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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Amanda Mix,

Plaintiff,

v.
Asurion Insurance Services Incorporated, et
al.,

Defendants.

No. CV-14-02357-PHX-GMS

ORDER

Pending before the Court is Plaintiff Amanda Mix’s motion for class certification and appointment of class counsel pursuant to Federal Rule of Civil Procedure 23. (Doc. 65.) Also pending before the Court is Defendant Sterling Infosystems, Inc.’s (“Sterling”) motion to dismiss for lack of jurisdiction. (Doc. 107.) For the following reasons, the Court denies Mix’s motion and denies Sterling’s motion.

BACKGROUND

I. Fair Credit Reporting Act

Congress enacted the Fair Credit Reporting Act (“FCRA”) “to ensure fair and accurate credit reporting, . . . and protect consumer privacy.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). FCRA imposes certain requirements whenever a consumer report produced by a consumer reporting agency is used for employment purposes. A consumer report is defined as “any written . . . communication of any information by a consumer reporting agency bearing on a consumer’s . . . character, general reputation, personal characteristics, or mode of living which is used or expected to be used . . . for

1 the purpose of serving as a factor in establishing the consumer’s eligibility for . . .
2 employment purposes . . .” 15 U.S.C. § 1681a(d)(1)(B). A consumer reporting agency
3 (“CRA”) “means any person which . . . regularly engages . . . in the practice of
4 assembling or evaluating consumer credit information or other information on consumers
5 for the purpose of furnishing consumer reports to third parties . . .” *Id.* § 1681a(f). A
6 consumer report is used for employment purposes when it is “used for the purpose of
7 evaluating a consumer for employment . . .” *Id.* § 1681a(h). Within the context of
8 employment, “adverse action . . . means . . . a denial of employment or any other decision
9 for employment purposes that adversely affects any current or prospective
10 employee. . . .” *Id.* § 1681a(k)(1)(B)(ii).

11 A person who intends to use a consumer report for employment purposes may
12 only do so if “a clear and conspicuous disclosure has been made in writing to the
13 consumer at any time before the report is procured or caused to be procured, in a
14 document that consists solely of the disclosure, that a consumer report may be obtained
15 for employment purposes; and . . . the consumer has authorized [it] in writing . . .” *Id.*
16 § 1681b(b)(2)(A). “[B]efore taking any adverse action . . . the person intending to take
17 such adverse action shall provide to the consumer to whom the report relates . . . a copy
18 of the report; and . . . a description in writing” of the consumer’s rights under FCRA. *Id.*
19 § 1681b(b)(3) (emphasis added). A CRA may only furnish a third party with a consumer
20 report for employment purposes if the third party “certifies” to the CRA that the third
21 party “has complied with” § 1681b(b)(2) and, if applicable, “will comply with”
22 § 1681b(b)(3). *Id.* § 1681b(b)(1)(A).

23 Violations of FCRA subject the offender to varying levels of liability depending
24 on culpability. “Any person who is negligent in failing to comply with any requirement
25 [under FCRA] with respect to any consumer is liable” for “actual damages” plus the costs
26 of the litigation and reasonable attorney’s fees. *Id.* § 1681o(a). “Any person who
27 willfully fails to comply with any requirement [of FCRA] with respect to any consumer is
28

1 liable” for either “actual damages” or statutory damages of \$100 to \$1,000 per violation,¹
2 along with costs of and attorney’s fees, and in some cases punitive damages. *Id.*
3 § 1681n(a).

4 **II. Factual Background**

5 In early July 2014, Mix applied for a technical support position at Defendant
6 Asurion Insurance Services Inc. (“Asurion”) Mix applied to Asurion through
7 PeopleScout, a third-party vendor that assists Asurion with its recruiting efforts. On July
8 11, 2014, Asurion interviewed Mix at its office in Phoenix, Arizona. As part of its
9 normal application process, Asurion required Mix to sign a form consenting to a
10 background check² (including a criminal background check) conducted by co-defendant
11 Sterling. On July 16, 2014, Mix completed and signed the consent forms comprising a
12 three- to five-page packet of documents. At the time of her application Mix understood
13 that the background check would include a criminal check. The next day, an Asurion
14 recruiter submitted the pertinent information to Sterling to begin the background check.³

15 On July 18, 2014, Mix received an email from Asurion extending her a conditional
16 offer of employment contingent upon, among other things, the results of her background
17 check. Mix accepted the offer and agreed to start training on July 28, 2014. Asurion sent
18 a second confirmation email on July 22, 2014, confirming that Mix had accepted the offer
19 and would be starting on July 28, 2014.

