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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

En Banc

[Filed: Sept. 13, 2017]

S242928

THE HERTZ CORPORATION *et al.*,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent;

PETER LEE *et al.*,

Real Parties in Interest.

Court of Appeal,
First Appellate District,
Division Five - No. A151433

The petition for review is denied.

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

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APPENDIX B

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

[Filed: June 22, 2017]

A151433

San Francisco No. CGC15547520

THE HERTZ CORPORATION *et al.*,

Petitioners,

v.

SUPERIOR COURT FOR THE CITY AND
COUNTY OF SAN FRANCISCO,

Respondent;

PETER LEE *et al.*,

Real Parties in Interest.

BY THE COURT:*

The petition for writ of mandate is denied.

Date JUN 22 2017

/s/ [Illegible], P.J.

* Before Jones, P.J., Needham, J. and Bruiniers, J.

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APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 305

[Filed: April 5, 2017]

Case No. CGC-15-547520

PETER LEE and LATONYA CAMPBELL, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

THE HERTZ CORPORATION, *et al.*

Defendants.

**ORDER OVERRULING DEFENDANTS'
DEMURRER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Defendants The Hertz Corporation and Dollar Thrifty Automotive Group (collectively “Hertz” or “Defendants”) demur to Plaintiffs Peter Lee and Latonya Campbell’s (collectively “Plaintiffs”) Second Amended Complaint (“SAC”) filed on February 16, 2017 pursuant to Code of Civil Procedure sections 430.30, subd. (a) and 430.10, subd. (e). The motion came on for hearing on March 27, 2017, and appearances are as noted in the record. Having considered the materials submitted in support and opposition and the oral argument of counsel, the Court overrules Hertz’s demurrer to the SAC in its entirety.

I. REQUESTS FOR JUDICIAL NOTICE

Pursuant to California Evidence Code section 452, subdivisions (d) and (h), the Court takes judicial notice of the existence of Exhibits A through D of Defendants' Request for Judicial Notice, but not the truth of the matters asserted therein.

II. SECOND AMENDED COMPLAINT

On February 16, 2017, Plaintiffs filed a SAC on behalf of themselves and similarly situated persons against Hertz, alleging Hertz violated two statutory requirements under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq.

Plaintiffs' first cause of action alleges Hertz took adverse employment actions against Plaintiffs based in whole or in part on the information contained in their consumer reports. SAC ¶¶ 127-31. Plaintiffs allege Hertz failed to provide Plaintiffs with a copy of their consumer report and a reasonable amount of time to respond, and a summary of their rights to contest the accuracy of the report prior to taking adverse employment actions pursuant to the FCRA, 15 U.S.C. sections 1681b(b)(3)(A)(i) and (ii). *Id.* As a result, Plaintiffs allege they have been deprived of their consumer rights and prevented from timely and effectively contesting the adverse action. *Id.* ¶ 132. Plaintiffs allege the violations are willful because Hertz acted in deliberate or reckless disregard of Plaintiffs' rights under the FCRA, 15 U.S.C. section 1681b(b)(3)(A), and therefore, Plaintiffs allege they are entitled to statutory damages, punitive damages, attorneys' fees and costs pursuant to 15 U.S.C. sections 1681n(a)(1)(A), 1681n(a)(2), and 1681n(a)(3). *Id.* ¶¶ 133-36.

Plaintiffs' second cause of action alleges Hertz failed to provide Plaintiffs with clear and conspicuous notice in writing, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes pursuant to the "stand-alone requirement" of the FCRA, 15 U.S.C. section 1681b(b)(2)(A)(i). *Id.* ¶ 138. As a result, Plaintiffs allege they have been deprived of their privacy rights and prevented from making informed decisions about whether to permit Hertz to procure their personal information. *Id.* ¶ 139. Plaintiffs allege Hertz's violations were willful because Hertz acted in deliberate or reckless disregard of their obligations and the rights of Plaintiffs, and therefore, Plaintiffs allege they are entitled to statutory damages, punitive damages, costs and attorneys' fees pursuant to 15 U.S.C. sections 1681n(a)(1)(A), 1681n(a)(2), and 1681n(a)(3). *Id.* ¶¶ 140-42.

Defendants demur to both causes of action asserted in Plaintiffs' SAC on the ground that Plaintiffs failed to allege injury in fact as a result of Defendants' alleged violations.

III. LEGAL STANDARD

A demurrer lies where "the court has no jurisdiction of the subject of the causes of action alleged in the pleading" or where "the pleading does not state facts sufficient to constitute a cause of action." Code Civ. Proc. § 430.10(a) and (e). In general, "material facts alleged in the complaint are treated as true for the purpose of ruling on the demurrer." *C&H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal. App. 3d 1055, 1062. In addition, a court must construe the allegations of a complaint liberally with a view to substantial justice between the parties. Code Civ. Proc. § 452; *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186

Cal. App. 4th 1298, 1324. In ruling on a demurrer, a court may consider facts of which it has taken judicial notice, including the existence of a document. Code Civ. Proc. § 430.30.

If a plaintiff lacks standing to sue, the complaint can be challenged by general demurrer for failure to state a cause of action. *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1009.

IV. ANALYSIS

Hertz demurs to Plaintiffs' SAC on the grounds that (1) Plaintiffs lack standing because they fail to allege facts showing injury in fact as a result of Hertz's alleged noncompliance with the FCRA's procedural requirements; (2) under the doctrine of constitutional avoidance, Plaintiffs fail to state a cause of action because the FCRA cannot be construed to permit actions for statutory damages absent actual injury; and (3) Plaintiffs fail to state a cause of action because their claims do not fall within the zone of interests protected by the FCRA. For the reasons set forth below, the Court overrules Hertz's demurrer to Plaintiffs' SAC.

A. Overview of the FCRA

Congress enacted the Fair Credit Reporting Act (FCRA or Act) FCRA in 1970 and further amended it in 1996 to ensure "fair and accurate credit reporting." § 1681(a)(1). The FCRA regulates the creation and use of consumer reports by consumer agencies for specified purposes, including employment purposes. See § 1681a(d)(1)(B); § 1681b. As relevant to the instant case, the FCRA requires an employer to provide a job applicant a copy of his or her report and a summary of his or her rights, prior to taking any adverse action

based on the information provided in the consumer report. 15 U.S.C. section 1681b(b)(3)(A), provides:

(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.

§ 1681b(b)(3)(A). The FCRA also requires a clear and conspicuous disclosure in writing to the job applicant prior to procuring the consumer report. 15 U.S.C. section 1681b(b)(2)(A), provides, in relevant part:

[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.

§ 1681b(b)(2)(A).

The FCRA provides a private right of action in any United States district court, or any court of competent jurisdiction against employers who fail to comply with the provisions regarding use of consumer reports. § 1681p. The Act provides for actual damages for negligent failure to comply with the Act. § 1681o. An employer who willfully fails to comply with the requirements imposed by the FCRA is liable for actual damages or statutory damages of not less than \$100 and not more than \$1,000, punitive damages, and attorneys' fees as determined by the court. § 1681n. In the instant case, Plaintiffs seek statutory damages, punitive damages, and attorney fees and costs for Defendants' willful failure to comply with the Act. SAC ¶¶ 134-136, 141-142.

B. Plaintiffs Have Standing to Bring Claims Based Upon the FCRA

Defendants argue that Plaintiffs must allege injury in fact in order to have standing to assert their claims in this court. As discussed below, the Court concludes that there is no basis upon which to impose an injury in fact requirement in order to have standing to bring the claims asserted in this case.

In California, a plaintiff has standing if he is able to allege injury, i.e., an invasion of his legally protected interests. *Surrey v. TrueBeginnings* (2008) 168 Cal.App.4th 414, 417. Moreover, it is well-settled that the prerequisites for standing to assert statutorily-based causes of action are determined from the

statutory language, as well as the underlying legislative intent and the purpose of the statute. See *Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 466 (citation omitted).

Guided by these rules, the Court concludes that Plaintiffs in this case have standing to bring claims based upon the FCRA. First, the FCRA provides Plaintiffs with a private right of action either in the federal courts, “or any court of competent jurisdiction.” Second, the underlying legislative intent and the purpose of the FCRA weigh strongly in favor of finding that Plaintiffs have sufficiently alleged their standing to bring the instant case. The legislative intent and purpose of the FCRA was described in *Syed v. M-I LLC* (9th Cir. 2017) 846 E.3d 1034, as modified Mar. 20, 2017 WL 1050586 as follows:

Congress amended the FCRA in 1996. Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208, § 2403, 110 Stat. 3009-426, 3009-431. It recognized “the significant amount of inaccurate information that was being reported by consumer reporting agencies and the difficulties that consumers faced getting such errors corrected.” S. Rep. No. 108-166 at 5-6 (2003) (describing 1996 amendments). Congress was specifically concerned that prospective employers were obtaining and using consumer reports in a manner that violated job applicants’ privacy rights. S. Rep. No. 104-185 at 35 (1995). The disclosure and authorization provision codified at 15 U.S.C. § 1681b(b)(2)(A) was intended to address this concern by requiring the prospective employer to disclose that it may obtain the applicant’s consumer report for employment purposes

and providing the means by which the prospective employee might prevent the prospective employer from doing so—withholding of authorization. S. Rep. No. 104-185 at 35. This provision furthers Congress’s overarching purposes of ensuring accurate credit reporting, promoting efficient error correction, and protecting privacy. *See Safeco*, 551 U.S. at 52. Indeed, in addition to securing job applicants’ privacy rights by enabling them to withhold authorization to obtain their consumer reports, the provision promotes error correction by providing applicants with an opportunity to warn a prospective employer of errors in the report before the employer decides against hiring the applicant on the basis of information contained in the report. *Syed* at p. *2

Thus, the legislative intent and purpose of the FCRA is to protect job applicants’ privacy rights and to require the prospective employer to make specific and particularized disclosures in order to protect those privacy rights. The FCRA requires detailed adherence to the notice requirements when procuring a consumer report or background check. The Court is of the view that Hertz’s alleged failure to comply with these requirements constitutes an invasion of Plaintiffs’ privacy rights conferred by the FCRA. Accordingly, Plaintiffs have sufficiently alleged their standing to bring the claims asserted in this case.

C. California Does Not Require Injury In Fact In Order to Have Standing to Sue

For the proposition that “injury in fact” is an additional requirement in order to have standing in California, Defendants rely upon a number of federal

and California state court decisions, none of which are binding on this Court. The federal court decisions cited by Defendants, including the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, and the Ninth Circuit's recent ruling in *Syed v. M-I LLC* (9th Cir. 2017) 846 F.3d 1034, addressed the injury in fact requirement in the context of Article III standing. This Court, however, is not bound by the limitations of Article III standing on federal courts, and none of the cases cited by Defendants indicate otherwise. See *Reycraft v. Lee* (2009) 177 Cal. App. 4th 1211, 1217; *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal. App. 4th 980, 990.

In addition, none of the California cases cited by Defendants support a finding that California courts require a showing of injury akin to the federal "injury in fact" requirement in order to have standing. For instance, in *Boorstein*, the court held that a plaintiff must have suffered a "statutory injury" in order to have standing to bring a claim under Civil Code section 1798.83 because the plain language of the statute itself required a showing of injury. *Boorstein, supra*, 222 Cal.App.4th at 467. In contrast, the statutes at issue in this case do not expressly require a showing of injury. In *Cornelius v. Los Angeles County etc. Authority*, the court held that plaintiff lacked standing to challenge the constitutionality of federal regulations because he failed to establish an "actual or imminent injury." (1996) 49 Cal.App.4th 1761, 1770. However, nothing in *Cornelius* indicates that as a *general* matter, "injury in fact" is required to have standing to sue in California courts. Finally, in *Starbucks Corp. v. Superior Court*, the court held that plaintiffs cannot recover statutory damages for violation of a California statute prohibiting an

employer from asking job applicants about marijuana convictions because they had no marijuana convictions to disclose, and therefore could not have been aggrieved. (2008) 168 Cal.App.4th 1436, 1451. Nothing in *Starbucks*, however, indicates that “injury in fact” is a general requirement to have standing in California, or a general requirement for entitlement to statutory damages. Indeed, the court in *Starbucks* relied upon the language of the statute at issue in that case as the basis for its ruling. *Id.* at 1449. Absent any binding authority to support Hertz’s position, this Court will not impose an injury in fact requirement for purposes of determining standing to bring FCRA claims in California.

D. Plaintiffs Sufficiently Stated Causes of Action Under the FCRA

Relying on the “constitutional avoidance” theory, Defendants further argue that the FCRA must be construed to require a showing of actual injury since injury in fact is a “hard floor of Article III jurisdiction” that Congress cannot eliminate by statute. Mtn. at p. 12. As discussed above, however, this Court is not bound by Article III’s requirement of injury in fact, and therefore the “constitutional avoidance” theory has no application in this case. Moreover, the Court finds that none of the cases cited by Defendants support a finding that actual injury is required to state a cause of action under the FCRA. Absent any binding authority in support of Defendants’ position, this Court will not create an actual injury requirement to state a cause of action under the FCRA.

In light of the clear statutory language, legislative history, and case law, the Court finds that Plaintiffs have sufficiently alleged their First and Second Causes of Action. Plaintiffs have sufficiently alleged

Defendants' willful violation of the statute, i.e. failure to provide Plaintiffs with a summary of their rights under the FCRA prior to taking these adverse employment actions and failure to provide Plaintiffs with a clear and conspicuous notice in writing, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes. Plaintiffs have also sufficiently alleged an injury as a result of Defendants' alleged violations, i.e. revocation of their job offers without having been given a copy of their background report and a summary of their consumer rights under the statute, or a disclosure notice in the format required by the statute. Based on the plain language of the FCRA, no more is required to state a cause of action.

D. Plaintiffs are Within the Zone of Interest
Protected by the FCRA

Finally, Defendants argue that Plaintiffs' claims fail because they do not fall within the "zone of interests" protected by the FCRA. Even if the Court finds that the "zone of interests" doctrine is applicable here, the Court finds, for the reasons stated below, that Plaintiffs' claims fall within the zone of interests protected by the FCRA.

Both parties contend *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436 supports their position. In that case, plaintiffs, on behalf of a class, sought to recover statutory damages for violation of a California statute prohibiting an employer from asking job applicants about marijuana convictions within the last two years. The trial court found the plaintiffs had standing and denied summary judgment. The Court of Appeal reversed summary judgment finding that the plaintiffs were not misled by the application, that the statute did not apply to them

personally, and that they were not aggrieved. The Court observed “[w]e see nothing in the statute to support plaintiffs’ claim that the Legislature intended to protect the privacy interests of job applicants who had no marijuana convictions in their background. *Id.* at 1449.

In contrast, here, Congress was specifically interested in protecting the privacy of job applicants by establishing detailed requirements applicable to background checks. Even if Congress intended the FCRA to protect only those with a prior record, Plaintiffs in this case fall within that category. See SAC ¶¶ 51,73.

V. CONCLUSION

As discussed above, Plaintiffs have standing to bring the claims asserted in this case, Plaintiffs have sufficiently stated their causes of action, and Plaintiffs are within the zone of interests protected by the FCRA. Accordingly, Hertz’s demurrer to Plaintiffs’ Second Amended Complaint is overruled in its entirety. Defendants have 30 days to file answers.

IT IS SO ORDERED.

Dated: April 5, 2017

/s/ Mary E. Wiss
Mary E. Wiss
Judge of the Superior Court

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APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Case Number: CGC-15-547520

PETER LEE and LATONYA CAMPBELL, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

THE HERTZ CORPORATION, *et al.*

Defendants.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, T. Michael Yuen, Clerk of the Superior Court of
the County of San Francisco, certify that I am not a
party to the within action.

On April 5, 2017, I electronically served the ORDER
OVERRULING DEFENDANTS' DEMURRER TO
PLAINTIFFS' SECOND AMENDED COMPLAINT
via File&ServeXpress® on the recipients designated
on the Transaction Receipt located on the
File&ServeXpress® website.

Dated: April 5, 2017

T. Michael Yuen, Clerk

By: /s/ Sean Kane
Sean Kane, Deputy Clerk

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APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION
COMPLEX DIVISION

Case No. CGC-15-547520

PETER LEE and LATONYA CAMPBELL, on behalf of
themselves and all others similarly situated,
Plaintiffs,

vs.

THE HERTZ CORPORATION, DOLLAR THRIFTY
AUTOMOTIVE GROUP, INC.; and DOES 1-20, inclusive,
Defendants.

Judge: Hon. Mary E. Wiss
Location: Dept. 305

CORRECTED SECOND AMENDED COMPLAINT
FOR VIOLATIONS OF THE FCRA
CLASS ACTION
DEMAND FOR JURY TRIAL

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Attorneys for Plaintiffs and proposed Class Members

Plaintiffs Peter Lee and Latonya Campbell ("Plaintiffs"), individually and on behalf of themselves and all others similarly situated, allege, upon personal knowledge as to themselves and upon information and belief as to other matters, as follows:

INTRODUCTION

1. Plaintiffs Peter Lee (“Mr. Lee”) and Latonya Campbell (“Ms. Campbell”) (collectively, “Plaintiffs”) bring this case as a class action pursuant to the federal Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 *et seq.* against the Hertz Corporation and its subsidiary, Dollar Thrifty Automotive Group, Inc. (collectively, “Hertz” or “Defendants”).

2. Hertz routinely rejects job applicants, including Mr. Lee and Ms. Campbell, based on information contained in background check reports (“consumer reports”) that it obtains from background check companies called “consumer reporting agencies” or “CRAs,” such as Sterling Infosystems, Inc., d/b/a SterlingBackcheck (“Sterling”), one of the largest consumer reporting agencies in the United States.

3. In doing so, Hertz fails to strictly comply with federal law governing the procurement and use of consumer reports for employment purposes.

4. Specifically, Hertz systematically violates 15 U.S.C. § 1681b(b)(3)(A)(i) and (ii) by using consumer reports to make adverse employment decisions without first providing the job applicant who is the subject of the report with sufficient and timely notification of its intent to take an adverse action, a copy of the report, and a summary of the job applicant’s rights under the FCRA.

5. Before procuring consumer reports from Sterling and/or other CRAs, Hertz also fails to inform job applicants in a clear and conspicuous disclosure in writing, in a document that consists *solely* of the disclosure, that it may procure a consumer report for employment purposes. Instead, in Hertz’s online job application, a blank copy of which is attached hereto as Exhibit 1,

the only mention Hertz makes of the fact that a consumer report will be procured for employment purposes is in a series of paragraphs which appear on the same web page as numerous other pieces of extraneous information, including a purported liability release, various disclosures about who Hertz may share information with, a purported authorization for third parties to provide information to a consumer reporting agency, and numerous multi-paragraph purported “state law notices” relating to a variety of state laws, including everything from notices about state laws protecting people with criminal backgrounds against employment discrimination to lie detector tests. Because the statement about background checks is contained in a multi-page job application which contains numerous pieces of extraneous information, it does not constitute the stand-alone disclosure required by the FCRA in violation of 15 U.S.C. § 1681b(b)(2)(A)(i).

6. Defendants have violated the above-mentioned provisions of the FCRA willfully and pursuant to their companywide policies and procedures.

7. On behalf of themselves and others similarly situated, Plaintiffs seek statutory damages; punitive damages; pre-judgment and post-judgment interest; and reasonable attorneys’ fees, costs, and expenses associated with this action.

JURISDICTION AND VENUE

8. This Court has jurisdiction over Plaintiffs’ FCRA claims pursuant to 15 U.S.C. § 1681p and the California Constitution, Article VI, § 10.

9. This Court has personal jurisdiction over this matter because Defendants conduct substantial business

activity in California and engaged in the unlawful acts described herein in this state.

10. Venue is proper in this county under California Code of Civil Procedure § 395.5 because a substantial part of the events and omissions giving rise to the claims alleged herein occurred in this county.

PARTIES

Plaintiffs

Peter Lee

11. Plaintiff Peter Lee is an African-American man who lives in Richmond, California.

12. In May 2014, while employed in a similar position with a competing company, Mr. Lee applied and interviewed for the position of counter sales representative with Hertz's Dollar/Thrifty-branched rental car location at the San Francisco International Airport. *Latonya Campbell*

13. Plaintiff Latonya Campbell is an African-American woman who lives in San Francisco, California.

14. In late April 2014 and early May 2014, Ms. Campbell applied and interviewed for a counter sales position with Hertz's Thrifty-branded rental car location on O'Farrell Street in San Francisco, California.

15. Mr. Lee, Ms. Campbell, and other Hertz job applicants are "consumers" as defined by the FCRA, 15 U.S.C. § 1681a(c).

Defendants

Hertz Corporation

16. Hertz Corporation operates the Hertz, Dollar, Thrifty, and Firefly car rental brands in more than

11,000 corporate and licensee locations in approximately 140 countries.

17. Hertz Corporation is the largest worldwide airport general use car rental company with more than 1,700 airport locations in the United States.

18. Hertz Corporation is registered as a Delaware corporation and maintains its headquarters at 999 Vanderbilt Beach Road in Naples, Florida.

