IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN WALKER, JR., on behalf of himself and all others similarly situated,

Plaintiff,

v.

REALHOME SERVICES AND SOLUTIONS, INC., d/b/a OWNERS.COM,

Defendant.

CIVIL ACTION FILE

NO. 1:18-CV-03044-WMR-WEJ

FINAL REPORT AND RECOMMENDATION

This matter is before the Court on Defendant's Motion to Dismiss [8]. For the reasons explained below, the undersigned **RECOMMENDS** that said Motion be **GRANTED**.

I. BACKGROUND

Defendant, REALHome Services and Solutions, Inc. ("RHSS"), is a real estate services and brokerage business incorporated in Florida and headquartered in Atlanta, Georgia. (Compl. [1] ¶ 9.) Plaintiff, John Walker, Jr., holds a Florida real estate license. (Id. ¶ 24.) He sought a position with defendant in October

2017. (Id. ¶ 25.) An agent of defendant's named Stephanie Bra interviewed plaintiff via telephone and videoconference and offered him a position as a real estate agent. (Id. ¶¶ 27-28.)

On or about November 8, 2017, Mr. Walker received an email from Jonathan Haynie of RHSS's Agent Processing Team which detailed the documents that he would need to sign and return and contained links for him to access them. (Compl. ¶ 29.) One of those documents that plaintiff reviewed and signed was a Background Check Consent and Release, which provides in its entirely as follows:

> By my signature below, I consent to the release of criminal reports and/or investigative consumer reports to REALHome Services and Solutions, Inc. and its affiliates. I also authorize disclosure to REALHome Services and Solutions, Inc., its affiliates and/or to the background check vendor of information concerning my employment history, earning history, education, credit history, credit capacity and credit standing, motor vehicle history and standing, criminal history and litigation records. I hereby release REALHome Services and Solutions, Inc. and its affiliates, its officers, directors and employees harmless from any and all liability that may arise with respect to any of the foregoing reports and/or information.

(Epshteyn Decl. ¶ 5 & Ex. 1 [8-2], at 5; see also Compl. ¶ 30.)[1]

[1] Although the Complaint suggests that plaintiff applied for employment with defendant (Compl. ¶¶ 1, 5, 7, 18-19, 23, 43, 45-46), the documents he signed show that he sought a position as an independent contractor. In ruling on a motion to dismiss, a court may consider a document referred to in the Complaint that is (1)

Other documents signed by plaintiff on November 8, 2017 included an Independent Contractor Agreement ("ICA").[2] (Compl. ¶¶ 29- 32; see also Epshteyn Decl. ¶ 6 & Ex. 2 [8-2], at 7-17.) In relevant part, Section 1(a) of the ICA provides that plaintiff, who is referred to as "Contractor" throughout, "shall act as an independent contractor real estate salesperson." (Epshteyn Decl. Ex. 2 [8-2], at 7.) Section 1(c) of the ICA further provides that plaintiff

> shall be responsible for all of [his] professional licenses and personal expenses, including but not limited to office, telephone, internet, fax, automobile, travel, workmen's compensation and disability insurance and other insurance, entertainment, food, lodging, license fees and dues, all income taxes, self-employment taxes (FICA) and the like ….

(Id.)

Section 3 of the ICA, entitled "Independent Contractor Relationship," provides as follows:

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central to the plaintiff's claim, and (2) undisputed. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002); Day v. Taylor, 400 F.3d 1272, 1276 (11th Cir. 2005). "In this context, 'undisputed' means that the authenticity of the document is not challenged." Day, 400 F.3d at 1276. The Court agrees with defendant that the Background Check Consent and Release that is the subject of Plaintiff's First Claim for Relief is central to the Complaint. (See Compl. ¶¶ 30-31.) Moreover, it is undisputed.

[2] Plaintiff did not attach a copy of the ICA to the Complaint, but the Court may consider it for the same reasons that it considered the Background Check Consent and Release form. (See supra note 1.)

Client and Contractor intend that, to the maximum extent permissible by law:

(a) Contractor shall be deemed to be an independent contractor. Contractor shall be free to devote Contractor's time, energy, effort and skill as is necessary to meet Contractor's obligations under this Agreement. Contractor shall not be required to keep definite office hours or participate in "floor time". Contractor shall not have mandatory duties except those specifically set out in this Agreement. Nothing in this Agreement shall constitute an employment agreement or offer of employment (by either party), a partnership, a joint venture, or any other form of relationship other than an independent contractor relationship. Contractor's independent contractor status will define the parties' relationship notwithstanding any different designation on Contractor's real estate license. Contractor shall have no authority to bind Client to any contractual or other obligation whatsoever. Client shall not in any manner be answerable or accountable for: (i) any violation by Contractor of any federal, state or local laws, regulations, ordinances, rules or orders; or (ii) for any injury, loss or damage arising from or out of any act or omission of Contractor.

