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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

AHMED S. ADAN, an individual,  
Plaintiff,  
v.  
INSIGHT INVESTIGATION, INC. a  
California corporation; and DOES 1-10,  
inclusive,  
Defendant.

Case No.: 16cv2807-GPC(WVG)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFF’S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

[Dkt. Nos. 43, 44.]

Before the Court is Defendant’s motion for partial summary judgment and Plaintiff’s motion for partial summary judgment. (Dkt. Nos. 43, 44.) Oppositions and reply briefs were filed. (Dkt. Nos. 46, 47, 48, 49.) After a review of the briefs, the supporting documentation, and the applicable law, the Court GRANTS in part and DENIES in part Defendant’s motion for partial summary judgment and DENIES Plaintiff’s motion for partial summary judgment.

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1 **Procedural Background**

2 On November 15, 2016, the case was removed from state court. (Dkt. No. 1.)  
3 After the Court granted Plaintiff’s motion for leave to file an amended complaint, (Dkt.  
4 No. 20), on April 18, 2017, Plaintiff Ahmed S. Adan (“Plaintiff” or “Adan”) filed a first  
5 amended complaint (“FAC”) against Defendant Insight Investigations, Inc. (“Defendant”  
6 or “Insight”). (Dkt. No. 21.) Plaintiff claims that he was the victim of an erroneous  
7 employment background check report which included a criminal history that was not his  
8 but another person’s with the same name, and as a result, was never hired for the job he  
9 was offered. (Id.)

10 **Factual Background**

11 On February 20, 2015, Road Runner Sports (“RRS”) placed a request with Insight  
12 for a background check report on Plaintiff in connection with an offer of employment.  
13 (Dkt. No. 47-21, P’s Response to D’s SSUF, No. 1.) On February 20, 2015, Plaintiff  
14 signed a document titled “Consent to Obtain Consumer Reports For Employment  
15 Purposes,” authorizing Insight to conduct a background check on him in connection with  
16 an offer of employment from RRS. (Id., No. 2.) After receiving the request from RRS,  
17 Insight emailed a link to its online portal to Plaintiff via email, where Plaintiff had the  
18 opportunity to review the information already inserted by RRS and make changes or  
19 comments, where necessary. (Id., No. 3.) At the time, Plaintiff did not disclose a middle  
20 name as it was not a requirement on the online request. (Id., No. 4.)

21 On March 2, 2015, Insight completed the report on Plaintiff. (Id., No. 5.) In  
22 March 2015, RRS informed him that his offer of employment had been rescinded. (Id.,  
23 No. 6; Dkt. No. 43-7, Stepanyan Decl., Ex. 3, Adan Depo. at 76:7-24 (Adan testified  
24 concerning when he was informed of RRS’ decision to rescind his offer as follows: “I’m  
25 not sure a hundred percent, but it was -- I don’t know if it was April or March.”) The  
26 background report disclosed a criminal history belonging to another individual. (Dkt.  
27 No. 46-11, D’s Response to P’s SSUF, No. 1.) On March 23, 2015, Plaintiff contacted  
28 Insight by telephone, for the first time, disputing the information on his background

1 check report. (Dkt. No. 47-21, P’s Response to D’s SSUF, No. 7.) At the time, Plaintiff  
2 did not disclose his middle name and Defendant never asked for his middle name. (Id.,  
3 No. 8.) During the call, Plaintiff was told to obtain a Case of Mistaken Identity from San  
4 Diego Superior Court. (Dkt. No. 46-11, D’s Response to P’s SSUF, No. 5.) After this  
5 phone call disputing the information on his consumer report, Defendant did not provide  
6 any written notice to Plaintiff about the results of any reinvestigation. (Id., No. 6.)

7 On April 8, 2015, Plaintiff called Insight again disclosing his middle name. (Dkt.  
8 No. 47-21, P’s Response to D’s SSUF, No. 9.) Subsequent to the call, it was discovered  
9 that the criminal history belonged to an Ahmed N. Adan, not Plaintiff Ahmed S. Adan.  
10 (Dkt. No. 47-2, Fok Decl., Ex. 1 at 5.) On April 9, 2015, Insight updated Plaintiff’s  
11 report. (Dkt. No. 46-11, D’s Response to P’s SSUF, No. 10.) Insight subsequently called  
12 RRS to inform it of the update on the report.<sup>1</sup> (Id., No. 11.)

13 On April 14, 2015, Plaintiff obtained a “Certificate of Identity Theft: Judicial  
14 Finding of Factual Innocence” from San Diego Superior Court. (Dkt. No. 47-21, P’s  
15 Response to D’s SSUF, No. 12.) On the same day, after the state court proceeding,  
16 Plaintiff was informed by April Harvey, the Human Resources coordinator at RRS, that  
17 Insight had updated his report. (Id., No. 13.)

18 The FAC alleges four causes of actions for violations of certain provisions under  
19 the Fair Credit Reporting Act (“FCRA”). The first cause of action alleges a violation of  
20 15 U.S.C. § 1681e(b) for willfully/recklessly, or in the alternative, negligently failing to  
21 utilize reasonable procedures to ensure the maximum possibly accuracy of the  
22 information. (Dkt. No. 21, FAC ¶¶ 39, 46.) The second cause of action claims a  
23 violation of 15 U.S.C. § 1681k(a)(2) for willfully/recklessly, or in the alternative,  
24 negligently failing to utilize strict procedures to ensure that the reported public records  
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27 <sup>1</sup> The fact is disputed as to when Insight informed RRS about the updated report. Defendant claims it  
28 notified RRS on April 9, 2015, (Dkt. No. 43-6, Stepanyan Decl., Ex. 2, Bovy Depo. at 13:24-14:17),  
while Plaintiff asserts RRS was notified on April 14, 2015, (Dkt. No. 47-19, Fok Decl., Ex. 18 at 6).

1 information for employment purposes was complete and up to date. (Id. ¶¶ 48, 52.) The  
2 third cause of actions asserts a violation of 15 U.S.C. § 1681g(a) for willfully/recklessly,  
3 or in the alternative, negligently failing to disclose to Plaintiff his full file despite  
4 multiple requests. (Id. ¶¶ 54, 57.) The fourth cause of action claims a violation of 15  
5 U.S.C. § 1681i(a)(6) for willfully/recklessly, or in the alternative, negligently failing to  
6 provide Plaintiff with written notice of the results of the reinvestigation within five  
7 business days after the completion of the reinvestigation. (Id. ¶¶ 59, 63.)

8 In his opposition to Defendant’s motion for partial summary judgment, Plaintiff  
9 does not oppose Defendant’s motion for partial summary judgment on the third cause of  
10 action for willful and negligent violation of 15 U.S.C. § 1681g(a), and in fact concedes  
11 that there are no material issues of fact on the third cause of action. (Dkt. No. 47 at 20  
12 (“Plaintiff intends to file a non-opposition to Defendant’s motion on Plaintiff’s Third  
13 cause of action.”).) Therefore, the Court GRANTS as unopposed Defendant’s motion for  
14 partial summary judgment on the third cause of action for willful and negligent violations  
15 of 15 U.S.C. § 1681g(a).

