to California and not only to Plaintiffs.
>
> . . .
>
> Plaintiffs did not produce evidence to show the allegedly defamatory Facebook posting, which concerned critics of a product sold in all 50 states, substantially connected Burdick to California. *Plaintiffs did not produce evidence that Burdick expressly aimed or intentionally*

> *targeted his intentional conduct at California,* rather than at them personally, and therefore failed to meet their burden of demonstrating facts justifying the exercise of personal jurisdiction over Burdick.

(*Burdick*, 233 Cal.App.4th at pp. 25-26, emphasis added.)

For the first time in reply, Defendant raises the argument that Plaintiff does not allege Defendant's conduct harmed him. (Reply, p. 3:6 — 4:9.) Introducing new argument in reply is generally impermissible. "It is a serious mistake to leave key arguments for the reply brief on the theory it will give you the last word with the court. The court is *likely to refuse to consider new evidence or arguments first raised in reply papers,* or it may grant the other side time for further briefing." (Weil & Brown, *supra*, at ¶ 9:106.1 (original emphasis).) Specifically, Defendant argues,

> California courts do not have jurisdiction "to entertain claims [against nonresidents] involving no in-state injury and no injury to residents of California. *Bristol-Myers Squibb*, 137 S. Ct. at 1782 (reversing California Supreme Court's ruling that a California court may exercise jurisdiction to decide claims against a nonresident that "involve no harm in California and no harm to California residents"). [I] Despite this clear-cut constitutional requirement for all actions in California and elsewhere, Plaintiff does not contend 'that First Advantage's alleged conduct caused him any harm, and he certainly does not argue that any harm occurred in California. Thus, he has waived any argument on this point. (*See Santantonio*, 25 Cal. App. 4th at 113;

> *(Mot. at* 4-5 *(arguing that Plaintiff was not harmed in California.))*

(Reply, p. 3:19-23 (emphasis added). See also *id.* at p. 4:11-23.) Although Defendant cites to its moving papers, pages 4 – 5, it did *not* argue that Plaintiff was not harmed by Plaintiffs conduct.[1] Although Defendant cites to black letter law as to the elements of specific jurisdiction, including the element of harm (MPA, p. 4:14-22.) Defendant does not actually proffer any specific argument or evidence as to the harm element. Instead, the argument that follows on pages 4 – 5 pertains to Defendant's conduct causing Plaintiffs harm in California, and not Plaintiffs harm. Specifically, the argument in the moving papers was:

> First Advantage did not engage in any conduct in California related to Plaintiffs claims and did not direct its conduct related to Plaintiffs claim to California. Plaintiffs claim is that First Advantage made his report available to Frito-Lay without first having it certify that Plaintiff had authorized the report by signing the Background Check Authorization after Frito-Lay disclosed it would obtain his report for employment purposes. (Compl. ¶¶ 20-23.) First Advantage made the report available on its servers in Indiana for Frito-Lay to access (O'Connor Decl. ¶¶ 10 – 12.) That conduct occurred wholly outside of California (*Id.* ¶¶ 11-14.) The conduct was not expressly

[1] Notably, in the summary of its argument, Defendant argues, "The Court does not have personal jurisdiction because [Defendant] is *not at home in California* and *Plaintiff's claim does not arise out of First Advantage's conduct in California.*" (MPA, p. 3:2-3 emphasis added.) Defendant does not argue in the moving papers that Plaintiff was not harmed by Defendant's conduct.

> aimed at California, and *it did not harm Plaintiff in California.* Also, Frito-Lay's background screening team is in Texas. (RJN Ex. D, Hauck Decl. ¶¶ 4- 6.) Nothing ties Plaintiffs claim to California other than his mere presence in the state. Thus, Plaintiff cannot show that First Advantage purposefully availed itself of the privilege of conducting activities in California or purposefully directed its conduct underlying Plaintiffs claim at California. [Citations.]

(MPA, p. 4:23 – 5:8.) Although, Defendant does assert "it did not harm Plaintiff in California," that assertion is conclusory and not supported by any evidence.