20 In the meantime, Sterling ran Mix’s background check. Sterling’s background
21 check system is known as its managed Client Matrix Application service. A client matrix
22 is unique to each employer-client and consists of a set of standards that Sterling then uses
23 to score background check reports for that particular employer. Sterling processed

24
25 ¹ The statute does not provide guidelines for determining what number within this
range should be awarded in any given case involving statutory damages.

26 ² There is no dispute that Sterling’s background check constitutes a “consumer
27 report” as defined by § 1681a(d)(1)(B).

28 ³ Asurion, as a user of consumer reports for employment purposes, is subject to the
requirements set out in § 1681b(b)(2) and § 1681b(b)(3). Sterling is also subject to the
FCRA regulations governing CRAs, including § 1681b(b)(1).

1 Asurion's requests for background checks utilizing three platforms: ScreeningDirect,
2 AISS, and SterlingDirect (East). The process within each platform is allegedly
3 indistinguishable, except to the extent that the platforms employ variations of scoring
4 language. ScreeningDirect's background check scores included, at that time, green
5 (meets hiring criteria), yellow (needs further review), or red (does not meet hiring
6 criteria), as well as Pass or Fail. ScreeningDirect now scores background checks as
7 Level1, Level2, or Level3, as well as Pass or Review. SterlingDirect (East)'s background
8 check scores included, at that time, Alert, Provisional, or Clear. AISS's background
9 check scores included, at that time, Alert, Informational, or Clear.

10 Using the ScreeningDirect platform, Sterling scored Mix's background check as
11 red. The basis for this was a pending criminal charge in another state. Mix does not
12 contest that the charge was pending at the time Sterling ran the report. Mix does,
13 however, state that at that time she had "already worked out an agreement with the
14 prosecutor to get the charge expunged from her record." (Doc. 65 at 11).

15 Upon completion of the background check, Sterling's system automatically
16 emailed Asurion the results, which indicated that Mix did not meet Asurion's hiring
17 criteria. (Doc. 41-4.) As a result of Mix's background check, Asurion decided to revoke
18 Mix's employment offer. Thus, on July 25, 2014, soon after receiving and reviewing the
19 results of Mix's background check, Asurion requested that Sterling initiate its "Managed
20 Adverse Action" service. The service triggers the creation of a pre-adverse action notice
21 letter that Sterling sends to a rejected candidate on behalf of Asurion. At Asurion, Mix's
22 name was moved to a document listing candidates who are to be removed because they
23 "will not start." (Doc. 65-2 at 12.)

24 Asurion also informed PeopleScout recruiter Marty Grubb that Mix did not meet
25 Asurion's hiring criteria. Grubb informed Mix that same day that because of the results
26 of her background check Asurion was no longer able to offer her employment. (Doc. 41-
27 3.) Grubb's email further informed Mix that within a week she would receive a letter
28 from Sterling that would provide her with a copy of her background check results and

1 instructions on how to dispute them. PeopleScout also called and left Mix a voicemail to
2 the same effect.

3 Mix's start date was scheduled for July 28, 2014. Mix received Sterling's pre-
4 adverse action notice letter dated July 25, 2014 sometime shortly thereafter. (Doc. 41-4.)
5 The letter had no clear title or subject line, and although the letter was drafted and sent by
6 Sterling, it appeared to come from Asurion. The letter explained that Asurion contracts
7 with Sterling to conduct its background checks, and stated the following:

8 Based on this information [from Mix's background check],
9 subject to you successfully challenging the accuracy of this
10 information, we have decided to revoke your conditional offer
11 of employment. STERLING INFOSYSTEMS has not made
12 this decision and is not able to explain why the decision was
13 made.