#### 16 **A. Legal Standard on Motion for Summary Judgment**

17 Federal Rule of Civil Procedure 56 empowers the Court to enter summary  
18 judgment on factually unsupported claims or defenses, and thereby “secure the just,  
19 speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477  
20 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the “pleadings,  
21 depositions, answers to interrogatories, and admissions on file, together with the  
22 affidavits, if any, show that there is no genuine issue as to any material fact and that the  
23 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is  
24 material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477  
25 U.S. 242, 248 (1986).

26 The moving party bears the initial burden of demonstrating the absence of any  
27 genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can  
28 satisfy this burden by demonstrating that the nonmoving party failed to make a showing

1 sufficient to establish an element of his or her claim on which that party will bear the  
2 burden of proof at trial. Id. at 322-23. If the moving party fails to bear the initial burden,  
3 summary judgment must be denied and the court need not consider the nonmoving  
4 party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

5 Once the moving party has satisfied this burden, the nonmoving party cannot rest  
6 on the mere allegations or denials of his pleading, but must "go beyond the pleadings and  
7 by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions  
8 on file' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex,  
9 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an  
10 element of its case, the moving party is entitled to judgment as a matter of law. Id. at  
11 325. "Where the record taken as a whole could not lead a rational trier of fact to find for  
12 the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v.  
13 Zenith Radio Corp., 475 U.S. 574, 587 (1986). In making this determination, the court  
14 must "view[] the evidence in the light most favorable to the nonmoving party." Fontana  
15 v. Haskin, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility  
16 determinations, weighing of evidence, or drawing of legitimate inferences from the facts;  
17 these functions are for the trier of fact. Anderson, 477 U.S. at 255.

18 In its motion for partial summary judgment, Defendant first claims that Plaintiff  
19 lacks Article III standing to bring his third cause of action for a violation of 15 U.S.C. §  
20 1681i(a)(6) as there has been no showing of any concrete harm to Plaintiff. Moreover,  
21 even if he had standing, Plaintiff cannot establish a negligent violation because he cannot  
22 establish actual damages which is required under 15 U.S.C. § 1681o. Next, as to the  
23 remaining three causes of action, Defendant argues Plaintiff lacks evidence to support  
24 statutory and punitive damages as there is no evidence of any willfulness and/or  
25 recklessness on the part of Insight.

## 26 **B. Article III Standing**

27 Defendant argues that Plaintiff does not have Article III standing to bring his  
28 fourth cause of action under 15 U.S.C. § 1681i(a)(6)(A). Plaintiff disagrees.

1 “‘[T]he ‘irreducible constitutional minimum of [Article III] standing’” requires that  
2 “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the  
3 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable  
4 judicial decision.” Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citing Lujan v.  
5 Defenders of Wildlife, 504 U.S. 555, 560 (1992)). The plaintiff bears the burden of  
6 demonstrating these elements. Id.

7 “To establish injury in fact, a plaintiff must show that he or she suffered ‘an  
8 invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or  
9 imminent, not conjectural or hypothetical.’” Id. at 1548 (quoting Lujan, 504 U.S. at 560).  
10 The Supreme Court noted that concreteness is quite distinct from particularization. Id.  
11 An injury is “particularized” if it affects “the plaintiff in a personal and individual way.”  
12 Id. In addition, for an injury to be “concrete”, it must be “de facto,” meaning that it is  
13 “real” and not “abstract.” Id. However, an injury need not be “tangible” in order to be  
14 “concrete,” and intangible injuries may constitute injury in fact. Id. at 1549.

15 In order to determine whether an intangible harm constitute injury in fact, the  
16 Court in Spokeo provided two factors to be considered: “history and the judgment of  
17 Congress.” Id. at 1549. Specifically, “(1) whether the statutory violation bears a ‘close  
18 relationship to a harm that has traditionally been regarded as providing a basis for a  
19 lawsuit in English or American courts,’ and (2) congressional judgment in establishing  
20 the statutory right, including whether the statutory right is substantive or procedural.”  
21 Matera v. Google, No. 15cv 4062-LHK, 2016 WL 5339806, at \*9 (N.D. Cal. Sept. 23,  
22 2016).

23 Spokeo also held that “the violation of a procedural right granted by statute can be  
24 sufficient in some circumstances to constitute injury in fact.” Spokeo, 136 S. Ct. at 1549.  
25 In such a case, a plaintiff “need not allege any additional harm beyond the one [the  
26 legislature] has identified.” Id. But, a plaintiff does not automatically satisfy the injury  
27 requirement whenever a statute grants a right and purports to authorize a suit to vindicate  
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1 it. Id. “Article III standing requires a concrete injury even in the context of a statutory  
2 violation.” Id.

3 In Spokeo, the defendant allegedly violated the Fair Credit Reporting Act  
4 (“FCRA”), which requires consumer reporting agencies to “follow reasonable procedures  
5 to assure maximum possible accuracy of” consumer reports. Id. at 1545 (quoting 15  
6 U.S.C. § 1681e(b)). The U.S. Supreme Court noted that the Ninth Circuit’s analysis  
7 addressed whether the injury was particularized but did not address whether the alleged  
8 procedural FCRA violation constituted a “concrete injury” and remanded the issue to the  
9 Ninth Circuit. Id. at 1550. The Court, as an example, noted that “[i]t is difficult to  
10 imagine how the dissemination of an incorrect zip code [in violation of the FCRA],  
11 without more, could work any concrete harm.” Id. Thus, while “the violation of a  
12 procedural right granted by statute can be sufficient in some circumstances to constitute  
13 injury in fact,” a “bare procedural violation, divorced from any concrete harm” is not. Id.  
14 at 1549 (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)).

15 On remand, the Ninth Circuit addressed whether the plaintiff sufficiently plead a  
16 concrete injury. Robins v. Spokeo, Inc., 867 F.3d 1108, 1111-12 (9th Cir. 2017). The  
17 Ninth Circuit asked “(1) whether the statutory provisions at issue were established to  
18 protect his concrete interests (as opposed to purely procedural rights), and if so, (2)  
19 whether the specific procedural violations alleged in this case actually harm, or present a  
20 material risk of harm to, such interests.” Id. at 1113.

21 The Ninth Circuit held that Robins alleged injuries that were concrete sufficient to  
22 establish Article III standing as the statutory provision at issue, 15 U.S.C. § 1681e(b)  
23 requiring reporting agencies to “follow reasonable procedures to assure maximum  
24 possible accuracy”, protects Robin’s concrete interest in accurate credit reporting. Id. at  
25 1115. Second, it held that Robins also alleged actual harm because Spokeo had prepared  
26 a report that contained inaccurate information about him and published it on the Internet.  
27 Id. at 1116. The Ninth Circuit concluded that Robins’s claim implicates his “concrete  
28 interests in truthful credit reporting.” Id.

1 Here, the fourth cause of action alleges a failure to receive written notice of the  
2 results of the reinvestigation within five business days of its completion in violation of 15  
3 U.S.C. § 1681i(a)(6)(A).<sup>2</sup> Defendant argues that Plaintiff lacks Article III standing to  
4 bring his fourth cause of action for violation of 15 U.S.C. § 1681i(a)(6) as he is alleging a  
5 mere procedural violation that he did not receive the results of reinvestigation within five  
6 business of its completion without a showing of any concrete harm to him. According to  
7 Defendant, the legislative intent of the FCRA, to prevent the inaccuracy in credit reports,  
8 is not implicated with the notice of reinvestigation after an error has potentially been  
9 made. In response, Plaintiff argues that the provision is a tool designed to protect against  
10 inaccuracies.<sup>3</sup> As to actual harm, he maintains that because Defendant failed to provide  
11 written notice of the results of a reinvestigation within 5 business days after completion  
12 of the reinvestigation, he continued to prosecute his “mistaken identity” petition and  
13 spent time and money to attend the Certificate of Factual Innocence hearing which did  
14 not even address the inaccuracy in his report. If he had been informed of the results of  
15 the reinvestigation, Adan would have ceased prosecuting his petition of mistaken  
16 identity. Moreover, by not informing him, he continued to worry about his job prospect  
17 and suffered emotional distress.