Furthermore, there is a significant distinction between Defendant arguing in its moving papers that "it did *not harm Plaintiff in California;"* and in its reply that "Plaintiff does not contend that First Advantage's alleged conduct caused him *any harm."*

To the extent that Plaintiff has not pled harm or injury, Defendant may file a demurrer challenging the pleading.

Finally, Defendant's argument that courts hold specific jurisdiction lacking for FCRA claims when the consumer's residence is the only connection to the forum is not supported by the cases cited, and the Court does not find persuasive the Defendant's reliance upon unreported district court (trial court) decisions.

In *Smith v. HireRight Solutions, Inc.*, the decision involved a motion to transfer venue to Oklahoma, and not a motion to quash service. (*Smith v. HireRight Solutions, Inc.* (E.D. Pa., June 7, 2010, No. CIV.A. 09-6007) 2010 WL 2270541, at *2 (granting transfer in finding, *inter alia,* "all of the operative facts common

to the defined class occurred in Oklahoma. Pennsylvania maintains no substantive connection to the suit").)

In *Mullins v. Equifax Information Services, LLC.*, again, the decision involved a motion to transfer venue. (*Mullins v. Equifax Information Services. LLC* (E.D. Va., Apr. 28, 2006, No. CIV.A. 3:05CV888) 2006 WL 1214024 (denying transfer on both improper venue and convenience of the parties and witnesses grounds).)

Although the following cases are more on point, they are distinguishable because the defendant in those cases did not direct its activities at the forum state. Rather, the defendant in those cases *obtained the consumer reports from third parties,* while Defendant here is accused of *generating the reports* without consent.

In *Zellerino v. Roosen*, the district court dismissed the complaint without prejudice on a motion for judgment on the pleadings (actually challenging personal jurisdiction per FRCP, rule 12(b)(2)). The district court held it lacked personal jurisdiction where,

> [I]t is apparent that the defendants' conduct of accessing the plaintiffs credit report, which presumably took place in California, cannot furnish a basis for them to be sued in a Michigan court, even though the plaintiff felt the impact of that privacy breach in Michigan. *None of the defendants' challenged conduct had anything to do with Michigan itself* The plaintiff does not allege that any of the defendants' alleged actions took place in Michigan. Instead, *the complaint alleges that*

> *the defendants, California residents, obtained the plaintiffs consumer report from Equifax, a Georgia-based company, and falsely certified that the report was for a lawful purpose.*

(*Zellerino v. Roosen* (E.D. Mich. 2015) 118 F.Supp.3d 946, 952 (emphasis added).)

In *Gillison v. Lead Express, Inc.*, granting the motion to dismiss, the district court found the plaintiffs' jurisdictional allegations were insufficient, as they pertained to the defendant obtaining credit reports from third parties in order to potentially do targeted marketing to those customers. (*Gillison v. Lead Express, Inc.* (E.D. Va., Mar. 30, 2017, No. 3:16CV41) 2017 WL 1197821, at *1.) "Because the Plaintiffs allege no meaningful Virginia contacts by the Defendants that accompanied the Plaintiffs' purported injuries in Virginia, such as actions purposefully directed at Virginia, the Court cannot exercise personal jurisdiction over the Defendants on the basis of the effects test." (Id. at *14.)

> In *Cole v. Capital One*, granting motion to dismiss, the district court found. Plaintiffs Complaint alleges no jurisdictional facts with respect to Data Mortgage. The only facts alleged in the Complaint regarding Data Mortgage is that it is "in the business of brokering or procuring mortgage loans," and that it *"obtained Plaintiff's credit report on June 5, 2015,"* without having a permissible purpose for doing so.

(*Cole v. Capital One* (D. Md., May 5, 2016, No. GJH-15-1121) 2016 WL 2621950, at *3 (emphasis added).) Following *Zellerino*, the court held, *"The mere fact that Data Mortgage obtained Plaintiff's credit report* and

that Plaintiff is a Maryland resident does not establish that Data Mortgage purposefully availed itself of the privilege of conducting activities in Maryland." (*Id.* (emphasis added).)

DATED: June 4, 2018

/s/ Hon. Marie S. Weiner
HON. MARIE S. WEINER
COORDINATION MOTION JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed 06/19/17]

Case No. 17-cv-00152-VC

Re: Dkt. No. 46

MARCUS CHISM,

Plaintiff,

v.