19. Hertz Corporation owns and operates the relevant Dollar/Thrifty-branded car rental offices located on O'Farrell Street in San Francisco, California, and at the San Francisco International Airport, 780 McDonnell Road, San Francisco, California, through its wholly-owned subsidiary, Dollar Thrifty Automotive Group, Inc.

20. At all relevant times, Hertz Corporation has been a "person" using "consumer reports" of Mr. Lee, Ms. Campbell, and similarly situated job applicants for "employment purposes," and has taken "adverse action" against Plaintiffs and similarly situated job applicants, as defined under 15 U.S.C. § 1681a. These adverse actions were based wholly or in part on those consumer reports.

Dollar Thrifty Automotive Group

21. Dollar Thrifty Automotive Group, Inc. is wholly owned and operated by the Hertz Corporation.

22. There are approximately 340 Dollar and Thrifty corporate locations in the United States and Canada.

23. Dollar Thrifty Automotive Group, Inc. is a Delaware corporation and maintains its headquarters at 5330 E. 31st Street, Tulsa, Oklahoma.

24. At all relevant times, Dollar Thrifty Automotive Group, Inc. has been a “person” using “consumer reports” of Mr. Lee, Ms. Campbell, and similarly situated applicants for “employment purposes,” and has taken “adverse action” against Plaintiffs and similarly situated applicants, as defined under 15 U.S.C. § 1681a. These adverse actions have been based wholly or in part on those consumer reports.

STATEMENT OF FACTS

Background Information

25. Hertz conducts background checks on job applicants as part of its standard employment screening process.

26. Hertz does not perform these background checks in-house. Rather, Hertz relies on outside consumer reporting agencies to obtain this information and report it to Hertz.

Hertz uses Sterling as its “consumer reporting agency,” and pays Sterling money to receive background reports on prospective employees.

27. Sterling is among the largest employment background screening companies in the United States, i.e., those that provide “consumer reports,” as defined by 15 U.S.C. § 1681a(d)(1)(B), to employers.

28. As of 2013, Sterling conducted a reported 16 million background searches every year for employers.

29. In order to provide these consumer reports, Sterling investigates and reviews public record databases and assembles and/or maintains consumer files that contain public record information concerning, among other things, the alleged criminal record history of individuals. Sterling then sells this information to employers, including Hertz.

Plaintiff Lee's Experience

30. In May 2014 Hertz personnel recruited Mr. Lee to interview for a counter sales representative position with Hertz at its Dollar/Thrifty-branded car rental location at the San Francisco International Airport.

31. At the time Hertz recruited him for a position with the company, Mr. Lee worked for a competitor car rental company in a similar position.

32. Mr. Lee interviewed for the position with Hertz sometime in the first half of May 2014. At the close of the interview, Mr. Lee was given an offer of employment, pending the processing of his application materials.

33. To begin this process, a Hertz representative instructed Mr. Lee to complete an online application by following a link sent to him via email.

34. Mr. Lee completed the online application as instructed.

35. The online application contained a section disclosing Hertz's intention to run a criminal background check, which was part of the overall job application, rather than in a separate document, in writing, consisting solely of the disclosure.

36. Numerous pieces of extraneous information, including a statement purporting to release from liability Hertz and other entities involved in the background check process, appeared with the disclosure in the online application. Thus, the disclosure was not made "in a document that consists *solely* of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added).

37. The online application also did not require Mr. Lee's authorization, in writing, of the procurement of a consumer report.

38. On May 15, 2014, Mr. Lee received an email from Kimberly Kowallis ("Ms. Kowallis"), a field recruiter for Hertz, confirming his conditional offer of employment.

39. On May 27, 2014, after Mr. Lee had passed Hertz's mandatory drug screening, he received an email from Ms. Kowallis with a link to an addendum to the Hertz application specific to California and Hawaii. The email requested that Mr. Lee complete the online application addendum.

40. Mr. Lee completed the online application addendum as instructed.

41. The online application addendum also did not contain a disclosure "in a document that consists *solely* of the disclosure." 15 U.S.C. §1681b(b)(2)(A)(i) (emphasis added).

42. The online application addendum did not require Mr. Lee's authorization, in writing, of the procurement of a consumer report.

43. Also on May 27, 2014, Mr. Lee received an email from Ms. Kowallis with the subject line "Hertz Orientation Package." This email provided information about Mr. Lee's onboarding with Hertz.

44. Ms. Kowallis subsequently scheduled Mr. Lee to begin working for Hertz on June 9, 2014. After receiving confirmation of his start date with Hertz, Mr. Lee provided a notice of resignation, effective June 9, 2014, to his then-current employer.

45. At some point during the processing of Mr. Lee's application, Hertz obtained one or more consumer

reports from Sterling containing information about Mr. Lee's background, including information about pending criminal charges against Mr. Lee for which he had not been convicted.

46. Hertz did not provide Mr. Lee with a clear and conspicuous disclosure in the form of a written document that consisted *solely* of the disclosure, that it may obtain a consumer report for employment purposes, before it caused the procurement of a consumer report on Mr. Lee, as required by 15 U.S.C. § 1681b(b)(2)(A)(i).

47. On June 3, 2014, Mr. Lee received a call from Ms. Kowallis informing him that Hertz would not hire him because of the criminal history information contained in his background check. Ms. Kowallis told Mr. Lee that she could not do anything about his rejection because the decision was based on "Hertz policy."

48. Mr. Lee asked Ms. Kowallis for a copy of the background check information that Hertz had obtained and was instructed to contact Sterling.

49. Later that same day, Mr. Lee received an email from Ms. Kowallis confirming that Hertz had, indeed, rescinded his job offer because he did not meet the company's "background qualifications."

50. As a result of the criminal history information contained in the consumer report it procured from Sterling, Hertz stopped the onboarding process, and did not move forward with the job that it had offered Mr. Lee.

51. After Ms. Kowallis informed Mr. Lee that he would not be hired because of criminal history information contained in his background check on

June 3, 2014, Mr. Lee contacted Sterling by phone and requested a copy of the consumer report that Sterling provided to Hertz in connection with Mr. Lee's application for employment.

52. In response to Mr. Lee's request, sometime on or after June 3, 2014, Sterling sent Mr. Lee by regular mail a copy of a consumer report prepared by Sterling (the "June 3rd Package"). Mr. Lee did not receive a copy the June 3rd Package until sometime after June 3, 2014.

53. Sometime on or after June 4, 2014, Sterling sent to Mr. Lee by regular mail an undated letter, inaccurately entitled "Pre-Adverse Action Notice," which bore the Hertz corporate logo (the "June 4th Letter"). Enclosed with the June 4th Letter was a copy of a consumer report prepared by Sterling dated June 4, 2014.

54. Mr. Lee did not receive the June 4th Letter until sometime after June 4, 2014.

55. The June 4th Letter informed Mr. Lee that, based on a "Criminal Report" provided by Sterling, Hertz was considering revoking Mr. Lee's conditional offer of employment, subject to Mr. Lee successfully challenging the criminal report information.

56. At the time that Sterling mailed Mr. Lee the June 3rd Package and the June 4th Letter (as well as at the time Mr. Lee received them), however, Hertz had already revoked Mr. Lee's conditional offer of employment based upon information contained in Mr. Lee's consumer report, provided to Hertz by Sterling.

57. Mr. Lee was denied the opportunity the FCRA guaranteed to him, namely to review his report and a summary of rights prior to adverse action being taken

against him. He was supposed to have a reasonable period of time after being provided with the report and a summary of rights to explain the circumstances regarding the criminal charges and their lack of relevance to his job application, and Hertz's illegal conduct denied him that opportunity.

58. Mr. Lee's criminal history was not relevant to the counter sale representative position for which he applied for reasons including the circumstances of his arrest, the nature of the crimes charged, and the fact that he had not been convicted of any crime.

Plaintiff Campbell's Experience

59. Sometime in the last week of April 2014, Ms. Campbell went in person to apply for a counter sales position at the Dollar/Thrifty-branded car rental location owned by Hertz on O'Farrell Street in San Francisco ("the O'Farrell Street location").

60. Ms. Campbell spoke with a woman named Rosanna from Human Resources who told Ms. Campbell to fill out the Hertz online application.

61. On or about April 30, 2014, Ms. Campbell completed an online application, which contained a section disclosing Hertz's intention to run a criminal background check, which was part of the overall job application, rather than in a separate document consisting solely of the disclosure.

62. Numerous pieces of extraneous information, including a statement purporting to release from liability Hertz and other entities involved in the background check process, appeared with the disclosure in the online application. Thus, the disclosure was not made "in a document that consists *solely* of the

disclosure.” 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added).

63. Also, the online application did not require Ms. Campbell’s authorization, in writing, of the procurement of a consumer report.

64. During the week of May 5, 2014, Ms. Campbell interviewed at the O’Farrell Street location with a gentleman who was a regional manager.

65. After a week passed since her interview without word from Hertz, Ms. Campbell applied for and interviewed with another company.

66. On or about May 19, 2014, Ms. Kowallis called Ms. Campbell and made a conditional offer of employment as an Instant Return Representative at the O’Farrell Street location. That same day, Ms. Kowallis sent Ms. Campbell an email confirming the offer, which was conditioned on the completion of a pre-employment drug test and criminal background check.

67. Around the same time that she received Hertz’s conditional offer of employment, Ms. Campbell was offered a second interview with the other company, but she declined because she preferred the job with Hertz.

68. Shortly thereafter, Ms. Campbell successfully completed the drug test and filled out online forms sent by Sterling requesting information about her previous employment history.

69. The online forms did not contain a clear and conspicuous disclosure, “in a document that consists *solely* of the disclosure,” that a consumer report would be obtained. 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added).

70. At some point during the processing of Ms. Campbell's employment application, Hertz obtained from Sterling one or more consumer reports on Ms. Campbell that contained information regarding a misdemeanor offense related to domestic violence for which Ms. Campbell was sentenced to probation for three years.

71. Hertz did not provide Ms. Campbell with a clear and conspicuous disclosure in the form of a written document that consisted *solely* of the disclosure, that it may obtain a consumer report for employment purposes, before it caused the procurement of a consumer report on Ms. Campbell, as required by 15 U.S.C. § 1681b(b)(2)(A)(i).

72. On or about June 2, 2014, Ms. Kowallis called and asked Ms. Campbell to start work at the O'Farrell Street location on June 9, 2014. Later that day, Ms. Campbell received an email from Ms. Kowallis with a "1st day paperwork" appointment reminder for June 9, 2014.

73. Sometime before June 4, 2014, Ms. Kowallis called and told Ms. Campbell that the legal department had been made aware of Ms. Campbell's misdemeanor conviction and stated that Hertz does not hire people with criminal convictions involving violence. Ms. Kowallis did not refer to any policy or practice with respect to hiring people who are on probation.

74. Ms. Campbell responded that she had been the victim of domestic violence prior to, and at the time of, her conviction. Ms. Kowallis told Ms. Campbell to send her any evidence of Ms. Campbell's status as a domestic violence victim and that she would forward it to the legal department.

75. On or around June 4, 2014, and after Ms. Campbell's conversation with Ms. Kowallis, Ms. Campbell obtained and sent to Hertz two letters, one from her probation officer, Ms. Nakeisha Peacock, in the San Francisco Adult Probation Department, and one from the victim advocate in the San Francisco Office of the District Attorney, confirming that Ms. Campbell is a victim of domestic violence. Ms. Peacock stated in her letter that based on Ms. Campbell's excellent progress on probation, she would attempt to terminate Ms. Campbell's probation early and expunge her record.

76. On or about June 6, 2014, Ms. Kowallis cancelled the "1st day paperwork" appointment reminder she had previously set for June 9, 2014.

77. On or about June 10, 2014, Ms. Kowallis called and told Ms. Campbell that Hertz could not hire her. When Ms. Campbell asked why, Ms. Kowallis responded that Ms. Campbell was on probation and that it was against Hertz's policy to hire anyone on probation.

78. On June 10, 2014, Ms. Kowallis sent Ms. Campbell an email titled "Offer Rescinded," stating that Hertz could not "continue to extend an offer of employment due to the following reason: PROBATION (CONCURRENT SENTENCE); SENTENCE LENGTH: 3 YEARS."

79. Sometime after Hertz rescinded her job offer, Ms. Campbell received a package, including a copy of the consumer report Hertz procured, in the mail.

80. Ms. Campbell's criminal history and status on probation were not relevant to the counter sales position for which she applied for reasons including the

nature and circumstances of the misdemeanor and probation.

81. Ms. Campbell was denied the opportunity the FCRA guaranteed to her, namely to review her report and a summary of rights prior to adverse action being taken against her. She was supposed to have a reasonable period of time after being provided with the report and a summary of rights to explain the circumstances regarding the misdemeanor and probation and their lack of relevance to her job application, and Hertz's illegal conduct denied her that opportunity.

Factual Allegations Common to All Class Members

82. Employers commonly use criminal background screening reports to determine employment eligibility. A significant percentage of these reports, however, contain incomplete, inaccurate, misleading, or improper records that can erroneously disqualify a job applicant or employee. Recognizing this danger, Congress provided strict reporting and disclosure requirements in the FCRA to ensure that prospective employees have the opportunity to review reports summarizing their background information and to contest any inaccuracies and illegal disclosures and/or provide additional information before these reports influence employment decisions.

83. The FCRA requires that "before taking any adverse action based in whole or in part on [a consumer report]," the employer taking the adverse action must provide "the consumer to whom the report relates" with:

- (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 [Consumer Financial Protection] Bureau under section 1681g(c)(3).

15 U.S.C. § 1681b(b)(3)(A)(i) and (ii).

84. The FCRA defines adverse action as either “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee,” or “any action taken or determination that is . . . adverse to the interests of the consumer.” 15 U.S.C. § 1681a(k)(1)(B).

85. Hertz has routinely and systematically failed to provide Plaintiffs and other job applicants with a copy of their consumer reports *before* taking adverse actions against them, in violation of 15 U.S.C. § 1681b(b)(3)(A)(i).

86. Hertz has further routinely and systematically failed to provide Plaintiffs and other job applicants with a summary of their rights under the FCRA prior to taking adverse actions against them, in violation of 15 U.S.C. § 1681b(b)(3)(A)(ii).

87. Also, under the FCRA, employers “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.

15 U.S.C. § 1681b(b)(2)(A)(i) and (ii) (emphasis added).

88. Hertz routinely and systematically violates 15 U.S.C. § 1681b(b)(2)(A) by providing a disclosure that contains numerous pieces of extraneous information, rather than making the disclosure in a document consisting *solely* of the disclosure.

89. Defendants have acted willfully in violating the requirements of the FCRA. Defendants knew or should have known that including extraneous information with the disclosure, and failing to provide consumers with copies of their consumer reports and a summary of their rights under the FCRA before taking adverse action, violated the FCRA. As described below, these obligations are well-established by the plain language of the FCRA, abundant case law, and the promulgations and opinion letters of the Federal Trade Commission.

90. Despite Defendants' awareness of their legal obligations, Defendants have acted consciously in breaching their known duties and depriving Plaintiffs and other job applicants of their rights under the FCRA.

91. At a minimum, Defendants' conduct has been reckless in failing to make an appropriate inquiry to ascertain their obligations under the FCRA.

92. First, Defendants' online job application is not a "document that consists solely of the disclosure[]" that a consumer report may be obtained for employment purposes" because the disclosure was included as part of the overall job application, rather than in a

separate document consisting “solely” of the disclosure.

93. Second, Defendants’ online job application is not a “document that consists solely of the disclosure[] that a consumer report may be obtained for employment purposes” because it contains a plethora of extraneous information. Specifically, the application contained the following items, each of which, standing alone, would be sufficient to render the application non-compliant with the stand-alone disclosure requirement, and all of which, in combination, certainly render the application non-compliant:

- a. A statement whereby the applicant purports to release Defendants, all third parties, and all of Defendants’ consumer reporting agencies from various liabilities, including “all claims . . . that may arise out of the Company’s drug test, criminal background check and Motor Vehicle records check policies”;
- b. A section for the applicant to fill in regarding the applicant’s prior employment, education and experience;
- c. A declaration that false statements on the application may be sufficient cause not to hire;
- d. A statement that Defendants comply with laws prohibiting discrimination;
- e. A purported agreement from the applicant that a single authorization for the procurement of a consumer report will remain in effect for the duration of the applicant’s

employment, and that no further disclosures or authorization will be required;

f. A statement that all job offers are contingent upon, among other things, completion of a criminal background check;

g. A purported agreement authorizing Defendants to verify all information contained in the application; and

h. A statement that the applicant understands that any employment will be “at will.”

94. All of the information referenced in the preceding paragraph was conveyed on a single web page viewable on a single computer screen, and residing at a single web page.

95. Numerous courts, including the Ninth Circuit Court of Appeals, have held that disclosure forms that contain extraneous information, including but not limited to a purported liability waiver, violate 15 U.S.C. § 1681b(b)(2)(A) the FCRA. *See Syed v. M-I, LLC*, No. 14 17181, (9th Cir. Jan. 20, 2107); *Jones v. Halstead Mgmt. Co., LLC*, No. 14-CV-3125 VEC, 2015 WL 366244, at *5 (S.D.N.Y. Jan. 27, 2015); *Miller v. Quest Diagnostics*, No. 2:14-Civ-04278, 2015 WL 545506, at *3 (W.D. Mo. Jan. 28, 2015); *Martin v. Fair Collections & Outsourcing, Inc.*, No. GJH-14-3191, 2015 WL 4064970, at *4 (D. Md. June 30, 2015).¹

¹ *See also Legrand v. The Cato Corporation*, No. 1:15 CV 2091, 2016 WL 1618135, at *5 (N.D. Ohio Apr. 22, 2016); *Woods v. Caremark PHC, L.L.C.*, No. 4:15-CV-00535-SRB, 2015 WL 6742124, at *2 (W.D. Mo. Nov. 2, 2015); *Lagos v. The Leland Stanford Junior Univ.*, No. 5:15 CV-04524-PSG, 2015 WL 7878129, at *2 (N.D. Cal. Dec. 4, 2015); *Johnson v. Casey's Gen. Stores, Inc.*, ___ F. Supp. 3d ___, No. 6:15-CV-30860MDH, 2015 WL 4542143, at *3 (W.D. Mo. July 27, 2015); *Rawlings v. ADS*

96. The FTC has stated that disclosure forms must not be “encumbered by any other information . . . [in order] to prevent consumers from being distracted by other information side-by-side with the disclosure.” See Exhibit 2, Letter from Clarke W. Brinckerhoff, Fed. Trade Comm’n, to H. Roman Leathers, Manier & Herod (Sept. 9, 1998) (emphasis added).

97. The FTC has also opined that it is inappropriate to include liability waivers in disclosure forms. See Advisory Opinion to Hauxwell (June 12, 1998), available at 1998 WL 34323756 (“[T]he [disclosure] form should not contain any extraneous information. . . . The inclusion of such a waiver in a disclosure form will violate Section 604(b)(2)(A)[1] of the FCRA, which requires that a disclosure consist ‘solely’ of the

Alliance Data Sys., Inc., No. 2:15-CV-04051-NKL, 2015 WL 3866885, at *6 (W.D. Mo. June 23, 2015); *Doe v. Sentech Employment Servs., Inc.*, No. 15-14348, 2016 WL 2851427, at *1 (E.D. Mich. May 16, 2016); *Albu v. Home Depot, Inc.*, No. 1:15-CV-00412-ELR, 2016 WL 1169196, at *5 (N.D. Ga. Mar. 4, 2016); *Robrinzine v. Big Lots Stores, Inc.*, No. 15-CV-7239, 2016 WL 212957, at *6 (N.D. Ill. Jan. 19, 2016); *Moore v. Rite Aid Hdqtrs Corp.*, No. CIV.A. 13-1515, 2015 WL 3444227, at *12 (E.D. Pa. May 29, 2015); *Speer v. Whole Food Mkt. Grp., Inc.*, No. 8:14-CV-3035-T-26TBM, 2015 WL 1456981, at *3 (M.D. Fla. Mar. 30, 2015); *Dunford v. Am. Databank, Inc.*, 64 F. Supp. 3d 1378, 1388 (N.D. Cal. Aug. 12, 2014); *Groshek v. Time Warner Cable, Inc.*, No. 15-C-157, 2015 WL 4620013, at *2 (E.D. Wis. July 31, 2015); *Avila v. NOW Health Grp., Inc.*, No. 14 C 1551, 2014 WL 3537825, at *2 (N.D. Ill. July 17, 2014); *Singleton v. Domino’s Pizza, LLC*, Case No. 11-cv-1823, 2012 WL 245965, at *8 (D. Md. Jan. 25, 2012); *Reardon v. Closetmaid Corp.*, No. 2:-8-cv-01730, 2013 WL 6231606, at *10-11 (W.D. Pa. Dec. 2, 2013); *Lengel v. HomeAdvisor, Inc.*, 102 F. Supp. 3d 1202, 1209-12 (D. Kan. 2015); *Harris v. Home Depot U.S.A., Inc.*, No. 15-CV-01058-VC, ___ F. Supp. 3d ___, 2015 WL 4270313, at *1 (N.D. Cal. June 30, 2015); *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 433 (E.D. Va. 2015).

disclosure that a consumer report may be obtained for employment purposes.”).