18 Under Robins, the Court first asks whether 15 U.S.C. § 1681i(a)(6)(A) was  
19 enacted to protect Adan’s concrete interests. Robins, 867 F.3d at 1113. Congress’  
20 purpose in enacting the FCRA was to ensure “fair and accurate credit reporting” and  
21 provides procedures to “curb the dissemination of false information.” Spokeo, 136 S. Ct.

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24 <sup>2</sup>(A) In general.--A consumer reporting agency shall provide written notice to a consumer  
25 of the results of a reinvestigation under this subsection not later than 5 business days after  
26 the completion of the reinvestigation, by mail or, if authorized by the consumer for that  
purpose, by other means available to the agency.

27 15 U.S.C. § 1681i(a)(6)(A).

28 <sup>3</sup> Confusingly, the Court notes that Plaintiff’s full argument on Article III standing is partly contained in  
his opposition to Defendant’s motion for partial summary judgment and partly contained in his reply to  
his motion for partial summary judgment. (Dkt. Nos. 47, 49.)



1 at 1545, 1550. Congress also “emphasized that ‘the consumer has a right . . . to correct  
2 any erroneous information in his credit file.” Thomas v. FTS USA, LLC, 193 F. Supp.  
3 3d 623, 633 (E.D. Va. 2016) (citation omitted) (emphasis in original). Congress also  
4 sought “‘to establish [ ] the right of a consumer to be informed of investigations into his  
5 personal life.” Id. (emphasis in original).

6 The reinvestigation procedure that requires a credit reporting agency<sup>4</sup> (“CRA”) to  
7 conduct a free reinvestigation of any dispute raised by a consumer under § 1681i supports  
8 Congress’ purpose in curbing or decreasing the risk of the dissemination of false  
9 information by requiring CRA’s to conduct a prompt investigation of any inaccurate or  
10 incomplete information in a consumer’s report. The provision requires that once a  
11 reinvestigation is completed, the CRA must provide written notice to the consumer by  
12 mail or “if authorized by the consumer for that purpose, by other means available.” See  
13 U.S.C. § 1681i(a)(6)(A). The prompt notice requirement concerning the results of a  
14 reinvestigation promotes Congress’ purpose in enacting the FCRA to ensure “fair and  
15 accurate reporting” and ensure the “integrity of information in the consumer’s file and on  
16 the consumer’s piece of mind in knowing about the CRA’s conclusion after  
17 reinvestigation.” Ricketson v. Experian Info. Solutions, Inc., -- F. Supp. 3d --, 2017 WL  
18 3142750, at \*4 n.3 (W.D. Mich. July 18, 2017). Therefore, the Court concludes that the  
19 first factor of Robins has been met that 15 U.S.C. § 1681i(a)(6) was enacted to protect  
20 Adan’s concrete interests in “fair and accurate” reporting.

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24 <sup>4</sup> (f) The term “consumer reporting agency” means any person which, for monetary fees,  
25 dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the  
26 practice of assembling or evaluating consumer credit information or other information on  
27 consumers for the purpose of furnishing consumer reports to third parties, and which uses  
28 any means or facility of interstate commerce for the purpose of preparing or furnishing  
consumer reports.

15 U.S.C. § 1681a(f). The parties do not dispute that Insight is a CRA subject to the FCRA.

1 Next, the Court must address whether Defendant's failure to provide written notice  
2 to Plaintiff about the results of the reinvestigation within 5 business days, caused actual  
3 harm or presented a material risk of harm to his interest in fair and accurate reporting.  
4 See Robins, 867 F.3d at 1113.

5 Defendant contends that no actual harm has been demonstrated from its alleged  
6 failure to provide Plaintiff with written notice of the results of the reinvestigation.  
7 Plaintiff claims he unnecessarily spent time and money prosecuting and attending a  
8 hearing for his petition of "mistaken identity" and subsequently obtained a certification of  
9 identity theft concerning a judicial finding of factual innocence on April 14, 2015. (Dkt.  
10 No. 47-17, Fok Decl., Ex. 16 at 2.) He also suffered emotional distress concerning his  
11 job prospect with RRS.

12 On April 8, 2015, Plaintiff contacted Insight and talked with Donna Cotter, an  
13 Insight representative. In this telephone conversation, he provided his middle name. In  
14 that phone call, Adan expressed his concern that his job will not be there by the time he  
15 gets his name cleared at a court hearing on April 13, 2015. (Dkt. No. 47-2, Fok Decl.,  
16 Ex. 1 at 4.) This concern is memorialized in an email from Donna Cotter to Joshua  
17 Haydon, the CEO of Insight. (Id.) It appears that after the phone call, Cotter conducted a  
18 social security trace and instantly learned that the criminal history of Ahmed Adan, with  
19 the middle initial of N., had been reported on Plaintiff's background check report. (Id.)

20 It is undisputed that Defendant updated Plaintiff's report on April 9, 2015.  
21 Defendant had until April 16, 2017<sup>5</sup> to submit a written report to Plaintiff but no written  
22 report was ever provided to him.<sup>6</sup> As a result, Plaintiff unnecessarily attended his  
23 "mistaken identity hearing" in state court and continued to worry about his job prospect.  
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26 <sup>5</sup> While Defendant states it had until April 17, 2015 to provide notice, the Court's calculation that  
27 Defendant until April 16, 2015 is based on computing the five business days under Federal Rule of Civil  
28 Procedure 6.

<sup>6</sup> As discussed below, there is a genuine issue of material fact as to whether Defendant complied with  
the statute by providing oral notice.

1 Emotional distress regarding the uncertainty of his job prospects constitute  
2 concrete harm resulting from informational injury. Ricketson, 2017 WL 3142750, at \*5  
3 (citing Guimond, 45 F.3d at 1332-33 (holding that “actual damages” under the FCRA  
4 “include[s] recovery for emotional distress and humiliation”); see also Davis v. Astrue,  
5 874 F. Supp. 2d 856, 863 (N.D. Cal. 2012) (“[M]any courts have found that emotional  
6 distress may constitute an injury-in-fact for purposes of standing”).

7 Plaintiff has demonstrated actual harm by the cost, time and emotional distress  
8 from Defendant’s failure to comply with the notice provision. Even though Defendant  
9 argues Plaintiff knew on April 14, 2015 that his report was updated when he was  
10 informed by April Harvey, RRS’s HR coordinator, the question is not when he learned of  
11 the updated report but whether Defendant complied with the statute and provided written  
12 notice to Adan and the resulting harm from Defendant’s failure to act. Accordingly, the  
13 Court concludes Plaintiff has established concrete injuries to satisfy Article III standing.