FRITO-LAY, INC., *et al.*,

Defendants.

ORDER GRANTING MOTION TO DISMISS

Marcus Chism has alleged that Frito-Lay and First Advantage Background Services Corp. violated the Fair Credit Reporting Act when Frito-Lay obtained background check reports from First Advantage about Chism and others applying for a job. First Advantage has moved to dismiss Chism's claim against it for its alleged failure to obtain the required certification from Frito-Lay that Frito-Lay had complied with the Fair Credit Reporting Act's disclosure requirements before First Advantage provided Frito-Lay with Chism's background check report.

Chism has stated a claim for a violation of the certification requirement. He has provided reason to believe that First Advantage did not receive the required certification from Frito-Lay. First Am. Compl. ¶¶ 83-86, 89. First Advantage argues that the facts in the

complaint are potentially consistent with its compliance with the law. But this alternative explanation does not render Chism's explanation implausible. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Chism has also sufficiently alleged that the violations of the Fair Credit Reporting Act were willful. Early in the complaint, he asserts that the violations by the defendants were willful. First Am. Compl. ¶ 2. More importantly, he has pleaded facts to support willfulness based on the unreasonableness of First Advantage's alleged interpretation of the law. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007); *Syed v. M-I LLC*, 853 F.3d 492, 504 (9th Cir. 2017). Chism has plausibly alleged that First Advantage's reliance on a blanket certification or after-the-fact certification would constitute a willful violation because those forms of certification clearly do not comply with the Fair Credit Reporting Act. *See* First Am. Compl. ¶¶ 86, 90.

Chism's factual allegations are consistent with a potential violation of the certification requirement for the class he identifies. It is fair to infer from the complaint that First Advantage violated the Fair Credit Reporting Act in the same way against Chism and other class members. *See* First Am. Compl. ¶¶ 85, 89.

Chism's allegations against First Advantage in the current complaint are vague with respect to standing. Chism's counsel provided an interpretation of these allegations at oral argument. The allegations in the complaint, as interpreted by Chism's counsel, do not give rise to standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *cf. Syed*, 853 F.3d at 499. The claim against First Advantage is therefore dismissed. Dismissal is with leave to amend to the extent Chism wishes to clarify whether he knew that a background

check would be conducted and whether he authorized the background check.

Any amended complaint shall be filed within 14 days of this order.

IT IS SO ORDERED.

Dated: June 19, 2017

/s/ Vince Chhabria
VINCE CHHABRIA
United States District Judge

APPENDIX F

United States Code Annotated
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection
(Refs & Annos)
Subchapter III. Credit Reporting Agencies
(Refs & Annos)

Currentness

15 U.S.C.A. § 1681b Permissible purposes of consumer reports

(a) In general

Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments, determining the appropriate level of such payments, or enforcing a child support order, award, agreement, or judgment;

(B) the parentage of the consumer for the child to which the obligation relates has been established

or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws); and

(C) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(D) Redesignated (C)

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act or the Federal Credit Union Act, or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the

person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) of this title.

(2) Disclosure to consumer

(A) In general

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

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or

other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application—

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency

that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Bureau under section 1681g(c)(3) of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of

section 31502 of Title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will—

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation

Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made—

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department

For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the

Senior Executive Service or equivalent civilian or military rank.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information.—The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation.—The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if—

(A) the consumer authorizes the agency to provide such report to such person; or

(B) (i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e);

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

(2) Limits on information received under paragraph (1)(B)

A person may receive pursuant to paragraph (1)(B) only—

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries

Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification

A consumer shall notify a consumer reporting agency under paragraph (1)—

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system

Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall—

(A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2) (B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election

An election of a consumer under paragraph (1)—

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency—

(i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system

(A) In general

Each consumer reporting agency that, under subsection (c)(1)(B), furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall—

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency—

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance

Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is

deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide

Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless—

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Protection of medical information

(1) Limitation on consumer reporting agencies

A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 1681c(a)(6) of this title) about a consumer, unless—

(A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;

(B) if furnished for employment purposes or in connection with a credit transaction—

(i) the information to be furnished is relevant to process or effect the employment or credit transaction; and

(ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(C) the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 1681c(a)(6) of this title.