(b) Contractor shall acquire, as a self-employed person, such workmen's compensation and disability insurance as appropriate and consistent with its status as an independent contractor.

(c) Client and Contractor acknowledge and agree that Contractor shall not be treated as an employee with respect to the provision of any of the Services for Federal tax purposes. Contractor hereby agrees not to claim or assert, or to support any third party assertion of, the existence of an employer/employee relationship with Client and/or the Qualifying Broker.

(d) Except as required by law: (i) Contractor is under the control of Client as to the results of Contractor's work only, and not as to the hours spent accomplishing such results; (ii) Contractor has

> no authority to bind Client and/or the Qualifying Broker by any promise or representation; and (iii) Client and the Qualifying Broker shall not be liable for any obligation or liability incurred by Contractor.
>
> (e) Contractor's only remuneration shall be the compensation specified in Section 4 which is based on Contractor's sales and other performance outputs.
>
> (f) Contractor is only performing Services as a real estate sales agent and shall not be treated as an employee for state and federal tax purposes.

(Epshteyn Decl. Ex. 2 [8-2], at 9.)

In addition, Section 21 of the ICA, entitled, "No Employment Agreement," states as follows:

> CONTRACTOR HEREBY EXPRESSLY ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT IS NOT, AND WILL NOT UNDER ANY CIRCUMSTANCES BE DEEMED TO BE, A CONTRACT OF EMPLOYMENT BETWEEN CLIENT AND CONTRACTOR.

(Epshteyn Decl. Ex. 2 [8-2], at 12-13.) Finally, Section 25 of the ICA contains language similar to that found in the Background Check Consent and Release. (Id. at 13.)

Plaintiff alleges that after he sent an email to Mr. Haynie on November 15, 2017 requesting a status update (Compl. ¶ 34), he received an e-mail from Ms. Braunstein on November 17, 2017 which stated: "We did get your background

check back and unfortunately, it did not pass our review so we cannot move forward with our process of bringing you on as an agent." (Id. ¶ 35.) RHSS did not send plaintiff a copy of the background check that Ms. Braunstein referenced or a statement of his rights under the Fair Credit Reporting Act ("FRCA"), 15 U.S.C. § 1681 et seq. (Compl. ¶¶ 36, 40.) Plaintiff did receive an email from Mr. Haynie that included copies of the documents he had completed with the word "VOID" stamped on them. (Id. ¶ 38.) Those documents are attached as exhibits to the Epshteyn Declaration [8-2]. (See supra notes 1 & 2.)

II. CONTENTIONS OF THE PARTIES

Plaintiff contends that RHSS violated the FCRA in two ways. First, plaintiff asserts that defendant required him as a job applicant to sign a standardized background check authorization form that did not consist "solely of the disclosure that a consumer report may be obtained for employment purposes," as required by 15 U.S.C. § 1681b(b)(2)(A)(i), but also included a liability waiver in that form. (Compl. ¶ 2 & Count VI, the First Claim for Relief.) Plaintiff contends that this liability waiver violated the FCRA's stand-alone disclosure requirement.

Second, plaintiff asserts that the FCRA requires a "user" of a consumer report who intends to take any "adverse action" against a job applicant "based in

whole or in part" on information obtained from a consumer report, to provide notice of that fact to the job applicant and to include with the notice a copy of the consumer report and a notice of the applicant's dispute rights under the FCRA, before taking the adverse action. (Compl. ¶ 3, quoting 15 U.S.C. § 1681b(b)(3)(A).) According to Mr. Walker, the FCRA's so-called "pre-adverse action notice" requirement alerts an applicant that he is about to experience an adverse action based on a report's contents, and provides him an opportunity to challenge the accuracy, completeness, or relevancy of the information in the report before that job is lost. (Id. ¶ 4.) Plaintiff alleges that defendant obtained a background check about him and denied him employment as a real estate agent, likely based upon criminal history information in the report that has previously been inaccurately associated with plaintiff and which does not pertain to him. (Id. ¶ 5.) Plaintiff never found out what information defendant held against him, however, because in alleged violation of the FCRA, defendant willfully and negligently failed to comply with the FCRA's mandatory pre-adverse action notification requirement and failed to provide a copy of the inaccurate background report it obtained before the adverse action occurred. (Id. ¶ 6 & Count VII, the Second Claim for Relief.)