14 Furthermore, the alleged failure to provide Plaintiff with written notice of the  
15 results of the reinvestigation constitutes a right to information or informational injury.  
16 Ricketson, 2017 WL 3142750, at \*4 (violation of § 1681i constitutes informational  
17 injury); see also Syed v. M-I, LLC, 853 F.3d 492, 499 (9th Cir. 2017) (disclosure  
18 requirement creates a right to information). Courts have held that “‘informational injury’  
19 is a type of intangible injury that can constitute an Article III injury in fact.” Stacy v.  
20 Dollar Tree Stores, Inc., -- F. Supp. 3d --, 2017 WL 3531513, at \*6 (S.D. Fla. Aug. 14,  
21 2017) (quoting Dreher v. Experian Info. Solutions, Inc., 856 F.3d 337, 345 (4th Cir.  
22 2017)). “[A] constitutionally cognizable informational injury requires that a person lack  
23 access to information to which he is legally entitled *and* that the denial of that  
24 information creates a ‘real’ harm with an adverse effect.” Dreher, 856 F.3d at 345  
25 (emphasis in original). A plaintiff who alleges a “violation of a statutory right to receive  
26 information alleges a concrete injury.” Church v. Accretive Health, Inc., 654 Fed. App’x  
27 990, 994-95 (11th Cir. 2016).

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1           Accordingly, the Court concludes that Plaintiff has sufficiently demonstrated  
2 concrete harm to satisfy Article III standing to assert a cause of action for a violation of  
3 15 U.S.C. § 1681i(a)(6). The Court DENIES Defendant’s motion for partial summary  
4 judgment on the fourth cause of action for lack of Article III standing.

5 **C. Actual Damages for Negligent Violations under 15 U.S.C. § 1681o**

6           Next, Defendant argues that even if Plaintiff has standing, he cannot establish a  
7 negligent violation of 15 U.S.C. § 1681i(a)(6) since he cannot prove actual damages as  
8 required by 15 U.S.C. § 1681o as to the fourth cause of action. Plaintiff opposes.

9           15 U.S.C. § 1681o provides,

10           Any person who is negligent in failing to comply with any requirement  
11 imposed under this subchapter with respect to any consumer is liable to that  
12 consumer in an amount equal to the sum of – (1) any actual damages  
13 sustained by the consumer as a result of the failure . . . .

14 15 U.S.C. § 1681o.

15           Defendant raises the same facts and arguments about actual harm it raised  
16 concerning the Article III standing issue but does not provide any legal authority that the  
17 requirement of actual damages under § 1681o is distinct from actual harm under Article  
18 III standing. Because the Court concluded that Plaintiff presented sufficient facts to  
19 assert actual harm under Article III standing, the Court concludes Plaintiff has provided  
20 sufficient facts to support actual damages for his allegation of a negligent violation of 15  
21 U.S.C. § 1681i(a)(6).

22 **D. Willful Violations under the FCRA<sup>7</sup>**

23           Defendant moves for summary judgment arguing there is no evidence of any  
24 willful and/or reckless violation of the first and second causes of action under 15 U.S.C. §  
25 1681e(b) and 15 U.S.C. § 1681k(a)(2). It argues that under the United States Supreme  
26 Court case of Safeco, Ins. Co. of America v. Burr, 551 U.S. 47 (2007), there is no

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28 <sup>7</sup> Defendant does not move for summary judgment on the first two causes of action for negligent  
violations of 15 U.S.C. § 1681e(b) and § 1681k(a)(2).

1 “clearly established” authority mandating Insight to verify Adan’s middle name with  
2 RRS and to make the “middle name” a required field for its clients or consumers.  
3 Plaintiff asserts that Defendant failed to require a middle name from employers or  
4 consumers, failed to inquire further when no middle name was provided, failed to take  
5 into account the name variations including middle name initials revealed in its social  
6 security trace product, failed to provide the court researcher all name variations known to  
7 Defendant, which is in violation of its own agreement, failed to ensure its court  
8 researchers return the exact full name of the criminal defendant, failed to consult court  
9 records when there is a criminal “hit” and failed to conduct a root-cause analysis of  
10 consumer complaints despite multiple prior disputes. (Dkt. No. 47 at 18.) He claims  
11 Insight should have known that its procedure involved a high risk of harm.

12 Statutory and punitive damages are available under the FCRA only where a  
13 defendant “willfully fails to comply” with the statute. 15 U.S.C. § 1681n(a). Willfulness  
14 under § 1681n reaches actions taken in “reckless disregard of statutory duty,” in addition  
15 to actions “known to violate the Act.” Safeco, 551 U.S. at 56-57. “[W]illfulness or  
16 recklessness is a higher standard” than negligence. Collins v. Experian Info. Solutions,  
17 Inc., 775 F.3d 1330, 1336 (11th Cir. 2015).

18 A party does not act in reckless disregard of the FCRA “unless the action is not  
19 only a violation under a reasonable reading of the statute’s terms, but shows that the  
20 company ran a risk of violating the law substantially greater than the risk associated with  
21 a reading that was merely careless.” Safeco, 551 U.S. at 69. A defendant must have  
22 taken action involving “an unjustifiably high risk of harm that is either known or so  
23 obvious that it should be known.” Id. at 68.

24 Generally, courts have held that willfulness under the FCRA is a fact issue for the  
25 jury.<sup>8</sup> Taylor v. First Advantage Background Servs. Corp., 207 F. Supp. 3d 1095, 1112

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28 <sup>8</sup> Defendant argues that willfulness is a question of law for the Court and cites to Syed where the Ninth  
Circuit stated that a “court may resolve a question of willfulness as a matter of law.” Syed v. M-I, LLC,

1 (N.D. Cal. 2016) (citing cases); Edwards v. Toys “R” Us, 527 F. Supp. 2d 1197, 1210  
 2 (C.D. Cal. 2007) (willfulness under FCRA is a fact question for the jury) (citing  
 3 Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (“The  
 4 reasonableness of the procedures and whether the [insurance] agency followed them will  
 5 be jury questions in the overwhelming majority of cases.”)); Lenox v. Equifax Info.  
 6 Servs. LLC, No. 05–01501–AA, 2007 WL 1406914, at \*6 (D. Or. May 7, 2007) (“the  
 7 determination as to whether defendant’s action or inaction rises to the level of willfulness  
 8 so as to violate the statutory obligations of the FCRA is also a question of fact”); Cairns  
 9 v. GMAC Mortgage Corp., No. CV 04–01840 PHX(SMM), 2007 WL 735564, at \*8 (D.  
 10 Ariz. Mar. 5, 2007) (“in this case, like in the overwhelming number of cases in which  
 11 state of mind is dispositive, the issue of punitive damages is best left for the trier of fact  
 12 to determine”).

13 The first cause of action alleges that Defendant willfully and/or recklessly violated  
 14 15 U.S.C. § 1681e(b)<sup>9</sup> by failing to use reasonable procedures to ensure the maximum  
 15 possible accuracy of the information. (Dkt. No. 21, FAC ¶ 39.) “Liability under §  
 16 1681e(b) is predicated on the reasonableness of the credit reporting agency’s procedures  
 17 in obtaining credit information.” Guimond, 45 F.3d at 1333 (citations omitted).

18 Therefore, a reasonableness determination of Insight’s procedures and whether it was  
 19  
 20

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21  
 22 853 F.3d 492, 503 (9th Cir. 2017). However, Syed involved FCRA’s stand-alone disclosure  
 23 requirement which was held to be not ambiguous and where the parties acknowledged that the court may  
 24 resolve the question as a matter of law. Id. Syed did not involve the reasonableness of the procedures  
 25 used by a credit reporting agency and is not applicable to this case.