(2) Limitation on creditors

Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical information treated in the manner required under section 1681c(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

(3) Actions authorized by Federal law, insurance activities and regulatory determinations

Section 1681a(d)(3) of this title shall not be construed so as to treat information or any communication of

information as a consumer report if the information or communication is disclosed—

(A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);

(B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act, or described in section 6802(e) of this title; or

(C) as otherwise determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).

(4) Limitation on redisclosure of medical information

Any person that receives medical information pursuant to paragraph (1) or (3) shall not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

(5) Regulations and effective date for paragraph (2)

(A)[1] Regulations required

The Bureau may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

(6) Coordination with other laws

No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.

[1] So in original. No subpar. (B) has been enacted.

APPENDIX G

United States Code Annotated
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection
(Refs & Annos)
Subchapter III. Credit Reporting Agencies
(Refs & Annos)

Effective: June 3, 2008
Currentness

15 U.S.C.A. § 1681n Civil liability for willful noncompliance

(a) In general

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

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

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

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

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

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

APPENDIX H

SUPERIOR COURT FOR
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

Case No. CGC-17-560531

MARCUS CHISM, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,
a Florida Corporation and
DOES 1 through 100, inclusive,

Defendants.

(Filed Concurrently With: Memorandum of
Points and Authorities;
Request for Judicial Notice;
[Proposed] Order)

Date: November 17, 2017
Time: 9:30 a.m.
Dept.: Law & Motion (Dept. 302)
Reservation No. 10171117-02
Complaint Filed: August 2, 2017

DEFENDANT'S NOTICE OF MOTION AND MOTION TO QUASH FOR LACK OF PERSONAL JURISDICTION

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 17, 2017, at 9:30 a.m., or as soon thereafter as counsel may be heard in Department 302 of the above-captioned Court, located at 400 McAllister St., San Francisco, CA 94102, Defendant First Advantage Background Services Corp. will and hereby does move, pursuant to California Code of Civil Procedure Section 418.10, for an order quashing service of summons and dismissing Plaintiff's Complaint. This motion is brought on the ground that the Court lacks general and specific personal jurisdiction over Plaintiff, and First Advantage thus requests that Plaintiffs Complaint be dismissed without prejudice.

First Advantage's Motion to Quash is based on this Notice of Motion and Motion; First Advantage's Request for Judicial Notice; the Declaration of Matthew O'Connor; and the Memorandum of Points and Authorities supporting this Motion to Quash; all the pleadings and papers on file in this action; and upon such argument and evidence as may be presented to the Court at the hearing on this matter.

DATE: October 18, 2017

Respectfully submitted,

SEYFARTH SHAW LLP

By: /s/ Frederick T. Smith
Frederick T. Smith*
Esther Slater McDonald*
Eric M. Lloyd

Attorneys for Defendant

FIRST ADVANTAGE BACKGROUND SERVICES CORP.

**to be admitted pro hac vice*

SUPERIOR COURT FOR
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

Case No. CGC-17-560531

MARCUS CHISM, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,
a Florida Corporation and
DOES 1 through 100, inclusive,

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Date: November 17, 2017
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Dept.: 302
Reservation No. 10171117-02
Complaint Filed: August 2, 2017

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO QUASH FOR LACK OF PERSONAL JURISDICTION

Defendant FIRST ADVANTAGE BACKGROUND SERVICES CORP., by and through its attorneys and pursuant to CCP § 418.10, moves to quash service of summons and to dismiss Plaintiff

MARCUS CHISM's Complaint for lack of personal jurisdiction. As detailed below, Plaintiff fails to allege that this Court has personal jurisdiction over First Advantage, and the facts demonstrate that First Advantage is not at home in California and Plaintiff's claim does not arise out of First Advantage's forum-related activity. Therefore, the Court should quash service of summons and dismiss Plaintiff's Complaint for lack of personal jurisdiction.