98. The Ninth Circuit has held that the language of § 1681b(b)(2) is unambiguous, such that a failure to comply is willful as a matter of law. *Syed*, Slip. Op. at 3-4 (“[I]n light of the clear statutory language that the disclosure document must consist ‘solely’ of the disclosure, a prospective employer’s violation of the FCRA is ‘willful’ when the employer includes terms in addition to the disclosure.”).

99. Sterling, Hertz’s contractor for providing consumer reports, has provided its clients with a number of advisories related to the FCRA’s stand-alone disclosure requirement. For example, Sterling offers its clients FCRA compliance seminars taught by Richard I. Greenberg, a partner at the employment law firm of Jackson Lewis LLP, and Joe Rotondo, the Vice President of Regulatory Compliance at Sterling Infosystems, Inc. *See* Exhibit 3 at 19-21. In its seminars, Sterling warns clients to “Be Careful Of Extraneous Information On Stand-Alone Disclosure[.]” *Id.* at 21. Sterling also warns its client that “A Separate Stand-Alone Disclosure Is Mandated.” *Id.* at 20.

100. The FCRA requires that, prior to procuring consumer reports, employers must certify to the consumer reporting agency that they will comply with the FCRA’s stand-alone disclosure and Pre-Adverse Action requirements. *See* 15 U.S.C. § 1681b(b)(1).

101. In accordance with Sterling’s standard procedures, Sterling required Defendants to certify that they would comply with the stand-alone disclosure and Pre-Adverse Action requirements of the FCRA.

102. Defendants did, in fact, certify to Sterling that they would comply with the stand-alone disclosure and Pre-Adverse Action requirements of the FCRA.

103. In their contract with Sterling, Defendants agreed that before obtaining a consumer report, Defendants would provide a disclosure in writing to the consumer that a consumer report will be obtained for employment purposes and that such disclosure will be made in a document consisting solely of the disclosure.

104. In their contract with Sterling, Defendants agreed that before taking adverse action against a consumer based in whole or in part on a consumer report, they would provide that consumer with a copy of their report as well as a notice of their rights under the FCRA.

105. Defendants also agreed to contact Sterling to obtain special procedures for preparation and use of a consumer report in the case of suspected misconduct or violation of state, federal, or local law. Plaintiffs' reports were not procured by Defendants using the special procedures referred to in the contract for these kinds of reports.

106. Defendants did not procure Plaintiffs' reports in connection with any investigation of suspected misconduct relating to employment, or compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.

107. Despite the warnings Sterling gives its clients, and despite the representations they made to Sterling, Defendants failed to provide job applicants with a stand-alone disclosure prior to procuring consumer

reports on them, and they failed to provide Pre-Adverse Action Notice prior taking adverse action against them.

108. By systematically providing Plaintiffs and other class members with documents which did not comply with the FCRA, Defendants knowingly and willfully violated 15 U.S.C. § 1681b(b)(2)(A)(i).

109. By systematically failing to provide Plaintiffs and other class members with a copy of their reports and a notice of their rights under the FCRA prior to taking adverse action against them, Defendants knowingly and willfully violated 15 U.S.C. § 1681b(b)(3)(A).

ALLEGATIONS OF CONCRETE HARM

110. In Congress's judgment, an employer's failure to provide job applicants with a clear and conspicuous disclosure is unfair and inequitable and causes concrete injury to those job applicants. See 15 U.S.C. § 1681(b).

111. In Congress's judgment, an employer's failure to provide job applicants with a copy of their consumer report and a summary of their rights under the FCRA before it takes an adverse action is unfair and inequitable and causes concrete injury to those job applicants. See 15 U.S.C. § 1681(b).

112. Plaintiffs and other class members suffered concrete harm from Hertz's actions in at least three ways. First, Hertz invaded Plaintiffs and class members' right to privacy. Under the FCRA, "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" it complies with the statutory requirements (i.e., disclosure and authorization) set forth in the following subsections. 15 U.S.C. § 1681b(b)(2). As one court put it, "[t]he FCRA makes

it unlawful to ‘procure’ a report without first providing the proper disclosure and receiving the consumer’s written authorization.” *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015). By procuring Plaintiffs and class members’ reports without complying with these requirements, Hertz invaded Plaintiffs and class members’ privacy.

113. Second, Plaintiffs and class members have suffered concrete informational injuries because Hertz failed to provide Plaintiffs and class members with information to which they were entitled by statute. *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998).

114. Third, Hertz’s policy has caused concrete injury to Plaintiffs and class members because, among other examples, it has deprived them of learning about their statutory rights under the FCRA, reviewing the accuracy of the information reported about them that Hertz has used in taking adverse employment actions, being confronted with the charges against them, and explaining their story prior to suffering an adverse employment action. Hertz’s policy has prevented Plaintiffs and class members of the opportunity to explain the issues and negative records in their consumer reports and discuss them with Hertz during the determination of Plaintiffs’ and class members’ suitability for the jobs in question.

CLASS ACTION ALLEGATIONS

115. Mr. Lee and Ms. Campbell bring this Class Action pursuant to California Code of Civil Procedure § 382 on behalf of themselves and two classes of persons.

116. Plaintiffs assert the First Cause of Action on behalf of the “Pre-Adverse Action Notice Class” defined as follows:

Pre-Adverse Action Notice Class: All applicants for employment with Hertz in the United States within five years of the filing of this complaint through the date of final judgment who were subject to an adverse action based in whole or in part on information contained in a consumer report without receiving a copy of the consumer report and summary of their rights under the FCRA within a reasonable period of time prior to the adverse action, as required by 15 U.S.C.

§ 1681b(b)(3)(A).

117. Plaintiffs assert the Second Cause of Action on behalf of the “FCRA Disclosure Class” defined as follows:

FCRA Disclosure Class: All applicants for employment with Hertz in the United States within five years of the filing of this complaint through the date of final judgment about whom Hertz procured a consumer report.

118. The members of the FCRA Pre-Adverse Action Class and the FCRA Disclosure Class are collectively referred to as “Class Members.”

119. Plaintiffs reserve the right to amend the definition of above-defined classes based on discovery or legal developments.

Existence of Ascertainable and Sufficiently Numerous Class

120. The Class Members identified herein are so numerous that joinder of all members is impracticable.

Hertz employs over 30,000 workers worldwide, with the vast majority located within the United States. Although Plaintiffs do not know the precise number of job applicants harmed by Defendants' violations of the FCRA, the number is far greater than feasibly could be addressed through joinder. The precise number is easily ascertainable from Defendants' own records, which are uniquely within Defendants' possession.

Existence of a Well-Defined Community of Interest

Predominance of Common Questions of Fact and Law

121. There are questions of law and fact common to Class Members, and these questions predominate over any questions affecting only individual members. Common questions include, among others:

- a. whether Hertz violated the FCRA by taking adverse action, based wholly or in part on information contained a consumer report, against Plaintiffs and other members of the Pre-Adverse Action Notice Class without first providing them with a copy of the consumer report and a summary of their rights under the FCRA and a reasonable amount of time to respond, as required by 15 U.S.C. § 1681b(b)(3)(A);
- b. whether Hertz violated the FCRA by failing to provide Plaintiffs and the FCRA Disclosure Class with a clear and conspicuous disclosure in writing, in a document that consisted solely of the disclosure, prior to procuring their consumer reports for employment purposes, as required by 15 U.S.C. § 1681b(b)(2)(A);

- c. whether Hertz was willful in its non-compliance with the requirements of the FCRA;
- d. whether Hertz was negligent in its non-compliance with the requirements of the FCRA; and
- e. the proper measure of statutory and punitive damages.

Typicality

122. Plaintiffs are members of the classes they seek to represent. Defendants failed to provide Mr. Lee and Ms. Campbell with a copy of their respective consumer reports and a summary of their rights under the FCRA prior to taking adverse action against them based on information contained in their consumer reports, as required by 15 U.S.C. § 1681b(b)(3)(A)(i) and (ii). Additionally, Hertz failed to provide Plaintiffs with a clear and conspicuous disclosure in writing, in a document consisting solely of the disclosure, before procuring consumer reports about them for employment purposes, as required by 15 U.S.C. § 1681b(b)(2)(A)(i) and (ii).

123. Plaintiffs' claims are typical of the claims of the classes they seek to represent. Upon information and belief, it is Defendants' standard practice to take adverse action against job applicants, based on information contained in consumer reports, without first providing them with a copy of their consumer reports and a written summary of their rights under the FCRA.

Additionally, upon information and belief, it is Hertz's standard practice to cause the procurement of consumer reports without first providing a clear and

conspicuous disclosure in writing to applicants, in a document that consists solely of the disclosure. Mr. Lee and Ms. Campbell are entitled to relief under the same causes of action as other Class Members.

Adequacy of Representation

124. Mr. Lee and Ms. Campbell will fairly and adequately represent and protect the interests of the Class Members. Plaintiffs' interests are not in conflict with those of the Class Members. Plaintiffs have retained counsel who are competent and experienced in complex class actions, employment litigation, and the intersection thereof.

Superiority of Class Action

125. A class action, pursuant to California Code of Civil Procedure § 382, is superior to other available means for the fair and efficient adjudication of this controversy. All members of each class are entitled to recover for Defendants' willful failures to comply with the FCRA's requirements on the procurement and/or use of consumer reports for employment purposes. The amount of each Class Member's individual claim is small compared to the expense and burden of individual prosecution of this litigation. The FCRA's statutory damages, which Class Members will prove at trial are warranted, will render calculation of damages for Class Members highly straightforward. The propriety and amount of punitive damages are based on Defendants' conduct, making these issues common to Class Members. Individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit against Defendants to recover such damages. Also, because Defendants have maintained a common policy of failing to properly inform Class Members of their rights under the FCRA, many Class Members

are likely unaware that their rights have been violated.

126. Further, a class action is superior because Defendants have acted and/or refused to act on grounds generally applicable to the Class Members, making the requested relief appropriate with respect to Plaintiffs and the Class Members as a whole.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Hertz's Failure to Provide Pre-Adverse Action Notice
(15 U.S.C. § 1681b(b)(3)(A), Brought by Plaintiffs
on Behalf of Themselves and the Pre-Adverse
Action Notice Class)

127. Plaintiffs incorporate the preceding paragraphs as alleged above.

128. Hertz procured consumer reports containing information regarding Plaintiffs and the Pre-Adverse Action Notice Class Members from Sterling, a consumer reporting agency.

129. Hertz took adverse employment actions against Plaintiffs and the FCRA Pre-Adverse Action Notice Class Members based in whole or in part on the information contained within those consumer reports.

130. Prior to taking these adverse employment actions, Hertz failed to provide Plaintiffs and each Pre-Adverse Action Notice Class Member with a copy of his or her consumer report and a reasonable amount of time to respond.

131. Hertz also failed to provide Plaintiffs and each Pre-Adverse Action Notice Class Member with a summary of their rights under the FCRA prior to taking these adverse employment actions.

132. As a result of Hertz's actions, Plaintiffs and the Pre-Adverse Action Notice Class Members have been deprived of their consumer rights and prevented from timely and effectively contesting the adverse action.

133. The foregoing violations were willful. Defendants acted in deliberate or reckless disregard of their obligations and the rights of Plaintiffs and other class members under 15 U.S.C. § 1681b(b)(3)(A). Defendants' willful conduct is reflected by the facts contained in the preceding paragraphs, as well as, *inter alia*, the following:

- a. The FCRA's pre-adverse action notice provision was enacted in 1996, and Defendants have had since its enactment to become compliant;
- b. Defendants' conduct is inconsistent with the FTC's longstanding regulatory guidance, judicial interpretation, and the plain language of the statute;
- c. Despite the pellucid statutory text and there being a depth of guidance, Defendants have adopted a policy of taking adverse action without first providing a copy of the consumer's report and a summary of his or her rights; and
- d. By adopting such a policy, Defendants voluntarily ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

134. Plaintiffs and the Pre-Adverse Action Notice Class Members are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each

and every one of these violations, pursuant to 15 U.S.C. § 1681n(a)(1)(A).

135. Plaintiffs and the Pre-Adverse Action Notice Class Members are entitled to such amount of punitive damages as the Court may allow pursuant to 15 U.S.C. § 1681n(a)(2).

136. Plaintiffs and the Pre-Adverse Action Notice Class Members are further entitled to recover their costs and attorneys' fees, pursuant to 15 U.S.C. § 1681n(a)(3).

SECOND CLAIM FOR RELIEF

Hertz's Failure to Provide Clear and Conspicuous Disclosure Prior to Procurement of Consumer Report (15 U.S.C. § 1681b(b)(2)(A), Brought by Plaintiffs on Behalf of Themselves and the FCRA Disclosure Class)

137. Plaintiffs incorporate the preceding paragraphs as alleged above.

138. Hertz procured consumer reports containing information regarding Plaintiffs and the FCRA Disclosure Class Members from a consumer reporting agency for employment purposes without first providing clear and conspicuous notice in writing, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes. Instead, Hertz provided a disclosure that was part of a larger online application, which contained numerous pieces of extraneous information, in violation of 15 U.S.C. § 1681b(b)(2)(A)(i).

139. As a result of Hertz's actions, Plaintiffs and the FCRA Disclosure Class Members have been deprived of their privacy rights and prevented from making

informed decisions about whether to permit Hertz to procure their personal information.

140. The foregoing violations were willful. Defendants acted in deliberate or reckless disregard of their obligations and the rights of Plaintiffs and other class members under 15 U.S.C. § 1681b(b)(2)(A)(i). Defendants' willful conduct is reflected by the facts contained in the preceding paragraphs, as well as, *inter alia*, the following:

- a. The FCRA was enacted in 1970; Defendants, which were founded before 1970, have had sufficient time to become compliant;
- b. Defendants' conduct is inconsistent with the FTC's longstanding regulatory guidance, judicial interpretation, and the plain language of the statute;
- c. Defendants knew or had reason to know from their communications with Sterling that Defendants' conduct violated the FCRA;
- d. Defendants certified to Sterling that they would comply with the disclosure requirements of the FCRA, but failed to do so;
- e. Defendants repeatedly and routinely used the forms it used with Plaintiffs prior to procuring consumer reports;
- f. Defendants' inclusion of a liability release in their job application clearly indicates awareness by Defendants that they could be held liable for improperly procuring a consumer report and represents an effort to avoid such liability;
- g. Despite the pellucid statutory text and there being a depth of guidance, Defendants

systematically procured consumer reports without first disclosing in writing to the consumer in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

h. By adopting such a policy, Defendants voluntarily ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

141. Plaintiffs and the FCRA Disclosure Class Members are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each and every one of these violations, pursuant to 15 U.S.C. § 1681n(a)(1)(A).

142. Plaintiffs and the FCRA Disclosure Class Members are entitled to such amount of punitive damages as the Court may allow pursuant to 15 U.S.C. § 1681n(a)(2).

Plaintiffs and the FCRA Disclosure Class Members are further entitled to recover their costs and attorneys' fees, pursuant to 15 U.S.C. § 1681n(a)(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class Members pray for relief as follows:

(a) Certification of Plaintiffs' FCRA claims as a class action pursuant to California Code of Civil Procedure § 382;

(b) Designation of Plaintiffs Peter Lee and Latonya Campbell as representatives of the Class Members;

(c) Designation of Plaintiffs' counsel of record as Class Counsel;

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(d) A declaration that Defendants committed multiple, separate violations of the FCRA;

(e) A declaration that Defendants acted willfully, in deliberate or reckless disregard of Plaintiffs' and Class Members' rights and Defendants' obligations under the FCRA;

(f) An award of statutory damages for Defendants' willful conduct under the FCRA;

(g) Exemplary and punitive damages to deter future misconduct in an amount commensurate with Defendants' ability to pay;

(h) Costs incurred herein, including reasonable attorneys' fees to the extent allowable by law;

(i) Pre-judgment and post-judgment interest, as provided by law;

(j) Payment of a reasonable service award to Plaintiffs, in recognition of the services they have rendered and will continue to render to the Class Members, and the risks they have taken; and

(k) Such other and further legal and equitable relief as this Court deems necessary, just and proper.

JURY DEMAND

Plaintiffs hereby demand a jury trial to the extent authorized by law.

Dated: April 12, 2017

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Respectfully submitted,

By: /s/ Jahan C. Sagafi

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APPENDIX F

2016 U.S. Dist. LEXIS 166911

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
SAN JOSE DIVISION

No. 15-cv-04562-BLF

PETER LEE, et al.,

Plaintiffs,

v.

The Hertz Corporation, *et al.*,

Defendants.

December 2, 2016, Decided;
December 2, 2016, Filed

Prior History: Lee v. Dollar Thrifty Auto. Group, Inc.,
2016 U.S. Dist. LEXIS 24835 (N.D. Cal., Feb. 26, 2016)

Counsel: For Peter Lee, on behalf of himself and all
others similarly situated, Latonya Campbell, on behalf
of herself and all others similarly situated, Plaintiffs:
Jahan C. Sagafi, LEAD ATTORNEY, Katrina Leigh
Eiland, Outten & Golden LLP, San Francisco, CA; E.
Michelle Drake, PRO HAC VICE, Joseph C Hashmall,
Berger & Montague, P.C., Minneapolis, MN; Elisa
Marie Della-Piana, Meredith Patricia Desautels Taft,
Lawyers Committee For Civil Rights, San Francisco,
CA.

For The Hertz Corporation, Dollar Thrifty Automotive Group, Inc., Defendants: Robert A. Dolinkol, LEAD ATTORNEY, Charles M. Dyke, Matthew J. Frankel, Nixon Peabody LLP, San Francisco, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING MOTION TO DISMISS AND
REMANDING CASE TO SAN FRANCISCO
COUNTY SUPERIOR COURT

[Re: ECF 47]

Plaintiffs Peter Lee and Latonya Campbell (collectively, “Plaintiffs”) filed a First Amended Complaint (“FAC”) on behalf of themselves and similarly situated persons against Defendants The Hertz Corporation and Dollar Thrifty Automotive Group, Inc. (collectively, “Hertz”¹), alleging that Hertz violated two procedural requirements of the Fair Credit Reporting Act (“FCRA”) with respect to their applications for employment. First, Plaintiffs allege that the employment application forms Hertz used in the course of its hiring process violated the “stand-alone requirement” of the FCRA, 15 U.S.C. § 1681b(b)(2)(A)(i). Second, Plaintiffs allege that by withdrawing their conditional offers of employment without first providing them with a copy of their consumer reports and a summary of their rights to contest its accuracy, Hertz failed to comply with sections 1681b(b)(3)(A)(i) and (ii) of the FCRA. Hertz now moves under Fed. R. Civ. P. 12(b)(1)

¹ Dollar Thrifty Automotive Group, Inc. is wholly owned and operated by The Hertz Corporation. FAC ¶ 21.

and 12(h)(3) to dismiss this case in its entirety for lack of subject matter jurisdiction, based on the U.S. Supreme Court's recent decision in *Spokeo v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). Mot., ECF 77. For the reasons set forth below, the Court GRANTS Defendant's motion and remands the case to the San Francisco County Superior Court.

I. BACKGROUND

Hertz routinely obtains information contained in consumer reports to conduct background checks on prospective employees, and uses the information in the reports as the basis for adverse employment action against such persons, such as refusing to hire them or withdrawing conditional offers of employment. FAC ¶ 2, ECF 43. Plaintiffs allege that the disclosures relating to these background checks violated the FCRA's stand-alone requirement because they failed to provide "a clear and conspicuous disclosure made in writing, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes." FAC ¶ 117. Plaintiffs also allege that Hertz's failure to provide Plaintiffs with a copy of his or her consumer report, a reasonable amount of time to respond prior to taking adverse employment actions, and a summary of their rights under the FCRA, violates the FCRA's pre-adverse action notice requirement. *Id.* ¶ 112, 113. Plaintiffs do not allege that the contents of the reports were inaccurate nor do they allege that they were confused by the disclosure notice regarding consent to procure a consumer report.

A. Allegations Relevant to Plaintiff Peter Lee

Plaintiff Lee applied to work for Hertz's Dollar/Thrifty-branded car rental location at the San

Francisco International Airport in May 2014. *Id.* ¶ 30. During the hiring process, he used Hertz's online application form (the "Online Job Application") to apply for employment with Hertz. *Id.* ¶ 33; Ex. A to Mot., ECF 47-1. The Online Job Application contained a section disclosing Hertz's intention to run a criminal background check. FAC ¶ 35. Hertz reviewed the application and conditionally offered Lee a position at the company. *Id.* ¶ 38. Nearly two weeks later, Hertz asked Lee to fill out an addendum to the application form, which required him to authorize Hertz to procure a consumer report on him. *Id.* §§ 41, 42; Ex. B to Mot., ECF 47-1. While the consumer report was pending, Hertz informed Lee that he would begin work on June 9, 2014, at which point Lee provided a notice of resignation to his then-current employer. FAC ¶ 44.

