23-1118(L)
23-1166(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT FAIR HOUSING CENTER, CARMEN ARROYO, MIKHAIL ARROYO, Plaintiffs-Appellants-Cross-Appellees,

v.

CORELOGIC RENTAL PROPERTY SOLUTIONS, LLC, Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court for the District of Connecticut
No. 18-CV-705

PAGE PROOF REPLY BRIEF FOR DEFENDANT-APPELLEE/CROSS-APPELLANT CORELOGIC RENTAL PROPERTY SOLUTIONS, LLC

Timothy J. St. George
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, VA 23219
Telephone: (804) 697-1200
timothy.st.george@troutman.com

Jill M. O'Toole
O'TOOLE + O'TOOLE PLLC
280 Trumbull Street, 15th Fl.
Hartford, CT 06103
Tel.: 860.519.5813
Fax: 914.232.1599
jotoole@otoolegroup.com

Attorneys for CoreLogic Rental Property Solutions, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

PAGE(S)

Statutes

Regulations

INTRODUCTION

The disposition of RPS's cross-appeal on Mr. Arroyo's Fair Credit Reporting Act ("FCRA") claims is straightforward. Controlling U.S. Supreme Court and Second Circuit precedent hold that a consumer only has Article III standing to challenge a failure to receive a consumer file disclosure if the consumer can prove "adverse," "downstream consequences" from that omission. After a ten-day bench trial, the district court found Mr. Arroyo had proven no such consequences. Appellants did not appeal that factual finding. The district court erred, however, by failing to consider the ramifications of that factual finding on its subject matter jurisdiction, and instead awarding Mr. Arroyo statutory and punitive damages under the FCRA. The Court should vacate the district court's judgment on Counts Four and Five and dismiss those FCRA claims for lack of subject matter jurisdiction.

Even assuming subject matter jurisdiction, the district court further erred as a matter of law by awarding Mr. Arroyo judgment under two FCRA provisions (15 U.S.C. §§ 1681g and 1681h). The district court correctly found Ms. Arroyo never submitted "proper identification" to obtain a copy of Mr. Arroyo's file on his behalf, which is a statutory condition precedent to obtaining a file disclosure under §§ 1681g and 1681h. That lack of proper identification occurred because Ms. Arroyo never sent RPS a version of her conservatorship certificate with an impressed Probate Court seal; a requirement that is explicitly stated on the face of the conservatorship

certificate. The lack of compliance with the FCRA's requirement to provide proper identification should have ended the inquiry and resulted in judgment for RPS.

Mr. Arroyo, however, asserts he was still entitled to judgment because this Court should "imply" an obligation on RPS to have informed Ms. Arroyo about the facially-obvious defects in the conservatorship certificates that she submitted to RPS when seeking Mr. Arroyo's file. This Court cannot override the clear statutory requirement of proper identification by implication. Such an implication, moreover, also cannot support a claim that RPS acted in "willful" violation of the FCRA, which is a prerequisite to obtaining statutory and punitive damages under the FCRA. Even more, the regulation invoked by Mr. Arroyo to "imply" such an obligation (12 C.F.R. § 1022.137(a)(2)(iii)) has no relevance here, as: (1) RPS is not a "nationwide specialty consumer reporting agency," which is the only type of entity that is subject to the identified regulation; and (2) the regulation was promulgated under a separate FCRA provision (§ 1681j) that has never been at issue in this case.

Finally, the district court's FCRA judgment was the product of procedural error. At summary judgment, the district court correctly held that Mr. Arroyo's claims under §§ 1681g and 1681h could not survive based on the plain text of those provisions, as applied to the facts of this case. At the same time, however, the district court interjected the previously-unpled FCRA regulation into the case, and it allowed Mr. Arroyo's FCRA claims to proceed to trial on the basis of that regulation. RPS

then defeated that regulatory claim at trial based on multiple arguments. Post-trial, however, the district court *sua sponte* revived the previously-rejected statutory claims under §§ 1681g and 1681h and then awarded Mr. Arroyo judgment under those FCRA provisions. RPS identified in its opening brief the obvious prejudice this sequence of events caused to it, which Mr. Arroyo failed to rebut. That procedural error further requires reversal of the FCRA judgment.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER MR. ARROYO'S FCRA CLAIMS

Based on the district court's uncontested findings of fact, the district court lacked subject matter jurisdiction over Mr. Arroyo's FCRA claims, and it thus lacked jurisdiction to enter judgment under Counts Four and Five of the Complaint.