I. BACKGROUND

Plaintiff applied online for a position with Frito-Lay, Inc., and, as part of the application process, Plaintiff signed a "Background Check Authorization" form, acknowledging that Frito-Lay had disclosed that it would obtain his background report for employment purposes and authorizing Frito-Lay to do so. First Advantage prepared the background report outside the State of California and then made the report available on its servers in Indiana for Frito-Lay to access. (Declaration of Matthew O'Connor ("O'Connor Decal.") ¶¶ 10-14, Exhibit A.)

First Advantage is incorporated in Florida, and its headquarters are in Atlanta, Georgia. (O'Connor Decl. ¶ 8.) First Advantage prepares background reports on individuals applying for employment with Frito-Lay. (*Id.* ¶ 9.) First Advantage uses a platform called Enterprise Advantage to process reports for Frito-Lay. (*Id.* ¶ 10.) First Advantage hosts completed reports on its secure, non-public servers in Indiana and makes the reports available

for Frito-Lay to access. (*Id.* ¶ 11.) After completing Mr. Chism's report, First Advantage made it available on its servers in Indiana for Frito-Lay to access. (*Id* ¶ 12.) First Advantage did not prepare Mr. Chism's background report in the State of California. (*Id.* ¶ 13.) First Advantage did not mail or email Mr. Chism's completed background report to Frito-Lay's facility in Rancho Cucamonga, California. *(Id.* ¶ 14.)

In his Complaint, Plaintiff alleges that First Advantage violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") by failing to have Frito-Lay certify that it had informed him it would obtain his background report and that he had authorized the report when he signed the Background Check Authorization. (Compl. ¶¶ 20-23.) Plaintiff alleges that, on information and belief, that First Advantage is a "citizen" of California. (*Id.* ¶ 7.) Plaintiff also alleges that he worked "in the State of California from approximately October 2015 to September 2016." (*Id.* ¶ 6.) The Complaint does not include any other allegations about California, and Plaintiff does not allege that First Advantage took any action in California.

Plaintiff initially sued First Advantage, PepsiCo, Inc., and Frito-Lay in federal court but later voluntarily dismissed First Advantage and PepsiCo from that action before refiling his claim against First Advantage in this Court. (Defendant's Request

for Judicial Notice ("RJN"), Exs. A-C.[1]) Frito-Lay likewise disputes that Plaintiff's claims are properly brought in a California court and has moved to transfer Plaintiff's federal action to the Eastern District of Texas for reasons explained in Frito-Lay's Motion to Transfer Venue and the Declaration of Erica Hauck submitted in support of that motion. (*Id.* Ex. D & Attachment 2 ("Hauck Decl.").)

Those reasons include the following: Frito-Lay is incorporated in Delaware, and its headquarters are in Plano, Texas. *(Id.* Ex. D, Hauck Decl. ¶¶ 2-3.) Frito-Lay employs individuals throughout the United States and has a national background screening program for employment. (*See id* ¶¶ 4-5.) The background screening program is implemented, administered, and executed from Frito-Lay's headquarters by a team of human resources professionals. (*Id.*) All team members work out of Frito-Lay's headquarters in Texas; no one on the background screening team is in California. (*See id.* ¶¶ 4-7.) Among other things, the background screening team reviews background reports prepared by First Advantage and notifies applicants when information in their background reports may adversely affect their potential employment with Frito-Lay. (*Id.* ¶ 5.)

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[1] PepsiCo appears to have been included in the Complaint in this action as a mistake. First Advantage did not provide Plaintiffs report to PepsiCo. (O'Connor Decl. ¶ 15.)

II. STANDARD OF REVIEW

On a challenge to personal jurisdiction by a motion to quash, Plaintiff must prove, by a preponderance of the evidence, the factual bases justifying the exercise of jurisdiction. *Vons Cos. v. Seabest Foods, Inc.* (1996) 14 Cal. 4th 434, 449. Plaintiff "must come forward with affidavits and other competent evidence to carry this burden and cannot simply rely on allegations in an unverified complaint." *Via View, Inc. v. Retzlaff* (2016) 1 Cal. App. 5th 198, 209-10.

