17-1889-cv

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

FRANK LONG, MICHAEL WHITE, and JOSEPH SHIPLEY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– against –

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendant-Appellee Southeastern Pennsylvania Transportation Authority ("SEPTA") has failed to show that Plaintiffs lack standing to bring their Fair Credit Reporting Act ("FCRA") claims. Each Plaintiff has pleaded allegations, which, if proven, show that SEPTA violated the FCRA by failing to provide them with a copy of their consumer report and a statement of their FCRA rights before denying them a job. Moreover, each Plaintiff suffered a concrete injury as a result of SEPTA's omission when they were denied the opportunity to see their consumer reports, to verify the information the reports contained, to learn of their right to raise issues with SEPTA, and to contextualize information in order to obtain jobs for which they were qualified.

In *Susinno v. Work Out World, Inc.*, __ F.3d __, No. 163277, 2017 WL 2925432 (3d Cir. July 10, 2017), the Third Circuit affirmed that no more is required for a plaintiff to have standing to assert a claim. In that case, the Court held that a plaintiff has standing to sue where she has alleged a harm the statute aimed to prevent and that is related to interests traditionally recognized at common law. *Id*. at *4-5. Here, Plaintiffs easily satisfy both requirements.

SEPTA ignores *Susinno,* and instead injects facts that are not in the record. Contrary to the allegations of the Complaint, SEPTA argues that Plaintiffs were not harmed by its failure to provide their consumer reports because SEPTA

purportedly denied them jobs based solely on disclosures Plaintiffs made in their job applications, which automatically disqualified them under SEPTA's blanket hiring policy. At this stage of the case, this argument is premature because it relies on facts that must be established through discovery, conflicts with Plaintiffs' allegations, and does not deprive Plaintiffs of standing to sue.

Fundamentally, SEPTA's defense would require the Court to adopt its version of the facts before any discovery has taken place and despite SEPTA's acknowledgement that it violated the FCRA by obtaining background checks that it failed to provide to Plaintiffs. This would undermine the FCRA's goals of increasing transparency, reducing errors, and ensuring hiring decisions are made based on all of the facts, and would instead incentivize non-compliance.

ARGUMENT

I. This Court's Decision in *Susinno* Is Dispositive of the Standing Question.

The recent Third Circuit case, *Susinno v. Work Out World Inc.*, is dispositive with regard to whether Plaintiffs have alleged a concrete harm giving them standing to bring their FCRA claims.[1] *See* 2017 WL 2925432. In *Susinno*, the plaintiff brought a claim under the Telephone Consumer Protection Act ("TCPA") alleging that she received an unsolicited call on her cell phone, and that the defendant had left a prerecorded promotional offer lasting one minute on her

[1] *Susinno* was issued two days before SEPTA's opposition brief was filed.

voicemail. *Id*. at *1. The district court granted the defendant's motion to dismiss the complaint on the grounds that: (1) Congress did not intend for the TCPA to bar the alleged conduct; and (2) the receipt of the call and voicemail had not caused the plaintiff a "concrete injury." *Id*.

The Third Circuit reversed, holding that the TCPA provided the plaintiff with a cause of action and that her alleged injury was concrete giving her standing to sue. *Id*. at *5. With respect to whether the plaintiff had alleged a concrete injury, the Court built on its standing analysis in *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017) ("*In re Horizon Healthcare*"). It "summarize[d] *Horizon*'s rule as follows. When one sues under a statute alleging 'the very injury [the statute] is intended to prevent,' and the injury 'has a close relationship to a harm . . . traditionally . . . providing a basis for a lawsuit in English or American courts,' a concrete injury has been pleaded." *Susinno*, 2017 WL 2925432, at *4 (quoting *In re Horizon Healthcare*, 846 F.3d at 639-40) (footnote omitted).

Applying the rule to the facts before it, the Court held that the plaintiff had alleged an injury the TCPA aimed to prevent—namely, a single automated telephone call to her cell phone—and that the TCPA "protect[ed] essentially the same interests that traditional causes of action [for invasion of privacy] sought to protect." *Id*. at *4. Although a single telephone message would not have given

rise to a common law claim, Congress "elevated a harm that, while 'previously inadequate at law,' was of the same character of previously existing 'legally cognizable injuries.'" *Id*. (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). "*Spokeo* addressed, and approved, such a choice by Congress." *Id*.