Defendant has filed a Motion to Dismiss [8] under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant argues that plaintiff lacks Article III standing to pursue his First Claim for Relief because he has not sustained an "injury-in-fact." Assuming there is standing, defendant further contends that both of plaintiff's Claims for Relief should be dismissed for failure to state a claim, because the provisions of the FCRA on which he relies only apply when the consumer report was procured and/or used for "employment purposes." Because plaintiff never applied for employment with RHSS, but rather sought the opportunity to be an independent real estate agent, defendant asserts that it did not obtain the consumer report for employment purposes and thus had no obligation to comply with those provisions.

III. STANDARDS OF REVIEW

A. Rule 12(b)(1)

Rule 12(b)(1) permits dismissal of a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). "[A] motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) can be based upon either a facial or factual challenge to the complaint." McElmurray v. Consol. Gov't of Augusta-Richmond Cty., 501 F.3d 1244, 1251 (11th Cir. 2007). "If the

challenge is facial, 'the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised,'" and "'the court must consider the allegations in the plaintiff's complaint as true.'" Id. (citation omitted). A "facial attack" on the complaint "'require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (per curiam) (quoting Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980)). "'Factual attacks,' on the other hand, challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered.'" Id. RHSS is making a facial attack here because it contends that, even taking the allegations in the Complaint as true, this Court lacks subject matter jurisdiction over plaintiff's First Claim for Relief given his lack of standing.

B. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss a complaint, or portions thereof, for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss, the Court must take the allegations of the complaint as true and must construe those allegations in the light most favorable to the plaintiff. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir. 2008) (per curiam).

Although a court is required to accept well-pleaded facts as true when evaluating a motion to dismiss, it is not required to accept the plaintiff's legal conclusions. Chandler v. Sec'y of Fla. Dep't of Transp., 695 F.3d 1194, 1199 (11th Cir. 2012) (per curiam) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). When evaluating the sufficiency of a plaintiff's complaint, the court makes reasonable inferences in favor of the plaintiff, but is not required to draw the plaintiff's inference. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005) (per curiam). Similarly, the Court does not accept as true "unwarranted deductions of fact or legal conclusions masquerading as facts." Snow v. DirecTV, Inc., 450 F.3d 1314, 1320 (11th Cir. 2006) (internal quotation marks and citation omitted).

Finally, the Court may dismiss a complaint if it does not plead "enough facts to state a claim to relief that is plausible on its face." Chandler, 695 F.3d at 1199 (internal quotation marks and citation omitted). In Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the Supreme Court observed that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555. Although factual allegations in a complaint need not be detailed, those allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (citations and footnote omitted). Moreover, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. The mere possibility that the defendant might have acted unlawfully is not sufficient to allow a claim to survive a motion to dismiss. Id. Instead, the well-pleaded allegations of the complaint must move the claim "across the line from conceivable to plausible." Twombly, 550 U.S. at 570.

IV. ANALYSIS

A. Relevant FCRA Provisions

Congress enacted the FCRA "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52 (2007). Within the statutory framework of the FCRA, section 1681b broadly addresses "[p]ermissible purposes of consumer reports," with section 1681b(a) enumerating the exclusive list of such purposes. The provisions therein apply broadly to all users and/or furnishers of consumer reports and allow for the use of consumer reports in connection with, for example, certain credit and insurance transactions, "legitimate business needs" regarding a business transaction, or, more generally, in accordance with any written instructions provided by the consumer. See 15 U.S.C. § 1681b(a)(1)-(6). One of the permissible purposes includes the use of a consumer report "for employment purposes." Id. § 1681b(a)(3)(B).

Section 1681b(b) is a narrower subsection of the FCRA that focuses on one of the permissible purposes found in section 1681b(a). Specifically, section 1681b(b) establishes additional "[c]onditions for furnishing and using consumer reports for employment purposes." 15 U.S.C. § 1681b(b). These provisions

include both the stand-alone disclosure requirement (section 1681b(b)(2)(A)) and the pre-adverse action notice requirement (section 1681b(b)(3)(A)) that RHSS is alleged to have violated here in plaintiff's First and Second Claims for Relief, respectively.

The stand-alone disclosure requirement is a procedural requirement that applies before a consumer report is obtained. It provides that a person may not procure a consumer report for employment purposes unless

> 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.