The requirements for Article III standing in the context of an FCRA file disclosure claim were recently addressed in detail in the U.S. Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). *Ramirez* concerned, in relevant part, efforts by consumers to review credit files maintained by TransUnion about them. *Id.* at 423. In *Ramirez*, the Supreme Court repeatedly emphasized the bedrock principle of "[n]o concrete harm, no standing." *Id*. at 442. Importantly, the Supreme Court held Article III standing for purported FCRA file disclosure violations – based on a so-called "informational injury" – requires factually proving the existence of "downstream consequences" in the form of

"adverse effects" from the failure to receive the file disclosure. *Id.* The Supreme Court also emphasized that those "downstream consequences" must be both practical and real, as "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III." *Id.* Based on those principles, the Supreme Court held that the class members who brought claims related to their file disclosures lacked standing due to their failure to prove "downstream consequences," including because they had "not demonstrate[d], for example, that the alleged information deficit hindered their ability to correct erroneous information before it was sent to third parties." *Id.* Because there was no proven factual link between the informational deprivation and the asserted injury, there was no standing.

The Second Circuit has similarly emphasized that tangible, "downstream consequences" related to a claimed deprivation of information are required for Article III standing. *See Harty v. West Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) (citing *Ramirez* and requirement for "downstream consequences" in finding a lack of standing due to deprivation of information on a hotel website where the plaintiff did "not allege anywhere in his complaint that he was using the website to arrange for future travel"); *see also Laufer v. Ganesha Hosp. LLC*, No. 21-995, 2022 WL 2444747, at *2 (2d Cir. July 5, 2022) (finding a lack of "downstream consequences" due to informational deprivation related to hotel travel when "Laufer did not allege concrete plans to visit Connecticut, let alone Quality Inn Cromwell").

Other courts, both within the Second Circuit and elsewhere, have affirmed that Article III requires proof of actual adverse impact on the individual seeking the requested information. *See, e.g.*, *Huff v. TeleCheck Services, Inc.*, 923 F.3d 458, 463 (6th Cir. 2019) (finding no standing for alleged failure to receive consumer file under the FCRA when the plaintiff could not identify that the denial of the information imposed any harm "in the flesh-and-blood or dollars-and-cents sense"); *Rivera v. PLS Check Cashers of N.Y., Inc.*, No. 22-cv-5642, 2024 WL 263218, at *8 (S.D.N.Y. Jan. 24, 2024) (dismissing claim for lack of subject matter jurisdiction when "there is no evidence (either disputed or undisputed) that Rivera suffered any harm from defendants' failure to provide her with the required wage notices . . . . Indeed, Rivera has not claimed at any point in this lawsuit that she was paid less than full, New York Labor Law-compliant wages.") (citing *Ramirez*); *Merck v. Walmart Inc.*, No. 2:20-cv-2908, 2023 WL 4848510, at *7 (S.D. Ohio July 28, 2023) (failure to provide FCRA-required disclosures to a job applicant did not give rise to Article III standing after *Ramirez*, where the record reflected that "that Walmart would not have hired Merck in June 2016," even despite plaintiff's claim that he would have used the information to try and "explain true-but-negative" information and to advocate for an additional interview).

In his opposition brief, Mr. Arroyo claims his injury under the FCRA was that Ms. Arroyo could have used a file disclosure to try and convince WinnResidential

to admit him sooner because he was disabled and therefore could not commit any future crimes. *See* Appellants' Opp'n Br. at 33-34. The district court rejected that speculative contention, ECF 317 ("Order") at 56-57, which is a factual finding that Mr. Arroyo did not appeal.

That factual finding rejecting Mr. Arroyo's claim of injury also was amply supported by the trial record. WinnResidential was made aware Mr. Arroyo was completely disabled even *before* Ms. Arroyo applied on his behalf in April 2016. Order ¶ 47. Ms. Arroyo further informed WinnResidential of Mr. Arroyo's disability on several subsequent occasions in 2016 and 2017. *Id.* ¶¶ 51, 54. WinnResidential also had access to the full tenant screening report, including all details concerning Mr. Arroyo's pending criminal charge, from the moment RPS transmitted the report to WinnResidential on April 26, 2016. *Id.* ¶¶ 26, 49. Despite knowing all those facts, WinnResidential refused to overturn its initial decision denying Mr. Arroyo's application for many months, stretching well into 2017. *Id.* ¶¶ 54-60. WinnResidential continued with that inexplicable pattern of conduct even after: (1) Ms. Arroyo learned Mr. Arroyo was denied due to a criminal record on December 28, 2016; (2) Ms. Arroyo had the criminal charge formally withdrawn in April 2017; and (3) Ms. Arroyo and Mr. Arroyo both sued WinnResidential in a Connecticut Commission on Human Rights and Opportunities proceeding, resulting in a fact-finding hearing in June 2017. *See id.* The trial court recognized all those

