UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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SARMAD SYED, an individual, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

M-I LLC, a Delaware Limited Liablity Company; PRECHECK, INC., a Texas Corporation; and DOES 1-10,

Defendants.

CIV. NO. 1:14-742 WBS BAM

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

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Plaintiff Sarmad Syed brought this putative class-action lawsuit against defendants M-I, LLC ("M-I") and PreCheck, Inc. ("PreCheck"), in which he alleges that defendants failed to comply with federal credit reporting laws while conducting pre-employment background checks. The court dismissed plaintiff's initial Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be

granted. (Aug. 8, 2014 Order (Docket No. 34).) Plaintiff has filed a First Amendment Complaint ("FAC"), (Docket No. 36), and defendants again move to dismiss the FAC pursuant Rule 12(b)(6) for failure to state a claim, (Docket Nos. 38, 39).

## I. Factual and Procedural History

Plaintiff applied for a job with M-I on July 20, 2011. (FAC ¶ 14.) During the application process, plaintiff filled out and signed a one-page form entitled "Pre-Employment Disclosure and Release." (Id.) That form, which PreCheck allegedly prepared and provided to M-I, included the following language:

> I understand that the information obtained will be used as one basis for employment or denial of employment. I hereby discharge, release, and indemnify prospective employer, PreCheck, Inc., their agents, servants, and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.
>
> It is expressly understood that the information obtained through the use of this release will not be verified by PreCheck, Inc.

(Id.)

At some point "within the last two years," plaintiff allegedly obtained and reviewed his personnel file. (Id. ¶¶ 34, 50.) He discovered that defendants had procured a consumer credit report about him. (Id.) Based on this report, plaintiff alleges two violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq. First, plaintiff alleges that M-I procured this report unlawfully because the disclosure form he signed included the extra language set forth above, and thus

appeared in a form that did not consist "solely of the disclosure," as required by the FCRA. (Id. ¶ 17.) Second, plaintiff alleges that PreCheck violated the FCRA by furnishing M-I with a consumer report on plaintiff without first obtaining a certification from M-I stating that M-I "has complied" with its statutory obligations "with respect to the consumer report." (Id. ¶ 42.)

II. Legal Standard

On a motion to dismiss under Rule 12(b)(6), the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a plaintiff pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

Plaintiff seeks statutory and punitive damages for violations of the FCRA, (FAC ¶¶ 31, 47), which requires him to allege that defendants "willfully fail[ed] to comply with the requirements of [the FCRA]." 15 U.S.C. § 1681n(a) (emphasis added). In Safeco Insurance Company of America v. Burr, the Supreme Court held that the FCRA's use of the term "willfully"

requires a plaintiff to show that the defendant's conduct was intentional or reckless. 551 U.S. 47, 57 (2007). Recklessness consists of "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." Id. at 68 (citation and internal quotation marks omitted). In other words, "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." Id. at 69. A defendant's violation of the FCRA is not reckless simply because its understanding of a statutory obligation is "erroneous"; instead, a plaintiff must allege, at a minimum, that the defendant's reading of the FCRA is "objectively unreasonable." Id.

In applying this standard, the Supreme Court considered whether the defendant's interpretation "has a foundation in the statutory text" and whether the defendant had "guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took." Id. at 69-70. Noting "a dearth of guidance and . . . less-than-pellucid statutory text," the Court declined to find the defendant's interpretation objectively unreasonable. Id. at 70. Finally, the Court observed that the presence or absence of subjective bad faith made no difference "where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." Id. at 70 n.20.

Safeco's analysis strongly suggests that the issue of

whether a defendant's reading of the FCRA was "objectively unreasonable" is a question of law.[1] See Van Straaten v. Shell Oil Prods. Co., 678 F.3d 486, 490-01 (7th Cir. 2012) (stating that the Safeco Court "treated willfulness as a question of law"). The Court held that there was no need to remand the case for further factual development because, as a matter of law, "Safeco's misreading of the statute was not reckless." Safeco, 551 U.S. at 71. And perhaps most tellingly, the Court analogized this inquiry to the "clearly established" inquiry required under its qualified immunity precedents--an inquiry that is legal in nature. See id. at 70 (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

Accordingly, courts may consider whether a particular interpretation was "objectively unreasonable" upon a motion to dismiss. See, e.g., Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., 848 F. Supp. 2d 532, 543-46 (E.D. Pa. 2012) (considering court cases and FTC guidance on the question of willfulness for purposes of a motion to dismiss); see also Long v. Tommy Hilfiger U.S.A., Inc., 671 F.3d 371, 378 (3d Cir. 2012) (affirming dismissal upon a motion to dismiss because a defendant's interpretation "although erroneous, was at least objectively reasonable"); Shlahtichman v. 1-800 Contacts, Inc.,

[1] Some courts have treated the question of whether a defendant's conduct was "willful" as a factual inquiry, see, e.g., Edwards v. Toys "R" Us, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) (citing cases treating willfulness as a question of fact), but these cases either predate Safeco or are distinguishable from the situation in Safeco and the one here because the relevant statute they addressed was "not ambiguous or susceptible to conflicting interpretations," see id. at 1209.