26 <sup>9</sup> 15 U.S.C. § 1681e(b) provides:

27 (b) Accuracy of report

28 Whenever a consumer reporting agency prepares a consumer report it shall follow  
 reasonable procedures to assure maximum possible accuracy of the information  
 concerning the individual about whom the report relates.

1 followed are typically jury question.<sup>10</sup> Id.; Neill v. Experian Info. Solutions, Inc., No. CV  
 2 16-4326-PHX-JJT, 2017 WL 3838671, at \*2 (D. Az. Sept. 1, 2017) (jury questions as to  
 3 reasonableness of procedures and whether agency followed them). Determining whether  
 4 there has been a willful violation of § 1681e(b) is typically a question of fact for the jury.  
 5 Taylor v. First Advantage Background Servs. Corp., 207 F. Supp. 3d 1095, 1112 (N.D.  
 6 Cal. 2016); Starkey v. Experian Info. Solutions, Inc., 32 F. Supp. 3d 1105, 1111 (C.D.  
 7 Cal. 2014) (denying summary judgment on willful violation under § 1681e(b).)

8 The second cause of action raises a claim under 15 U.S.C. § 1681k(a)(2) for  
 9 willfully/recklessly failing to use strict procedures to ensure that the reported public  
 10 records information for employment purposes was complete and up to date. (Dkt. No.  
 11 21, FAC ¶ 48.) 15 U.S.C. § 1681k(a)(2) provides,

12 A consumer reporting agency which furnishes a consumer report for  
 13 employment purposes and which for that purpose compiles and reports items  
 14 of information on consumers which are matters of public record and are  
 15 likely to have an adverse effect upon a consumer's ability to obtain  
 16 employment shall-- . . . (2) maintain strict procedures designed to insure that  
 17 whenever public record information which is likely to have an adverse effect  
 18 on a consumer's ability to obtain employment is reported it is complete and  
 19 up to date.

20 15 U.S.C. § 1681k(a)(2).

21 To show a violation under this section, a plaintiff must show that: “(1) a CRA  
 22 furnished a consumer report for employment purposes compiled from public records  
 23 containing adverse information; (2) the CRA failed to maintain strict procedures designed  
 24 to insure that the information in that report was complete and up to date; and (3) the  
 25 consumer report was either incomplete or not up to date.” Henderson v. Corelogic Nat’l

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26 <sup>10</sup> Defendant objects to the evidence and arguments presented by Plaintiff that addresses the  
 27 “reasonableness” of its procedures as applicable to a negligent violation and not applicable to a willful  
 28 violation. However, the statute requires that the Court consider whether Insight followed “reasonable  
 procedures to assure maximum possibility accuracy of the information”, 15 U.S.C. § 1681e(b). Because  
 a determination of a willful violation of § 1681e(b) requires an inquiry into whether reasonable  
 procedures were followed, such a violation is a question for the jury.

1 Background Data, LLC, 178 F. Supp. 3d 320, 333 (E.D. Va. 2016) (citing Farmer v.  
2 Phillips Agency, Inc., 285 F.R.D. 688, 700 (N.D. Ga. 2012)). A record is “complete” if it  
3 allows a “user to either link the record to the consumer who was the subject of the search  
4 query or exclude that consumer as the source of the record. Conversely, then, any record  
5 that does not contain sufficient identifying information to verify the identity of the  
6 originating consumer is incomplete.” Id. at 334. The term “strict procedures” have not  
7 been defined by the FCRA but requires more than “reasonable procedures. Id. at 336.

8 Here, since the issue of reasonableness is a question for the jury, then the issue of  
9 whether Defendant maintained strict procedures is also a question for the jury. Id. at 336.  
10 (citing Dalton v. Capital Ass. Indus., Inc., 257 F.3d 409, 417 (4th Cir. 2001) (“because . .  
11 . there is a factual dispute over whether [the defendant] followed reasonable procedures,  
12 we necessarily hold that there is a factual dispute over whether it followed strict  
13 procedures.”); Adams v. Nat’l Eng’g Serv. Corp., 620 F. Supp. 2d 319, 332 (D. Conn.  
14 2009) (“because the court has already found that there exists a factual dispute over  
15 whether [defendant] followed reasonable procedures, the court necessarily holds that  
16 there exists a genuine issue of material fact as to whether it followed strict procedures.”).

17 In its motion, Defendant relies on the analysis in Safeco to demonstrate its actions  
18 were not willful by arguing that since there is no “clearly established” authority that  
19 required Insight to verify Plaintiff’s middle name with RRS and make the “middle name”  
20 a required field for its clients or consumers, its procedures were not a violation under a  
21 reasonable reading of the statutes. Defendant argues that the texts of both statutes are  
22 less than “pellucid” as to the steps Plaintiff claims it should have taken in procuring  
23 Plaintiff’s report. Plaintiff opposes contending that there was ample authority to put  
24 Insight on notice that its procedures involved a high risk of harm.

25 As an initial matter, Defendant’s argument that it did not willfully violate the  
26 FCRA because there was no “clearly established” law requiring it to verify Plaintiff’s  
27 middle name or make the middle name a required field is an incorrect interpretation of  
28 Safeco. Ramirez v. Trans Union, LLC, Case No. 12cv632-JSC, 2017 WL 113161, at \*2



1 (N.D. Cal. Mar. 27, 2017) (Safeco did not hold that a defendant’s conduct willfully  
2 violates the FCRA only when its conduct violated clearly established law). Instead, the  
3 Court in Safeco utilized the “clearly established” language in the case of Saucier v. Katz,  
4 533 S. Ct. 2151 (2001) addressing qualified immunity, to support its holding that reckless  
5 disregard requires an objectively unreasonable reading of the statute. Safeco, 551 U.S. at  
6 70. It did not hold that the law must be “clearly established” in order to demonstrate  
7 reckless conduct. Therefore, Defendant’s “clearly established” argument on a  
8 willful/reckless violation is not well-taken.

9 On the issue of reckless disregard, the United States Supreme Court held that a  
10 plaintiff must show that the defendant’s reading of the statute’s terms was objectively  
11 unreasonable and the defendant ran the risk of “violating the law substantially greater  
12 than the risk associated with a reading that was merely careless.” Safeco, 551 U.S. at 69.

13 First, to determine whether the reading of the statute was objectively unreasonable,  
14 the Court in Safeco noted that the statute was silent on what the word “increase” meant  
15 and because the Court had no guidance from courts of appeal or the Federal Trade  
16 Commission, it held that due to the dearth of guidance and the “less-than-pellucid  
17 statutory text”, Safeco’s reading was not objectively unreasonable. Id. at 69-70.

18 Recently in Syed, the Ninth Circuit rejected the defendant’s argument that since there  
19 was minimal guidance from federal appeals courts and administrative agencies on the  
20 interpretation of the statute at issue, it rendered the defendant’s interpretation of the  
21 statute objectively reasonable. Syed, 853 F.3d at 503. The Ninth Circuit held that the  
22 lack of guidance on a statute’s interpretation does not render defendant’s interpretation  
23 reasonable. Id. at 504. “[L]ack of definitive authority does not, as a matter of law,  
24 immunize [a party] from potential liability.” Id. (quoting Cortez v. Trans Union, LLC,  
25 617 F.3d 688, 721 (3d Cir. 2010)). In Syed, the court held that although there was a  
26 dearth of guidance on the issue it concluded that the defendant’s interpretation was  
27 “objectively unreasonable.” Id.