facts, and it thus properly concluded "[t]here are simply too many unanswered questions for the Court to find by a preponderance of the evidence that WinnResidential would have accepted Mr. Arroyo's application sooner had Ms. Arroyo received Mr. Arroyo's consumer report sooner." *Id.* at 58.

In short, the district court found there was no actual proof that RPS's refusal to provide Ms. Arroyo with a copy of Mr. Arroyo's file disclosure had any downstream, real-world, adverse effect in the way he claimed: housing denial. *See, e.g.*, *Quieju v. La Jugeria Inc.*, No. 23-cv-264, 2023 WL 3073518, at *2 (E.D.N.Y. Apr. 25, 2023) ("[W]hat [plaintiff] is really saying is that *if* defendants had given him the required documents, those documents *would have* informed him that he was not being paid his required wages. Enlightened by that knowledge, plaintiff then *would have* demanded his required wages. Having made such a demand, defendants *would have* then paid him his required wages . . . . and plaintiff *would have* avoided the injury he suffered by the failure to properly pay him . . . . This hypothetical chain of events is not what the Supreme Court means by a [concrete] injury . . . .") (citing *California v. Texas*, 593 U.S. 659, 674 (2021), and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)) (emphases in original).

Faced with the district court's (un-appealed) factual findings, Mr. Arroyo argues that he has standing, despite the lack of any proven adverse effect, because *Ramirez*'s "downstream consequences" "meant only some use for the information

beyond bringing a lawsuit," regardless of whether the use would have remedied the alleged injury. Appellants' Opp'n Br. at 37. Put another way, in seeking to substantially lower the bar for Article III standing, Mr. Arroyo argues "downstream consequences" require nothing more than a future intent to use the information, even if that intended use would be futile in avoiding the claimed "injury." Not so.

That argument is foreclosed by *Ramirez* and its emphasis on "real world," "adverse effect[s]," such as an ability to use the withheld information "to *correct* erroneous information" before its transmission. 594 U.S. at 442 (emphasis added). *Ramirez* confirmed the need for actual, "downstream *consequences*" of the informational deprivation beyond the attempted use of the information alone.[1] Mr.

[1] Mr. Arroyo cites to *Kelly v. RealPage Inc.*, 47 F.4th 202 (3d Cir. 2022), as somehow supporting his position. Appellants' Opp'n Br. at 34 n.127. But, in finding "adverse effects" for the two plaintiffs in that action, the Third Circuit held as follows:

> There were errors in their files—Kelly's report erroneously included two DUI convictions and a misdemeanor conviction for an outdated inspection tag, while Bey's mistakenly included a civil action for possession and an eviction filing, and the omission of RealPage's sources allegedly impaired their ability to correct these errors. Neither Kelly nor Bey *ever convinced RealPage to correct their reports; both were denied the apartments for which they applied* . . . .

Kelly, 47 F.4th at 214 (emphasis added). Thus, as required by *Ramirez*, the Third Circuit focused on the alleged effect of the deprivation of the information, *i.e.*, an inability to secure housing, which is the same claimed injury that Mr. Arroyo simply failed to prove at trial. In contrast to the allegations made by the plaintiffs in *Kelly*, Mr. Arroyo simply did not prove any link between the receipt of his file and denial of housing. Further, unlike in *Kelly*, there was no "erroneous" information to

Arroyo's interpretation of *Ramirez* would vitiate the key jurisdictional distinction drawn by the Supreme Court between an insufficient "informational injury" and a proven "concrete harm."[2] For all those reasons, Mr. Arroyo lacked Article III standing for his FCRA claims, and the district court's judgment must be vacated.[3]

"correct" in Mr. Arroyo's file. Everything that RPS reported about Mr. Arroyo was indisputably accurate.

[2] Mr. Arroyo also argues that "actual damages are not necessary to establish standing under Article III," citing *Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S. Ct. 792 (2021), for the proposition that "nominal damages" can support standing, even without actual damages. *See* Appellants' Opp'n Br. at 33 n.125. But *Uzuegbunam* is irrelevant to Mr. Arroyo's lack of concrete injury in this case.