615 F.3d 794, 803 (7th Cir. 2010) (same).

III. M-I's Motions to Dismiss Plaintiff's Disclosure Claim

Plaintiff alleges that M-I's interpretation of the FCRA to permit the inclusion of release and indemnity language in the disclosure form was "objectively unreasonable," (FAC ¶ 18), and supports this allegation by pointing to the "plain and clearly ascertainable" statutory language as well as three FTC opinion letters and several district court opinions on the subject, (FAC ¶¶ 19-23).

This court previously rejected plaintiff's contention that the FCRA's language is as clear as he claims. (Aug. 8, 2014 Order at 6-7.) The relevant portion of § 1681b(b) requires that the document "consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i). But the immediately following subsection allows the consumer's authorization to "be made on the document referred to in clause (i)"--that is, the same document as the disclosure. 15 U.S.C. § 1681b(b)(2)(A)(ii). Thus, the statute itself suggests that the term "solely" is more flexible than at first it may appear. This "less-than-pellucid" statutory language weighs in favor of finding that M-I's interpretation was objectively reasonable. Safeco, 551 U.S. at 70.

The next relevant question becomes whether, at the time M-I used the form, "guidance from the courts of appeals or the Federal Trade Commission . . . warned it away from the view it took." Id. But direction from the FTC must be "authoritative guidance." Id. For instance, the Safeco Court rejected the use of an informal letter written by an FTC staff member because it "did not canvass the issue" and "explicitly indicated it was

merely 'an informal staff opinion . . . not binding on the Commission.'" Id. at 70 n.19.

Just like the letter rejected by the Supreme Court in Safeco, all three letters cited for support by plaintiff explicitly indicate they are informal staff opinions. See Letter from William Haynes, Att'y, Div. of Credit Practices, Fed. Trade Comm'n, to Richard W. Hauxwell, CEO, Accufax Div. (June 12, 1998), 1998 WL 34323756 (F.T.C.), at *3 ("The views that are expressed above are those of the Commission's staff and not the views of the Commission itself."); Letter from William Haynes, Att'y, Div. of Credit Practices, Fed. Trade Comm'n, to Harold Hawkey, Employers Ass'n of N.J. (Dec. 18, 1997), 1997 WL 33791224 (F.T.C.), at *3 ("The above views constitute informal staff opinions and are advisory in nature and not binding upon the Commission."); Letter from Cynthia Lamb, Investigator, Div. of Credit Practices, Fed. Trade Comm'n, to Richard Steer, Jones Hirsch Connors & Bull, P.C. (Oct. 21, 1997), 1997 WL 33791227 (F.T.C.), at *2 ("The opinions set forth in this letter are those of the staff, and are not binding on the Commission."). These letters lack the authority needed to support plaintiff's allegation post-Safeco.

The district court opinions cited by plaintiff also cannot support his position because all of the decisions were issued after M-I used its form in 2011. See Reardon v. Closetmaid Corp., Civ. No. 2:08-1730, 2013 WL 6231606 (W.D. Pa. Dec. 2, 2013); Singleton v. Domino's Pizza, Civ. No. 11-1823, 2012 WL 245965 (D. Md. Jan. 25, 2012); Waverly Partners, Civ. No. 3:10-28, 2012 WL 3645324 (W.D.N.C. Aug. 23, 2012). These cases

could not have warned M-I away from the view it took under the Safeco standard if they had not yet come into existence.

None of the legal authority cited by plaintiff suffices to make M-I's understanding of its obligation under the FCRA at the relevant time objectively unreasonable. Given this "dearth of authority" and the "less-than-pellucid" statutory text, the court finds no support for plaintiff's allegation of willfulness and it must grant M-I's motion to dismiss.

* * *

While leave to amend must be freely given, the court is not required to permit futile amendments. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992); Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983); Reddy v. Litton Indus., Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

Having already given plaintiff leave to amend his Complaint once, the parties have had ample opportunity to brief this court on the issue of willfulness. Because the court finds that M-I's interpretation of the FCRA is not objectively unreasonable as a matter of law, no set of facts will allow plaintiff to plausibly allege that M-I "willfully" violated the FCRA under the Safeco standard. Accordingly, any proposed amendment would be futile, and the court will not grant plaintiff

further leave to amend.