28

1 In this case, Defendant argues there was no guidance from the court of appeals or  
2 the Federal Trade Commission on whether it should have required a middle name as an  
3 identifier from its customer or from Plaintiff. Plaintiff responds that there was ample  
4 authority to put Defendant on notice that its procedure involved a high risk of harm.  
5 Plaintiff cites to a consent order entered into with the Federal Trade Commission. FTC v.  
6 TRW Inc., 784 F. Supp. 361 (N.D. Tex. 1991). TRW addressed mixed file cases, in  
7 general, where some or all information in a consumer report pertains to persons other than  
8 the person who is subject to that report. Id. at 362. In order to reduce the incidence of  
9 mixed files, TRW was required to improve “information gathering, storing and  
10 generating systems to reduce occurrences of Mixed Files” to allow its software system to  
11 use a consumer’s full identifying information, defined as full last and first name; middle  
12 initial; full street address; zip code; year of birth; any generational designation; and social  
13 security number, for matching and identification purposes. Id. at 362.

14 Plaintiff also cites to the following cases. In Adams, the plaintiff applied for a  
15 contract position, and was hired contingent on a background check. Adams, 620 F. Supp.  
16 2d at 323-24. The background check revealed several possible criminal records when her  
17 first name, last name and date of birth was entered but the criminal records were not hers.  
18 Id. She subsequently was not hired for the position. Id. at 326. The Court held that there  
19 were genuine issues of material fact as to her claim under 15 U.S.C. § 1681e(b) and 15  
20 U.S.C. § 1681k(a)(2). Id. at 330, 332. In another case, Smith v. LexisNexis Screening  
21 Solutions, Inc., 76 F. Supp. 3d 651, 664 (E.D. Mich. 2014), aff’d in part and rev’d in part  
22 by 837 F.3d 604 (6th Cir. 2016), the court denied the defendant’s motion for summary  
23 judgment on whether Defendant’s practice of not requiring employers to provide  
24 consumers’ middle names could pose an unjustifiably high risk of harm. Id.

25 These authorities provided Defendant with notice that mixed file cases are not  
26 uncommon and that other persons’ criminal records have appeared for persons with the  
27 same name, last name and birthdate. While there is no specific guidance from any  
28 caselaw or the FTC concerning the requirement of a middle name when conducting a

1 background check, the Court cannot conclude that Insight’s interpretation of the two  
2 provision was objectively reasonable.

3 After a jury trial in Smith, the Sixth Circuit reversed the jury verdict’s finding of  
4 willful violation of the FCRA on whether the defendant took reasonable steps under §  
5 1681e(b). Smith v. LexisNexis Screening Solutions, Inc., 837 F.3d 604, 610 (6th Cir.  
6 2016). The court explained the defendant’s efforts to combat inaccuracies such as  
7 requiring a first name, last name, and birthdate, and also when provided a middle name  
8 and social security number kept the agency’s dispute rate at a low 0.2% and precluded a  
9 finding of willful violation of § 1681e(b). Id. at 610-11. The Sixth Circuit also noted  
10 that a single inaccuracy does not rise to the level of willful violation of the FCRA. Id. at  
11 611.

12 Defendant asserts the facts of this case is akin to Smith. Defendant claims it vetted  
13 and audited its vendors it used to obtain consumer information to ensure they were  
14 providing accurate information, and because of this practice and procedure, Insight’s  
15 dispute rate has been significantly less than 1% in the years before Plaintiff’s report.

16 In response, Plaintiff has raised evidence to create a genuine issue of material fact  
17 whether its procedures when vetting its vendors were reasonable in order to assure  
18 maximum possible accuracy on consumer reports and whether its dispute rate is accurate.  
19 According to Insight’s vetting requirements on its researcher or vendors, it “requires due  
20 diligence and vetting to be performed on every public record researcher prior to the use  
21 of their services . . . . Prior to use, Insight Investigations, Inc. verified . . . confirmation of  
22 certification under the ‘NAPBS PROVIDER GUIDELINES’” (Dkt. No. 47-11, Fok  
23 Decl., Ex. 10, at 4.) Plaintiff argues that this section mandates that Defendant ensure its  
24 court researchers comply with NAPBS Provider Guidelines, which require that court  
25 researchers must return the subject’s exact full name, and Defendant’s court researchers  
26 failed to do so. In reply, Defendant argues its vetting requirements only mandate that the  
27 researcher be certified under NAPBS Provider Guidelines, not that they comply with all  
28 provisions of the NAPBS Provider Guidelines. This raises an issue of fact as to

1 Defendant's vetting requirements and whether Defendant's vetting policies were  
2 reasonable in order to assure maximum possible accuracy on consumer reports.

3 In addition, Mr. Bovy, Insight's CIO, states that in 2015, Insight prepared 46,949  
4 reports and only six of the reports were disputed by consumers. (Dkt. No. 43-3, Bovy  
5 Decl. ¶ 5.) He states that none of the disputes concerned a failure to require or use a  
6 consumer's middle name. (Id. ¶ 6.) However, Plaintiff notes that he informed Insight of  
7 a dispute concerning his middle name in 2015 and Mr. Bovy does not recognize  
8 Plaintiff's dispute which creates a disputed fact as to the accuracy of his calculations.

9 Next, Defendant cites to Plaintiff's deposition transcript where he stated that he did  
10 not believe that Defendant intentionally or willfully issued an inaccurate report  
11 demonstrates Defendant was not willful. However, a party's subjective intent is not  
12 relevant under the "reckless disregard standard." See Adams, 620 F. Supp. at 330 n. 7  
13 ("while the record contains no indication that [the defendant] intentionally reported  
14 inaccurate information--in fact, the record shows that [the defendant] took immediate  
15 steps to remedy the inaccuracies in its report once those inaccuracies came to light--the  
16 Supreme Court recently held that a defendant may be held liable for willfully failing to  
17 comply with the FCRA under 15 U.S.C. § 1681n for actions taken in "reckless disregard"  
18 of the statutory requirements of the Act.").

19 Next, as to whether Insight ran a risk of "violating the law substantially greater  
20 than the risk associated with a reading that was merely careless" is the line between  
21 recklessness and negligence. See Syed, 853 F.3d at 505. The question is whether Insight  
22 ran an "unjustifiably high risk of violating the statute." Safeco, 551 US at 70.

23 In support, Plaintiff presents the expert report of Tom Larson who stated that  
24 when it comes to criminal records, the industry standard for identification is "first name,  
25 middle name, last name and date of birth." (Dkt. No. 47-5, Fok Decl., Ex. 4, Tom Larson  
26 Expert Report at 4.) Also, if a CRA goes to a court and performs an index search, and a  
27 file is identified, the researcher should review the file to match the name and other  
28 identifiers. (Id. at 5.) Moreover, Larson opined that no conviction record should ever be

1 reported unless it is absolutely verified. (Id. at 7.) Next, Plaintiff presents the Safe  
2 Hiring Manual, which is also relied on by Defendant’s expert, which states the best  
3 practice is to use all information in the possession of the employer, researcher or  
4 screening firm to determine if the criminal record is associated with the subject. (Dkt.  
5 No. 47-6, Fok Decl., Ex. 5 at 3.) If there is a “hit,” the researcher “needs to determine if  
6 the person located is truly the applicant.” (Id.)