At some point between the time Hertz informed Lee of his start date and June 3, 2014, Hertz obtained one or more consumer reports from its third-party consumer reporting agency, Sterling InfoSystems, Inc. ("Sterling"). *Id.* ¶ 45; Ex. C to Mot., ECF 47-1 ("Sterling Form"). The consumer report contained information about Lee's background, including information about pending criminal charges for which he had not been convicted. FAC ¶ 45. On June 3, 2014, Hertz informed Lee that, based on company policy, it would not hire him because of the information contained in his background check. *Id.* §§ 47, 49. Lee asked Hertz for a copy of his background check and he was instructed to contact Sterling, which he did. *Id.* §§ 48, 51. Lee alleges that Sterling sent him a copy of his consumer report sometime on or after June 3, 2014, and that he did not receive this copy until sometime after that date. *Id.* ¶ 52. Lee also alleges that sometime on or after June 4, 2014, Sterling sent him, by regular mail, an undated letter titled

“Pre-Adverse Action Notice,” which bore the Hertz’s corporate logo. *Id.* ¶ 53. Enclosed with this letter was a copy of the consumer report prepared by Sterling dated June 4, 2014. *Id.*

B. Allegations Relevant to Plaintiff Latonya Campbell

Plaintiff Campbell had a similar experience. Campbell applied to work for a counter sales position at the Dollar/Thrifty-branded car rental location owned by Hertz in San Francisco in late- April 2014. *Id.* ¶ 59. Campbell filled out the same Online Job Application as did Lee. *Id.* ¶¶ 59-63; Ex. D to Mot., ECF 47-1. As with Lee, Hertz extended a conditional offer of employment to Campbell pending a criminal background check. FAC ¶ 66. Upon receiving this conditional offer, Campbell declined a second interview with another company because she preferred the job with Hertz. *Id.* ¶ 67. Shortly thereafter, Campbell also filled out the Sterling background check disclosure and authorization form. *Id.* ¶ 68; Ex. E to Mot., ECF 47-1.

Campbell’s background report contained information regarding a misdemeanor conviction related to domestic violence for which she was sentenced to three years of probation. FAC ¶ 70. After confirming a start date with Campbell, Hertz informed her that company policy prohibited the hiring of an individual with a criminal conviction involving violence. *Id.* ¶ 73. Campbell attempted to explain the situation in which this conviction arose, and Hertz’s representative instructed her to send Hertz evidence supporting her status as a victim of domestic violence, which she did. *Id.* ¶¶ 74, 75. Hertz then revoked Campbell’s conditional job offer. *Id.* ¶¶ 76-78. Sometime after Hertz rescinded her job offer, Campbell received a package,

including a copy of the consumer report Hertz procured, in the mail. *Id.* ¶ 79.

C. Procedural History

Plaintiffs initially filed this putative class action in California Superior Court, County of San Francisco, which Defendants then removed to this Court. *See generally* Notice of Removal & Ex. A, ECF 1, 1-1. Thereafter, Hertz filed a motion to stay the action pending the Supreme Court's issuance of its decision in *Spokeo*. ECF 13. The Court granted Hertz's motion to stay over Plaintiffs' objections. ECF 35. After the Supreme Court decided *Spokeo*, Plaintiffs filed the operative complaint on behalf of themselves and all other similarly situated persons. To address the Supreme Court's decision in *Spokeo*, Plaintiffs advance two theories of standing: (1) invasion of privacy and (2) informational injury.

II. LEGAL STANDARD

A. Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction. Under Article III of the U.S. Constitution, the Court has subject matter jurisdiction only if the party bringing the action has standing, an inquiry that addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (citation omitted). When a defendant moves to dismiss under Rule 12(b)(1), the plaintiff, as the party seeking to invoke the court's jurisdiction by filing the complaint, bears the burden of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128

L. Ed. 2d 391 (1994). A defendant may attack the court's jurisdiction as it appears on the face of the complaint or by presenting affidavits and other evidence. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). For a facial attack, the court must "accept all allegations in the complaint as true and construe them in the light most favorable to the plaintiff[]." *Id.*

B. *Spokeo* and Standing

In *Spokeo*, the Supreme Court reaffirmed that to have Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." 136 S. Ct. at 1547 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Here, it is undisputed that the alleged statutory violations are traceable to Hertz's conduct, and that the alleged violations are redressable by statutory damages. Accordingly, the remainder of the discussion on the standing issue is addressed solely to the requirement of injury in fact.

To establish injury in fact, a plaintiff must have suffered "an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citing *Lujan*, 504 U.S. at 560). To be "particularized," an injury "must affect the plaintiff in a personal and individual way." *Id.* (citing *Lujan*, 504 U.S. at 560 n.1). Here, it is undisputed that Plaintiffs have alleged a particularized injury.

The Supreme Court in *Spokeo* distilled several "general principles" from its prior cases with respect to concreteness. *Id.* at 1549-50. A concrete injury is one that is "'real,' and not 'abstract.'" *Id.* at 1548 (citation

omitted). Tangible injuries plainly satisfy this requirement. *Id.* at 1549. Nevertheless, intangible injuries may also be concrete. *Id.* In evaluating whether an intangible injury satisfies the “concreteness” requirement, the *Spokeo* Court identified two important considerations (1) “whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts” and (2) the judgment of Congress, which “has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

The Supreme Court then elaborated on the connection between statutory standing and concrete injury. First, the Court explained that “Article III standing requires a concrete injury even in the context of a statutory violation[.]” *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)). Therefore, “[a plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.” *Id.*

At the same time, the Court observed, in cases where “harms may be difficult to prove or measure[.]” “the violation of a procedural right granted by statute can be sufficient . . . [and] a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.” *Id.* (citing *FEC v. Akins*, 524 U.S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998); *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)). The Supreme Court noted that although one of the FCRA’s purposes is to protect against inaccurate credit reporting, “not

all inaccuracies cause harm or present any risk of harm.” *Id.* at 1550.

C. The FCRA

As relevant here, the FCRA provides that the employer must, in advance, provide the consumer with a clear and conspicuous written disclosure, and obtain the consumer’s consent to obtain a consumer report:

[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.

§ 1681b(b)(2). The consumer is also provided the right to review and discuss the content of a report with the prospective employer, before adverse action is taken against him or her based on the report:

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 pre-

sent by the Bureau under Section 1681g(c)(3) of this title.

§ 1681b(b)(3). The purpose of this and other provisions of the FCRA is to ensure fair and accurate credit reporting, protect consumer privacy, and promote efficiency in the banking system. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007); 15 U.S.C. § 1681 (congressional findings and statement of purpose).

III. DISCUSSION

Plaintiffs bring this claim for improper disclosure under section 1681b(b)(2) and for Hertz's failure to provide a copy of the report, and allow them an opportunity to review and discuss its content with Hertz before adverse action was taken against them in violation of section 1681b(b)(3). Hertz argues that Plaintiffs have no standing to pursue this claim because they seek statutory damages based solely on Hertz's bare procedural violation of the FCRA, divorced from any concrete harm. Mot. 1. Plaintiffs respond that *Spokeo* did not alter constitutional requirements for standing, and that they have alleged two concrete injuries: violation of the right to privacy and informational injuries. Opp'n 1, ECF 50; FAC ¶¶ 92-96. Because the injuries claimed are different as to each cause of action asserted against Hertz, the Court addresses each cause of action below.

A. Count II—Improper Disclosure

Count II, for improper disclosure, is based on section 1681b(b)(2), which forbids a person from procuring a consumer report without obtaining the consumer's express written consent in advance. Under the statute, the consumer's consent must be made on a single document that contains only required information

that is “clear and conspicuous.” Plaintiffs claim that Hertz violated section 1681b(b)(2) by giving them two documents—the Online Job Application and Sterling Form—that contained extraneous information in addition to the required disclosures.

i. Right to Privacy

Plaintiffs allege that Hertz invaded their right to privacy by procuring their background reports without complying with the FCRA’s stand-alone disclosure requirement. FAC ¶ 94. Hertz argues that Plaintiffs did not suffer an invasion of privacy because they knew that Hertz would procure a background check, and consented to the procurement of this report by voluntarily signing or electronically accepting multiple authorizations.² Mot. 12. Citing *Thomas v. FTS USA, LLC*, No. 13-cv-825, 2016 U.S. Dist. LEXIS 85545, 2016 WL 3653878 (E.D. Va. June 30, 2016), Plaintiffs contend that their signed authorization for Hertz to procure his background report was not “informed,” and thus, it was “illegal” for Hertz to obtain their consumer reports for employment purposes. Opp’n 11; *see id.* at 1, 9, 18, 21. Therefore, Plaintiffs’ position is that Hertz’s procurement of the background report in violation of the FCRA was an invasion of privacy. *Id.* at 11.

In reply, Hertz correctly distinguishes *Thomas* from the case at hand. Reply ISO Mot. 10-11, ECF 53. In

² Hertz also argues that Plaintiffs do not allege that the information obtained for the background report was private. Mot. 12. Plaintiffs contend that it is irrelevant that some of the information comes from public sources, because the act of consolidating it and providing it to a potential employer implicates privacy concerns. Opp’n 9-10. Because the Court agrees that Plaintiffs consented to the background check, it declines to address this issue.

Thomas, the plaintiff alleged that his former employer procured his and other class members' consumer reports without first providing the required written disclosure or obtaining the consumers' written consent, as required by the FCRA. 2016 U.S. Dist. LEXIS 85545, 2016 WL 3653878, at *1. The plaintiff later learned that his employer had received his consumer report when he was denied continued employment based upon the inaccurate information contained in the report. 2016 U.S. Dist. LEXIS 85545, [WL] at *3. Here, in contrast, Plaintiffs do not allege that the disclosures they received prevented them from understanding that they were authorizing Hertz to procure a background report or that they would not have authorized Hertz to a background report had they received a FCRA-compliant disclosure. See Reply ISO Mot. 10; cf. *Feist v. Petco Animal Supplies, Inc.*, No. 16-cv-1369, 2016 U.S. Dist. LEXIS 163781, 2016 WL 6902549, at *2 (N.D. Cal. Nov. 22, 2016) ("Here, Plaintiffs have plausibly alleged that they may have been confused or distracted by the length of the Consent Form."). Indeed, Plaintiffs have not proffered such an allegation nor is there any indication that Plaintiffs could plausibly allege those facts. Instead, the crux of Plaintiffs' complaint is that the consent form did not technically comply with the requirements of the FCRA. This is the kind of bare procedural violation that the Supreme Court described in *Spokeo* as insufficient. See, e.g., *Nokchan v. Lyft, Inc.*, No. 15-cv-3008, 2016 U.S. Dist. LEXIS 138582, 2016 WL 5815287, at *4 (N.D. Cal. Oct. 5, 2016); *Larroque v. First Advantage LNS Screening Sols., Inc.*, No. 15-cv-4684, 2016 U.S. Dist. LEXIS 119249, 2016 WL 4577257, at *4-5 (N.D. Cal. Sept. 2, 2016).

ii. Informational Injury

Plaintiffs' alleged informational injury is also based on the consent form containing extraneous information. In support of their informational injury claim, Plaintiffs relies on *Public Citizen*, 491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377, and *Akins*, 524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d 10. FAC ¶ 95. Both of these cases were cited by the Supreme Court in *Spokeo* as examples of a concrete harm being suffered when information authorized by statute was not supplied. In *Public Citizen*, the harm was the inability of the plaintiff to monitor the judiciary because the ABA refused to release documents that congressional statutes made open records. In *Akins*, the harm was an inability to obtain information regarding the American Israel Public Affairs Committee's membership, contributions, and expenditures that the plaintiffs believed were required by law.

Hertz attempts to distinguish *Akins* and *Public Citizen* by arguing that both cases involved challenges to the government's failure to comply with a statutory obligation to disclose information of public concern.³ Mot. 13-15. Plaintiffs reject this interpretation, and instead suggest that both cases support standing here because in *Akins* and *Public Citizen*, the Supreme Court rejected the idea that plaintiffs who were deprived of information they were entitled to receive had to demonstrate an additional injury—the deprivation of information itself sufficed to constitute the required injury for purposes of Article III. Opp'n 14-

³ Hertz also attempts to draw a distinction based on the purported importance of the rights at issue in *Akins* and *Public Citizen*. Mot. 15. However, such a determination is not essential to this motion, so the Court declines to make this distinction.

15. In reply, Hertz again emphasizes that *Akins* and *Public Citizen* involved government records. Reply ISO Mot. 14-15. Hertz also attempts to distinguish the cases Plaintiffs cite, because in those cases, the plaintiffs were actually deprived of information to which they were legally entitled whereas here, Plaintiffs were provided with the information required by the FCRA, albeit along with other alleged extraneous information. Reply ISO Mot. 15-16; *see, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) (plaintiff was deprived of information to which she was legally entitled); *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 U.S. App. LEXIS 12414, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (same).

The Court agrees that the deprivation of statutorily mandated information can cause an intangible but concrete harm, if that harm is of the type Congress sought to prevent. Plaintiffs, however, have not alleged that Hertz's disclosure form did not contain the information required by the FCRA. *Cf. Akins*, 524 U.S. at 21 (“[A] plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” (citing *Pub. Citizen*, 491 U.S. at 449)). Instead, Plaintiffs claim that the disclosure was not in the format required by the statute because it contained “extraneous” information. Absent some additional allegation of harm, the Court cannot find an informational injury based on the current record.

B. Count I—Adverse Action

Count I, the adverse action claim, is based on section 1681b(b)(3), which provides a consumer the right to receive a copy of the report, and review and discuss its content with the prospective employer, before the

adverse action is taken against him or her based on the report. Plaintiffs allege that Hertz rescinded their conditional offers of employment without giving them notice and the opportunity to discuss the content of the report with Hertz. FAC ¶ 96. Hertz first argues that the Supreme Court addressed this precise issue in *Spokeo* when it cited as an example of a violation of one of the FCRA's procedural requirements that may result in no harm, a situation in which a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, but the information provided is accurate. Mot. 11 n.7; 136 S. Ct. at 1550. Hertz also contends that the violation of the FCRA is merely technical, inasmuch as Plaintiffs do not claim the information contained in the reports was inaccurate, and they therefore lack standing to pursue the adverse action claim. Mot. 15-16.

Plaintiffs, however, argue that *Spokeo* did not address the cause of action asserted in this case and that Hertz deprived them the opportunity to discuss the contents of their reports. Opp'n 21-25. As to the former, Plaintiffs contend that the notice referred to in the portion of *Spokeo* cited by Defendants relates to a different section of the FCRA—section 1681e(d), which requires the consumer reporting agency to provide notice to its customers—and is therefore irrelevant. Opp'n 21. As to the latter, Plaintiffs assert that the FCRA gives them the right to specific information at a specific time, and Hertz's failure to provide the required information at the proper time constitutes a concrete injury. *Id.* at 21-22. Citing to some of the legislative history, Plaintiffs state that Congress enacted section 1681b(b)(3) to require employers to provide employees with pre-adverse action disclosures so they may correct or become aware of the consumer information. *Id.* at 23. Here, however, Hertz took adverse

action—*i.e.*, revocation of the conditional offers—before informing Plaintiffs what was in their reports or notifying them of their rights under the FCRA. *Id.*

In reply, Hertz correctly reiterates that Plaintiffs’ did not suffer any concrete harm by Hertz’s late procurement of pre-adverse action packages. Reply 17. In the complaint, Plaintiffs concede that they communicated with Hertz regarding the contents of their criminal background reports, and Campbell was even given an opportunity to provide written evidence on her own behalf. Moreover, neither Plaintiff alleges that the information on which Hertz relied was inaccurate or that timely receipt of pre-adverse action packages would have allowed them to successfully contest Hertz’s decision. Although the Court notes that Campbell’s probation officer stated in her letter to Hertz that she would have attempted to terminate Campbell’s probation early and expunge her record, Campbell does not allege that Hertz would have or had any obligation to hold the position open for Campbell to do so.

The Court also agrees that the *Spokeo* Court addressed this very issue by providing the example discussed above. *See* 136 S. Ct. at 1550. Again, neither Lee nor Campbell contest the accuracy of the information cited in their criminal background reports. Rather, they simply allege that the information was “not relevant” to the positions for which Plaintiffs applied. FAC ¶¶ 58, 80. Thus, it appears that Plaintiffs seek to dispute how Hertz treats accurate information, rather than the lack of an opportunity to timely correct inaccurate information. *See Dutta v. State Farm Mut. Auto. Ins. Co.*, No. 14-cv-4292, 2016 U.S. Dist. LEXIS 152850, 2016 WL 6524390, at *3 (N.D. Cal. Nov. 3, 2016). This is not what the FCRA

protects. *See Spokeo*, 136 S. Ct. at 1550 (“Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.”).

IV. ORDER

In light of the foregoing, the Court concludes that under *Spokeo* and the facts of this case, Plaintiffs have failed to establish that they meet Article III’s injury-in-fact requirement, and the motion to dismiss is GRANTED. Accordingly, the case is remanded to the San Francisco Superior Court.

IT IS SO ORDERED

Dated: December 2, 2016

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

APPENDIX G

Description	Date/Time	Client ID
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (284) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2017 Until 05/31/2017	06/01/2017 11:18 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (704) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2016 Until 12/31/2016	06/01/2017 11:18 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (593) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2015 Until 12/31/2015	06/01/2017 11:17 AM	ELIBRARY - CLIENT BILLING OFF

70a

advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (358) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2014 Until 12/31/2014	06/01/2017 11:17 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (374) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2013 Until 12/31/2013	06/01/2017 11:17 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (482) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2012 Until 12/31/2012	06/01/2017 11:17 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (213) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2011 Until 12/31/2011	06/01/2017 11:16 AM	ELIBRARY - CLIENT BILLING OFF

71a

advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (148) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2010 Until 12/31/2010	06/01/2017 11:16 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (199) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2009 Until 12/31/2009	06/01/2017 11:16 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (177) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2008 Until 12/31/2008	06/01/2017 11:15 AM	ELIBRARY - CLIENT BILLING OFF
advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01-2017) (213) Search Type: Boolean T&C Content: California Federal District Court Dockets Date: From 01/01/2007 Until 12/31/2007	06/01/2017 11:15 AM	ELIBRARY - CLIENT BILLING OFF

72a

advanced: ("Fair Credit Reporting Act" OR FCRA) & DA(aft 12-31-2006 & bef 06-01- 2017) (3,745) Search Type: Boolean T&C Content: California Federal District Court Dockets	06/01/2017 11:14 AM	ELIBRARY - CLIENT BILLING OFF
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APPENDIX H

1. ADRIANA C SANCHEZ V. OSTERKAMP
TRANSPORTATION GROUP ET AL
May 16, 2017
CA LOS ANGELES SUPER. CT.
BC661121
LABOR & EMPLOYMENT
2. SHADEA ROBERTSON V. THE SAILS GROUP
INC ET AL
May 16, 2017
CA LOS ANGELES SUPER. CT.
BC661122
LABOR & EMPLOYMENT
3. CHARLENE NORSHIP ET AL V. BANK OF
AMERICA NA
May 12, 2017
CA LOS ANGELES SUPER. CT.
BC660985
CONTRACTS, BREACH OF CONTRACT
4. Mario Melendez v. Synchrony Bank and Equifax
Information Services LLC
May 10, 2017
CA Santa Clara Super. CT.
17CV309943
Civil
Judge(s): William J Elfving
5. EDWARD JOSEPH III V. SELECT STAFFING
ET AL
May 09, 2017
CA LOS ANGELES SUPER. CT.
BC660667
LABOR & EMPLOYMENT

6. MOHAMED S ADAN V. US SECURITY ASSOCIATES INC [E-FILE]
May 09, 2017
CA SAN DIEGO SUPER. CT.
37-2017-00016605-CU-OE-CTL
LABOR & EMPLOYMENT
7. DEVON M BAILEY V. SECTRAN SECURITY INC
May 01, 2017
CA LOS ANGELES SUPER. CT.
BC659823
LABOR & EMPLOYMENT
8. MATTHEW C. BROWNDORF V. XEROX EDUCATION SERVICES, LLC
May 01, 2017
CA ORANGE SUPER. CT.
30-2017-00917697-CU-BT-CJC
UNFAIR COMPETITION & BUSINESS PRACTICES, BUSINESS TORT
9. HORACE CRAWFORD V. ABM INDUSTRIES GROUP LLC
March 10, 2017
CA LOS ANGELES SUPER. CT.
BC653124
TORTS/NEGLIGENCE
Judge(s): MAREN E. NELSON
10. FISHER V. ENTERPRISE RENT-A-CAR COMPANY OF LOS ANGELES, LLC
March 06, 2017
CA ORANGE SUPER. CT.
30-2017-00907805-CU-PO-CXC
TORTS/NEGLIGENCE, WRONGFUL DEATH, NON-MOTOR VEHICLE
Judge(s): SANDERS

11. ANTHONY HERAS V. CONTEMPORARY
INFORMATION CORPORATION
February 28, 2017
CA LOS ANGELES SUPER. CT.
BC652212
OTHER
12. ANTHONY HERAS V. EQUIFAX INC
February 28, 2017
CA LOS ANGELES SUPER. CT.
BC652211
OTHER
13. ANTHONY HERAS V. AMERICAN EXPRESS
COMPANY INCORPORATION
February 27, 2017
CA LOS ANGELES SUPER. CT.
BC652017
CONTRACTS
Judge(s): MICHAEL L. STERN
14. AMES V. UNITED ROAD TOWING, ETAL
February 16, 2017
CA SAN BERNARDINO SUPER. CT
CIVDS1702876
LABOR & EMPLOYMENT
15. ANTHONY HERAS V. GOOD SAMARITAN
HOSPITAL ET AL
January 26, 2017
CA LOS ANGELES SUPER. CT.
BC648174
CONTRACTS
16. ANTHONY HERAS V. CAPITAL ONE BANK NA
January 11, 2017
CA LOS ANGELES SUPER. CT.
BC646024

CONTRACTS

Judge(s): GAIL FEUER

17. ANTHONY HERAS V. T D BANK N A

January 10, 2017

CA LOS ANGELES SUPER. CT.