III. ARGUMENT

The Court does not have personal jurisdiction because First Advantage is not at home in California and Plaintiff's claim does not arise out of First Advantage's conduct in California. Under California's long-arm statute, the Court may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CCP § 410.10. Personal jurisdiction may be either general or specific. *Vons Cos.,* 14 Cal. 4th at 444.

A. The Court Does Not Have General Personal Jurisdiction.

A court has general jurisdiction over a corporation "when [its] affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum *State." Daimler AG v. Bauman* (2014) 134 S. Ct. 746, 754. In all but the most exceptional circumstances, a corporation is "at home" only in the corporation's "place of incorporation and its principal place of busi-

ness." *BNSF Ry. Co. v. Tyrrell* (2017) 137 S. Ct. 1549, 1558 (quotation marks omitted). First Advantage is a Florida corporation with its principal place of business in Atlanta, Georgia. (O'Connor Decl. ¶ 8.) First Advantage's contacts with California are not so substantial as to render it "at home" in California, and, contrary to Plaintiff's allegation, First Advantage is not a "citizen of California." *See Wachovia Bank v. Schmidt* (2006) 546 U.S. 303, 318 ("[A] corporation's citizenship derives . . . from its State of incorporation and principal place of business."). Therefore, the Court does not have general jurisdiction.

B. The Court Does Not Have Specific Personal Jurisdiction.

Plaintiff also cannot establish specific jurisdiction because nothing ties this dispute to California other than Plaintiff's presence in the state. Specific jurisdiction exists when, although the defendant lacks such pervasive forum contacts that the defendant may be treated as present for all purposes, it is nonetheless proper to subject the defendant to the forum state's jurisdiction in connection with a particular controversy. *Epic Commc'ns, Inc. v. Richwave Tech., Inc.* (2009) 179 Cal. App. 4th 314, 327.

For a state court to exercise specific or "case-linked" jurisdiction, "the *suit* must aris[e] out of or relat[e] to the defendant's contacts with the *forum." Bristol-Myers Squibb Co. v. Super. Ct.* (2017) 137 S Ct. 1773, 1780 (quotation marks omitted). A court cannot exercise jurisdiction over

a defendant based on forum activity "unrelated" to the plaintiff's claim, regardless of the extent of that activity. *Id.* at 1781 (rejecting the California Supreme Court's "substantial connection" test because its sliding-scale approach "resembles a loose and spurious form of general jurisdiction").

In other words, there must be a relationship among the defendant, the forum, and the claim at issue, and that relationship "must arise out of contacts that the defendant *himself creates* with the forum State." *Walden v. Fiore* (2014) 134 S. Ct. 1115, 1121-22 (quotation marks omitted). The United States Supreme Court has "consistently rejected" attempts to establish specific jurisdiction based on "contacts between the plaintiff (or a third party) and the forum State." *Id.* at 1122. There must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Bristol-Myers,* 137 S. Ct. at 1781.

For specific jurisdiction to exist, a defendant must "purposefully and voluntarily direct [its] activities towards the forum so that [it] should expect, by virtue of the benefit [it] receives, to be subject to the court's jurisdiction based on [its] contacts with the forum." *See, e.g., Pavlovich v. Super. Ct.,* (2002) 29 Cal. 4th 262, 269 (citation and internal quotation marks omitted); *Schwarzenegger v. Fred Martin Motor Co.* (9th Cir. 2004) 374 F.3d 797, 802. To establish purposeful direction, a plaintiff must show that the defendant: (1) committed an intentional act; (2) expressly aimed at the forum state; and

(3) causing harm to the plaintiff in the forum state. *See, e.g., Burdick v. Super. Ct.* (2015) 233 Cal. App. 4th 8, 19-20 & n.2; *Schwarzenegger,* 374 F.3d at 803. The plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the defendant's conduct in the forum and point to specific activity indicating that the defendant expressly aimed its conduct at the forum. *Pavlovich,* 29 Cal. 4th at 271; *see also Burdick,* 233 Cal. App. 4th at 20 (holding that purposeful direction requires "evidence of express aiming or intentional targeting" and "the defendant's knowledge that [its] intentional conduct would cause harm in the forum").