Uzuegbunam concerned only the *redressability* element of Article III standing and held that where the injury and traceability elements are indisputably satisfied (unlike here), an award of nominal damages will suffice to satisfy the final redressability element. 141 S. Ct. at 797 ("There is no dispute that Uzuegbunam has established the first two elements [of Article III standing]. The only question is whether the remedy he sought—nominal damages—can redress [his injury]."). Mr. Arroyo's standing problem is not about redressability, it is about a fundamental failure to prove any downstream consequences from the alleged file disclosure violation.

[3] Mr. Arroyo's complete focus on the claimed sufficiency of his "informational injury" ignores that the trial record *also* discredited any argument that his claimed injury was "fairly traceable" to any conduct by RPS, which is an additional, separate requirement for Article III standing. *California*, 593 U.S. at 668-69. For the reasons addressed above, Mr. Arroyo also failed to prove at trial that the claimed informational injury was traceable to the claimed adverse effect of housing denial/delay.

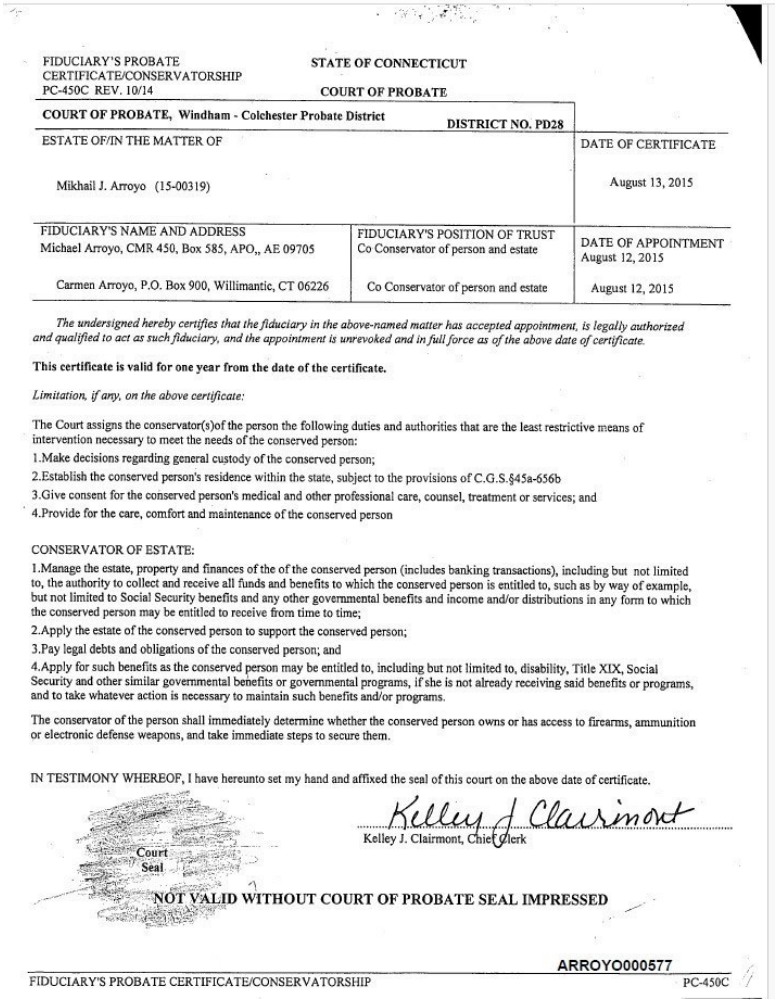
II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING IN MR. ARROYO'S FAVOR ON THE FCRA CLAIMS, BECAUSE MS. ARROYO FAILED TO MEET A STATUTORY CONDITION PRECEDENT TO OBTAIN HIS CONSUMER FILE

Even assuming subject matter jurisdiction, the district court erred in granting judgment to Mr. Arroyo because the district court also found Ms. Arroyo did not submit "proper identification" to RPS, which is a condition precedent under the FCRA to asserting a file disclosure claim.