14 (*Id.*) The letter included a copy of Mix's background check as well as a summary of her
15 rights under FCRA. This is the first instance where Mix was given access to her
16 background check. The letter further informed Mix that she could dispute the "accuracy
17 or completeness" of the results of her background check directly with Sterling, but that
18 she needed to do so within five business days of the receipt of the letter, and that if she
19 chose to dispute the results, she also needed to contact Asurion. (*Id.*) The letter provided
20 contact information for both Sterling and Asurion. (*Id.*)

21 Mix did not dispute the results of her background check. Pursuant to the terms of
22 the Managed Adverse Action service, if the subject of the background check initiates no
23 dispute within five business days, Sterling, on behalf of Asurion, sends a final notice of
24 adverse action letter to the applicant. Thus, Mix eventually received the final notice of
25 adverse action letter stating that Asurion could no longer consider Mix for employment.
26 The letter was dated August 1, 2014. (Doc. 100 at 22.)

27 **III. Alleged Violations of FCRA**

28 Because Mix does not allege that the information provided to Asurion by Sterling
was inaccurate, nor does she allege that she took any steps to dispute it, Mix does not
seek any actual damages authorized by the statute. Rather, Mix complains of

1 Defendants' alleged failures to comply with statutory procedural mandates. She thus
2 seeks to recover the specified amount of statutory damages for each of the Defendants'
3 alleged willful failures to provide her with the necessary procedures. She can make no
4 claims, as authorized by the statute, based on the alleged negligence of the Defendants.

5 Count I of Mix's complaint raises several alleged violations of § 1681b(b)(3)(A)
6 against Asurion. Mix first alleges that Asurion violated FCRA when, in response to
7 procuring Mix's consumer report from Sterling, it took adverse action against Mix via the
8 July 25, 2014 email from PeopleScout without first providing Mix with a copy of her
9 background check or a description of her FCRA rights. Mix also alleges that Asurion
10 committed a separate violation when it prevented Mix from starting on July 28, 2014, her
11 original start date, without first providing her with a copy of her background check and a
12 description of her FCRA rights. Finally, Mix alleges that by mailing its final adverse
13 action letter on August 1, 2014, Asurion failed to give Mix adequate time to review and
14 dispute the results of her background check before being terminated.

15 Count II alleges that Asurion violated § 1681b(b)(2) when it requested a consumer
16 report about Mix without first presenting Mix with a clear and conspicuous written
17 disclosure document consisting solely of the disclosure.

18 Count III alleges various claims in the conjunctive or alternative against Sterling,
19 again all constituting violations of § 1681b(b)(3)(A). Mix first alleges that Sterling
20 violated the statute when it took adverse action against Mix without first providing her
21 with a copy of her background check and a description of her FCRA rights. Mix alleges
22 Sterling took adverse action itself when, between July 23 and July 25, 2014, it reported to
23 Asurion the content of Mix's consumer report and flagged for Asurion that Mix failed to
24 meet Asurion's employment qualifications. Mix also alleges that Sterling's July 25, 2014
25 letter, sent on behalf of Asurion, which revoked Mix's employment offer but included a
26 copy of Mix's report and a description of her FCRA rights, violated the statute, because a
27 copy of her background check and a description of her rights needed to be sent in a
28 previous letter to comply with the law. Mix further alleges that by mailing the final

1 adverse action letter on August 1, 2014, Sterling failed to give Mix adequate time to
2 review and dispute the results of her background check before being terminated.

3 Count IV re-alleges Count II, but against Sterling.

4 Count V alleges that Sterling violated § 1681b(b)(1), which requires that Sterling
5 only furnish consumer reports to Asurion if Asurion certifies that it will comply with
6 § 1681b(b)(2) and (b)(3). Mix alleges that Sterling furnished Asurion with consumer
7 reports knowing that Asurion did not comply with those sections.

8 Mix seeks to certify two classes and one sub-class, each comprising members
9 who, she alleges, suffered the same FCRA violations.