IV. PreCheck's Motion to Dismiss Plaintiff's Certification Claim

A. Plaintiff Alleges a Willful Violation of the FCRA

Plaintiff alleges that PreCheck "intentionally or recklessly" breached its obligation under § 1681b(b)(1) of the FCRA. (FAC ¶¶ 42-43.) This obligation, plaintiff argues, required PreCheck to obtain a specific certification from M-I after M-I had provided a disclosure form to plaintiff and received plaintiff's authorization but before it furnished M-I with the consumer report. (See FAC ¶ 49.) Plaintiff's understanding relies on § 1681b(b)(1)'s use of the phrase "has complied with paragraph (2) with respect to the consumer report." 15 U.S.C. § 1681b(b)(1)(A)(i).[2]

PreCheck argues it interpreted § 1681b(b)(1) as allowing it to obtain a one-time "prospective, blanket certification" from M-I. (PreCheck's Mem. at 9 (Docket No. 38-1).) It points to a document purportedly provided by M-I to PreCheck in June 2002 that promised M-I would "preform legal obligations [under the FCRA]," including that it would "make a clear and conspicuous written disclosure to the consumer before

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[2] Section 1681b(b)(1) provides in relevant part:

> A consumer reporting agency may furnish a consumer report for employment purposes only if--
>
> (A) the person who obtains such report from the agency certifies to the agency that--
>
> (i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable . . ."

15 U.S.C. § 1681b(b)(1) (emphasis added).

the report is obtained, in a document that consists solely of the disclosure, that a report may be obtained." (See id. at 12; Do Decl. Ex. A (Docket No. 10-4).)

Unlike the interpretation analyzed in Safeco, however, the court sees no apparent foundation in the text of § 1681b(b)(1) for PreCheck's belief that it could rely on M-I's prospective certification of compliance with paragraph (2). See Safeco 551 U.S. at 69-70 ("While we disagree with Safeco's analysis, we recognize that its reading has a foundation in the statutory text and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor." (internal citations omitted)). Prospective certification actually runs counter to § 1681b(b)(1)'s use of the phrase "has complied," which clearly appears to refer retrospectively to an action already taken. 15 U.S.C. § 1681b(b)(1) ("the person has complied with paragraph (2)" (emphasis added)). It makes no sense for M-I to certify that it "has complied" with the FCRA before having done so; M-I must wait until it actually "has complied" to certify its actions. Even if the statute's language is not entirely "pellucid," it is clear enough to foreclose the use of a prospective certification as to compliance with paragraph (2).

This understanding is reinforced by the statute's next clause, which requires certification that "the person will comply with paragraph (3) . . . if paragraph (3) becomes applicable"--a sharp contrast of language suggesting that Congress contemplated prospective certification as to paragraph (3), but not paragraph (2). 15 U.S.C. § 1681b(b)(1)(A)(i). Accordingly, whether or not

PreCheck received a prospective certification from M-I in 2002, the plain language of § 1681b(b)(1) supports plaintiff's allegation that PreCheck intentionally or recklessly violated the FCRA by failing to secure a certification that M-I "has complied" with paragraph (2).

PreCheck's actions might be objectively reasonable if it could point to some court decision or "authoritative guidance" from the FTC that it relied upon when deciding to use a prospective, blanket certification. That is, PreCheck must show that it had some "sufficiently convincing justification" for thinking that a prospective certification fulfilled its obligation under the FCRA. Safeco 551 U.S. at 69-70. But PreCheck has not provided, and the court cannot find, any court decision addressing the use of prospective certifications under § 1681b(b)(1).

PreCheck does offer two FTC opinion letters, (Precheck's Mem. at 9-10 (Docket No. 39)), but these letters do not authorize, or even directly address, the use of prospective certification. The first letter only confirms that a consumer reporting agency "is not required to maintain a record of the consumer's underlying written authorization" so long as it "receive[s] the employer's certification before furnishing a consumer report for employment purposes." (See Letter from Shoba Kammula, Fed. Trade Comm'n, to Stephen Kilgo, President, Intelnet Inc. (July 28, 1998), Muro Decl. Ex. A (Docket No. 39-3).) The second letter states that a consumer reporting agency must obtain certification "that the client obtaining the report is in compliance" with 15 U.S.C. § 1681b(b)(2). (See Letter from

William Haynes, Att'y , Div. of Credit Practices, Fed. Trade Comm'n, to John Beaudette, Operations Manager, Employment Screenings Servs. (June 9, 1998), Muro Decl. Ex. B.) When read in context, the use of the phrase "in compliance" does not authorize prospective certification. And even if it did, neither letter contains the level of "authoritative guidance" required by Safeco. (See Letter from Shoba Kammula, Fed. Trade Comm'n, to Stephen Kilgo, President, Intelnet Inc. (July 28, 1998), Muro Decl. Ex. A ("This is an informal staff opinion and is not binding on the Commission."); Letter from William Haynes, Att'y , Div. of Credit Practices, Fed. Trade Comm'n, to John Beaudette, Operations Manager, Employment Screenings Servs. (June 9, 1998), Muro Decl. Ex. B ("The statements contained in this letter represent the opinions of the Commission's staff and are advisory in nature.").)