7 Mr. Bovy, Insight’s CIO, the person most knowledgeable and the employee who  
8 runs Insight’s background checks, testified that it would be helpful to know the criminal  
9 defendant’s full name if its available. (Dkt. No. 47-8, Fok Decl., Ex. 7, Bovy Depo. at  
10 88:5-8.) He testified that the middle name is now a required field after a CFPB<sup>11</sup> ruling.  
11 (Id. at 9-16.) Insight’s CEO Joshua Haydon testified that there is a general understanding  
12 that a researcher must return the subject’s middle name if one is contained in the court’s  
13 indexed records. (Dkt. No. 47-3, Fok Decl., Ex. 2, Haydon Depo. at 106:24-107:12.)

14 Even Mr. Nadell, Defendant’s expert, testified that the industry guideline is for the  
15 researcher to return the person’s full legal name as it appears in the court records. (Dkt.  
16 No. 47-10, Fok Decl., Ex. 9, Nadell Depo. vol. 2 at 33:17-20.) He states that a middle  
17 name always improves accuracy. (Dkt. No. 47-4, Fok Decl., Ex. 3, Nadell Depo. vol. 1,  
18 136:3-6.) He also asserted that certain articles, such as the Safe Hiring Manual, state that  
19 capturing the middle name is important or valuable if you can get it. (Id. at 171:16-  
20 174:7.)

21 Further, the Public Record Retrieval Industry Standards Manual, (“PRRISM”),  
22 states that the researcher, as part of the public search, agrees to supply “the [e]xact full  
23 name as listed in docket or index” and all “identifiers listed in docket or index, including  
24 address, date of birth, SSN, or any other relatable Identifier.” (Dkt. No. 47-9, Fok Decl.,  
25

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26  
27 <sup>11</sup> It appears that Mr. Bovy is referencing the CFPB press release dated October 29, 2015 which was  
28 issued more than seven months after Insight prepared Adan’s report. (Dkt. No. 43-16, Stepanyan Decl.,  
Ex. 12.)

1 Ex. 8, at 3.) Lastly, the National Association of Professional Background Screeners  
 2 (“NAPBS”) provides guidelines for research providers concerning criminal research and  
 3 states that if a criminal record is found, the report must include the subject’s “exact full  
 4 name.” (Dkt. No. 47-8, Fok Decl., Ex. 7 at 14.) These facts concerning the industry  
 5 standards and expert testimony that a middle name improves accuracy raise a genuine  
 6 issue of disputed material fact precluding summary judgment on the whether Insight ran  
 7 an “unjustifiably high risk of harm that is either known or so obvious that it should be  
 8 known.” Accordingly, the Court DENIES Defendant’s motion for summary judgment on  
 9 the allegation of willfulness under 15 U.S.C. § 1681e(b) and 15 U.S.C. § 1681k(a)(2).

10 **D. Fourth Cause of Action – Violation of 15 U.S.C. § 1681i(a)(6)**

11 In the fourth cause of action, Plaintiff asserts that Defendant willfully and/or  
 12 recklessly violated 15 U.S.C. §§ 1681i(a)(6)(A) and (B) by failing to provide Plaintiff  
 13 written notice containing required items within 5 business days after completion of the  
 14 reinvestigation. (Dkt. No. 21, FAC ¶¶ 59.)

15 Defendant moves for partial summary judgment arguing that there is no evidence  
 16 of willfulness and/or reckless conduct by its failure to provide written notice of the results  
 17 of the reinvestigation. Moreover, Defendant argues it provided Plaintiff with oral notice  
 18 and complied with the provision that notice may be provided “by other means available  
 19 to the agency.” Plaintiff moves for partial summary judgment asserting that Defendant  
 20 failed to provide any written notice to him and such conduct constitutes a willful  
 21 violation of 15 U.S.C. §§ 1681i(a)(6)(A) & (B).<sup>12</sup>

22 The FCRA requires a consumer reporting agency to conduct a free reinvestigation  
 23 of a consumer’s file if “the completeness or accuracy of any item of information  
 24

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25  
 26 <sup>12</sup> In his motion for partial summary judgment, Adan also seeks summary judgment under 15 U.S.C. §  
 27 1681i(a)(1), a claim not asserted in the FAC. In opposition, Defendant argues that the motion should be  
 28 denied because the claim is not asserted in the first amended complaint. In reply, Plaintiff acknowledges  
 that the specific claim is not alleged in Plaintiff’s FAC, and withdraws his motion on this statutory  
 provision.

1 contained in a consumer's file . . . is disputed by the consumer." 15 U.S.C. §  
2 1681i(a)(1)(A). 15 U.S.C. § 1681i(a)(6)(A) requires a consumer reporting agency to  
3 provide written notice of the results of the reinvestigation within 5 business days of its  
4 completion of the reinvestigation either "by mail or, if authorized by the consumer for  
5 that purpose, by other means available to the agency." 15 U.S.C. § 1681i(a)(6)(A).

6 The notice must include

- 7 (i) a statement that the reinvestigation is completed;  
8 (ii) a consumer report that is based upon the consumer's file as that file is  
9 revised as a result of the reinvestigation;  
10 (iii) a notice that, if requested by the consumer, a description of the  
11 procedure used to determine the accuracy and completeness of the  
12 information shall be provided to the consumer by the agency, including the  
13 business name and address of any furnisher of information contacted in  
14 connection with such information and the telephone number of such  
15 furnisher, if reasonably available;  
16 (iv) a notice that the consumer has the right to add a statement to the  
17 consumer's file disputing the accuracy or completeness of the information;  
18 and  
19 (v) a notice that the consumer has the right to request under subsection (d)  
20 that the consumer reporting agency furnish notifications under that  
21 subsection.

22 15 U.S.C. § 1681i(a)(6)(B).

23 On the merits, Defendant argues, without providing relevant legal analysis, that it  
24 met the requirement of notice since Plaintiff was notified by telephone which constitutes  
25 "other means available to the agency." Mr. Bovy, the CIO of Insight, testified that he  
26 recalls a telephone call initiated by Insight where he informed Plaintiff that Insight had  
27 called the court and confirmed the middle name was not the same as Plaintiff's and that  
28 Insight updated the report. (Dkt. No. 43-6, Stepanyan Decl., Ex. 2, Bovy Depo. at  
121:23-123:20.) In one of the calls, Insight told Adan that they would call him back with  
the updated information, and he agreed to the notice by telephone. (Id. at 122:1-9.)  
Although not clear, it appears that Adan called Insight on April 8, 2015 and Insight called  
him back with the updated information on April 9, 2015. (Id. at 123:13-20.) Since

1 Plaintiff was informed by “other means”, Insight argues it was not required to provide  
2 written notice.

3 In his motion, Plaintiff argues, without legal support, that “other means” include  
4 other methods of written communication and not an oral communication. He argues that  
5 an oral communication cannot be contemplated by the statute since the notice provision  
6 requires, *inter alia*, a “consumer report that is based upon the consumer’s file as that file  
7 is revised as a result of the reinvestigation.” 15 U.S.C. § 1681i(a)(6)(B). Therefore,  
8 according to Plaintiff, an oral communication does not satisfy the “other means available  
9 to the agency.”