In its opening brief (at pages 62-64), RPS explained that the FCRA categorically prohibits a consumer reporting agency like RPS from disclosing a file to a consumer absent the consumer's provision of "proper identification." 15 U.S.C. § 1681h(a)(1). In his opposition brief, Mr. Arroyo does not even attempt to address the extensive authority cited by RPS holding that a consumer's obligation to provide proper identification is "a condition precedent necessary to trigger Defendants' FCRA disclosure obligation." *Samuel v. SageStream, LLC*, No. 1:22-cv-01277, 2023 WL 4048695, at *4 (N.D. Ga. Apr. 28, 2023); *see Hicks v. Smith*, No. 3:17-cv-251, 2020 WL 5824031, at *7-8 (W.D. Ky. Sept. 30, 2020) (same); *Ogbon v. Beneficial Credit Servs., Inc.*, No. 10-cv-3760, 2013 WL 1430467, at *7-8 (S.D.N.Y. Apr. 8, 2013) (same).

Mr. Arroyo's evidence of "proper identification" was the Connecticut Probate Court Form PC-450C "Fiduciary's Probate Certificate/Conservatorship" ("Conservatorship Certificate"). The Conservator Certificate submitted by Ms.

Arroyo to RPS states *on its face* that it is "NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED":



FIDUCIARY'S PROBATE CERTIFICATE/CONSERVATORSHIP
PC-450C REV. 10/14

STATE OF CONNECTICUT
COURT OF PROBATE

COURT OF PROBATE, Windham - Colchester Probate District **DISTRICT NO. PD28**

ESTATE OF/IN THE MATTER OF		DATE OF CERTIFICATE
Mikhail J. Arroyo (15-00319)		August 13, 2015
FIDUCIARY'S NAME AND ADDRESS	**FIDUCIARY'S POSITION OF TRUST**	**DATE OF APPOINTMENT**
Michael Arroyo, CMR 450, Box 585, APO,, AE 09705	Co Conservator of person and estate	August 12, 2015
Carmen Arroyo, P.O. Box 900, Willimantic, CT 06226	Co Conservator of person and estate	August 12, 2015

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary, and the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Limitation, if any, on the above certificate:

The Court assigns the conservator(s)of the person the following duties and authorities that are the least restrictive means of intervention necessary to meet the needs of the conserved person:

1.Make decisions regarding general custody of the conserved person;
2.Establish the conserved person's residence within the state, subject to the provisions of C.G.S.§45a-656b
3.Give consent for the conserved person's medical and other professional care, counsel, treatment or services; and
4.Provide for the care, comfort and maintenance of the conserved person

CONSERVATOR OF ESTATE:

1.Manage the estate, property and finances of the of the conserved person (includes banking transactions), including but not limited to, the authority to collect and receive all funds and benefits to which the conserved person is entitled to, such as by way of example, but not limited to Social Security benefits and any other governmental benefits and income and/or distributions in any form to which the conserved person may be entitled to receive from time to time;
2.Apply the estate of the conserved person to support the conserved person;
3.Pay legal debts and obligations of the conserved person; and
4.Apply for such benefits as the conserved person may be entitled to, including but not limited to, disability, Title XIX, Social Security and other similar governmental benefits or governmental programs, if she is not already receiving said benefits or programs, and to take whatever action is necessary to maintain such benefits and/or programs.

The conservator of the person shall immediately determine whether the conserved person owns or has access to firearms, ammunition or electronic defense weapons, and take immediate steps to secure them.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this court on the above date of certificate.

Kelley J. Clairmont
Kelley J. Clairmont, Chief Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

ARROYO000577

FIDUCIARY'S PROBATE CERTIFICATE/CONSERVATORSHIP PC-450C

Ex. 28 at ARROYO000577; *see* Ex. 26 at ARROYO000484. Indeed, an impressed seal is legally required under Connecticut law to empower the conservator to act on a conserved individual's behalf. *See, e.g.*, *Johnson v. Raffy's Cafe I, LLC*, No. CV-106002069S, 2015 WL 2166123, at *3 (Conn. Super. Ct. Apr. 6, 2015) (noting that a "probate certificate . . . is not valid without a probate seal impressed"), *aff'd*, 163 A.3d 672 (Conn. App. Ct. 2017). Significantly, in their opposition brief, the Arroyos

cite no legal authority holding that a conservator's certificate is valid without an impressed seal.