1. First Advantage did not engage in conduct in California relating to Plaintiff's claim or direct its conduct relating to Plaintiffs claim to California.

First Advantage did not engage in any conduct in California related to Plaintiffs claim and did not direct its conduct related to Plaintiffs claim to California. Plaintiffs claim is that First Advantage made his report available to Frito-Lay without first having it certify that Plaintiff had authorized the report by signing the Background Check Authorization after Frito-Lay disclosed that it would obtain his report for employment purposes. (Compl. ¶ 11 20-23.) First Advantage made the report available on its servers in Indiana for Frito-Lay to access. (O'Connor Decl. ¶¶ 10-12.) That conduct occurred wholly outside of California. (*Id.* ¶¶ 11-14.) The conduct was not expressly aimed

at California, and it did not harm Plaintiff in California. Also, Frito-Lay's background screening team is in Texas. (RJN Ex. D, Hauck Decl. in 4-6.) Nothing ties Plaintiffs claim to California other than his mere presence in the state. Thus, Plaintiff cannot show that First Advantage purposefully availed itself of the privilege of conducting activities in California or purposefully directed its conduct underlying Plaintiffs claim at California. *See Pavlovich,* 29 Cal. 4th at 269; *see also Schwarzenegger,* 374 F.3d at 802.

2. Courts routinely hold that specific jurisdiction is lacking for FCRA claims when the consumer's residence is the only connection to the forum.

Further, courts have repeatedly held that "the situs of the material events [for FCRA claims] . . . is generally the place where the defendant credit reporting agency conducted its business." *Smith v. HireRight Sols., Inc.* (E.D. Pa. June 7, 2010) No. CIV.A. 09-6007, 2010 WL 2270541, at *4 (transferring FCRA case from state of plaintiffs residence to state of defendant's principal place of business); *see also Mullins v. Equifax Info. Servs., LLC* (E.D. Va. Apr. 28, 2006) No. Civ.A. 3:05CV888 2006 WL 1214024, at *2 (same). For this reason, courts routinely hold that personal jurisdiction does not exist over a FCRA defendant that conducted its activities outside the forum state.

For example, in *Zellerino v. Roosen,* a Michigan resident sued California defendants in Michigan, alleging that they had accessed the plaintiffs

report without a permissible purpose. (E.D. Mich. 2015) 118 F. Supp. 3d 946, 948. The court held that it did not have personal jurisdiction over defendants because their conduct of accessing the plaintiffs credit report in California "cannot furnish a basis for them to be sued in a Michigan court, even though the plaintiff felt the impact of that privacy breach in Michigan." *Id.* at 952. Likewise, in *Gillison v. Lead Express, Inc.,* the plaintiffs, who lived in the forum state, asserted that the court had specific jurisdiction because the defendants "obtained consumer reports on Virginia consumers." (E.D. Va. Mar. 30, 2017) No. 3:16-cv-41, 2017 WL 1197821, at *11. The court rejected that argument and held that "[o]btaining information on Virginia consumers from a third-party without any direct interaction with those Virginia consumers does not establish purposeful availment." *Id.* In *Coe v. Capital One, N.A.,* the court explained that finding jurisdiction merely because a non-resident defendant obtained a consumer report on a forum resident would "'improperly attribute[] a plaintiff's forum connection to the defendant and make[] those connections "decisive" in the jurisdictional analysis.' (D. Md. May 5, 2016) No. GJH-15-1121, 2016 WL 2621950, at *3 (quoting *Walden,* 134 S. Ct. at 1125). Similarly, First Advantage's act of making Plaintiffs information available outside of California to a third party does not provide a basis for personal jurisdiction.

3. Plaintiff is the only link to California.

"[T]he plaintiff cannot be the only link between the defendant and the forum." *Walden,* 134 S. Ct. at 1122. And personal jurisdiction does not exist merely because a defendant "knew or should have known that his intentional acts would cause harm in the forum state." *Pavlovich,* 29 Cal. 4th at 270. In *Walden,* Nevada plaintiffs sued a Georgia defendant in Nevada for conducting an allegedly unlawful search in Georgia. *Id.* at 1119. The plaintiffs alleged that the defendant knew that they were residents of Nevada and that it was foreseeable that the harm from the unlawful search would be felt in Nevada. *Id.* at 1122-25. The Supreme Court disagreed, finding that focusing on the defendant's knowledge of the plaintiffs' residence "improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis." *Id.* at 1124.