BC646248

CONTRACTS

18. William Gray v. Trans Union LLC

December 22, 2016

CA Santa Clara Super. CT.

16CV304324

Civil Judge(s): Mary E Arand

19. CHARLENE NORSHIP ET AL V. EXPERIAN
INFORMATION SOLUTIONS INC

September 15, 2016

CA LOS ANGELES SUPER. CT.

BC634049

CONTRACTS, BREACH OF CONTRACT

20. RAHIM MULTANI V. PRO VALUE
PROPERTIES INC ET AL

July 15, 2016

CA LOS ANGELES SUPER. CT.

BC627489

TORTS/NEGLIGENCE

21. KRISTINA DYER V. OCWEN LOAN
SERVICING, LLC

June 20, 2016

CA ORANGE SUPER. CT.

30-2016-00858806-CU-OR-CJC

REAL PROPERTY

Judge(s): GRIFFIN

22. JESUS X MIRAMONTES V. U S
HEALTHWORKS INC
June 09, 2016
CA LOS ANGELES SUPER. CT.
BC623326
LABOR & EMPLOYMENT
Judge(s): JOHN SHEPARD WILEY JR
23. CHANCE PATAKI V. BANK OF AMERICA, NA
June 06, 2016
CA SAN BERNARDINO SUPER. CT
CIVDS1608856
REMEDIES, DAMAGES
24. NAVEEZ DEZFOLI V. JPMORGAN CHASE
BANK
May 19, 2016
CA LOS ANGELES SUPER. CT.
BC621018
TORTS/NEGLIGENCE
Judge(s): ANN I. JONES
25. GABRIEL M. QUINONES V. CREDITORS
SPECIALTY SERVICE INC
April 27, 2016
CA ORANGE SUPER. CT.
30-2016-00849047-CU-MC-CJC
CIVIL PROCEDURE
Judge(s): SCHULTE
26. ALYSSA BURNTHORNE-MARTINEZ V.
SEPHORA USA, INC., A DELAWARE CORPO-
RATION ET AL
April 22, 2016
CA SAN FRANCISCO SUPER. CT.
CGC-16-551620
CIVIL
Judge(s): JOHN K. STEWART

27. DE VOLK V. ENCORE CAPITAL GROUP INC
[IMAGED]
March 24, 2016
CA SAN DIEGO SUPER. CT.
37-2016-00009754-CU-WT-CTL
LABOR & EMPLOYMENT, WRONGFUL
TERMINATION/DISCHARGE
28. DERRICK BELL V. LORNA JANE USA INC
March 21, 2016
CA LOS ANGELES SUPER. CT.
BC614424
LABOR & EMPLOYMENT
29. Nick Miletak v. TaskRabbit, Inc.
March 21, 2016
CA Santa Clara Super. CT.
16CV292981
Civil Judge(s): Mary E Arand
30. JAY KOWARSKY V. OCWEN LOAN
SERVICING, LLC
February 26, 2016
CA ORANGE SUPER. CT.
30-2016-00837731-CU-MC-CJC
CIVIL PROCEDURE
Judge(s): FELL
31. FRANK NOORI V. VIVINT INC
February 24, 2016
CA LOS ANGELES SUPER. CT.
BC611434
LABOR & EMPLOYMENT
Judge(s): ANN I. JONES
32. DEMETA REYES V. EXPERIAN INFORMATION
SOLUTIONS, INC.
February 16, 2016
CA ORANGE SUPER. CT.

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30-2016-00835147-CU-MC-CXC
CIVIL PROCEDURE

33. JOHN DOE V. EXPERIAN DATA CORP.

February 09, 2016
CA ORANGE SUPER. CT.
30-2016-00834537-CU-MC-CXC
CIVIL PROCEDURE

34. ABROGINA V. KENTECH CONSULTING INC
[EFILE]

February 05, 2016
CA SAN DIEGO SUPER. CT.
37-2016-00004067-CU-OE-CTL
LABOR & EMPLOYMENT

35. JONATHAN TORAL V. GENERAL
CORPORATION INVESTIGATION INC

February 03, 2016
CA LOS ANGELES SUPER. CT.
BC609126
LABOR & EMPLOYMENT

36. CUNNINGHAM V. KELLY SERVICES

December 29, 2015
CA SAN BERNARDINO SUPER. CT
CIVDS1519220 CIVIL

37. ROBERT STONE V. U S SECURITY
ASSOCIATES INC

December 15, 2015
CA LOS ANGELES SUPER. CT.
BC604257
OTHER Judge(s): JOHN SHEPARD WILEY JR;
EMILIE H. ELIAS; ELIHU M. BERLE

38. ROSENBAUM V. INSIGHT GLOBAL INC
[E-FILE]
November 06, 2015
CA SAN DIEGO SUPER. CT.
37-2015-00037548-CU-MC-CTL
CIVIL
39. IVONNE LANZAS V. ASTRAZENECA ET AL
October 30, 2015
CA LOS ANGELES SUPER. CT.
BC599703
LABOR & EMPLOYMENT
Judge(s): DEIRDRE HILL
40. SHELTON V. HAL HAYS CONSTRUCTIONS
INC
October 16, 2015
CA RIVERSIDE SUPER. CT.
RIC1512464
CLASS ACTION
41. ERIC HALVORSON ET AL V. TALENTBIN, INC.
October 02, 2015
CA SAN FRANCISCO SUPER. CT.
CGC-15-548270
CIVIL
Judge(s): JOHN K. STEWART
42. A. PAYNE v. EXPERIAN INFORMATION
SOLUTIONS, INC
September 15, 2015
CA SANTA CLARA SUPER. CT.
1-15-CV-285618
Unfair Competition & Business Practices,
Business Tort

43. TSCHIRNER V. CALIFORNIA BUSINESS
BUREAU INC [IMAGED]
September 02, 2015
CA SAN DIEGO SUPER. CT.
37-2015-00029745-CU-BT-CTL
UNFAIR COMPETITION & BUSINESS
PRACTICES, BUSINESS TORT
44. PETER LEE ET AL V. THE HERTZ
CORPORATION ET AL
August 21, 2015
CA SAN FRANCISCO SUPER. CT.
CGC-15-547520
CIVIL Judge(s): TERI L. JACKSON; MARY E.
WISS; JOHN K. STEWART
45. T. LAGOS v. THE LELAND STANFORD
JUNIOR UNIVERSITY
August 18, 2015
CA SANTA CLARA SUPER. CT.
1-15-CV-284497
Civil Procedure
46. ROBERT STONE V. STERLING INFOSYSTEMS
INC
August 13, 2015
CA LOS ANGELES SUPER. CT.
BC591410
OTHER
Judge(s): AMY D. HOGUE
47. LARRY MONTEZ V. CHAPMAN GLOBAL
MEDICAL CENTER, INC.
July 31, 2015
CA ORANGE SUPER. CT.
30-2015-00801843-CU-OE-CXC
LABOR & EMPLOYMENT
Judge(s): DUNNING

48. LORRETTA NESBITT V. POSTMATES INC.
July 31, 2015
CA SAN FRANCISCO SUPER. CT.
CGC-15-547146
CIVIL
Judge(s): JOHN K. STEWART
49. DESIREE GILBERG V. CALIFORNIA CHECK
CASHING STORES INC
July 20, 2015
CA LOS ANGELES SUPER. CT.
BC588602
LABOR & EMPLOYMENT
Judge(s): WILLIAM F. HIGHBERGER
50. SUSAN LINES V. BANK OF AMERICA
NATIONAL ASSOCIATION ET AL
July 13, 2015
CA LOS ANGELES SUPER. CT.
BC587862
TORTS/NEGLIGENCE
51. CICELY MELLO V. TRADER JOE'S COMPANY
July 10, 2015
CA SAN FRANCISCO SUPER. CT.
CGC-15-546803
CIVIL
Judge(s): JOHN K. STEWART
52. SOLOMON ASHLEY V. LOS ANGELES CITY OF
January 26, 2015
CA. LOS ANGELES SUPER. CT.
BC570345
CIVIL
53. JOEL GONZALEZ V. EQUIFAX INFORMATION
SERVICES LLC
October 24, 2014
CA SAN BERNARDINO SUPER. CT

CIVDS1416257
REMEDIES, DAMAGES

54. JUSTIN POLK V. WAL-MART STORES INC
ET AL
July 15, 2014
CA LOS ANGELES SUPER. CT.
BC551669
LABOR & EMPLOYMENT, WRONGFUL
TERMINATION/DISCHARGE
Judge(s): GREGORY W. ALARCON; DEBRE K.
WEINTRAUB
55. REGMON L. HAWKINS V. TRACERS
INFORMATION SPECIALISTS, INC.
March 04, 2014
CA ORANGE SUPER. CT.
30-2014-00708862-CU-OE-CJC
LABOR & EMPLOYMENT
Judge(s): GRIFFIN
56. V. BARBERO v. EQUIFAX INFORMATION
SERVICES, LLC
February 18, 2014
CA SANTA CLARA SUPER. CT.
1-14-CV-260766
Civil Procedure
57. ROGER L CULBERSON II V. THE WALT
DISNEY COMPANY
November 01, 2013
CA LOS ANGELES SUPER. CT.
BC526351
LABOR & EMPLOYMENT
Judge(s): ANN I. JONES; JANE JOHNSON
58. DAVID E BRENT V. KELLY SERVICES INC
August 30, 2013
CA LOS ANGELES SUPER. CT.

BC519964
LABOR & EMPLOYMENT

59. ISSEN ALIBRIS V. CHECKPAST LLC

August 07, 2013

CA LOS ANGELES SUPER. CT.

BC517583

TORTS/NEGLIGENCE

Judge(s): JOHN SHEPARD WILEY JR; EMILIE
H. ELIAS; WILLIAM F. HIGHBERGER

60. JOHN NGUYEN V. EXPERIAN ET AL

June 14, 2013

CA LOS ANGELES SUPER. CT.

BC512189

TORTS/NEGLIGENCE

Judge(s): TERRY A. GREEN; JOSEPH R. KALIN

61. ALEKSANDR KOVALERCHIK V. EXPERIAN

INFORMATION SOLUTIONS INC

June 07, 2013

CA LOS ANGELES SUPER. CT.

BC511486

TORTS/NEGLIGENCE, PERSONAL INJURY

62. ROE V. AMERICAN DATABANK, LLC A

FOREIGN CORPORATION DOING BU

June 07, 2013

CA ALAMEDA SUPER. CT.

HG13682746

LABOR & EMPLOYMENT

APPENDIX I

Case Info	Parties	Summary	Lawyers
North and East Bay Alameda County Superior Court RG17-861054 5/19/2017 12:00:00 AM Oakland	Adan Ortiz, on behalf of himself, all others similarly situated v. Genco1 Inc., a Delaware corporation	Fair Credit Reporting Act class action. Defendant routinely acquires credit and background reports on individuals to conduct background checks for employment purposes without providing proper disclosures and obtaining proper authorization.	P: Shaun Setareh
Los Angeles State Los Angeles Superior Court BC661121 5/16/2017 12:00:00 AM	Central District Adriana C. Sanchez, and on behalf of all others similarly situated v. Osterkamp Transportati on Group; Osterkamp Trucking Inc.; Dedicated Fleet Systems Inc.; Frontier Transportati on Inc. Judge: Freeman	Class action for Violation of the Fair Credit Reporting Act. Defendants would conduct a background check on plaintiffs and other prospective, current and former employees and use information from credit and background reports in connection with their hiring process without providing proper disclosures and obtaining proper author-ization in compliance with the law.	P: Shaun Setareh

Los Angeles State Los Angeles Superior Court Central District BC661122 5/16/2017 12:00:00 AM	Shadea Robertson, and on behalf of all others similarly situated v. The Sails Group Inc.; Supported and Independent Living Services (SAILS) Bakersfield Inc. Judge: Freeman	Class action for Violation of the Fair Credit Reporting Act. Defendants would conduct a background check on plaintiffs and other prospective, current and former employees and use information from credit and background reports in connection with their hiring process without providing proper disclosures and obtaining proper authorization in compliance with the law.	P: Shaun Setareh
Los Angeles State Los Angeles Superior Court Central District BC66-985 5/12/2017 12:00:00 AM	Charlene Norship; Joseph Kretchet v. Bank of America, N.A. Judge: Palazuelos	Violation of the Fair Credit Reporting Act	P: Pro per
Los Angeles State	Edward Joseph III, and on behalf of all	Class action for Violation of the Fair Credit Reporting	P: Devin Fok

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Los Angeles Superior Court Central District BC660667 5/9/2017 12:00:00 AM	others similarly situated v. Select Staffing; Insight Worldwide Inc. Judge: Nelson	Act. Select failed to place plaintiff with any employer after receiving a background check report that impermissibly disclosed convictions that had been dismissed.	P. Lawyer Firm: DHF Law
San Francisco Superior Court San Francisco County Superior Court CGC-17-558733 5/8/2017 12:00:00 AM	Jason P. Perry, on behalf of himself, all others similarly situated v. John Stewart Company; Does	Class action for unfair credit reporting. An employment application contained an authorization and disclosure form for an investigative consumer report into plaintiff's history that did not meet the requirements of the Fair Credit Reporting Act. The form was embedded with extraneous information, rather than being a clear and unambiguous disclosure in a stand-alone document.	P: Shaun Setareh
Inland Counties Riverside County Superior Court	Deana Dincoff; James Dincoff v. Transunion Corp.; Does	Fair Credit Reporting Act. Defendant is reporting an erroneous debt on plaintiffs' credit	P: Todd Friedman

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MCC17002 80 3/16/2017 12:00:00 AM Murrieta		report and have failed to correct it.	
Central Valley San Joaquin County Superior Court 2016-13079 12/28/2016 12:00:00 AM	STK-CV-UOE- Efrain Palacios, an individual and on behalf of all others similarly situated v. DBI Beverage, a Tennessee corporation; DBI Beverage San Joaquin; Does	Fair Credit Reporting Act class action. Defendants did not provide prospective or current employees the required notification that they were going to conduct a background check on them that included pulling their credit report.	P: Todd Schneider
Orange County Orange County Superior Court 00893243C JC 12/19/2016 12:00:00 AM	Akram Chahin; Jackelyn You v. Experian Information Solutions, Inc.; Does	Fair Credit Reporting Act.	P: Todd Friedman
Inland Counties Riverside County Superior Court	Johnathan L. Gonsalves v. LoanCare LLC; Does	Fair Credit Reporting Act. Defendant is reporting inaccurate credit information on	P: Jeremy Golden

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RIC161618 6 12/8/2016 12:00:00 AM Riverside		plaintiff's credit report and has refused to correct it.	
North and East Bay Alameda County Superior Court RG16-833457 9/30/2016 12:00:00 AM Oakland	Joyce Benton, individually and on behalf of all others similarly situated v. Clarity Services Inc.; Does	Fair Credit Reporting Act. Defendant discloses consumers' private information to unlicensed payday lenders.	P: Mark Chavez P. Lawyer Firm: Chavez Gertler
Los Angeles State Los Angeles Superior Court Central District BC634049 9/15/2016 12:00:00 AM	Charlene Norship; Joseph Kretchet v. Experian Information Solutions Inc.; DFS Services LLC; Chase Bank (USA) N.A.; Citibank N.A. Judge: Linfield	Violation of the Fair Credit Reporting Act	P: Pro per
Inland Counties Riverside County Superior Court	Jong Gul Park v. TD Bank USA NA; Experian Information	Fair Credit Reporting Act. Defendants are reporting inaccurate information on	P: Howard Silver

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RIC160943 1 7/25/2016 12:00:00 AM Riverside	Solutions Inc.; Does	plaintiff's credit report, including a credit card account which was opened as a result of identity theft.	
Los Angeles State Los Angeles Superior Court Central District BC627489 7/15/2016 12:00:00 AM	Rahim Multani v. Pro Value Properties, Inc.; APB Properties, LLC; One West Bank, N.A.; CIT Bank, N.A.; Ocwen Loan Servicing, LLC; Equifax Information Services, LLC; Experian Information Solutions, Inc.; Transunion Corp. Judge: Mackey	Violation of the Fair Debt Collection Practices Act and Fair Credit Reporting Act.	P: F. Freddy Sayegh P. Lawyer Firm: The Foxy Firm
Los Angeles State Los Angeles Superior Court BC623326	Central District Jesus X. Miramontes v. U.S. Healthworks, Inc. Judge: Wiley	Class action for violations of the Fair Credit Report- ing Act. Defendant failed to provide notice of the use of consumer reports to make hiring decisions. along	P: Devin Fok

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6/9/2016 12:00:00 AM		with a summary of employee rights.	
Los Angeles State Los Angeles Superior Court Central District BC6210185 /19/2016 12:00:00 AM	Naveed Dezfoli v. JPMorgan Chase Bank Judge: A. Jones	Class action for violation of the Fair Credit Reporting Act and the California Con- sumer Reporting Agencies Act. Inaccurate reporting of account information.	P: Todd Friedman
Central Coast Ventura County Superior Court 56- 2016- 00481853- CU- MC- VTA 5/18/2016 12:00:00 AM	James Fox; Jeryln Fox v. Wells Fargo Bank, NA; Equifax Information Services, LLC; Trans Union, LLC; Does Judge: Baio	Fair Credit Reporting Act. Defendants approved a short sale of plaintiffs' property and said a foreclosure would not appear on their credit reports. Defendants instead reported negative information to the credit bureaus.	P: Howard Silver
Orange County Orange County Superior Court 00849047C JC 4/27/2016	Gabriel M. Quinones v. Creditors Specialty Service of Nevada Inc.; Creditors Specialty Service of	Fair Credit Reporting Act.	P: Adam Fullman P. Lawyer Firm: The Fullman Firm

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12:00:00 AM	Nevada Inc.; Does Judge: Schulte		
Central Valley Fresno County Superior Court 16CECG01321 4/26/2016 12:00:00 AM	Dave Meza, an individual, on behalf of himself and all others similarly situated v. AT&T Inc.; Pacific Bell Telephone Company; Does	Fair Credit Reporting Act class action. Defendants procured a consumer report on plaintiff for employment purposes without first making a clear and conspicuous disclosure in writing to plaintiff.	P: Peter Dion-Kindem
Central Valley Fresno County Superior Court 16CECG01192 4/14/2016 12:00:00 AM	Dave Meza, an individual, on behalf of himself and all others similarly situated v. Verizon Communications Inc., a Delaware corporation; Verizon California Inc.; Does	Unfair credit reporting class action. Defendants violated the Fair Credit Reporting Act by procuring consumer reports for employment purposes without first making the requisite disclosures and obtaining consent.	P: Peter Dion-Kindem
Los Angeles State Los Angeles Superior	Lisa Douglass v. USAA Casualty Insurance, Inc.; Bank of	Violations of the Fair Credit Reporting Act	P: Pro per

Court Central District BC613959 3/16/2016 12:00:00 AM	America Corporation, Inc.; Equifax, Inc.; TransUnion Corp. Judge: Hill		
Orange County Orange County Superior Court 00834537C JC 2/9/2016 12:00:00 AM	John Doe, individually and as a representati ve of the classes v. Experian Data Corp., dba Experian Public Records; Does Judge: Gastelum	Fair Credit Reporting Act class action. Defendant routinely includes information to its consumer reports furnished to third parties about criminal cases that have been dismissed pursuant to Michigan's Holmes Youthful Trainee Act.	P: Stephanie Tatar
Los Angeles State Los Angeles Superior Court Central District BC609126 2/3/2016 12:00:00 AM	Jonathan Torral v. General Corporate Investigation Inc. Judge: Alarcon	Violation of FCRA section 1681c; Violation of ICRAA section 1789.18	P: Devin H. Fok P. Lawyer Firm: DHF Law P.C.
Inland Counties San	Sandra Cunningham individually and as a	Employment class action. A disclosure defendant provides is not in compliant	P: Eleanor Frisch P. Lawyer

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Bernardino County Superior Court CIVDS1519 220 12/29/2015 12:00:00 AM San Bernardino	representati ve of the class v. Kelly Services Inc.	with the FCRA;s plain language because it includes inter alia extrane- ous information.	Firm: Nichols Kaster
Los Angeles State Los Angeles Superior Court Central District BC602327 12/1/2015 12:00:00 AM	Michael McLaurin v. Carmax Auto Superstores California LLC; Exeter Finance Corp.; Del Mar Recovery Solutions Inc. Judge: Beaudet	Fair credit reporting act (FCRA) 15 U.S.C. sec 1681; Breach of contract; Conversion	P: Therese S. Harris
Sacramento Sacramento County Superior Court 00186114 10/28/2015 12:00:00 AM	Greg S. Schmidt v. OCWEN Loan Servicing LLC; Does	Fair Credit Reporting Act. Plaintiff has been denied auto and mortgage loans because defendant continues to list a debt on his credit reports that was charged-off in 2009.	P: Christopher Fry
Inland Counties	Chris Shelton, on behalf of himself and	Fair Credit Reporting Act class action. Defendant did not provide	P: Shaun Setareh