Additionally, at trial, Mr. Arroyo never offered into evidence the originals of each Conservator Certificate, so it is unknown whether they contained the required impressed seal.[4] Regardless, it is undisputed Ms. Arroyo *never* provided to RPS a copy of a Conservatorship Certificate with the Probate Court's impressed seal, with Ms. Arroyo instead providing (by facsimile) copies of the Conservatorship Certificate without any impressed seal.[5] Moreover, as reflected by the image above, neither version of the Conservatorship Certificate even had a legible image of the seal. As the district court correctly noted, Ms. Arroyo sent only a "certificate with a marred image of a seal." Tr. 3/14/2022 11:5-23 (referring to Ex. 28); *see id.* 10:3-5, 10:15-22.

[4] Conservatorship Certificates are valid for only one-year. Ex. 28 at ARROYO000577; Ex. 26 at ARROYO000484. Ms. Arroyo submitted two different Conservator Certificates to RPS – one dated August 13, 2015 (Ex. 28 at ARROYO000577), when she was co-conservator with her ex-husband, and one dated August 8, 2016 (Ex. 26 at ARROYO000484), when she was co-conservator with another individual.

[5] There was no testimony about the original August 2016 certificate. As to the original August 2015 certificate, Ms. Arroyo testified that she had one when she faxed in the consumer file request but did not want to send in the original because at the time it was the only original she had. Tr. 3/14/2022 79:19-80:8.

The district court thus correctly held on summary judgment that "no reasonable factfinder could find" proper identification was provided by Ms. Arroyo. ECF 194 ("SJ Order") at 73, 75 ("[w]here state law defines the validity of an identification document, state law defines 'proper identification' under the FCRA"). The district court then reaffirmed that same factual holding at trial based on the trial record. Order at 52 ("Ms. Arroyo never furnished proper identification as required under the FCRA"). Based on that factual finding, RPS was necessarily entitled to judgment on Counts Four and Five. *See, e.g.*, *Samuel*, 2023 WL 4048695, at *4.

The district court, however, still awarded statutory and punitive damages under the FCRA based on the contention that RPS "did not direct Ms. Arroyo to submit [a Conservatorship Certificate] with an original seal." Order at 53. Mr. Arroyo likewise seeks to defend the district court's FCRA award on the grounds that RPS allegedly did not "reasonably infor[m] [Ms. Arroyo] of what additional identification materials she needed to obtain [Mr. Arroyo's] file." Appellants' Opp'n Br. at 38. Mr. Arroyo argues RPS "has presented no argument why 15 U.S.C. § 1681g(a) does not imply a duty to notify what additional materials are needed," with Mr. Arroyo then citing 12 C.F.R. § 1022.137(a)(2)(iii) in support of his proposed interpretative position. Appellants' Opp'n Br. at 38-39 (emphasis added). That argument fails on several grounds.

First, RPS has presented *extensive* authority as to why a consumer has the exclusive burden to provide proper identification to obtain a file. Appellee's Br. at 62-64 (collecting cases). Indeed, such a requirement is dictated by the FCRA's plain text, which provides that, "*as a condition of making the disclosures* required under section 1681g of this title," "*the consumer* [must] furnish proper identification." 15 U.S.C. § 1681h(a)(1) (emphases added).

Second, Mr. Arroyo seeks to modify the plain text of § 1681h(a)(1) through a regulation. But such a tactic is not allowed. "A regulation . . . may not serve to amend a statute . . . or to add to the statute 'something which is not there.'" *Iglesias v. United States*, 848 F.2d 362, 366 (2d Cir. 1988) (internal citations omitted); *see Rahman v. Limani 51, LLC*, No. 20-cv-6708, 2022 WL 3927814, at *5 (S.D.N.Y. Aug. 31, 2022) (declining to defer to agency's interpretation of a statute where the interpretation "reads into the statute a voluntary acceptance requirement that Congress did not include in the Act"); *Civic Ass'n of Deaf of N.Y. City, Inc. v. N.Y.*, No. 95-cv-8591, 2011 WL 5995182, at *10 (S.D.N.Y. Nov. 29, 2011) (to the extent regulations required more than a statute required, they would not be enforceable). The text of § 1681h(a)(1) controls and straightforwardly defeats Mr. Arroyo's claim.