A. Plaintiffs Alleged an Injury that the FCRA Aims to Prevent.

Plaintiffs satisfy the *Horizon* rule. First, "Congress squarely identified th[e] injury" that Plaintiffs allege. *Id*. In Section 1681b(b)(3), Congress created the legal right to possess and review information contained in a consumer report *before* an applicant is denied employment based in whole or in part on that information. 15 U.S.C. § 1681b(b)(3). As the Court has explained, Congress "created a private right of action to enforce the provisions of FCRA, and even allowed for statutory damages for willful violations—which clearly illustrates that Congress believed that the violation of FCRA causes a concrete harm[.]" *In re Horizon Healthcare*, 846 F.3d at 639; *see also Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017) (in the context of a Section 1681b(b)(2) violation, "Congress has recognized the harm such violations cause, thereby articulating a chain[] of causation that will give rise to a case or controversy" (citation omitted)).

The FCRA's legislative history further establishes that Congress enacted the statute to protect individuals from the precise harm that Plaintiffs allege. *See* Brief of Plaintiffs-Appellants ("Pls.' Br.") at 9-13. Congress sought "to prevent

consumers from being unjustly damaged because of inaccurate or arbitrary information." *Thomas v. FTS USA, LLC,* 193 F. Supp. 3d 623, 632 (E.D. Va. 2016) (quoting S. Rep. No. 517, 91st Cong., 1st Sess. ("S. Rep.") at 1). Congress also sought to ensure that individuals would be provided with the "opportunity to be confronted with the charges against [them] and tell [their] side of the story[,]" even if the information contained in their consumer reports was entirely accurate. *Id.* at 633 (quoting S. Rep. at 3); *see also* Pls.' Br. at 9-13. Congress made clear that individuals have "a right to know" when they are being denied employment "because of adverse information in a credit report." *Stokes v. Realpage, Inc.*, No. 15 Civ. 1520, 2016 WL 6095810, at *6 (E.D. Pa. Oct. 19, 2016) (quoting S. Rep. at 2).

B. The FCRA Protects the Same Privacy Interests that Traditional Causes of Action Sought to Protect.

Plaintiffs allege they and class members suffered the inappropriate use of their personal information, a harm which has a close relationship to analogous common law torts. *See In re Horizon Healthcare,* 846 F.3d at 639-40 (the "unauthorized dissemination of personal information . . . that [the] FCRA seeks to remedy has a close relationship to a harm [i.e., the invasion of privacy] that has traditionally been regarded as providing a basis for a lawsuit" (citation omitted)); *Susinno*, 2017 WL 2925432, at *4 ("[A] close relationship does not require that the newly proscribed conduct would 'give rise to a cause of action under common

law.'" (quoting *In re Horizon Healthcare*, 846 F.3d at 639)); *see also* Pls.' Br. at 30-31. Although the failure to provide a credit report containing personal information may not have given rise to a cause of action under common law, as in the case of the TCPA, Congress has "elevate[d] [the] harm" by creating a cause of action in the FCRA. *See Susinno*, 2017 WL 2925432, at *4. Thus, both under *Spokeo* and this Court's precedent, "standing to sue exists." *Id*. at *5; *see also Taha v. Cty. of Bucks*, No. 16-3077, 2017 WL 2871757, at *6 (3d Cir. July 6, 2017) (finding concrete injury under statute "when [plaintiff's] arrest information and booking photograph were publicly disseminated").[2]

II. Plaintiffs Were Not Required to Plead that Their Consumer Reports Were Inaccurate to Have Standing to Sue.

As Plaintiffs explained in their opening brief, they were not provided with their consumer reports in time to review them before they were denied employment. Plaintiffs Shipley and White were not provided their consumer reports at all and thus could not allege whether they are accurate or not. Even if crediting SEPTA's factual contention that the reports were accurate was