Finally, PreCheck points to several court cases allowing "blanket certifications" under a different subsection of the FCRA--15 U.S.C. § 1681e--and argues that these cases support its conclusion that prospective, blanket certifications can be used under § 1681b(b)(1) as well. (See Pl.'s Mem. at 10-11 (citing Boothe v. TRW Credit Data, 557 F. Supp. 66, 71 (S.D.N.Y. 1982); Hiemstra v. TRW, Inc., 195 Cal. App. 3d 1629, 1634 (2d Dist. 1987).) However, § 1681e contains significantly different language from § 1681b(b)(1). It contains concurrent- and prospective-looking language, while § 1681b(b)(1) contains retrospective language. Compare 15 U.S.C. § 1681e (requiring a user of consumer reports to "certify the purposes for which the information is sought, and certify that the information will be

used for no other purpose" (emphasis added), with 15 U.S.C. § 1681b(b)(1) (requiring that a user certify that "the person has complied with paragraph (2)" (emphasis added)). This distinction defeats the idea that PreCheck could have reasonably relied on cases interpreting § 1681e.

Unlike with M-I, the dearth of authority interpreting § 1681b(b)(1) works against PreCheck because PreCheck cannot justify its non-compliance with the plain meaning of the statutory text. Accordingly, the court finds dismissal for failure to state a claim against PreCheck inappropriate.[3]

B. The Statute of Limitations Does Not Preclude Plaintiff's Claim

An action under the FCRA must be filed within the earlier of: "(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p.

In Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010), the Supreme Court made clear that, when a federal statute of limitations incorporates a "discovery" rule, "the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation.'" Id. at 648 (quoting 28 U.S.C. § 1658(b)(1)). Notably, the defendant in Merck & Co. attempted to argue that the limitations period runs

[3] Any language in the court's August 8, 2014 Order that appears inconsistent with this determination shall be disregarded.

from the date the plaintiff gains so-called "inquiry notice," which the defendant took to mean "the point at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry." Id. at 650. The Supreme Court rejected this view. Id. at 650-53. The Court held that the statute of limitations does not necessarily run from the point a plaintiff has "inquiry notice." Id. at 653 ("We consequently find that the 'discovery' of facts that put a plaintiff on 'inquiry notice' does not automatically begin the running of the limitations period."); see also Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1206 (9th Cir. 2012) (explaining that Merck & Co. "held that the ultimate burden is on the defendant to demonstrate that a reasonably diligent plaintiff would have discovered the facts constituting the violation").

With regard to the claim against PreCheck, the facts allegedly constituting the violation are PreCheck's furnishing of a consumer report on plaintiff without first receiving § 1681b(b)(1) certification from M-I. Nothing on the disclosure and authorization form signed by plaintiff necessarily alerts plaintiff to a lack of § 1681b(b)(1) certification or otherwise constitutes "discovery by the plaintiff of the violation." 15 U.S.C. § 1681p. To the contrary, any alleged violation of § 1681b(b)(1)on the part of PreCheck would have had to occur after plaintiff signed the form. Further, PreCheck advances no reason, and the court can see no reason, why a reasonably diligent plaintiff would have necessarily discovered the § 1681b(b)(1) violation on September 19, 2011--the date plaintiff stopped

working for M-I. Because the court must accept the truth of plaintiff's allegation that he discovered the violation "within the last two years" for purposes of this motion, (FAC ¶ 50), the court will deny PreCheck's motion to dismiss on this ground.[4]

IT IS THEREFORE ORDERED that:

(1) the motion of defendant M-I LLC to dismiss this action as against it be, and the same hereby is, GRANTED, without leave to amend;

(2) the motion of defendant PreCheck, Inc. to dismiss this action as against it be, and the same hereby is, DENIED; and

(3) the motion of defendant PreCheck to strike be, and the same hereby is, DENIED without prejudice.

Dated: October 22, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[4] PreCheck also moves to strike plaintiff's class allegation pursuant to Federal Rule of Civil Procedure 12(f) on the basis that it defines an impermissible "fail-safe" class. See Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 538 (6th Cir. 2012) ("[A] 'fail-safe' class is one that includes only those who are entitled to relief . . . [and] allow[s] putative class members to seek a remedy but not be bound by an adverse judgment--either those class members win or, by virtue of losing, they are not in the class and are not bound.") (internal quotation marks and citations omitted). Because the issue of class certification is not presently before it, the court will deny PreCheck's motion to strike without prejudice. PreCheck may assert its fail-safe arguments in opposition to a motion for class certification or, if plaintiff fails to move for certification, renew its motion to strike prior to trial.