Third, the regulation cited by Mr. Arroyo (12 C.F.R. § 1022.137(a)(2)(iii)) to "imply" duties under §§ 1681g and 1681h has no application to RPS or to the facts of this case. Initially, that regulation was promulgated under 15 U.S.C. *§ 1681j* of

the FCRA, a statutory provision regarding "charges for certain disclosures" that has never been invoked by Mr. Arroyo, so it cannot be said that it was intended to affect the interpretation of the provision at issue here, § 1681h(a)(1). Even more, 12 C.F.R. § 1022.137(a)(2)(iii) speaks to the file disclosure process of "nationwide specialty consumer reporting agencies," which are specialized entities that compile and report several enumerated types of data about consumers. *See* 15 U.S.C. § 1681a(x) (defining a "nationwide specialty consumer reporting agency" and identifying the five specific types of data held by such an entity). The district court correctly held that RPS *is not* a "nationwide specialty consumer reporting agency," *see* Order at 50-51, another finding that Mr. Arroyo did not appeal. Consequently, whatever obligations might be "implied" to "nationwide specialty consumer reporting agencies" under 12 C.F.R. § 1022.137(a)(2)(iii) have no application to RPS.

Fourth, the district court awarded statutory and punitive damages to Mr. Arroyo. Both forms of relief are available only upon a finding that a defendant "willfully" violated the FCRA. *See, e.g.*, *Willey v. J.P. Morgan Chase, N.A.*, No. 09-cv-1397, 2009 WL 1938987, at *2 (S.D.N.Y. July 7, 2009) (statutory damages require proof of a "willful" violation). A claim of "willfulness" under the FCRA requires proof of "conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007) (internal quotation

marks omitted). In *Safeco*, the U.S. Supreme Court made clear that alleged willful violations of the FCRA turning on disputed issues of statutory interpretation can be found only in situations where: (1) the statutory language is "pellucid"; or (2) the application of the statutory provision to the facts of the case is otherwise "clearly established." *Id.* at 70.

Using that framework, although the Supreme Court in *Safeco* disagreed with the defendant's interpretation of the FCRA, the Supreme Court nonetheless held the incorrect construction "was not objectively unreasonable" as a matter of law and thus not a "willful" violation of the FCRA. *Id.* at 69. The Supreme Court relied on the fact that the relevant FCRA provisions did not clearly address the question at issue. *Id.* at 69-70. The Supreme Court also noted the absence of controlling authority, *i.e.*, "guidance from the courts of appeals or the Federal Trade Commission that might have warned [the defendant] away from the view it took." *Id.* at 70. The Supreme Court thus concluded the defendant's challenged interpretation fell "well short of raising the 'unjustifiably high risk' of violating the statute necessary" to support a finding of willfulness. *Id.*

As set forth above, the statutory requirement under §§ 1681g and 1681h that a consumer provide "proper identification" before receiving a consumer file is pellucid *in favor of RPS*. Regardless, Mr. Arroyo's attempt to have this Court affirm a finding of a "willful" FCRA violation based on a legally-unsupported and atextual

"implication" – that is itself based on a regulation that has no bearing on RPS or the FCRA provisions invoked in this action – falls woefully short of the high bar for such a showing under *Safeco*. *See, e.g.*, *Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 94 (2d Cir. 2021) (citing *Safeco,* affirming summary judgment for defendant on a claim it willfully violated the FCRA based on its "objectively reasonable reading" of the relevant FCRA provisions).

III. THE DISTRICT COURT ERRED BY REVIVING MR. ARROYO'S STATUTORY FCRA CLAIMS AFTER HAVING DISMISSED THEM BEFORE TRIAL

Finally, even assuming Mr. Arroyo's FCRA claims could overcome the jurisdictional and substantive defects identified above – and they cannot – judgment must still be reversed on procedural grounds given that the district court erroneously and *sua sponte* revived the FCRA claims on which judgment was entered against RPS post-trial and without any notice to RPS.

In its opening brief, RPS identified Second Circuit and other authority holding that it is an error of law for a district court to revive rejected claims post-trial absent notice to the previously-prevailing party and an opportunity to be heard. Appellee's Br. at 64-65 (citing *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989), *Hayduk v. City of Johnstown*, 386 F. App'x 55, 60-62 (3d Cir. 2010), and *Alberty-Velez v. Corporacion De Puerto Rico Para La Difusion Publica*, 242 F.3d 418, 423 (1st Cir. 2001)). In such a circumstance, "the judge *must inform the parties*

and give them an opportunity to present evidence relating to the newly revived issue." *Leddy*, 875 F.2d at 386 (emphasis added). And, when a party presents "even [a] brief outline of potential evidence" that it would have introduced at trial to contest the newly revived claims, reversal is required. *Alberty-Velez*, 242 F.3d at 425.