As in *Walden,* the only fact that connects this suit to the forum state is Plaintiff's status as a resident of the forum. The facts underlying Plaintiffs claim occurred outside of California and did not involve any interaction between Plaintiff and First Advantage. Therefore, like the plaintiff in *Walden,* Plaintiff cannot establish specific jurisdiction.

IV. CONCLUSION

First Advantage is not incorporated or headquartered in California, and Plaintiffs claim is not based on First Advantage's connections to

California. Accordingly, this Court lacks personal jurisdiction over First Advantage, and therefore, service of summons should be quashed and the Complaint should be dismissed.

DATE: October 18, 2017

Respectfully submitted,

SEYFARTH SHAW LLP

By: /s/ Frederick T. Smith
Frederick T. Smith
Esther Slater McDonald*
Eric M. Lloyd

Attorneys for Defendant

FIRST ADVANTAGE BACKGROUND SERVICES CORP.

**to be admitted pro hac vice*

EXHIBIT A

SUPERIOR COURT FOR
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

Case No. CGC-17-560531

MARCUS CHISM, on behalf of himself and all others similarly situated,

Plaintiff,

v.

FIRST ADVANTAGE BACKGROUND SERVICES CORP., a Florida Corporation and DOES 1 through 100, inclusive,

Defendants.

DECLARATION OF MATTHEW O'CONNOR

I, MATTHEW O'CONNOR, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

1. I am a resident of South Carolina, over eighteen years of age, and I am competent to testify as to all statements contained herein, which I am making by my own free will.

2. The statements made herein are based on: (i) my own personal knowledge gained through years of experience working at First Advantage Background Services Corp.; and (ii) my knowledge and review of the business records of First

Advantage. I have personal knowledge of the record-keeping systems relevant to First Advantage's business records as well as the creation and maintenance of the records.

3. At First Advantage, I am employed as a Vice President - Operations. I have been in this position for approximately four years. As Vice President - Operations, I am responsible for all aspects of Consumer Affairs.

4. Throughout my career, I have been closely involved in nearly all aspects of the processes and procedures of First Advantage for handling employment background checks. I am familiar with, and have personal knowledge of, the practices and procedures at First Advantage regarding, among other things, the process of conducting background checks and access to and receipt of those background reports.

5. As Vice President - Operations, I have access to information about First Advantage': customers, the background reports prepared for those customers, and the policies and processes by which the background reports are ordered, processed, and made available to the customers.

6. I am authorized to submit this Declaration in support of First Advantage's Motion tc Quash for Lack of Personal Jurisdiction in the above-captioned lawsuit, and I have personal knowledge and am competent to testify as to all matters contained herein.

7. I have read the Class Action Complaint in *Chism v. First Advantage Background Services Corp.* (San Francisco Sup. Ct. August 2, 2017) Dkt. No. 1, Civil Docket No. CGC-17-560531.

8. First Advantage is incorporated in Florida, and its headquarters are in Atlanta, Georgia.

9. First Advantage is a background screening company, and, among other things, First Advantage prepares background reports on individuals applying for employment with Frito-Lay, Inc.

10. First Advantage uses a platform called Enterprise Advantage to process reports for Frito-Lay.

11. First Advantage hosts completed reports, including Mr. Chism's' background report, on its secure, non-public servers in Indiana and makes the reports available for Frito-Lay to access.

12. After completing Mr. Chism's report, First Advantage made it available on its servers in Indiana for Frito-Lay to access.

13. First Advantage did not prepare Mr. Chism's background report in the State of California.

14. First Advantage did not mail or email Mr. Chism's completed background report to Frito-Lay's facility in Rancho Cucamonga, California.

15. First Advantage did not provide Mr. Chism's background report to PepsiCo, Inc.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th day of October, 2017.

/s/ Matthew O'Connor
MATTHEW O'CONNOR