10 DISCUSSION

11 I. Standing

12 Defendant Sterling has challenged Mix’s Article III standing as to her claim in
13 Count III, alone, in a motion to dismiss filed subsequent to Mix’s motion for class
14 certification. (Doc. 107.) Nevertheless, “[f]ederal courts are required *sua sponte* to
15 examine jurisdictional issues such as standing.” *Chapman v. Pier 1 Imports (U.S.) Inc.*,
16 631 F.3d 939, 954 (9th Cir. 2011) (en banc). The Court thus finds it necessary—
17 especially in light of the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*, 136
18 S. Ct. 1540 (2016)—to analyze whether all of Mix’s claims satisfy the requirements of
19 Article III standing.

20 “A plaintiff has the burden to establish that it has standing,” *WildEarth Guardians*
21 *v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015), and “a plaintiff must
22 demonstrate standing for each claim he seeks to press.” *DaimlerChrysler Corp. v. Cuno*,
23 547 U.S. 332, 352 (2006). Article III standing requires that the “plaintiff must have (1)
24 suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
25 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo*,
26 136 S. Ct. at 1547 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).
27 Injury in fact, the “[f]irst and foremost” element of standing, *Steel Co. v. Citizens for*
28 *Better Env’t*, 523 U.S. 83, 103 (1998), is established if the plaintiff shows that “he or she

1 suffered an ‘invasion of a legally protected interest’ that is ‘concrete and particularized’
2 and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548
3 (quoting *Lujan*, 504 U.S. at 560).

4 The Supreme Court’s recent decision in *Spokeo, Inc. v. Robins* dealt with the
5 question of injury in fact in the context of an alleged violation of FCRA. The holding of
6 *Spokeo* was narrow and only addressed the inquiry a court must make when assessing
7 injury in fact. According to the Supreme Court, when a plaintiff alleges an injury in fact,
8 and when a court determines whether that injury is “concrete and particularized,” the
9 court must consider concreteness and particularity as two separate, distinct inquiries. *Id.*
10 at 1548. A court may not simply say that because an injury is particularized, it is
11 necessarily concrete. *Id.* The *Spokeo* decision did not, however, purport to draw the line
12 between a “bare procedural violation” lacking concrete harm and a concrete injury in
13 fact. The holding of *Spokeo* was simply that a court must separately consider both
14 concreteness and particularity to make a finding of injury in fact. *See id.* at 1550 (“We
15 take no position as to whether the Ninth Circuit’s ultimate conclusion—that *Robins*
16 adequately alleged an injury in fact—was correct.”).

17 In remanding the case to the Ninth Circuit, the Supreme Court summarized the
18 concreteness inquiry a court must undertake. An injury is concrete if it is “de facto,” that
19 is, “it must actually exist.” *Spokeo*, 136 S. Ct. at 1548 (citing Black’s Law Dictionary
20 479 (9th ed. 2009)). Congress may, however, “elevat[e] to the status of legally
21 cognizable injuries concrete, *de facto* injuries that were previously inadequate in law”;
22 thus, in certain circumstances, alleged intangible injuries like the “risk of real harm” may
23 establish concrete injury. *Id.* at 1548–49 (citations omitted). Nevertheless, “Congress’
24 role in identifying and elevating intangible harms does not mean that a plaintiff
25 automatically satisfies the injury-in-fact requirement whenever a statute grants a person a
26 statutory right and purports to authorize that person to sue to vindicate that right. Article
27 III standing requires a concrete injury even in the context of a statutory violation.” *Id.* at
28 1549. Thus, a plaintiff cannot “allege a bare procedural violation, divorced from any

1 concrete harm, and satisfy the injury-in-fact requirement of Article III.” *Id.* at 1549; *see*
2 *also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (“[D]eprivation of a
3 procedural right without some concrete interest that is affected by the deprivation—a
4 procedural right *in vacuo*—is insufficient to create Article III standing.”). Applying these
5 principles to FCRA, the Court concluded that “[a] violation of one of the FCRA’s
6 procedural requirements may result in no harm”; accordingly, such a “bare procedural
7 violation” absent concrete injury would not be sufficient to confer standing. *Spokeo*, 136
8 S. Ct. at 1550. A necessary corollary to this finding is this: Even coupling a “bare
9 procedural violation” with a statutorily-authorized remedy (as FCRA does) does not
10 necessarily create a concrete interest the deprivation of which causes concrete injury in
11 fact.