[2] Plaintiffs did not authorize the dissemination of their private information without a chance to first review it—as further shown by SEPTA's own authorization form, which renders authorization contingent on Plaintiffs receiving a copy of their consumer report. *See* JA80-82 ("I understand that I will be notified by the Company if information contained in such Report results in a negative employment decision, including, without limitation, a decision to terminate my employment, and in that case I will be given a copy of such Report."). Although Plaintiffs do not concede that it was proper for SEPTA to attach these documents to its motion to dismiss, nonetheless, the documents support Plaintiffs' standing.

appropriate, which it is not at this stage, Section 1681b(b)(3) does not require Plaintiffs to show that their reports were inaccurate to state a claim.[3] *See also Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) ("Injury-in-fact is not Mount Everest.").

A. Plaintiffs Have Standing Even If Their Consumer Reports Were Accurate.

Even assuming the consumer reports contained accurate information, Plaintiffs would still have standing. The FCRA provides an applicant with the right to review his or her report and discuss its contents with a prospective employer before the employer takes adverse action—even where the information in the report is accurate. *See* Pls.' Br. at 10-12, 26; *Thomas*, 193 F. Supp. 3d at 638 ("Even if [plaintiffs'] consumer reports were entirely correct[,]" they "were deprived of the opportunity to explain any negative records in their consumer reports and discuss the issues raised in their reports with Defendants[.]"); *see also Benson v. Wells Fargo Bank*, No. 16 Civ. 5061, 2017 WL 2772119, at * 7 (D.S.D. June 26, 2017) (standing "is not limited to situations where the violation of [statutory] rights results in the dissemination of false information"); *Demmings v. KKW Trucking, Inc.*, No. 14 Civ. 49, 2017 WL 1170856, at *9 (D. Or. Mar. 29,

[3] Requiring a plaintiff to plead that her report was inaccurate in order to state a claim under Section 1681b(b)(3) would lead to an absurd result because the claim is that the employer failed to provide the report. *See* Brief of *Amicus Curiae* National Consumer Law Center at 28-29.

2017) ("Congress did not . . . condition the protections in the FCRA on the accuracy or the inaccuracy of the information contained in the consumer report."); *Mix v. Asurion Ins. Servs*. Inc., No. 14 Civ. 2357, 2016 WL 7229140, at *5 (D. Ariz. Dec. 14, 2016) (standing does not rest on dissemination of false information).

SEPTA cites *Cortez v. Trans Union LLC*, Def.'s Br. at 16, but the Third Circuit's opinion actually supports Plaintiffs' position because it shows that Congress intended the FCRA to protect against more than just the use of inaccurate information. 617 F.3d 688, 706 (3d Cir. 2010) ("Congress also hoped to address a number of related problems, including the inability at times of the consumer to know he is being damaged by an adverse credit report, the lack of access to the information in [his] file, the difficulty in correcting inaccurate information, and getting [his] version of a legitimate dispute recorded in . . . [his] credit file." (internal quotation marks omitted)).[4]

Here, SEPTA denied Plaintiffs the opportunity to explain their criminal histories, which Plaintiffs allege could have changed SEPTA's decision to deny them jobs. *See* JA23, 28, 30-31, 43-46. SEPTA speculates that there is nothing

[4] To the extent SEPTA relies on *Dalton v. Capital Associated Industries, Inc*., the court analyzed different FCRA sections. 257 F.3d 409, 415 (4th Cir. 2001) (discussing Congressional intent with respect to 15 U.S.C. § 1681e(b) and § 1681k—distinct sections of the FCRA regulating how CRAs report accurate information). Further, the district court cases SEPTA cites in which courts held that the plaintiffs lacked standing under Section 1681b(b)(3), *see* Def.'s Br. at 17-18, are inconsistent with this Court's analysis in *In re Horizon Healthcare* and ignore the full Congressional record.