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Riverside County Superior Court RIC151246 4 10/16/2015 12:00:00 AM Riverside	all others similarly situated v. Hal Hays Construction Inc.; Does	plaintiff and class with stand-alone written disclosures before obtaining a credit or background report.	
Inland Counties Riverside County Superior Court RIC151148 5 9/18/2015 12:00:00 AM Riverside	James Simpson v. Hemet Chrysler Dodge Jeep Ram; Does	Fair Credit Reporting Act. Defendant obtained plaintiff's credit report without permission.	P: Jeremy Golden P. Lawyer Firm: Golden Cardona-Loya
Silicon Valley San Mateo County Superior Court CIV535083 8/17/2015 12:00:00 AM	Elizabeth Larroque, individually and on behalf of others similarly situated v. First Advantage LNS Screening Solutions Inc.; Does	Fair Credit Reporting Act class action. Defendant provided consumer reports for employment purposes without first obtaining written agreement that the report would not be used improperly.	P: Peter Dion-Kindem
Orange County Orange County Superior	Larry Montez v. Chapman Global Medical	Fair Credit Reporting Act class action. Defendants violate the FCRA by failing to	P: Counselone, PC

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Court 00801843C XC 7/31/2015 12:00:00 AM	Center, Inc.; KPC Healthcare, Inc.	provide plaintiff and class members with a clear and conspicuous written disclosure before a consumer report is procured.	
San Francisco Superior San Francisco County Superior Court CGC-15- 547146 7/31/2015 12:00:00 AM	Lorretta Nesbitt, individually and as a representati ve of the class v. Postmates Inc.	Fair Credit Reporting Act class action. Defendant does not properly disclose to poten- tial employees that it obtains consumer or background reports. Statute requires that the disclosure be a “clear and conspicuous,” stand-alone document, but defendant embedded its disclosure within an employment application.	P: Matthew Helland P. Lawyer Firm: Nichols Kaster
Los Angeles State Los Angeles Superior Court BC588602 7/20/2015 12:00:00 AM	Central District Desiree Gilberg, and on behalf of all others similarly situated v. California Check Cashing Stores Inc.; Checksmart	Class action for failure to make proper disclosure in violation of the 15 U.S.C. Sec. 1681 b(b)(2)(A) (Fair Credit Reporting Act)	P: Shaun Setareh

	Financial LLC Judge: Highberger		
San Francisco Superior San Francisco County Superior Court CGC-15- 546803 7/10/2015 12:00:00 AM	Cicely Mello, individually and on behalf of all others similarly situated v. Trader Joe's Company	Fair Credit Reporting Act class action. Defendant does not properly disclose to poten- tial, current and past employees that it obtains consumer or background reports. Statute requires that the disclosure be a “clear and conspicuous,” stand- alone document, but defendant embedded its disclosure within an employment application.	P: Lionel Glancy P. Lawyer Firm: GlancyPr ongay
Inland Counties Riverside County Superior Court RIC150769 8 6/30/2015 12:00:00 AM Riverside	Dennis R. Rowley v. JP Morgan Chase Bank; Does	Fair Credit Reporting Act. Defendants attempted to collect even when plaintiff provided a police report stating he had been a victim of identity theft.	P: Howard Silver
North and East Bay	Regmon L. Hawkins, on behalf of	Class action. Fair Credit Reporting Act. Defendant S2	P: Michael Caddell

Alameda County Superior Court RG15-774306 6/16/2015 12:00:00 AM	himself and all others similarly situated v. S2Verify; International Corp; Does	Verify sells consumer reports based on an individual's criminal history without confirming that the information complies with the Fair Credit Reporting Act, and other issues.	P. Lawyer Firm: Caddell & Chapman
San Francisco Superior Court San Francisco County Superior Court CGC-15-546271 6/10/2015 12:00:00 AM	Darion Albert v. The San Francisco Municipal Transportation Agency (SFMTA)	Fair Credit Reporting Act. Defendant did not allow plaintiff to challenge an erroneous finding that he had a criminal record before denying him a license to drive a taxicab.	P: In proper
North and East Bay Sonoma County Superior Court SCV257268 6/8/2015 12:00:00 AM	Michelle Bercut v. Michael Stores Inc.; Does	Employment class action. Defendant improperly obtained and used consumer reports for plaintiff and other potential employees during the employment process, in violation of the Fair Credit Reporting Act.	P: Marc Godino P. Lawyer Firm: Glancy Prongay
Los Angeles State	Aram Avrand v. Ocwen Loan	Violations of the Fair Credit Reporting Act and	P: Eric Jimenez

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Los Angeles Superior Court Central District BC583420 5/29/2015 12:00:00 AM	Servicing, LLC Judge: Hiroshige	the California Consumer Credit Reporting Agencies Act	
Inland Counties Riverside County Superior Court PSC150235 6 5/22/2015 12:00:00 AM Palm Springs	David Beltran v. Next Level Home Theater, Inc.	Fair Credit Reporting Act. Defendants did not hire plaintiff based on his background report but did not provide him with a copy of his report or the required statement of rights.	P: Stephanie Tatar
Central Valley Fresno County Superior Court 15CECG01 528 5/13/2015 12:00:00 AM	Hussein Ali v. Chex System Inc.; E*Trade Financial Corporation	Defamation and Fair Credit Reporting Act. Defendant E*Trade reported to defendant Chex that plaintiff was involved in an account abuse. Plaintiff wrote to both defendants to inform them that the information was incorrect, but they refuse to correct the problem.	P: In proper
Los Angeles State	Maryna Pylypchuk v. Equifax	Violation of the fair credit reporting act	P: Howard D. Silver

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Los Angeles Superior Court Central District BC578937 4/20/2015 12:00:00 AM	Information Services LLC Judge: Bowick		
Los Angeles State Los Angeles Superior Court Central District BC578224 4/10/2015 12:00:00 AM	Danielle Miceli; and on behalf of all others similarly situated v. International Coffee & Tea LLC Judge: Freeman	Class action for violation of the fair credit reporting act sec.1681	P: Scott B. Cooper
Los Angeles State Los Angeles Superior Court Central District BC574951 3/9/2015 12:00:00 AM	Tawana Ferguson; and as representative of the class v. Ziprecruiter Inc. Judge: Wiley	Class action for failure to obtain certification of a permissible purpose in violation of 15 U.S.C. sec. 1681 e (a); Failure to obtain certification of disclosure, authorization, adverse action procedures, and equal employment opportunity laws in violation of U.S.C. sec. 1681	P: Matthews C. Helland P. Lawyer Firm: Nichols Kaster LLP

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		b(b)(1)(A); Failure to provide summary of consumer rights in violation of 15 U.S.C. sec. 1681 b(b)(1)(B); Failure to provide to users of FCRA Responsibilities in violation of 15 U.S.C. sec. 1681 e(d)(1)	
North and East Bay Alameda County Superior Court RG15-759015 2/17/2015 12:00:00 AM Oakland	Shadea Robertson, on behalf of herself and all others similarly situated v. E. Light Wind and Solar Inc.; E. Light Electrical Services Inc., a Colorado corporation; Does	Employment class action. In violation of the Fair Credit Reporting Act, defendants routinely acquire consumer credit reports to conduct background checks on prospective, current and former employees.	P: Shaun Setareh P. Lawyer Firm: Setareh Law Group
North and East Bay Alameda County Superior Court RG15-757046 2/2/2015 12:00:00	Terria K. Harris, on behalf of herself and all others similarly situated v. Home Depot USA Inc., a Delaware corporation; Does	Employment class action. Defendant uses consumer credit reports to conduct background checks on prospective, current and former employees, which violates the Fair Credit Reporting Act.	P: Shaun Setareh P. Lawyer Firm: Setareh Law Group

AM Oakland			
Los Angeles State Los Angeles Superior Court Central District BC568230 12/31/2014 12:00:00 AM	Carlo A. Carrion v. United Student Aid Funds, Inc.; Sallie Mae Inc. Judge: Treu	Violation of the Fair Credit Reporting Act	P: Pro per
North and East Bay Alameda County Superior Court RG14-732910 7/15/2014 12:00:00 AM Oakland	Leon Roe v. LexisNexis Risk Solutions Corp.; Does	Fair Credit Reporting Act violation. Defendant provided a potential employer a background screening report that included "possession of a weapon." Plaintiff was actually charged with possession of a dagger. The mistake caused plaintiff to lose his job.	P: Rudolph J. Alejo
Los Angeles State Los Angeles Superior Court	James Gusman v. National University International LLC	Violation of the fair credit reporting act; defendant reported derogatory information on plaintiffs credit report.	P: Todd M. Friedman

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Central District BC550934 7/8/2014 12:00:00 AM	Judge: White		
Los Angeles State Los Angeles Superior Court Central District BC547660 6/3/2014 12:00:00 AM	Linda Lam v. Cathay Bank Judge: Edmon	Class action for violations of the Fair Credit Reporting Act. Failure to provide copies of criminal background reports after taking adverse employment actions.	P: Pamela Tsao P. Lawyer Firm: Ascension Law Group
Los Angeles State Los Angeles Superior Court Central District BC544636 5/2/2014 12:00:00 AM	Enika R. Fluellen; Eddie L. Fluellen v. CarMax Auto Superstores California, LLC; Dante Carter; Mark Soleness Judge: Hill	Violation of the Consumer Credit Reporting Agencies Act and the Fair Credit Reporting Act.	P: Sharon Glassey P. Lawyer Firm: Glassey Smith
Silicon Valley Santa Clara County Superior Court 1-14-	Thanh Van Do v. Northwest Trustee Services Inc.	Violation of the Fair Credit Reporting Act. Defendant made inaccurate reporting of plaintiff's credit.	P: Charles Marshall

CV- 262514 3/20/2014 12:00:00 AM			
Silicon Valley Santa Clara County Superior Court 1-14-CV- 260766 2/18/2014 12:00:00 AM	Vivianne Barberp v. Equifax Information Services LLC	Violation of the Fair Credit Reporting Act. Defendants made inaccurate reporting of plaintiff's credit.	P: Ben Dupre
San Diego Superior San Diego County Superior Court 37-2014-00084767-CU- BT-CTL 1/23/2014 12:00:00 AM	Jaime Lea Derderian v. Southwestern & Pacific Specialty Finance Inc; Check N Go Judge: Pressman	Class action for violation of the fair credit reporting act. Defendant failed to make a firm offer of credit to plaintiff after obtaining their consumer credit report.	P: Jeffrey Wilens P. Lawyer Firm: Lakeshore Law
North and East Bay Alameda County Superior Court HG14-708649 1/2/2014 12:00:00 AM Hayward	Jose Leopoldo Rubio-Delgado v. American Background Information Services Inc.; Does	Fair Credit Reporting Act violation. Defendant furnished an inaccurate background check report on plaintiff to plaintiff's employer. The report included an auto theft charge	P: Devon H. Fok

		that was dismissed. As a result, plaintiff lost his job.	
San Francisco Superior Court San Francisco County Superior Court CGC-13-536520 12/30/2013 12:00:00 AM	Kamlesh Banga v. Equifax Information Services LLC; Does	Violation of the Fair Credit Reporting Act. Defendant sold plaintiff's credit report to creditors who then sent him unsolicited, preapproved credit offers.	P: In Pro Per
North and East Bay Alameda County Superior Court RG13-708456 12/30/2013 12:00:00 AM Oakland	Kamlesh Banga v. Kohl's Department Stores Inc.; Experian Information Solutions Inc.; Does	Fair Credit Reporting Act violation. Defendants violated a protective order in an underlying federal lawsuit by attaching plaintiff's credit reports to their Opposition to Motion for Sanction. Defendant Experian refused to remove the reports from public record.	P: Pro Se
North and East Bay Alameda County Superior Court	Jose Leopoldo Rubio-Delgado v. American	Fair Credit Reporting Act violation. Defendant provided an	P: Devin H. Fok

Court HG13- 707614 12/20/2013 12:00:00 AM Hayward	Background Information Services Inc.; Does	inaccurate background check to plaintiff's employer, Aerotek. The report included a misdemeanor that had been dismissed, which caused plaintiff to lose his job.	
North and East Bay Alameda County Superior Court RG13- 707606 12/20/2013 12:00:00 AM Oakland	Jane Roe v. Frito-Lay Inc.; Does	Class action for Fair Credit Reporting Act violation. Defendant failed to provide job appli- cants and employees with consumer reports it obtained before taking an adverse employment action.	P: Devin H. Fok
Los Angeles State Los Angeles Superior Court Central District BC526351 11/1/2013 12:00:00 AM	Roger L. Culberson II v. The Walt Disney Company Judge: Johnson	Class action for violations of the Fair Credit Report- ing Act. Failure to provide job applicants with copies of their con- sumer reports or notice of adverse actions based on those reports.	P: John Girardi P. Lawyer Firm: Girardi Keese
San Francisco Superior	John Martin v. Credit Consulting Services Inc.;	Violation of the California Consumer Reporting Agencies Act, Federal Fair	P: Babak Semnar

San Francisco County Superior Court CGC-13-533952 8/30/2013 12:00:00 AM	Experian Information Solutions Inc.; Equifax Inc.; Does	Credit Reporting Act and the Rosenthal Fair Debt Collections Act. Defendants went after plaintiff individually for consumer debt owed by the trust for which he is the trustee.	
Los Angeles State Los Angeles Superior Court Central District BC519964 8/30/2013 12:00:00 AM	David E. Brent v. Kelly Services, Inc. Judge: Johnson	Class action for violations of the Fair Credit Reporting Act.	P: Devin Fok
North and East Bay Alameda County Superior Court RG13-688885 7/24/2013 Oakland	12:00:00 AM Jennifer Roe v. First Advantage Background Screening Corp.; Does	Fair Credit Reporting Act violation. Defendant provides screening reports of individuals to employers that are inaccurate and not up to date.	P: Tanya Koshy P. Lawyer Firm: East Bay Community Law Center
North and East Bay Contra Costa County	Alfredo Leon Orea v. Mortgage Lenders Of	Violation of fair credit reporting act. Despite having been given instructions by plaintiff not to pull	P: Todd M. Friedman

Superior Court MSC13-01484 7/10/2013 12:00:00 AM	America LLC; Does	his credit report, defendant did so anyway, resulting in damage to plaintiff's credit rating.	
Los Angeles State Los Angeles Superior Court Central District BC512189 6/14/2013 12:00:00 AM	John Nguyen v. Experian; Equifax; Transunion; American Express; HSBC; CitBank; National Enterprises Systems; Bank of America; Northland Group; MCM; Verizon West; Arrow Judge: Green	Interference with prospective economic relations; violation of the Fair Credit Reporting Act. Failure to correct erroneous information on credit reports.	P: Thomas Pham Jr.
Central Coast Ventura County Superior Court 56-2013-00437706-CU- MC-VTA 6/10/2013 12:00:00	Bryan Getz on behalf of himself and all others similarly situated v. California-cinema Investments, Inc. dba Cinopolis Luxury	Class action for violations of the Fair Credit Reporting Act. Defendant prints more than the last five digits of customer's credit cards or debit cards on receipts for their purchases. Plaintiff is asking for an injunction, costs,	P: Daniel Gaines P. Lawyer Firm: Gaines & Gaines

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AM Ventura	Cinemas; Does Judge: Henry Walsh	and punitive damages.	
Los Angeles State Los Angeles Superior Court Central District BC511486 6/7/2013 12:00:00 AM	Aleksandr Kovalerchik v. Experian Information Solutions, Inc. Judge: Jessner	Violation of the Fair Credit Reporting Act and California Consumer Credit Reporting Agencies Act	P: John Fitzmorris
North and East Bay Alameda County Superior Court HG13- 682746 6/7/2013 12:00:00 AM Hayward	Jane Roe v. American Databank LLC; Does	Fair Credit Reporting Act violation. Defendant reported inaccurate infor- mation to credit reporting agencies, which caused plaintiff to lose her job.	Joshua Kim

APPENDIX J

Emory University School of Law

Legal Studies Research Paper Series

Research Paper No. 16-402

An Empirical Survey of No-Injury Class Actions

Joanna Shepherd

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AN EMPIRICAL SURVEY OF NO-INJURY CLASS ACTIONS

Joanna Shepherd

Professor of Law, Emory University School of Law

EXECUTIVE SUMMARY

American courts have long struggled with the propriety of “no-injury” claims by plaintiffs that have not suffered a concrete harm. Critics argue that these cases contravene the longstanding constitutional requirement that courts decide actual controversies, whereas supporters assert that the actions involve very real injuries that the law is designed to redress. Regardless of the validity of the arguments for or against no-injury class actions, one thing is clear: these actions only fulfill their compensatory purpose if plaintiffs receive an adequate share of the damages paid by defendants. In contrast, if the lion’s share of the damage award is allocated to litigation expenses or attorneys’ fees, the actions inefficiently compensate plaintiffs and instead, benefit primarily the lawyers.

This report empirically examines the allocation of no-injury class action awards among plaintiffs, attorneys, and other expenses. A team of independent

researchers examined data in Westlaw and Lexis drawn from final orders, settlement agreements, and various other court documents such as those approving settlements and attorneys' fee awards in 2,158 cases. The researchers further narrowed down the pool using standards suggested by the defendants and amici in the recent briefs submitted in the *Spokeo v Robins* case currently before the U.S. Supreme Court. We classified cases as no-injury actions if at least one of the four following conditions were met: (1) if the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (2) if the only harm was a technical statutory violation; (3) if any economic loss was negligible or infinitesimal; or (4) if the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm. Restricting the pool of cases to these "no-injury" criteria and including only cases for which there was information on the amounts of both attorneys' fees and settlement funds yielded a final data sample of 432 cases resolved between 2005-2015.

The 432 no-injury cases in the sample data were brought in the federal and state courts located in 33 states. In the data, 155 cases involve claims brought under state statutes and 296 involve claims brought under a federal statute. The most common federal statutes giving rise to claims in the data are the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, the Fair Credit Reporting Act, and the Electronic Funds Transfer Act. Of the 432 cases, only 2.5% of the cases were resolved at trial; the rest were resolved by settlement. The aggregate monetary value of the settlements and awards was approximately \$4 billion. Estimated monetary awards ranged from \$2,200 to \$580 million; the average was \$9.37 million.

In each case the total award was allocated to various combinations of class members, class representatives, attorneys' fees to class counsel, cy pres funds, other legal expenses, and the costs of administering the settlement fund. On average, 60 percent of the total monetary award paid by the defendants was allocated to the plaintiffs' class and 37.9 percent was allocated to attorneys' fees. However, the funds available to class members at the time of settlement may significantly overstate the actual amount class members ultimately receive. Many claims-made settlements with a fixed compensation per class member disperse the unclaimed portion of the settlement fund to a cy pres fund. As a result, the actual distribution to attorneys and plaintiffs may look very different than the relative funds available to each.

Although determining the claims rate is extremely difficult, previous studies suggest it is almost always less than 15 percent, and oftentimes less than one percent. In the sample data, if class members regularly claim less than 15 percent of these available funds, they would receive only 9 percent of the total monetary award paid by the defendant. That is, although 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class. A result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class actions.

I. Introduction

For decades American courts have struggled with the propriety of "no-injury" claims by plaintiffs that

have not suffered a concrete harm. The earliest no-injury claims were seen in “exposure-only” cases brought by plaintiffs who alleged exposure to toxic substances, but had not experienced any physical manifestations or symptoms. In addition to mass torts suits, exposure-only claims were made in product defect cases, environmental cases, and pharmaceutical litigation. More recently, no-injury claims have arisen in new areas of the law such as consumer fraud cases where consumer plaintiffs claim they were misinformed about purchases but were never harmed; invasion of consumer privacy cases where consumer plaintiffs claim their personal information was used inappropriately even though no harm resulted; and cases brought under numerous state and federal statutes for statutory violations that did not result in any tangible harm. Because only minimal damages are expected in cases with no concrete harm, the no-injury claims are often filed as class actions so that settlements can be pursued at a scale that justifies an award of substantial attorney fees. Such cases are rarely pursued individually because the potential damage awards would never justify the legal fees expended.

No-injury class actions have been the center of substantial debate. Critics argue that no-injury cases contravene the longstanding constitutional requirement in U.S. federal courts and similar requirements of state courts that courts decide actual controversies.¹ Generally, a plaintiff must demonstrate that they suffered a physical injury or foreseeable economic loss

¹ Victor E. Schwartz & Cary Silverman, *The Rise of “Empty Suit” Litigation. Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 601 (2015).

as a result of the defendants' conduct.² Such requirements preserve judicial resources for cases that involve actual injuries instead of cases that are speculative or involve intangible issues that are difficult to compensate. Tort law reserves liability for objectively genuine harms and Article III standing requires an "injury in fact" that will "likely . . . [be] redressed by a favorable decision."³ Indeed, in addressing the propriety of a "no-injury" class, the Seventh Circuit Court of Appeals concluded "'No injury, no tort, is an ingredient of every state's law."⁴

Supporters of no-injury class actions assert that the actions involve very real injuries that the law is designed to redress. They argue that consumers suffer a tangible loss when they purchase a product that has a latent defect or is different than advertised,⁵ or that exposure to potentially harmful substances is a harm in itself, even without physical manifestations. Similarly, they maintain that Congress and state legislatures have determined that statutory violations

² See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 165 (5th ed. 1984) ("Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action] The threat of future harm, not yet realized, is not enough.")

³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁴ *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002)

⁵ Public Citizen, *The Fiction of The "No-Injury" Class Action* 9-12 (2015), <http://www.citizen.org/documents/the-fiction-of-no-injury-class-action.pdf>

are worthy of legal redress, and that courts must honor those resolutions.⁶

Regardless of the validity of the arguments for or against no-injury class actions, one thing is clear: these actions only fulfill their compensatory purpose if plaintiffs receive an adequate share of the damages paid by defendants. In contrast, if a sizable portion of the damage award is allocated to litigation expenses or attorneys' fees, the actions inefficiently compensate plaintiffs.

Moreover, although plaintiff compensation is irrelevant to whether defendants are deterred from future harmful behavior, achieving deterrence through private class actions is exceptionally imprecise and inefficient. Whereas actions brought by state attorneys general are typically brought in "the public interest" and designed to curtail future behavior that is harmful to the citizens of a state, actions brought by private attorneys in class actions are rife with conflicts of interest and unlikely to be in the public interest. For example, the redundant and indulgent provisions in many state consumer protection laws—such as guaranteed awards of attorneys' fees, mandatory trebling of damages, and no requirement of actual harm—create incentives for private attorneys to aggregate not only meritorious suits, but also frivolous suits in order to extort settlements.⁷ Moreover, any claim brought under a statute allowing for the recovery of

⁶ Adam Klein, *Is Digital Injury "Real" Injury? Thoughts on Spokeo v. Robins*, LAWFARE (November 4, 2015), <https://www.lawfareblog.com/digital-injury-real-injury-thoughts-spokeo-v-robins>.

⁷ See James Cooper & Joanna Shepherd, *State Consumer Protection Acts: An Economic and Empirical Analysis*, ANTITRUST LAW JOURNAL (forthcoming, 2016).

attorneys' fees is likely to achieve deterrence less inefficiently than a comparable public enforcement action; private attorneys in these actions have an incentive to maximize their hourly billing beyond the efficient level.⁸

Although all litigated claims produce litigation expenses and attorneys fees, the nominal or intangible harm to plaintiffs in no-injury class actions call into question the true function of these claims. Who are the true beneficiaries of no-injury claims if defendants pay millions of dollars for behavior that produced little or no tangible harm to plaintiffs, and attorneys receive the lions' share of the award?

This report addresses this question by empirically examining the allocation of no-injury class action awards among plaintiffs, attorneys, and other expenses. The results are based on my study of 432 no-injury class action settlements and trial awards from 2005-2015. The study finds that, on average, 60 percent of the total monetary award paid by the defendants was allocated to the plaintiffs' class and 37.9 percent was allocated to attorneys' fees. However, because many settlements disperse the unclaimed portion of the settlement fund to a cy pres fund, the funds available to class members at the time of settlement may significantly overstate the actual amount class members ultimately receive. Although 60 percent of the

⁸ DEBORAH L. RHODE, ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 6 (2000) ("Under an hourly billing system, the temptation is to leave no stone unturned as long as lawyers can charge by the stone.") Herbert M. Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251 (1985); Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879 (2001).

total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class.

A result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class actions. Instead, the costs of no-injury class actions are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation. As a result, much of the no-injury litigation harms consumers instead of helping them as intended.

II. Previous Empirical Class Action Research

To date, no study has empirically examined the structure and allocation of no-injury class action awards. However, previous studies have examined awards in other types of class actions.

A 2007 study by the Rand Institute for Civil Justice received survey responses from 57 large insurance companies who had been defendants in 748 distinct class actions.⁹ Most of the class actions involved diminished value allegations, inadequate coverage claims, and various workers' compensation claims.¹⁰ In 32 cases, Rand was able to collect information about the total settlement fund offered by defendants to pay both the class fund and the legal fees and expenses. The total fund ranged from \$360,000 to \$150,000,000 with

⁹ Rand Institute for Civil Justice, *Insurance Class Actions in the United States* 5 (2007), http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG587-1.pdf

¹⁰ *Id.* at 35.

a median fund size of \$2,600,000.¹¹ The total settlement fund was less than \$5 million in 63 percent of the cases. In 22 cases, Rand was able to determine the benefits paid to individual class members—the median class member collected \$97.¹²

Rand was able to collect information on the attorneys' fees and legal expenses in 48 cases. These ranged from \$50,000 to \$50,000,000 with a median award of \$554,000.¹³ In 27 cases, Rand was able to estimate the percentage of the total settlement fund allocated to attorneys' fees and legal expenses. This percentage ranged from 12 to 41 percent with a median of 30 percent.¹⁴ However, oftentimes the settlement fund is not completely distributed to class members; in these cases the actual distribution to the class may vary substantially from the funds available for distribution. Rand was able to collect information on the funds actually distributed to class members in 36 cases; in those cases the attorneys' fees and legal fees comprised a median of 47 percent of the total distributed funds.¹⁵

To examine how federal courts think about attorneys' fees, a 2010 study analyzed 688 class action settlements approved by federal judges during 2006 and 2007.¹⁶ The most common cases were securities class actions, comprising well over one-third of the

¹¹ *Id.* at 52.

¹² *Id.* at 53.

¹³ *Id.*

¹⁴ *Id.* at 54.

¹⁵ *Id.* at 56.

¹⁶ Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

data sample.¹⁷ The study found that 89 percent of class actions resulted in a cash payment to class members.¹⁸ Nearly two-thirds of the sample resulted in settlements of less than \$10 million. The median settlement was \$5.1 million and the average, largely influenced by the \$6.6 billion Enron settlement, was \$54.7 million.¹⁹ The study determined that the average percentage of the total award allocated to class counsel was 25.4 percent.²⁰ They further found that in 69 percent of the settlements, the federal courts adopted a percentage-of-the-settlement approach to determine fees, either alone or in conjunction with the lodestar method.²¹

Another 2010 study examined attorneys' fees in 689 class actions from 1993-2008.²² The cases included several different types of claims, but were dominated by securities actions.²³ The average total award was \$116 million and the median was 12.5 million. The average percentage to attorneys over the cases was 23 percent.²⁴ However, the researchers found that courts approved higher fee percentages for categories of cases where the risk of recovery was greater. Like the previous study, the authors found that courts typically use the percentage-of-the-settlement approach to

¹⁷ *Id.* at 818.

¹⁸ *Id.* at 824.

¹⁹ *Id.* at 828.

²⁰ *Id.* at 833.

²¹ *Id.* at 832.

²² Theodore Eisenberg & Geoffrey Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 251(2010).

²³ *Id.* at 262.

²⁴ *Id.*

allocate attorneys' fees—they did so in 73 percent of cases in the sample data.²⁵ The study also found that legal expenses averaged an additional 2.8% of the recovery.²⁶

A recent study by Mayer Brown LLP examined settlements in 40 consumer and employee class actions initiated in federal courts in 2009.²⁷ The study did not compute statistics on the allocation of settlement funds, but provided a qualitative assessment of the outcomes. In 18 of the 40 settled cases, settlements required class members to file a claims request to obtain a recovery.²⁸ The authors were only able to collect information on the distribution of the settlement proceeds in 6 of the 18 cases. Five of the six cases had claims rates less than 12 percent indicating that less than 12 percent of the settlement fund was actually disbursed to class members.²⁹ The remaining case had a claims rate over 98 percent because it involved the Bernie Madoff Ponzi scheme and the average individual claim was over \$2.5 million.³⁰

In 13 of the 40 settled cases, the settlement proceeds were automatically distributed to class members.³¹ The cases generally involved ERISA class actions or other actions in which the defendant could easily

²⁵ *Id.* at 268-269.

²⁶ *Id.* at 262.

²⁷ Mayer Brown, LLP, *Do Class Actions Benefit Class Members* 5 (2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.* at 20.

³¹ *Id.* at 8.

ascertain the class members' eligibility and damages. The remaining 9 cases were resolved with no monetary compensation to class members; these cases involved injunctive relief or cy pres distributions.³² From this assessment, the authors concluded that most class settlements produce negligible benefits for class members and instead, primarily benefit the lawyers.³³

A 2014 study by NERA Economic Consulting examined 479 consumer class actions resolved by settlement between 2010 and 2013.³⁴ The cases involved product liability, false advertising, violation of consumer privacy, inadequate warning, fraud, or antitrust claims. NERA was able to collect information about the settlement fund in 321 cases. The median size of the fund in these cases was \$9.0 million,³⁵ with well over half of the settlement dollars paid to resolve antitrust class actions.³⁶ NERA did not examine relative allocations to class members, attorneys' fees, and legal expenses. However, they did determine that 84 percent of the 321 settlements included a monetary payment to plaintiffs as at least one component of the settlement; 26 percent of the settlements included some form of non-monetary compensation; and only 6 percent of settlements include a contribution to a cy pres fund.³⁷

³² *Id.*

³³ *Id.* at 12.

³⁴ NERA Economic Consulting, *Consumer Class Action Settlements*, 2010-2013, at 2 (2014), http://www.nera.com/content/dam/nera/publications/archive2/PUB_Consumer_Class_Action_Settlements_0614.pdf.

³⁵ *Id.* at 11.

³⁶ *Id.* at 6.

³⁷ *Id.* at 7-8.

These studies offer insight into the size and structure of class action settlements in consumer, securities, employee, and insurance class actions. Other studies provide useful information on the best practices to control class action exposure and costs.³⁸ However, no prior study has empirically explored details of the settlements in no-injury class actions. In the next section, I describe the coding project undertaken to provide this information.

III. Description of No-Injury Class Action Coding Project

To determine the size and allocation of no-injury class action settlements and awards, a large coding project was undertaken by a team of independent researchers from Emory University School of Law.³⁹ The researchers examined data in Westlaw and Lexis drawn from final orders, settlement agreements, and various other court documents such as those approving settlements and attorneys' fee awards in 2,158 cases. The class actions were identified using search terms and statutes that are commonly associated with no-injury cases: medical monitoring, consumer, false advertising, misleading, misrepresentation, privacy, fraud, unfair, deceptive, defective, cy pres, inadequate warning, inadequate information, defect, fraudulent, Fair Debt Collection Practices Act, Telephone Consumers Protection Act, and Fair Credit Reporting Act. Ultimately, the researchers examined all class actions

³⁸ Carlton Fields Jordan Burt, *Class Action Survey* (2015), <http://classactionsurvey.com>.

³⁹ This coding project was supported in part by Lawyers for Civil Justice. However, the views expressed in this article are those of the author and do not necessarily reflect the position of Lawyers for Civil Justice.

on Westlaw and Lexis with Trial or Settlement Award summaries that fit the search criteria between 2005-2015—2,158 cases in total.

The researchers further narrowed down the pool to include only those class actions fitting our no-injury criteria. The definition of “no-injury” is itself a matter of much debate: defendants often argue that plaintiffs suffered no injury whereas plaintiffs generally assert that even minor economic harms and technical statutory violations represent true injuries. There is no agreed-upon definition of what constitutes a no-injury case and there is certainly no court ruling identifying all the possible types of such cases. Nevertheless, to restrict the cases to some sort of meaningful definition, we used standards suggested by the defendants and amici in the recent briefs submitted in the *Spokeo v Robins* case currently before the Supreme Court.⁴⁰ We classified cases as no-injury actions if at least one of the four following conditions were met: (1) if the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (2) if the only harm was a technical statutory violation; (3) if any economic loss was negligible or infinitesimal; or (4) if the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm. Restricting the pool of cases to these no-injury criteria and including only cases for which there was information on the amounts of both attorneys’ fees and settlement funds yielded a final data sample of 432 cases.

For each of the cases, the researchers coded information on the court and jurisdiction, allegations, claims under federal or state statutes, type of resolution, total

⁴⁰ No. 13-1339, *cert. granted*, 135 S.Ct. 1892 (2015).

award or settlement fund, awards to individual class members and class representatives, attorneys' fees and litigation expenses, and allocations to cy pres funds. The following examples illustrate the kinds of cases in the data:

- the settlement in *Levitt v. Southwest Airlines*,⁴¹ in which Southwest Airlines agreed to replace drink vouchers they had stopped accepting in 2010 to customers that could produce unredeemed vouchers. Attorneys received \$1.3 million in fees.
- a settlement in *Jay Clogg Realty v. Burger King*,⁴² in which Burger King agreed to pay \$ 8.5 Million to settle claims asserting it sent unsolicited fax advertisements in violation of the Telephone Consumer Protection Act. Of the \$8.5 million, \$2.8 million was allocated to attorneys' fees. An additional \$250,000 was allocated to claims administration and the remainder of the fund would be divided between class members that made claims.
- a settlement in *Flores v. Diamond Bank*,⁴³ in which it was alleged that Diamond Bank did not have adequate notice on one ATM machine of its \$2.00 withdrawal fee in violation of the Electronic Funds Transfer Act. Under the settlement, Diamond Bank agreed to establish a settlement fund of \$75,000, of which \$5,000 went to the

⁴¹ In re: Southwest Airlines Voucher Litigation, 799 F.3d 701 (7th Cir. 2015).

⁴² Jay Clogg Realty Group, Inc. v. Burger King Corp., 298 F.R.D. 304, (D. Md. 2014).

⁴³ Flores v. Diamond Bank, No. 07 C 6403, 2008 WL 4861511 (N.D. Ill. Nov. 7, 2008).

class representative. An additional \$170,000 was allocated to attorneys' fees.

- a trial verdict in *Gutierrez v. Autowest*,⁴⁴ in which it was found that Autowest's lease agreements failed to contain a separate statement labeled "itemization of Gross Capitalized Cost" as required by the California Consumer Legal Remedies Act. Autowest was ordered to pay \$82,848 to the class, \$70,278 to the two class representatives, \$1,494,988 in attorney fees, and \$63,265 in expenses.
- a settlement in *Knights v. Publix*,⁴⁵ in which plaintiffs claimed that Publix routinely violated Fair Credit Reporting Act protections by procuring background checks on employees and job applicants without providing a "stand alone" disclosure. Instead Publix used a background check authorization screen that contained extraneous information—a liability waiver. Publix agreed to a settlement fund of \$6.8 million, with \$2.8 million of that going to attorneys' fees.
- a settlement in *Albanese v. Portnoff Law Associates*,⁴⁶ in which plaintiffs alleged that Portnoff Law, a debt collector, sent collection letters that did not state that it was sent by a debt collector, as required by the Fair Debt Collection Practices Act, nor did it contain a

⁴⁴ Verdict and Settlement Summary, *Gutierrez v. Autowest*, No. CGC05317755, 2009 WL 2736967 (Cal.Superior Feb. 25, 2009).

⁴⁵ *Knights v. Publix Super Mkts., Inc.*, No. 3:14-cv-0072 (M.D. Tenn. 2014).

⁴⁶ *Albanese v. Portnoff Law Assocs.*, 301 F. Supp. 2d 389 (E.D. Pa. 2004).

validation notice or verification language. Defendant agreed to settle the claims by paying \$250,000: \$160,000 to class counsel, \$80,00 to a settlement fund, and \$10,000 to the class representative.

- a settlement in *Kolinek v. Walgreens*,⁴⁷ in which plaintiffs alleged they received unsolicited prescription refill reminders from Walgreens pharmacies in violation of the Telephone Consumers Protection Act. To settle the dispute, Walgreens agreed to pay \$11 million into a settlement fund, with \$2.82 million of that going to attorneys' fees. The class representative was awarded \$5,000. Disbursement of the settlement fund depended on claims made; if all class members submitted valid claims, each member would recover \$1.20.

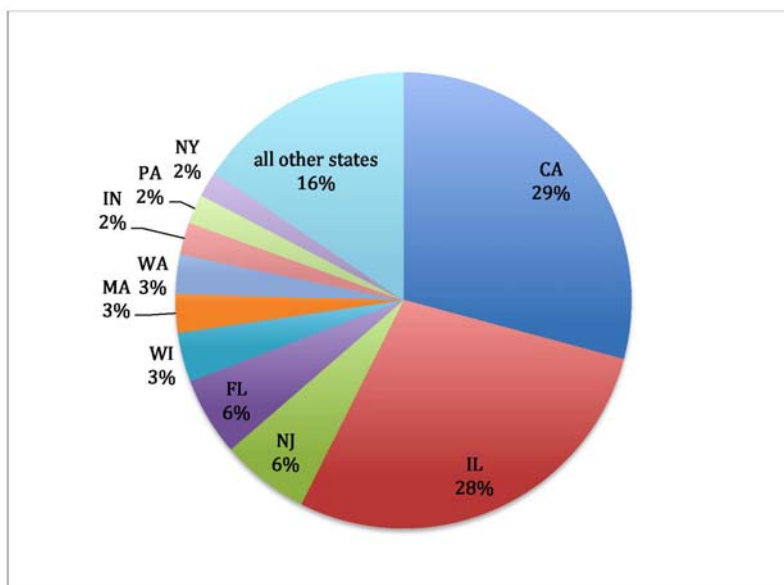
The aggregate dataset of 432 cases includes 367 claims resolved in federal court and 65 in state court. The cases were brought in the state and federal courts located in 33 states. Consistent with other class action studies,⁴⁸ the majority of the cases were heard in courts in California, Illinois, Florida, and New Jersey. Figure 1 reports the frequency with which the cases were resolved in different states, including both state courts and federal courts.

⁴⁷ *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 WL 3056813 (N.D. Ill. July 7, 2014).

⁴⁸ NERA Economic Consulting, *supra* note 34, at 5.

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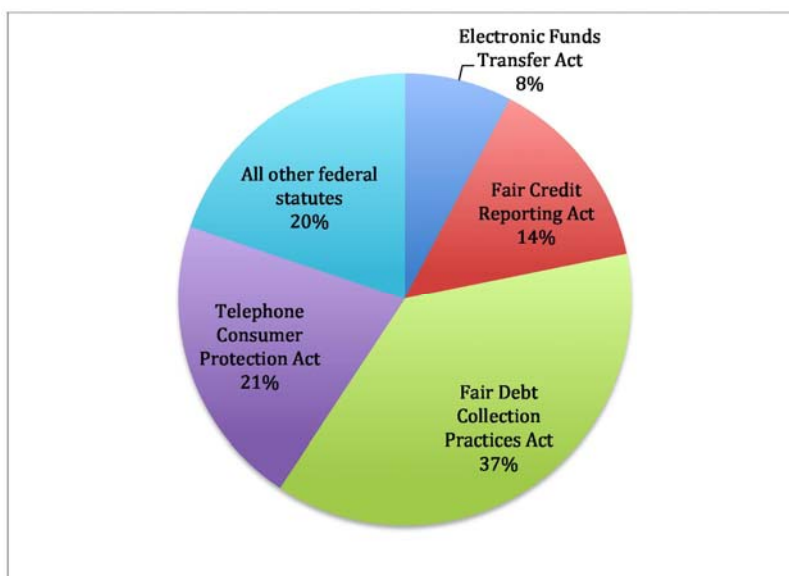
Figure 1: Location of Resolved Cases



In the data, 155 cases involve claims brought under state statutes. Claims brought under state laws in California and New Jersey account for almost two-thirds of the state law claims.⁴⁹ In 296 of the cases, claims were brought under a federal statute. Figure 2 reports the most common federal statutes under which claims in the sample data are brought.

⁴⁹ Note that the state law claims are not necessarily related to the location of resolved claims that is reported in Figure 1; some states, such as Illinois, may have experienced more resolved cases even though claims were not brought under that state's laws.

Figure 2: Most Common Federal Statutes giving rise to Claims in the Sample Data



Of the 432 cases, only 2.5% of the cases were resolved at trial. This low trial rate is consistent with other studies of class actions⁵⁰ and is likely the result of the significant risk defendants face at trial as well as class counsels' focus on fee recoveries as opposed to maximizing returns for clients. Claim aggregation in certain class actions, especially those with statutorily imposed damages like the TCPA,⁵¹ exposes defendants to potentially ruinous judgments at trial, putting enormous pressure on defendants to settle cases.

⁵⁰ Carlton Fields Jorden Burt, *supra* note 38, at 23.

⁵¹ Statutory damages under the Telephone Consumer Protection Act are \$500 per text, call, or fax. 47 U.S. Code § 227. Thus, a mass marketing campaign conducted by text messaging can easily expose a defendant to hundreds of millions of dollars in damages.