12 Several different district courts have dealt with post-*Spokeo* standing questions
13 with respect to FCRA. One such case, which Plaintiff cites, is *Thomas v. FTS USA, LLC*,
14 No. 3:13-cv-825, 2016 WL 3653878 (E.D. Va. June 30, 2016). *Thomas* concluded that
15 “the proposition that ‘[t]he . . . injury required by Article III may exist solely by virtue of
16 statutes creating legal rights, the invasion of which creates standing’ survives *Spokeo*
17 subject to qualification, depending on the facts of each case and the considerations
18 articulated above, but nevertheless intact.” *Id.* at *6. After analyzing the legislative
19 history of FCRA at great length, the *Thomas* court determined that FCRA’s procedural
20 safeguards vested certain substantive rights in consumers that would on their own satisfy
21 Article III’s injury in fact requirement if violated. *See id.* at *6–8. The plaintiff in
22 *Thomas* alleged the same two violations of FCRA as the plaintiff here: a failure to
23 provide timely notice of adverse action under § 1681b(b)(3) and a failure to provide a
24 proper disclosure under § 1681b(b)(2). The facts of *Thomas*, however, are distinct in an
25 important aspect. In *Thomas*, the initial report produced by the reporting agency
26 *incorrectly* contained numerous felony convictions, including, amongst others, drug and
27 statutory rape convictions. *Id.* at *3. It seems clear that where a consumer report
28 contains false information of this kind, its provision to a prospective employer without

1 providing the potential employee a chance to first see and correct that information creates
2 a concrete injury in fact. *See Thomas*, 2016 WL 3653878, at *8–9, *11–12. But in this
3 case, Sterling disseminated *true* information to the employer, information which Mix
4 never contested.

5 But the broad principle that the holding in *Thomas* rests on—that the violation of
6 statutory rights may in itself be a concrete injury—is not limited to situations where the
7 violation of those rights results in the dissemination of false information. The proper
8 inquiry is whether a procedural violation creates a “risk of real harm.” *Spokeo*, 136 S. Ct.
9 at 1549–50; *see also Lujan*, 504 U.S. at 573 n.8 (“We do *not* hold that an individual
10 cannot enforce procedural rights; he assuredly can, so long as the procedures in question
11 are designed to protect some threatened concrete interest of his that is the ultimate basis
12 of his standing.”). In the context of employment-related background checks, information
13 that is true but amenable to contextual explanation, delivered without time to provide that
14 explanation, does create a risk of real harm. *See Thomas*, 2016 WL 3653878, at *12
15 (“Even if all of the subclass members’ consumer reports were entirely correct . . . the sub-
16 class members were deprived of the opportunity to explain any negative records in their
17 consumer reports and discuss the issues raised in their reports with Defendants before
18 suffering adverse employment action.”); *Magallon v. Robert Half Int’l, Inc.*, 311 F.R.D.
19 625, 634 (D. Or. 2015) (“[T]he applicant must have enough time between the notice and
20 the final decision to meaningfully contest or explain the contents of the report.”). The
21 same is true for a disclosure that, because it is merely one section of a larger document,
22 results in “information overload” which inhibits a consumer’s ability to agree to a
23 background check with full knowledge of their rights and the potential consequences.

24 The disclosure requirements of § 1681b(b)(2)(A) were at issue in another post-
25 *Spokeo* district court case, *Meza v. Verizon Communications, Inc.*, No. 1:16-CV-0739
26 AWI MJS, 2016 WL 4721475 (E.D. Cal. Sept. 9, 2016). In that case, the court
27 considered whether a document that “did not consist solely of the disclosure, but included
28 additional provisions not authorized by the FCRA,” when the plaintiff did not “allege that

1 any information was incorrectly reported or that he suffered any negative consequences
2 whatsoever,” created a concrete injury so as to confer standing on the plaintiff. *Id.* at *2.
3 After examining *Spokeo*, the court, citing *Thomas*, found that FCRA created two
4 substantive rights through the statutory disclosure requirements: a “right to specific
5 information in the form of a clear and conspicuous disclosure” and a “right to privacy in
6 one’s consumer report that employers may invade only under stringently defined
7 circumstances.” *Id.* at *3 (quoting *Thomas*, 2016 WL 3653878, at *7). Thus, the court
8 concluded that the violation of the statutory provision caused both an “informational
9 injury” and a “privacy invasion” sufficient to confer standing. *Id.* at *3–4.