Plaintiffs could have said to change the outcome, but this is a factual argument that is not permissible at the motion to dismiss phase. Moreover, to have standing, Plaintiffs did not have to allege that that they would have received the job if SEPTA had complied with the FCRA. SEPTA's failure to comply with the FCRA "cause[d] an injury in and of itself" without the need to show any additional harm. *See In re Horizon Healthcare*, 846 F.3d at 639. "[S]o long as an injury 'affect[s] the plaintiff in a personal and individual way,' the plaintiff need not 'suffer any particular type of harm to have standing.'" *Id.* at 636 (quoting *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2015)) (rejecting argument that a plaintiff must allege economic loss to have standing); *see also Spokeo*, 136 S. Ct. at 1553 ("A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." (Thomas, J. concurring)).

Contrary to SEPTA's arguments, *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), support Plaintiffs. *See* Pls.' Br. at 32. In *Akins*, the Supreme Court held that a plaintiff does not need to allege any additional harm beyond what Congress has identified to prove injury. 524 U.S. at 20. The Supreme Court found that the plaintiffs' failure to obtain relevant information resulted in an injury that the statute sought to address. *Id.* In *Public Citizen*, the Supreme Court found that

a plaintiff's inability to obtain information allowed by statute "constitute[d] a sufficiently distinct injury to provide standing to sue." 491 U.S. at 449. Likewise, here, Plaintiffs allege that they were not provided with information the FCRA requires and, consequently, suffered the injury that Congress sought to prevent. *See* JA23, 28, 30-31, 34, 43.[5]

To the extent that SEPTA relies on its Policy #E20 to argue that it automatically disqualified Plaintiffs, the policy is likely illegal and unenforceable. "[I]t is against the public policy of the Commonwealth [of Pennsylvania] to summarily reject an individual for employment on the ground that the individual has a prior criminal record unless in doing so the employer is furthering a legitimate public objective." *El v. Se. Pa. Transp. Sys.*, 297 F. Supp. 2d 758, 761 (E.D. Pa. 2003); *see also Hunter v. Port Auth. of Allegheny Cty.*, 419 A.2d 631,

[5] SEPTA relies on *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 346-47 (4th Cir. 2017), to distinguish *Akins* and *Public Citizen*. However, to the extent the Fourth Circuit found that standing was derived from "the type of concrete harm Congress intended to protect[,]" *id.* at 347, it is consistent with Plaintiffs' position. Additionally, the *Dreher* court noted that "both [*Akins* and *Public Citizen*] involved the deprivation of information that adversely affected the plaintiffs' conduct." *Id.* at 346. Thus, *Dreher* reinforces Plaintiffs' argument. Similarly, *In re: Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation*, which SEPTA cites, actually supports Plaintiffs' argument that they were not required to "allege any *additional* harm beyond the one Congress has identified" even though the court failed to apply this reasoning to the facts before it. No. 14 Civ. 7563, 2017 WL 354023, at *7-8 (D.N.J. Jan. 24, 2017) (quoting *Spokeo*, 136 S. Ct. at 1549). In any event, the decision is not on point because it analyzed Section 1681(b)(2) of the FCRA—not (b)(3) claims. *Id.* at *4. Likewise, *Nokchan v. Lyft, Inc.*, also cited by SEPTA, only addresses 1681b(b)(2) claims. *See* No. 15 Civ. 3008, 2016 WL 5815287, at *9 (N.D. Cal. Oct. 5, 2016).

634 (Pa. Super. Ct. 1980) (discussing "the deeply ingrained public policy of [Pennsylvania] to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders").[6] Thus, in *El v. SEPTA*, this Court cautioned SEPTA that "the reasonable inference [is] that SEPTA has no real basis for asserting that its [criminal history screening] policy accurately distinguishes between applicants that do and do not present an unacceptable level of risk." 479 F.3d 232, 248 (3d Cir. 2007).