In his opposition brief, Mr. Arroyo does not address any of that precedent. Instead, Mr. Arroyo first argues the district court here somehow did not reverse course post-trial. Appellants' Opp'n Br. at 39. But the district court's summary judgment opinion speaks for itself and easily refutes that argument. The district court first held that Mr. Arroyo had failed to state a claim under the two FCRA statutory provisions pled (*i.e.*, §§ 1681g and 1681h). The district court then went "on to consider whether having found that Mr. Arroyo could 'not be properly identified in accordance with the FCRA,' RPS nevertheless violated its duty" under 12 C.F.R. § 1022.137(a)(2)(iii)(C) to interactively engage with Ms. Arroyo regarding her deficient requests. The district court quoted the regulation in full, and then held Mr. Arroyo had "submitted sufficient evidence to put into question whether RPS violated *this duty*." SJ Opinion at 75-76 (emphasis added). Thus, the only issue pending at trial was whether RPS violated that supposed regulatory "duty," a claim that RPS then *defeated* on multiple discrete bases at trial. Nothing else remained to be tried after summary judgment, so nothing else was tried.

Mr. Arroyo next asserts that any prejudice was minimal because RPS had "ample notice of the court's ultimate theory of liability under § 1681n." Appellants' Opp'n Br. at 40. That contention is nonsensical. Section 1681n of the FCRA is the statutory provision that authorizes the potential recovery of statutory and/or punitive damages under "any requirement" of the FCRA. Section 1681n provides no "theory of liability" on which relief can be sought. *See, e.g.*, *Jimenez v. T.D. Bank, N.A.*, No. 1:20-cv-07699, 2021 WL 4398754, at *11 (D.N.J. Sept. 27, 2021) ("Plaintiffs, in their opposition brief, put forth only one argument against dismissal: that their claims were not actually brought for violation of §§ 1681s-2(a) and (b), but instead were private actions under §§ 1681n and 1681o. However, this argument fails on its face. Sections 1681n and 1681o do not provide independent bases for civil liability, but instead provide private rights of action for violations of other requirements."). Indeed, the Complaint nowhere asserts an independent claim under § 1681n, which would not be viable. *See generally* ECF 1.

Finally, attempting to read defense counsels' minds, Mr. Arroyo argues RPS would not "have presented more or different evidence on the file disclosure question had it understood the theory of liability in play," noting that RPS's corporate trial representative had no "personal knowledge" of the interactions with Ms. Arroyo.[6]

[6] The specific RPS employee who interacted with Ms. Arroyo in 2016 died before trial in 2022.

Appellants' Opp'n Br. at 40. That argument fails. In its post-trial opinion, the district court focused on the supposed "condition" that was applied to Mr. Arroyo to require an executed power of attorney. Order at 53. Had RPS been aware that any such issues remained live at trial, RPS would have expanded its testimony regarding the lack of any such policy or condition to require a power of attorney. Moreover, RPS would have forcefully cross-examined Ms. Arroyo about her subjective awareness – apart from any direction from RPS – of the fact that the Conservatorship Certificate requires, on its face, an impressed seal. That would have further undercut any claim that Ms. Arroyo somehow actually needed any guidance from RPS.

RPS has amply identified the brief outline of additional evidence that it would have presented at trial, but for the prejudicial sequence of events with respect to the FCRA claims against it. Appellee's Br. at 67. Reversal is required.

CONCLUSION

For the reasons set forth in RPS's opening brief and above, this Court should affirm the district court's rulings in favor of RPS on Appellants' FHA claims on summary judgment and at trial. Additionally, this Court should vacate the district court's rulings against RPS on Counts Four and Five under the FCRA and either dismiss them for lack of jurisdiction or enter judgment in favor of RPS.

Dated: May 7, 2024

Respectfully submitted,

By: /s/ *Jill M. O'Toole*

Jill M. O'Toole
O'Toole + O'Toole PLLC
280 Trumbull Street, 15th Fl.
Hartford, CT 06103
Tel.: 860.519.5813
Fax: 914.232.1599
jotoole@otoolegroup.com

Timothy J. St. George
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, VA 23219
Tel. (804) 697-1254
Fax (804) 698-6013
timothy.st.george@troutman.com

Attorneys for Defendant-Appellee CoreLogic Rental Property Solutions, LLC

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

__x__ in accordance with Local Rule 28.1.1(c) this brief contains 4,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii) and Fed. R. App. P. 32(f), or

____ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

__x__ this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font, or

____ this brief has been prepared in a monospaced spaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ *Jill M. O'Toole*
Jill M. O'Toole