10 This reasoning is applicable not only to the disclosure requirements of
11 § 1681b(b)(2) but also to the notice requirements of § 1681b(b)(3) and the certification
12 requirements of § 1681b(b)(1). *Spokeo* acknowledged that “the violation of a procedural
13 right granted by statute can be sufficient in some circumstances to constitute injury in
14 fact,” and that “a plaintiff in such a case need not allege any *additional* harm beyond the
15 one Congress has identified.” 136 S. Ct. at 1549. Statutory provisions intended to
16 protect against harms identified in the statute create substantive rights, the deprivation of
17 which causes a concrete injury. FCRA’s text identifies the “need to insure that consumer
18 reporting agencies exercise their grave responsibilities with fairness, impartiality, and a
19 respect for the consumer’s right to privacy.” 15 U.S.C. § 1681(a)(4). Violations of
20 FCRA that unfairly deprive a consumer of relevant information, or obtain consent for a
21 background check without a statutorily-proper disclosure, implicate the harms Congress
22 identified in FCRA, and thus cause concrete harms.

23 An examination of Mix’s Amended Complaint indicates that these are the harms
24 for which she seeks redress. Counts I and III are not identical, but they assert the same
25 basic violation against Asurion and Sterling. Both parties allegedly violated
26 § 1681b(b)(3)(A) by taking adverse action against Mix “without first providing her a
27 copy of the report or a description of her FCRA rights.” (Doc. 41 at 18, 21.) Sterling ran
28 the report in late July 2014, and the report reflected information about Mix that was both

1 true at the time and served as a red flag on the report. Then, Mix alleges, between July
2 25, 2014 and August 1, 2014, Asurion and Sterling took the supposed adverse actions
3 underlying Counts I and III. (Doc. 41 at 18–19, 21–22.) She cites three actions by each
4 defendant as “addition[al] or . . . alternative” violations of FCRA: (1) Asurion’s e-mail
5 of July 25, informing Mix that she would not be hired, sent before Mix received a copy of
6 her report and a notice of her rights; (2) Asurion’s not permitting Mix to start on July 28,
7 also prior to Mix receiving her report and notice; (3) Asurion’s letter of August 1,
8 “permanently revoking [Mix’s] offer of employment,” which did not give Mix “sufficient
9 time to address the content of the report”; (4) Sterling’s provision of its background
10 check results to Asurion on July 25, without first providing Mix with her report and
11 notice; (5) Sterling’s letter of July 25, sent at the same time as Mix’s report and notice;
12 and (6) Sterling’s mailing of the August 1 letter without giving Mix a “reasonable
13 opportunity to successfully challenge the report.” (*Id.*)

14 Without deciding on the merits of Mix’s argument that any or all of these actions
15 are (1) adverse actions that (2) violate the requirements of § 1681b(b)(3), the resulting
16 consequences appear to be the type of “informational injury” identified in *Thomas*. In
17 her briefing addressing one of Asurion’s arguments against class certification, Mix
18 plainly admits “the procedural nature of [her] claim. It does not matter *why* Asurion
19 chose to reject her application. She is not suing Asurion because it did not hire her. She
20 is suing it because it took adverse action against her without providing her notice and an
21 opportunity to explain her side of the story.” (Doc. 87 at 4–5.) This is sufficient to allege
22 an informational injury to support standing as to both Counts I and III. Sterling’s motion
23 to dismiss Count III is denied.⁴

24
25 ⁴ Sterling points out that Mix did not initially read the first letter that Sterling sent,
26 and argues that she therefore could not have been harmed by any language that would
27 have misled an objectively reasonable reader into believing it was too late to contest her
28 results. (Doc. 107 at 15.) But the harm Mix alleges, strictly speaking, is not that the
letter misled her; it is that she did not receive the report and notice prior to receiving the
letter. There is still a question of whether the letter constitutes adverse action under
FCRA, and the objectively reasonable interpretation of the letter’s language is relevant to
that inquiry. For standing purposes, however, the fact that Mix did not initially read the
letter is irrelevant.