SEPTA's attempt to distinguish *Mix v. Asurion Insurance Services, Inc.*, is unpersuasive. Def.'s Br. at 20-21. In *Mix*, the court concluded that the plaintiff's injury supported standing for the same reasons that Plaintiffs' allegations support standing here: the employer took adverse action without providing notice and an opportunity to explain the report. 2016 WL 7229140, at *6. SEPTA asserts that the plaintiff in *Mix* had a "legitimate explanation" to offer her employer regarding her qualifications for the job, but this was not the basis for the court's holding, which was much broader. *See id*. ("Violations of FCRA that unfairly deprive a consumer of relevant information . . . implicate the harms Congress identified in FCRA, and thus cause concrete harms."). In any event, as discussed above, SEPTA cannot know whether Plaintiffs had legitimate explanations because it

[6] *See also* 18 Pa. C.S. § 9125(b); *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp't Opportunity Comm'n (Apr. 25, 2012), available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

denied them the chance to know what was in their reports, to learn that they had the right to respond to any negative information, and to attempt to explain how the information did not bear on their fitness for the job.

SEPTA's attempts to distinguish *Thomas v. FTS USA, LLC*, fail for three reasons. *See* Def.'s Br. at 25-26. First, there, the court recognized that the plaintiffs were injured by losing the opportunity to confront the charges in their reports and tell their side of the story even if their "consumer reports were entirely correct[.]" *Thomas*, 193 F. Supp. 3d at 638. Contrary to SEPTA's characterization, the case was not limited to "correct[ing] inaccurate or misleading information." Def.'s Br. at 27. Second, it was proper for *Thomas* to rely on pre-*Spokeo* cases given that *Spokeo* did not change the standing analysis and the Supreme Court itself continues to rely on pre-*Spokeo* standing cases. *See* Pls.' Br. at 21-24. Third, despite SEPTA's misleading characterization, *Dreher v. Experian Information Solutions, Inc*., did not overturn *Thomas*. It analyzed a different provision of the FCRA—a CRA's duty to accurately disclose information under Section 1681g(a)(2)—that is similar to the Section 1681e(b) violation at issue in *Spokeo*. 856 F.3d at 340. The plaintiffs in *Dreher* also failed "to identify either a common law analogue or a harm Congress sought to prevent"—further distinguishing it from *Thomas* and this case. *Id.* at 346.

B. *Spokeo* Does Not Condition Standing on Whether a Plaintiff Alleges a Consumer Report Is Inaccurate.

SEPTA plucks *dicta* from *Spokeo* to argue that Plaintiffs have failed to allege a concrete injury because they have not claimed that their consumer reports were inaccurate. *See* Def.'s Br. at 13 (noting that "[a] violation of one of the FCRA's procedural requirements may result in no harm" like "[f]or example, even if a [CRA] fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate" (quoting *Spokeo*, 136 S. Ct. at 1550)). However, even if the language that SEPTA quotes were not *dicta*,[7] it must be read in the context of the dispute in *Spokeo*—whether a CRA ensured the "maximum possible accuracy" of its reports under Section 1681e(b), a different section of the FCRA that Plaintiffs have not invoked (and with concerns that do not apply to Plaintiffs Shipley and White, who could not know if their consumer reports were accurate).[8] *See* 136 S. Ct. at 1545.

Unlike Section 1681b(b)(3), which is at issue here, Section 1681e(b) requires that a plaintiff plead that the consumer report included inaccurate

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[7] The language was *dicta* because it was unnecessary to the Supreme Court's holding. *Port Wash. Teachers' Ass'n v. Bd. of Educ. of Port Wash. Union Free Sch. Dist.*, 478 F.3d 494, 502 (2d Cir. 2007) (portions of opinion "unnecessary to [court's] decision" may "be characterized as dicta").

[8] Nonetheless, as Justice Thomas explained in his concurrence, even in the context of a Section 1681e(b) claim, "[i]f Congress has created a private duty owed personally to [the plaintiff] to protect *his* information, then the violation of the legal duty suffices for Article III injury in fact." *Spokeo*, 136 S. Ct. at 1554.

information to give rise to a claim. *See Cortez*, 617 F.3d at 708. Section 1681b(b)(3) has no such requirement. This is because Congress was concerned not only with inaccurate information. It also sought to provide applicants with a "right to know" the information forming the basis for their denial of employment, S. Rep. at 2, so that they would have an opportunity to tell their "side of the story" even with respect to accurately reported information, *see Thomas*, 193 F. Supp. 3d at 633 (quoting S. Rep. at 3); *see also* Pls.' Br. at 9-13.