15 U.S.C. § 1681b(b)(2)(A)(i).

The pre-adverse action notice requirement, by contrast, applies after a consumer report has been obtained but, as the name implies, before an employer takes an adverse employment action against a current or prospective employee based upon his or her consumer report. Specifically, the pre-adverse action notice requirement provides that

> 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….

15 U.S.C. § 1681b(b)(3)(A).

As shown in the above-quoted excerpts from the statute, both provisions apply only when a consumer report is obtained for "employment purposes." The FCRA defines "employment purposes" to mean "for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." 15 U.S.C. § 1681a(h).

B. Plaintiff Lacks Standing to Assert the First Claim for Relief

When a defendant challenges a plaintiff's standing by bringing a Rule 12(b)(1) motion, the plaintiff bears the burden to establish that jurisdiction exists. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The standing doctrine stems from Article III of the Constitution, which limits the judicial power of federal courts to "actual cases or controversies." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). "The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." Id. "A plaintiff seeking to establish Article III standing must satisfy three elements." Albu v. Home Depot, Inc., No. 1:15-CV-00412-ELR, 2016 WL 1169196, at *6 (N.D. Ga. Mar. 4, 2016).

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (citations omitted). "All three elements are an 'irreducible constitutional minimum,' and failure to show any one results in a failure to show standing." Koziara v. City of Casselberry, 392 F.3d 1302, 1305 (11th Cir. 2004) (quoting Lujan, 504 U.S. at 560).

This case concerns the first element. With regard to this first element, a "'concrete injury' must be '*de facto*'; that is, it must actually exist." Spokeo, 136 S. Ct. at 1548. A plaintiff cannot automatically satisfy the injury-in-fact requirement "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." Id. at 1549. A "bare procedural violation, divorced from any concrete harm," does not satisfy the injury-in-fact requirement of Article III. Id. "The party invoking federal jurisdiction bears

the burden of establishing these elements." Lujan, 504 U.S. at 561. This Court cannot proceed without the requisite Article III jurisdiction.

Mr. Walker alleges that RHSS's inclusion of a liability waiver in the Background Check Consent and Release form violated the FRCA's stand-alone disclosure requirement. As defendant correctly points out, nowhere in the Complaint does plaintiff allege that the inclusion of the liability waiver in the form caused him any confusion about what he was signing or that he was somehow deceived or misled by the alleged violation into authorizing a background check to which he would not have otherwise consented.

Several cases decided by colleagues in this District have held that, in the absence of such allegations, the inclusion of extraneous information in a disclosure form is a bare procedural violation that does not cause an injury in fact. See Stone v. U.S. Sec. Assocs., No. 1:16-CV-0371-MLB-JSA, 2018 WL 3745051, at *10 (N.D. Ga. May 31, 2018) (plaintiff who receives information required by the FCRA, but not in the required stand-alone format, and who otherwise suffers no confusion as a result, has not established sufficient concrete harm to give rise to standing because mere procedural violation occurred); Cooper v. Acad. Mortg. Corp. (UT), No. 1:16-CV-01546-LMM-CMS, 2017 WL 8186733, at *5-8 (N.D. Ga. Nov. 27,

2017) (where plaintiff does not allege that the extraneous information in the disclosure form caused her not to understand the consent she was giving, that she would not have provided consent but for the extraneous information; that the extraneous information caused her to be confused or distracted from the disclosure, or that she was unaware that a consumer report would be procured, her complaints about the form of the disclosure amount to a bare procedural violation, insufficient to create standing under Spokeo), R. & R. adopted, No. 1:16-CV-1546 (N.D. Ga. Mar. 6, 2018); LaFollette v. RoBal, Inc., No. 1:16-CV-02592-WSD, 2017 WL 1174020, at *4 (N.D. Ga. Mar. 30, 2017) (where plaintiff does not allege that she has suffered the harm addressed by Congress's promulgation of the stand-alone disclosure rule, i.e., an applicant's failure to understand that she was authorizing an employer background check, and plaintiff does not allege the form of the disclosure caused her confusion or caused her to fail to understand the disclosure, the allegations amount to no more than a bare procedural violation); Albu v. Home Depot, Inc., No. 1:15-CV-00412-ELR, 2016 U.S. Dist. LEXIS 185557, at *10 (N.D. Ga. Nov. 2, 2016) (recommending dismissal of plaintiff's Section 1681b(b)(2) claim for lack of standing under Spokeo as a "bare procedural violation" for three reasons: (1) the FCRA does not confer a substantive right to a stand-alone

disclosure; (2) the plaintiffs did not suffer concrete informational harm; and (3) the plaintiffs suffered no concrete harm to their privacy), R. & R. adopted, 2017 U.S. Dist. LEXIS 49918, at *4-7 (N.D. Ga. Mar. 20, 2017) (finding no concrete harm from inclusion of a liability waiver in disclosure form where there was no allegation that the plaintiffs were confused about what they had signed).