IV. EMPIRICAL ANALYSIS OF SETTLEMENT AND AWARD ALLOCATION

A. Total Awards and Settlements

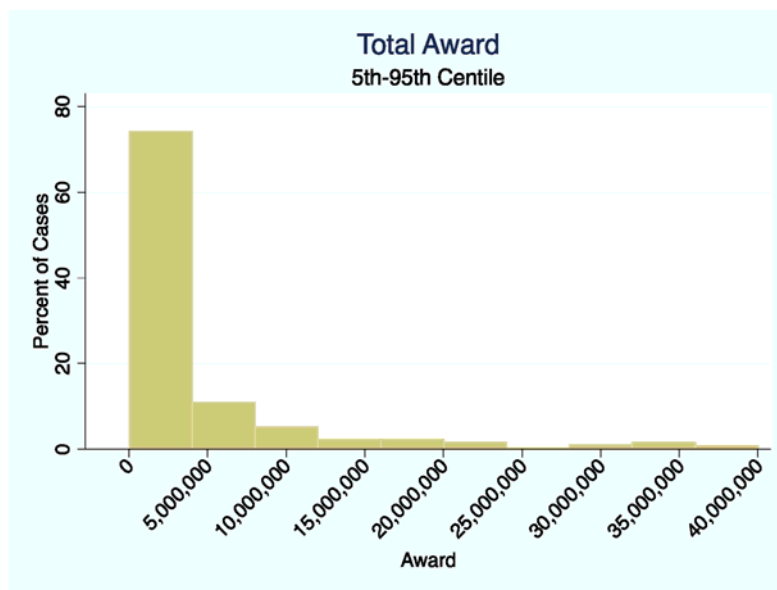
In the sample data, the aggregate monetary value of the settlements and awards for the 432 no-injury cases was approximately \$4 billion.⁵² Estimated monetary awards ranged from \$2,200 to \$580 million; the average was \$9.37 million and the median was over \$960,000. That is, the defendant in the average no-injury case in the sample data paid over \$9 million to the class, attorneys, and other fees.

However, the size of the monetary awards varied substantially. Many cases were resolved for less than \$5 million, and only 10 percent of the cases had total awards greater than \$20 million. Figure 3 shows the distribution of total awards between the 5th and 95th percentiles to discount any outlier awards.

⁵² Nonmonetary compensation that was not quantified or estimated in the legal documents was generally not included in the values of the total award.

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Figure 3. Distribution of Total Awards in the Sample Data

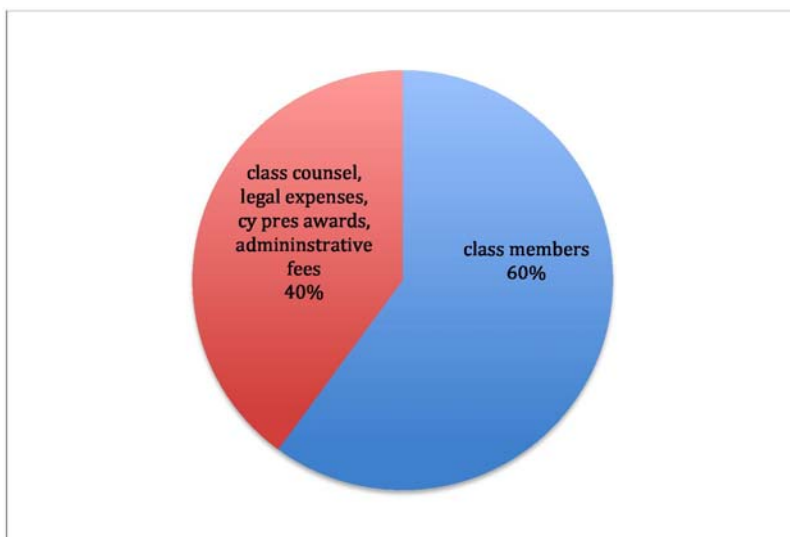


B. Allocation to Class Members

In each case the total award was allocated to various combinations of class members, class representatives, attorneys' fees to class counsel, cy pres funds, other legal expenses, and the costs of administering the settlement fund. On average, as reported in Figure 4, the plaintiffs' class was allocated only 60 percent of the total monetary award paid by the defendants; the median allocation was 67 percent.

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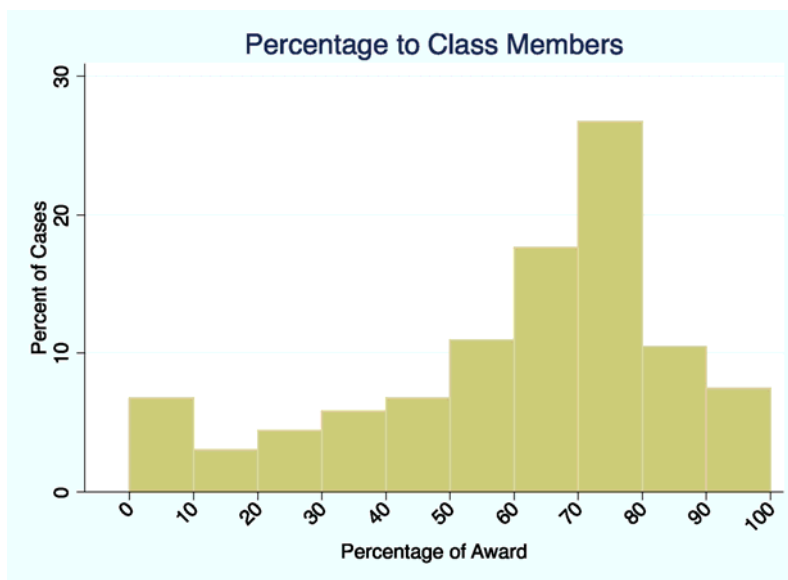
Figure 4: Average Allocation to Class Members, Attorneys, Cy Pres Funds, Legal Expenses, and Administrative Costs



However, this percentage varies substantially across cases based on numerous factors, including the type of case, class size, and type of award. In some cases where the only compensation to the class is nonmonetary and not quantifiable, the class received none of the monetary payment by the defendant. In other cases where a very large award was paid to the class and attorneys' fees were severely restricted, the class members received the overwhelming majority of the defendant's payment. Figure 5 displays the distribution of the class members' allocation across all 432 cases.

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Figure 5: Distribution of Percentage to Class Members Across All Cases



The allocation to class members also varies by the type of claims. Figure 5 shows the percentage of the total award available to class members' for various federal statutes.

Table 1: Allocation of Total Award to Class Members,
by Federal Statute

	Percentage to Class Members	Percentage to Class Counsel Attorneys' Fees, Other Legal Expenses, Cy Pres Fund, or Administrative Costs
Fair Debt Collection Practices Act (112 cases)	51.8	48.2
Telephone Consumers Protection Act (63 cases)	70.1	29.9
Fair Credit Reporting Act (42 cases)	55.4	44.6
Electronic Funds Transfer (23 cases)	62.4	37.6

However, the funds available to class members at the time of settlement may significantly overstate the actual amount class members ultimately receive. The majority of class actions, especially class actions involving consumers, require class members to submit a claim form to receive compensation. Class members receive compensation only if they affirmatively make a claim in response to a class settlement notice and can prove they are entitled to recovery. Many class members do not pursue the claims, deciding that the modest award is not worth their time or that corroborating their entitlement is too burdensome. At the end of the claim period, the settlement fund may be divided between the class members that did make a claim. Alternatively, the class members may get a

fixed amount and any leftover funds will be directed to a cy pres fund or, in some instances, returned to the defendant.

The actual amount disbursed to class members is rarely revealed. The information is not publicly available; defendants and defense lawyers do not want to reveal that only a small portion of the class actually received compensation; plaintiffs' attorneys do not want to reveal how sizable their fees are in comparison to the actual amount recovered by plaintiffs; and claims administrators are typically bound by a confidentiality agreement to keep the information private.

Nevertheless, some empirical research has attempted to estimate the claims rates in class actions. The RAND study of insurance class actions

found that in the 29 cases for which they could compute a claims rate, the median claims rate was 15 percent.⁵³ The Mayer Brown study of consumer and employee class actions found that in 5 of the 6 cases for which they could compute a claims rate, the claims rate was less than 12 percent.⁵⁴ Similarly, a federal court has observed that "claims made' settlements regularly yield response rates of 10 percent or less."⁵⁵ In perhaps the most compelling piece of recent evidence, a declaration submitted in federal court by an executive with a leading administrator of consumer

⁵³ Rand Institute for Civil Justice, *supra* note 9, at 55.

⁵⁴ Mayer Brown, LLP, *supra* note 27, at 10.

⁵⁵ *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005).

class actions reports that most class actions have a median claims rate of only 0.023 percent.⁵⁶

Claims rates in no-injury cases are likely as low if not lower than these estimates. Extremely modest awards to class members that are often only coupons or discounts rarely justify the effort of submitting a claim. Nevertheless, even if we assume that the claims rates reach 15 percent—the highest claims rate in the aforementioned studies—the actual disbursement to the class is likely to be considerably less than the fees paid to counsel.

C. Allocation to Cy Pres Funds, Class Counsel, and Class Representatives

Oftentimes, when the compensation per plaintiff is expected to be miniscule, defendants pay a large chunk of the award into a cy pres fund instead of making it available to plaintiffs. A cy pres fund is typically a nonprofit charitable organization or similar entity that supposedly has some relationship with the claims at issue in the case. However, cy pres awards have also come under attack as serving primarily to inflate attorneys' fee awards.⁵⁷ Even though the cy pres funds may have little relationship to class members, they are claimed to provide a benefit for the class, justifying an award of attorneys' fees to class counsel.

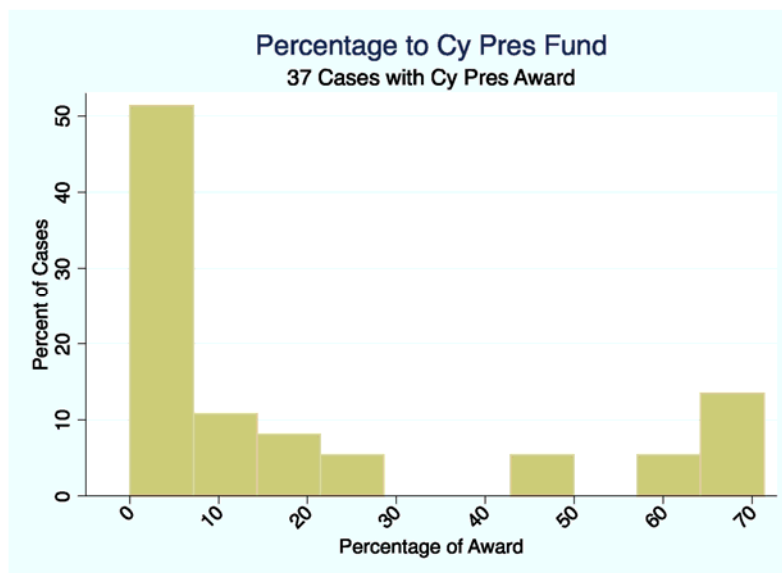
In the sample data, only 37 cases allocated a set award to a cy pres fund in the initial settlement agreement or trial verdict. In several other cases, cy pres

⁵⁶ Declaration of Deborah McComb Re Settlement Claims, Poertner v. Gillette, No. 6:12-CV-803-Orl-31DAB, 2014 WL 4162771 (M.D. Fla. Aug. 21, 2014), <http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf>.

⁵⁷ Mayer Brown, LLP, *supra* note 27, at 13.

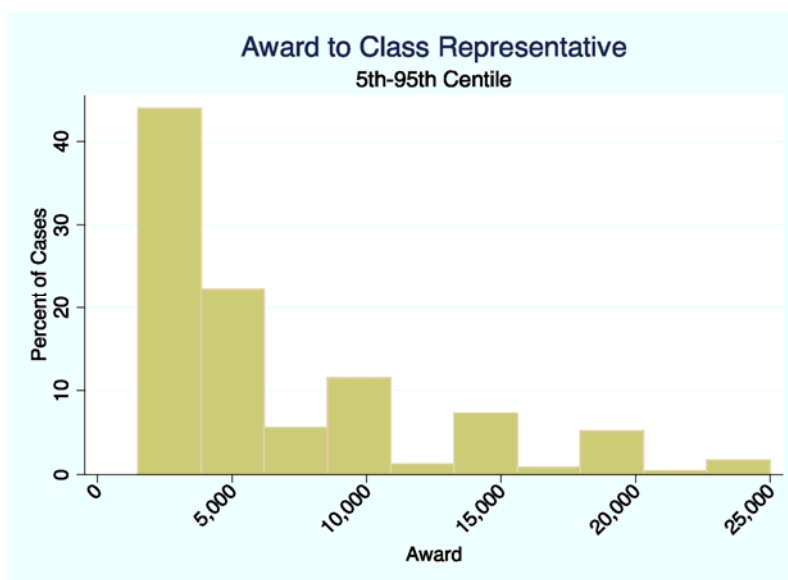
funds likely received the unclaimed portion of the settlement fund. In the 37 cases with a designated cy pres allocation, the average allocation was 21 percent of the total award. Figure 6 presents the distribution of the cy pres awards across the 37 cases.

Figure 6: Distribution of Designated Cy Pres Awards



Class representatives are often given an incentive award for the time they expend initiating and monitoring the case, producing documents and other evidence, testifying at depositions or trial, and approving the settlement. Figure 7 presents the distribution of awards to class representatives for the 303 cases in which it was possible to determine the incentive award. The average incentive award in the cases was \$8,620 and the median was \$3,000.

Figure 7: Distribution of Awards to Class Representatives



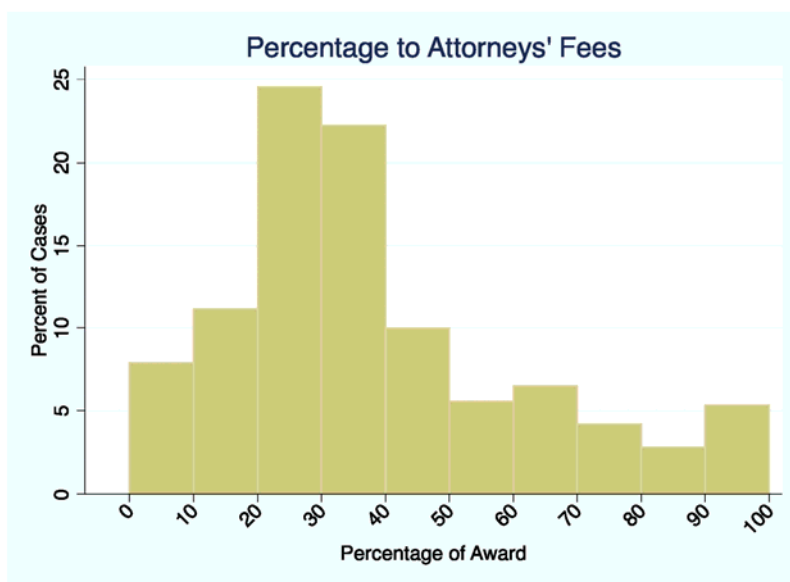
In every class action settlement or judgment, fees to class counsel must be approved by a judge. Judges typically use their authority under Rule 23 and the Class Action Fairness Act to determine what level of attorneys' fees would be "reasonable" in each case.⁵⁸ This is especially problematic in claims-made settlements, as reasonable attorneys fees may depend on how much compensation is paid to plaintiffs. Although courts use different methods, they frequently award plaintiffs' attorneys a percentage of the purported value of the settlement.

Figure 8 reports the distribution of the percentage allocated to attorneys' fees across all cases. In cases where a large portion of the compensation is nonmonetary or injunctive, attorneys receive a significant

⁵⁸ Fed. R. Civ. P. 23(h); 28 U.S.C. § 1712(a) (2005).

portion of the monetary award. In contrast, they may be allocated a lower percentage when the class size is significant or when courts using the lodestar approach determine that only a relatively small fee to attorneys is reasonable. The average percentage to class counsel in the 432 cases is 37.9 percent and the median is 30.9 percent.

Figure 8: Distribution of Allocation to Class Counsel's Fees

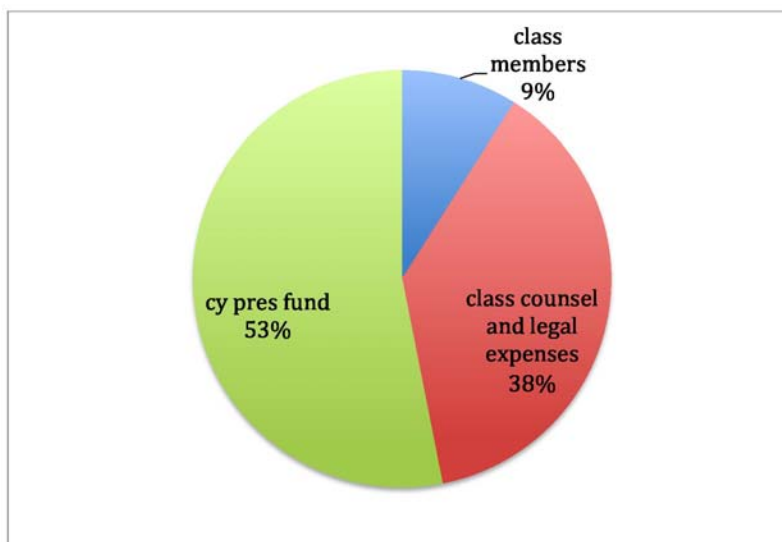


In some cases, the attorneys' fee percentage provides a basis of comparing the relative allocations to attorneys and plaintiffs. However, in many cases it overstates the relative benefits distributed to each group. As previously discussed, many claims-made settlements with a fixed compensation per class member disperse the unclaimed portion of the settlement fund to a cy pres fund. As a result, the actual distribution to attorneys and plaintiffs may look very different than the relative funds available to each.

Although determining the claims rate is extremely difficult, numerous sources suggest it is almost always less than 15 percent, and oftentimes less than one percent. In our sample data, the average settlement value is \$9.37 million and the average percentage available to class members is 60 percent, or \$5.6 million. However, if class members regularly claim less than 15 percent of these available funds, they would claim less than an estimated \$844,000, or only 9 percent of the average settlement of \$9.37 million. That is, although 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total. Moreover, in many

cases the claims rate is less than one percent, in which case the plaintiffs claim less than \$56,000. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class. Figure 9 reports the disproportionate distribution to attorneys, class members, and cy pres funds when plaintiffs claim 15 percent of the available funds—a claims rate that is likely much higher than the actual rate in many cases.

Figure 9: Estimated Actual Distributions in many Claims-Made Settlements



Thus, the average allocation available to class members in the no-injury class actions is 60 percent of the total award, but in many cases, the class members actually receive less than 9 percent. While even a 40 percent contingency fee is on the high end of the contingency fee spectrum, a result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class actions. Instead, as I explain in the next section, these cases impose costs on businesses that are ultimately passed on to consumers in the form of higher prices.

IV. Discussion: No-Injury Class Actions Harm Businesses and Consumers

Economic theory predicts that many no-injury class actions are of dubious social value and end up harming the very consumers they are meant to help. Both no-injury class action litigation and the threat of no-

injury claims impose significant costs on businesses. Protracted adversarial litigation imposes significant costs on defendant businesses that must foot the costs of defending against, settling, and paying these claims. Even the possibility of a no-injury class action claim forces businesses to incur litigation expenses to determine the scope of the law and acceptable behavior. Moreover, the *in terrorem* effect of class action lawsuits triggers defendants' risk-aversion and motivates them to settle claims for more than their expected value, often inducing a quick but expensive settlement.⁵⁹

The litigation expenses, attorneys' fees, and settlement costs are initially borne by businesses. However, they are soon passed on to consumers through increased prices, fewer innovations, and lower product quality. Indeed, several empirical papers confirm that businesses pass on litigation expenses to consumers across many different industries.⁶⁰

⁵⁹ Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1370 (2003).

⁶⁰ SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS AND COSTS TO CONSUMERS: THE IMPACT OF STATE CONSUMER ACTS ON AUTOMOBILE INSURANCE PREMIUMS (Preliminary Report) 4 (2011), http://www.masonlec.org/site/rte_uploads/files/CPA-Costs-Body-Sept-2011.pdf. See Henry N. Butler & Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts* 65 (Nw. Univ. Sch. of Law Faculty Working Paper No. 184, 2009) (suggesting through an empirical analysis of case law brought under State CPAs that the State CPAs are actually harming consumers and decreasing consumer welfare), <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/184/>; Richard L. Manning, *Is the Insurance Aspect of Producer Liability Valued by Consumers? Liability Changes and Childhood Vaccine Consumption*, 13 J. RISK & UNCERTAINTY 37 (1996); Richard L.

Most consumers will receive little benefit in exchange for the higher prices, reduced innovation, and lower product quality. Many of the no-injury claims concern business practices that cause little concrete consumer harm. As a result, forcing compensation or deterrence through litigation produces little, if any, tangible benefit to consumers.

Furthermore, regardless of the harm imposed on consumers by the business practice, many no-injury class actions produce little compensation for class members. Individual compensation all too often amounts to more than a few dollars or a coupon. Moreover, few eligible class members—less than one percent in many cases—actually pursue claims to receive the modest compensation. In these cases, the true beneficiaries of no-injury class actions are the lawyers.

Thus, the costs of no-injury class actions—increased business litigation costs, higher consumer prices, and fewer product innovations—are established by data and economic theory. In contrast, the benefits of many marginal no-injury cases are few or nonexistent. As a result, much of the no-injury class action litigation harms consumers instead of helping them as intended.⁶¹

Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J. L. & ECON. 247 (1994); Robert Martin, *General Aviation Manufacturing: An Industry Under Siege*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 478-99 (Peter W. Huber & Robert E. Litan eds., 1991);