The crux of a Section 1681b(b)(3) injury is the applicant's inability to review the information contained in her consumer report. Thus, *Spokeo*'s "cautionary example that a consumer's information may be 'entirely accurate' was not referencing an employer's duty to give § 1681b(b)(3)(B)[9] notice to an unsuccessful applicant." *Demmings*, 2017 WL 1170856, at *10 (D. Or. Mar. 29, 2017) (quoting *Spokeo*, 136 S. Ct. at 1550). Rather, *Spokeo* "addressed . . . a hypothetical [CRA]'s failure 'to provide the required notice to a user of the agency's consumer information.'" *Id*.

III. SEPTA's Failure to Comply with the FCRA Harmed Plaintiffs.

Plaintiffs have not alleged a technical violation of the FCRA, as SEPTA inaccurately contends. Rather, as discussed in Plaintiffs' opening brief, each

[9] Section 1681b(b)(3)(B) is an analogous section of the FCRA that requires employers to provide notice after taking an adverse action against a consumer who applies for a position over which the Secretary of Transportation has power. *See* 15 U.S.C. § 1681b(b)(3)(C).

Plaintiff alleges he was denied employment in whole or in part because of information contained in his consumer report. Pls.' Br. at 3-7, 14-16-, 24-26. By failing to provide Plaintiffs with their reports before denying them employment, SEPTA prevented them from verifying the accuracy of the information in the reports,[10] and the opportunity to show why the reports (even if accurate) did not render them unfit for the job. *See* Pls.' Br. at 24-26.[11]

SEPTA's omissions also denied Plaintiffs their right under the FCRA to learn how to dispute any inaccurate or arbitrary information the reports contained. As the Federal Trade Commission has explained, pre-adverse action disclosures serve an important educational purpose: without them, consumers may never know the rights Congress intended them to have. *See* Letter from William Haynes,

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[10] As discussed above, Plaintiffs Shipley and White still have no way to know whether their reports contained accurate information because SEPTA did not provide the reports to them. Thus, Plaintiffs do not concede that their reports were accurate, as SEPTA suggests, and could not have alleged that their reports were inaccurate.

[11] The Court should consider the Brief of *Amici Curiae* Community Legal Services, The National Employment Law Project, and Service Employees International Union Local 668 ("CLS *Amici* Br."), because it discusses an important policy rationale for Section 1681b(b)(3)—the opportunity for communication between employers and job applicants. CLS *Amici* Br. at 11. Among other things, notice under the FCRA provides an opportunity for applicants to contextualize any negative information before an adverse action is taken and increases the odds that employers will make employment decisions based on all of the circumstances. *See id*. at 12. In this regard, the FCRA promotes compliance with Pennsylvania law and policy, and federal anti-discrimination law, *id*. at 12-20, while also protecting against injury to applicants.

Attorney, Div. of Credit Practices, Fed. Trade Comm'n, to Harold Hawkey, Emp'rs Ass'n of N.J., 1997 WL 33791224, at *3 (Dec. 18, 1997).

Finally, SEPTA's alleged failure to follow the FCRA increased the "risk of harm" to Plaintiffs and the class they seek to represent that: (1) SEPTA would base its employment decisions on incorrect information or technically correct but misleading information; (2) SEPTA would not learn of mitigating circumstances that would have prevented it from making an adverse employment decision; and (3) applicants would not know of their FCRA rights and have their claims lapse before they could bring suit. These allegations further demonstrate the concrete nature of Plaintiffs' injuries. *See Spokeo*, 136 S. Ct. at 1550 ("Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." (internal quotation marks omitted)); *see also In re Horizon Healthcare*, 846 F.3d at 636 (discussing that standing can be based on "actual or *threatened* injury" (citation and internal quotation marks omitted; emphasis supplied)).

IV. SEPTA's Factual Defense that It Relied on Plaintiffs' Disclosures, Not Their Consumer Reports, Is Premature, Inaccurate, and Irrelevant to the Standing Issue.