Defendant cites a published Circuit court decision that is in accord with the authorities cited from this District. See Groshek v. Time Warner Cable, Inc., 865 F.3d 884, 888 (7th Cir. 2017) ("Congress did not enact § 1681b(b)(2)(A)(i) to protect job applicants from disclosures that do not satisfy the requirements of that section; it did so to decrease the risk that a job applicant would unknowingly consent to allowing a prospective employer to procure a consumer report."); id. at 887 (finding that the plaintiff did not suffer a concrete injury under the stand-alone requirement when "[h]is complaint contained no allegation that any of the additional information caused him to not understand the consent he was giving; no allegation that he would not have provided consent but for the extraneous information on the form; no allegation that additional information caused him to be confused; and, no allegation that he was unaware that a consumer report would be

procured. Instead, he simply alleged that Appellees' disclosure form contained extraneous information.").

In response, plaintiff cites a Circuit decision that he contends support his position. See Syed v. M-I, LLC, 853 F.3d 492 (9th Cir. 2017). However, as the Third Circuit explained in Long v. Southeastern Pennsylvania Transportation Authority, 903 F.3d 312 (3d Cir. 2018), Groshek and Syed turned out differently because their allegations are different:

> In both Groshek and Syed, the defendants disclosed that they would be obtaining consumer reports, but the disclosures were not in the format the FCRA requires. Groshek lacked standing because he did not allege that he failed to understand the disclosure. Syed had standing because he alleged he failed to understand the disclosure, and that if he had understood it, he would not have signed a liability waiver.

Id. at 325 (citations omitted).

Just as in the above-cited cases from this District and in Groshek, Mr. Walker has alleged only a bare procedural violation of section 1681b(b)(2)(A)(i), divorced from any concrete harm, which cannot be sustained after Spokeo. He does not contend that he was unaware of what he was signing as a result of the alleged one-sentence liability waiver included on his Background Check Consent and Release. Nor does he claim that he did not realize he was authorizing RHSS to obtain a background check about him, or that he would not have authorized the background

check but for the allegedly extraneous content. He also does not contend (as did the plaintiff in Syed) that he failed to understand the disclosure, and that if he had understood it, he would not have signed a liability waiver. Accordingly, plaintiff's First Claim for Relief should be dismissed for lack of standing.

C. The First and Second Claims for Relief Should be Dismissed

Defendant contends that the statutory provisions under which plaintiff proceeds make clear that they apply only when a consumer report is obtained or used "for employment purposes;" background checks obtained on prospective independent contractors are not "for employment purposes;" and Mr. Walker was applying to be an independent contractor. In response, plaintiff does not dispute that he applied to be an independent contractor rather than an employee. Instead, he argues that the term independent contractor should be read broadly to encompass what allegedly happened here so as to protect all job seekers.

Although the case law is not extensive, it is clear that the provisions of the FCRA urged by plaintiff here do not apply when consumer reports are obtained on persons seeking positions as independent contractors. See Smith v. Mut. of Omaha Ins. Co., No. 4:17-CV-00443-JAJ-CFB, 2018 WL 6921119, at *4 (S.D. Iowa Oct. 4, 2018); Johnson v. Sherwin-Williams Co., 152 F. Supp. 3d 1021, 1026-27 (N.D.

Ohio 2015); Lamson v. EMS Energy Mktg. Serv., Inc., 868 F. Supp. 2d 804, 816 (E.D. Wis. 2012). The authorities that Mr. Walker cites to support his argument (see Pl.'s Resp. [15] 11-18) are either dated, distinguishable, or not persuasive.

In sum, the documents plaintiff signed show that he was seeking work with RHSS as an independent contractor. Because the FCRA provisions on which he relies apply only to potential employees and not to potential independent contractors, plaintiff's First and Second Claims for Relief should be dismissed for failure to state a claim.

V. CONCLUSION

For the reasons set forth above, the undersigned **RECOMMENDS** that defendant's Motion to Dismiss [8] be **GRANTED**.

The Clerk is **DIRECTED** to terminate the reference to the Magistrate Judge.

SO RECOMMENDED, this 28th day of January, 2019.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE