# CULBERSON, et al. v. WALT DISNEY PARKS AND RESORTS

## MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

Date of Hearing: **February 9, 2018**
Department: 308
Case No.: BC526351



RULING

The motion for summary judgment is GRANTED.

BACKGROUND

This is a class action brought by Plaintiffs Roger Culberson II and Edward Joseph III (jointly, "Plaintiffs"), individually and on behalf of similarly situated consumers allegedly subjected to an adverse employment action based on information in consumer reports prepared by Sterling Infosystems, Inc. ("Sterling") at the request of Defendant Walt Disney Parks and Resorts ("Defendant").

The operative Second Amended Complaint ("SAC") asserts the following causes of action:

- Violation of the Fair Credit Reporting Act (15 U.S.C. §1681b(b)(3))[1]
- Violation of the Fair Credit Reporting Act (15 U.S.C. §1681b(b)(2))[2]

Subsequently, the Court certified the following two classes:[3]

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1 That statute provides in part:
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.

2 That statute provides in part:
Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—
**(i)** a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes . . . .

3 See 7/13/17 Ruling on Motion for Class Certification, p.2.

**Pre-Adverse Action Notice Class (Violation of 15 U.S.C. §1681b(b)(3))**

All individuals residing in the United States who were the subject of a consumer report obtained by Disneyland Resort for employment purposes and who were the subject of a "No Hire" recommendation made on the basis of information disclosed in a consumer report prepared by Sterling Infosystems, Inc. between November 1, 2011 to Present.[4]

**Defective Disclosure Class (Violation of 15 U.S.C. §1681b(b)(2))**

All individuals residing in the United States who were the subject of a consumer report obtained by Disneyland Resort for employment purposes between November 1, 2011 to Present and who executed a consent form identical to Exhibit 1 and 2 of the Declaration of Devin H. Fok [in support of the motion for class certification].

By this motion, Defendant moves for summary judgment or, alternatively, summary adjudication.

APPLICABLE LAW

CCP §437c, subdivision (p)(2) provides:

> For purposes of motions for . . . summary adjudication . . . A defendant . . . has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

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[4] It is undisputed that Sterling provided background check screening and related services to Disneyland until September 2015. See Defendant's UMF No. 7; see also Plaintiffs' Response to Defendant's UMF No. 7. The Pre-Adverse Action Notice class therefore closed at that time.

DISCUSSION

Defendant argues that it is entitled to summary judgment on three independent grounds. Defendant first argues that the undisputed facts disprove FCRA violations. See Motion, §III. Alternatively, Defendant argues that Plaintiffs cannot recover even assuming, *arguendo*, a technical FCRA violation because: (1) there is no triable issue as to a *willful* FCRA violation, which is a necessary predicate for recovery of statutory damages and punitive damages; or (2) Spokeo, Inc. v. Robins (2016) ___ U.S. ___, 136 S. Ct. 1540, as revised (May 24, 2016), which requires injury-in-fact, forecloses both claims. Id., §§IV.A-B.

A. Willfulness

Pursuant to 15 U.S.C. §1681n(a), "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000 . . . [and] such amount of punitive damages as the court may allow . . . ."

"[W]illfulness . . . cover[s] not only knowing violations of a standard, but reckless ones as well." See Safeco Ins. Co. of America v. Burr (2007) 551 U.S. 47, 57. Adopting the common law understanding of "recklessness," the U.S. Supreme Court stated that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." See Safeco, *supra*, 551 U.S. at 69.

Safeco involved consumer class actions against insurers for alleged willful violation of the FCRA (15 U.S.C. §1681m(a)) for failure to provide adverse action notices reflecting negative credit reports. One of the insurers, Safeco, did not give notice to the plaintiffs because it mistakenly thought that §1681m(a) did not apply to initial rate offers for new insurance. Id. at 68. The high court stated that "Safeco's reading of the statute, albeit erroneous, was not objectively unreasonable" because it "has a foundation in the statutory text." Id. at 69-70. It continued:

> This is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC . . . Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively

unreasonable, and so falls well short of raising the "unjustifiably high risk" of violating the statute necessary for reckless liability.[5]

Here, Defendant contends that there is no triable issue as to a willful FCRA violation. In support, it points to the fact that it retained Sterling, which is one of the country's largest background screening companies, provides background screening services to 50,000+ clients (including 25% of the Fortune 100 companies), and is accredited by the National Association of Professional Background Screeners. See Defendant's UMF Nos. 43-44. It also points to its procedures for ensuring FCRA compliance. See Defendant's UMF Nos. 2-9, 14, 18-36, and 41.

In opposition, Plaintiffs contends that: (1) Defendant's violation of §1681b(b)(3) is willful because its interpretation of "adverse action" [6] is objectively unreasonable; and (2) Defendant's violation of §1681b(b)(2) is willful because similar disclosure forms[7] have been invalidated by other courts. See Opposition, §III.B(a)[8] and III.C(a) (citing to Syed v. M-I, LLC (9th Cir.) 853 F.3d 492, cert. denied, (2017) 138 S. Ct. 447, Jones v. Halstead Management Co., LLC (S.D.N.Y. 2015) 81 F.Supp.3d 324, Robrinzine v. Big Lots Stores, Inc. (N.D. Ill. 2016) 156 F.Supp.3d 920, Martin v. Fair Collections & Outsourcing, Inc. (D. Md. June 30, 2015, No. GJH-14-3191) 2015 WL 4064970, and Case v. Hertz Corporation (N.D. Cal. Feb. 26, 2016, No. 15-CV-02707-BLF) 2016 WL 1169197).

Plaintiffs' contentions are not well-taken.

First, Defendant's interpretation of "adverse action" is not objectively unreasonable. The Court agrees with Defendant that coding an applicant "no hire" is not a final decision as evidenced by the undisputed fact that 27 persons originally coded as "no hire" were hired after they successfully appealed their background reports. See Defendant's UMF No. 41; see also Plaintiffs' Response to Defendant's UMF No. 41. Further, as Defendant notes, an applicant does not see the "no hire" coding, and instead, sees only the Pre-Adverse Action notice repeatedly stating that he/she has the right to dispute the Sterling report. See Defendant's UMF Nos. 19-22.

Similar to here, the plaintiff in Obabueki v. International Business Machines Corp. (S.D.N.Y. 2001) 145 F.Supp.2d 371, aff'd, 319 F.3d 87 (2d Cir. 2003) argued

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5 See Safeco, *supra*, 551 U.S. at 70.

6 15 U.S.C.A. §1681a(k)(1)(B)(ii) defines "adverse action" to include "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." See 15 U.S.C.A. §1681a(k)(1)(B)(ii).

7 Some of them were also Sterling disclosure forms.

8 There are two sections of Plaintiffs' opposition brief denominated as §III.B(a). This section appears on pages 10-11.

that the defendant's internal decision to rescind an employment offer was an adverse action. See Obabueki, *supra*, 145 F.Supp.2d at 391. The district court rejected that argument, stating that the plaintiff did not suffer any adverse effect until his employment offer was withdrawn, and noting that "the statute expressly allows for the formation of an intent to take adverse action before complying with Section 1681b(b)(3), as it states that 'the person *intending* to take' adverse action must provide the report and description of rights." Id. (italics in original); see also Costa v. Family Dollar Stores of Virginia, Inc. (E.D. Va. 2016) 195 F.Supp.3d 841, 846 ("More fundamentally, the plaintiffs' argument fails because the act of coding an applicant as not recommended during [the defendant's] process is the formation of intent to take adverse action—the action that triggers the § 1681b(b)(3)(A) notice requirement—not the adverse action itself. Further, the act of coding is an internal decision from which the applicant does not suffer any adverse effect.").

Second, Plaintiffs' reliance on Syed, Jones, Robrinzine, Martin, and Case to show a willful violation of §1681b(b)(2) is misplaced. Not only were those cases decided in the context of FRCP 12(b)(6) motions to dismiss (and thus, subject to a different legal standard[9]), they were decided years after Plaintiffs applied for employment at Disneyland[10] and therefore could not have put Defendant on notice of FCRA violations. See Safeco, *supra*, 551 U.S. at 70 (finding that Safeco did not act recklessly partly due to the "dearth of guidance" from courts of appeals or the FTC); see also Lewis v. Southwest Airlines Co. (N.D. Tex. Jan. 11, 2018, No. 3:16-CV-01538-M) 2018 WL 400775, at *4 (finding that FCRA violation was not willful and explaining: "At the time Southwest engaged Sterling to procure an investigative consumer report for Plaintiff pursuant to the Consent Form, no court of appeals had addressed the question of statutory interpretation at issue here; nor had the FTC offered 'authoritative guidance' on the issue. Indeed, it was not until after Plaintiff had filed this lawsuit that the Ninth Circuit issued its decision in *Syed*, holding that inclusion of a liability waiver in a FCRA disclosure constitutes a willful violation of the statute. In 2015, the district courts that had considered whether extraneous information in an FCRA disclosure constitutes a willful violation came to conflicting answers. At least one other Texas district court has consistently held that inclusion of extraneous information in an FCRA disclosure, prior to the relevant date in this case, does not constitute a willful violation of the stand-alone requirement.").

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9 "A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." See Robrinzine, *supra*, 156 F.Supp.3d at 925.

10 Plaintiff Culberson applied in October 2011 and Plaintiff Joseph applied in August 2013. See SAC, ¶¶21, 53.

The prior ruling by the Hon. Jane L. Johnson on the motion for summary adjudication of Plaintiff Culberson's individual adverse action claim[11] has no bearing here on the motion for summary judgment as to the certified classes. Judge Johnson found triable issues based on facts unique to Plaintiff Culberson (e.g., that Plaintiff Culberson had a telephone conversation with a Disneyland Casting Department employee who told him that he "had no job"). As Defendant points out, Plaintiffs, in successfully seeking class certification, abandoned reliance on facts unique to them. See Reporter's Transcript of Proceedings (attached to Davis Declaration as Exhibit F[12]), 38:2-13; see also Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Class Certification, 1:7-12, 6:19-24. To the extent Plaintiffs seek to revive them now to create a triable issue of fact, they are judicially estopped from doing so.[13] See Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181 ("Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.").

As there is no triable issue as to a willful FCRA violation, the motion for summary judgment is GRANTED. And since this ground is sufficient to support summary judgment, the Court need not address the other two independent grounds for Defendant's motion.

PLAINTIFFS' OBJECTIONS

Plaintiffs' objections to the Adams, De La Bretonne, Cervantes, and Miller Declarations are OVERRULED.

Plaintiffs' objections to the Defendant's Separate Statement of Undisputed Facts are STRICKEN. They are not objections to *evidence*. See CRC rules 3.1352 and 3.1354.

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11 At the time of that motion for summary judgment, the then operative First Amended Complaint alleged an adverse action claim (violation of 15 U.S.C. §1681b(b)(3)), but not a disclosure claim (violation of 15 U.S.C. §1681b(b)(2)).

12 The Davis Declaration erroneously refers to this as Exhibit G.

13 Rather than argue judicial estoppel, Defendant argues: "Because the named plaintiffs claimed that they were identically situated with the class, plaintiffs are bound by the facts class members admitted to be true. If plaintiffs attempt to dismiss any of these facts as inapposite to the two named plaintiffs, this Court should decertify the class *sua sponte*, because plaintiffs thereby will have repudiated the representation upon which this Court relied in certifying the class." See Motion, 5:2-6.