SEPTA's claim that it denied Plaintiffs employment based on their disclosures and not based on the information contained in the consumer reports depends on factual contentions that are contrary to Plaintiffs' allegations, which, at

this stage of the case, must be believed. *Susinno*, 2017 WL 2925432, at *1; *Argueta v. U.S. Immigration & Customs Enf't*, 643 F.3d 60, 74 (3d Cir. 2011).

In particular, Plaintiffs allege that SEPTA did rely on their consumer reports. Specifically, the Complaint states that: (1) SEPTA sent Mr. Long a letter stating that its decision not to hire him was based on information contained in his background report, JA28; (2) a SEPTA recruiter told Mr. Shipley not to report to work because his background had not yet been cleared, and days later denied him the job based on his criminal history, JA29; and (3) Mr. White was told that SEPTA was waiting for the results of his background check before he could start training, and SEPTA later denied him the job based on his criminal history, JA31.

Plaintiffs are entitled to discovery to test the validity of SEPTA's assertion for why it denied them employment (including whether SEPTA's employment denials really are automatic, and it would never consider factors like the age of convictions or rehabilitation, and whether it has ever made exceptions to its rules). But even if discovery shows that SEPTA relied partly on Plaintiffs' disclosures, Plaintiffs still have been injured under the FCRA because the statute makes it a violation for employers to rely "in whole *or in part*" on a consumer report to take adverse action without first providing it to the applicant. *See* 15 U.S.C. §

1681b(b)(3) (emphasis supplied).[12]

V. Plaintiffs Established All Three Standing Requirements.

SEPTA argues that Plaintiffs failed to establish the second and third standing requirements, which the District Court did not reach. However, Plaintiffs easily satisfy each requirement. *See also* JA105-06.

A. Plaintiffs' Alleged Injury Is Traceable to SEPTA's Conduct.

The second standing element requires "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Causation is satisfied where the injury is "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." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

Plaintiffs have alleged sufficient facts to show causation—namely, SEPTA failed to provide Plaintiffs with their consumer reports and a statement of their FCRA rights, which caused their injury. Although SEPTA contends that it rejected Plaintiffs based on their disclosures, Def.'s Br. at 29-30, as discussed above, this is contrary to Plaintiffs' allegations and is not the harm that Section 1681b(b)(3)

[12] Moreover, the FCRA defines "adverse action"—and thus the harm to Plaintiffs—broader than just "denial of employment." 15 U.S.C. § 1681a(k)(1)(B)(ii) (defining adverse action, *inter alia*, as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee").

seeks to prevent. *See Taha*, 2017 WL 28757, at *7 (noting causal connection between defendant's dissemination of private information and harm to plaintiff).

B. Plaintiffs Have Alleged a Redressable Injury.

Redressability requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). Plaintiffs seek redress for SEPTA's statutory violations of the FCRA. JA24, 26, 47. The FCRA provides for statutory damages in the range of $100-$1,000 if Plaintiffs prevail on their claims. The Court can adjudicate these statutory violations in Plaintiffs' favor by awarding Plaintiffs statutory damages. *See* 15 U.S.C. § 1681n; *Thomas*, 193 F. Supp. 3d at 629 ("It is undisputed that the alleged statutory violations are traceable to Defendants' conduct, and that the alleged violations are redressable by statutory damages.").

CONCLUSION

For these reasons, and as further explained in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court reverse the District Court's grant of SEPTA's motion to dismiss.

Dated: July 26, 2017
New York, New York

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d), the undersigned counsel hereby certifies that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit, and that I am a member in good standing of the Court.

/s/ Ossai Miazad
Ossai Miazad

CERTIFICATE OF COMPLIANCE

I, Ossai Miazad, hereby certify that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4,897 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. The hard copy and the electronic copy of this brief are identical.

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Dated: July 26, 2017

/s/ Ossai Miazad
Ossai Miazad

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Plaintiffs-Appellants was served on this 26th day of July, 2017, upon counsel of record via the Court's ECF filing system.

/s/ Ossai Miazad
Ossai Miazad