10 First, material to the issue raised is knowing the details of the communications  
11 between Adan and Insight. Bovy’s testimony is not clear as to the dates of who called  
12 who on what date. Mr. Bovy testified that he initiated a call to Plaintiff informing him  
13 about the results of the reinvestigation, but provides no date on when this call occurred  
14 but later states the call occurred on April 8 or 9. (Dkt. No. 43-6, Stepanyan Decl., Ex. 2,  
15 Bovy Depo. at 121:23-123:20.) He also states he orally received Adan’s consent to  
16 receive the results of the reinvestigation by telephone call but he does not state when he  
17 received the consent. If Insight notified Adan by telephone on April 9, then it would  
18 have been unnecessary for Adan to have attended the state court hearing on April 14,  
19 2015. The record to date creates an inference that Adan did not learn that his report had  
20 been updated until April Harvey informed him by email on April 14, 2017. (See Dkt. No.  
21 47-19, Fok Decl., Ex. 18 at 6.) The facts presented are disputed and not clear. Moreover,  
22 both party present their own interpretation of “other means available” without any legal  
23 authority to support their position,<sup>13</sup> and fail to support their arguments.

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24  
25  
26 <sup>13</sup> Defendant cites to Anderson v. TransUnion LLC, 367 F. Supp. 2d 1225, 1236 (W.D. WI 2005) where  
27 the court held that the defendant satisfied the notice provision, under § 1681i(a)(6), through a telephone  
28 call. Id. However, Anderson is inapposite as the plaintiff alleged the defendant failed to provide them  
notice of the results of the Automated Credit Dispute Verification form. The court held that §  
1681i(a)(6) does not require a CRA to provide notice of specific responses but only the results of the  
reinvestigation. Id. Because the defendant made changes that plaintiff sought during a telephone call,



1 As to willfulness, as discussed above, Defendant’s argument that there is no  
2 “clearly established” authority that required it to provide written notice of the results of  
3 the reinvestigation on the issue of willfulness is without merit. Defendant also argues  
4 that Plaintiff can show no established authority interpreting the statute as requiring written  
5 notice once notice has already been provided by other means authorized by the consumer.  
6 Plaintiff argues that “by other means” still requires written notice but by other mediums,  
7 such as fax or email. Since there is a genuine issue of material fact whether Plaintiff was  
8 notified “by other means”, the Court concludes this necessarily creates a genuine issue of  
9 material fact as to whether Defendant’s failure to provide written notice was willful  
10 and/or reckless.

11 Because there are disputed issues of material fact, and the parties presented  
12 insufficient legal analysis on this provision, the Court DENIES both parties’ motion for  
13 partial summary judgment.

#### 14 **E. Damages - Loss of Employment**

15 Defendant argues that Plaintiff seeks loss of future earnings from his lost  
16 employment with RRS but the undisputed facts demonstrate that the report issued by  
17 Insight had no bearing on RRS’ decision to rescind Adan’s job offer. Courtney Worle,  
18 the HR director and the person most knowledgeable at RRS, testified that Jennifer  
19 Melver, the VP of Operations, made the decision to rescind Adan’s offer. (Dkt. No. 43-  
20 17, Ex. 13, Worle Depo. at 45:11-49:16.) She testified that Melver’s decision to rescind  
21 the offer had nothing to do with Insight’s background report but was due to business  
22 considerations. (Id.) In fact, Ms. Melver did not even look at Adan’s background check.  
23 (Id. at 72:21-73:4.)

24  
25  
26  
27 that constituted sufficient notice. Id. Here, the facts are disputed as to the alleged telephone notice  
28 Defendant claims it made, and the facts do not demonstrate that changes were made during any  
telephone conversation between Plaintiff and Defendant.

1 In opposition, Plaintiff asserts that April Harvey, the HR coordinator at RRS,  
2 informed him that the reason the offer was rescinded was because of the background  
3 check report. (Dkt. No. 47-16, Fok Decl., Ex. 15, Adan Depo. at 76:12-17; 78:6-11.)  
4 Moreover, in an email dated April 9, 2015, April Harvey wrote, “Once you figure  
5 everything out, please send me documents and we will go from there. We do have one  
6 spot open for the call center.” (Dkt. No. 47-19, Fok Decl., Ex. 18 at 2.)

7 While the parties agree that Plaintiff’s offer of employment by RRS was rescinded  
8 in March 2015, (Dkt. No. 47-21, P’s Response to D’s SSUF, No. 6), the facts  
9 demonstrate that he was still a candidate for a position at RRS as of April 9, 2015.

10 Plaintiff has raised a genuine issue of material fact whether his job offer was  
11 rescinded due to the inaccurate background check report generated by Insight. The Court  
12 DENIES Defendant’s motion for summary judgment on the loss of employment damages  
13 claim.

#### 14 **F. Evidentiary Objections**

15 Defendant seeks to strike two paragraphs in Mr. Lawson’s expert report arguing he  
16 is not qualified to opine on Insight’s intent or compliance with the FCRA and constitute  
17 impermissible speculation and legal conclusions. (Dkt. No. 43-1.) Plaintiff, in his  
18 opposition, does not address Defendant’s objection and also does not rely on these two  
19 paragraphs to support his arguments. Accordingly, since Plaintiff did not rely on these  
20 opinions of Mr. Lawson, the court OVERRULES Defendant’s objections as moot.

21 In opposition, Plaintiff objects to the declaration of Shawn Bovy, the CIO of  
22 Insight, based on an alleged failure to disclose the underlying documents Bovy relies on  
23 to come to his conclusion under Rule 26(a) and the best evidence rule. (Dkt. No. 43-3,  
24 Bovy Decl.) In the declaration, Bovy presents the number of reports Insight prepared in  
25 2013, 2014 and 2015 and the number of those reports that were disputed by consumers.  
26 (Id. ¶¶ 3-5.) Defendant argues that Rule 26 does not require a party to produce  
27 information that a witness will testify about and a declaration under penalty of perjury is  
28 sufficient to satisfy the Rule of Evidence. Because the Court concluded that there was a

1 disputed issue of fact as to the accuracy of Bovy's declaration, the Court did not consider  
2 it and OVERRULES Plaintiff's objection as moot.

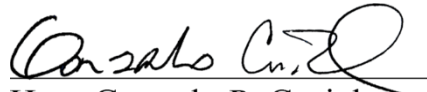
3 As to the other remaining evidentiary objections to Plaintiff's and Defendant's  
4 evidence, the Court notes the objections. To the extent that the evidence is proper under  
5 the Federal Rules of Evidence, the Court considered the evidence. To the extent that the  
6 evidence is not proper, the Court did not consider it.

7 **Conclusion**

8 Based on the above, the Court GRANTS in part and DENIES in part Defendant's  
9 motion for partial summary judgment. The Court GRANTS, as unopposed, Defendant's  
10 motion on the third cause of action and DENIES Defendant's motion on the first, second  
11 and fourth causes of action. The Court also DENIES Plaintiff's motion for partial  
12 summary judgment on the fourth cause of action. The hearing set for January 19, 2018  
13 shall be vacated.

14 IT IS SO ORDERED.

15 Dated: January 18, 2018

16   
17 Hon. Gonzalo P. Curiel  
18 United States District Judge  
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