1 Similarly, Mix’s Counts II and IV also allege a violation of § 1681b(b)(2)(A) that
2 adequately alleges injury in fact sufficient to support Article III standing. FCRA requires
3 that an employer seeking to procure a consumer report for employment purposes must
4 first provide a prospective employee with “a clear and conspicuous disclosure . . . in a
5 document that consists solely of the disclosure” § 1681b(b)(2)(A). Mix alleges that
6 Asurion and Sterling supplied her with a multi-page packet containing a FCRA disclosure
7 along with other items. This arguably created a risk that Mix’s information would be
8 disseminated without her fully informed, knowing consent, violating her privacy rights as
9 recognized in FCRA. Mix’s Counts II and IV are thus sufficient for standing purposes.

10 Count V implicates the same privacy harms as Counts II and IV. If a CRA
11 disseminates a consumer’s information without ensuring that the recipient will comply
12 with provisions intended to protect the consumer’s privacy, there is a real risk of harm to
13 the consumer’s privacy interests. Count V also therefore sufficiently alleges standing.

14 Because the Court concludes that Mix has standing to bring this action, the Court
15 need not engage in a standing analysis for potential class members. *See Bates v. United*
16 *Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (“In a class action, standing is
17 satisfied if at least one named plaintiff meets the requirements”); *see also Moore v.*
18 *Apple Inc.*, 309 F.R.D. 532, 541–42 (N.D. Cal. 2015) (“[T]he problem of uninjured
19 absent class members is a problem of Rule 23, not of Article III.” (quoting Newberg on
20 Class Actions § 2.3)); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 553 (C.D.
21 Cal. 2011) (“[W]here the class representative has established standing and defendants
22 argue that class certification is inappropriate because unnamed class members’ claims
23 would require individualized analysis of injury or differ too greatly from the plaintiff’s, a
24 court should analyze these arguments through Rule 23 and not by examining the Article
25 III standing of the class representative or unnamed class members.”).

26 **II. Class Certification**

27 Class certification under Rule 23 is a two-step process. First, a plaintiff must “be
28 prepared to prove that there are in fact sufficiently numerous parties, common questions

1 of law or fact, typicality of claims or defenses, and adequacy of representation, as
2 required by Rule 23(a).” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)
3 (internal quotations marks and citation omitted). Second, a plaintiff must “satisfy
4 through evidentiary proof” that least one of the bases for certification in Rule 23(b) is
5 met. *Id.* at 1432. At issue here is Rule 23(b)(3), which requires “that the questions of
6 law or fact common to class members predominate over any questions affecting only
7 individual members, and that a class action is superior to other available methods for
8 fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The party
9 seeking certification bears the burden of demonstrating that it has met all of these
10 requirements, and “the trial court must conduct a ‘rigorous analysis’” to determine
11 whether it has met that burden. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186
12 (9th Cir. 2001) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir.
13 1996)).

14 The Court is required to take the substantive allegations of the complaint as true.
15 *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d
16 1335, 1342 (9th Cir. 1982) (internal citation omitted). Further, because “class
17 determination generally involves considerations that are enmeshed in the factual and
18 legal issues comprising the plaintiff’s cause of action[,]” the Court’s analysis also
19 “frequently entail[s] overlap with the merits of the plaintiff’s underlying claim.” *Id.*
20 (internal quotation marks and citations omitted). Consideration of the merits, however,
21 must not be “free-ranging”; rather, any such consideration must be strictly limited “to
22 determining whether the Rule 23 prerequisites for class certification are satisfied.”
23 *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194–95 (2013).

24 Mix proffers two classes and one sub-class of individuals for certification. Class 1
25 or the “Asurion Class” represents “[a]ll individuals in the United States about whom
26 Asurion, from October 23, 2012 to present, (1) obtained a background screening report
27 from Sterling (2) in connection with the individual’s application for employment.” (Doc.
28 65 at 11.)

1 Sub-Class 1 or the “Asurion Sub-Class” represents “[a]ll members of the Asurion
2 Class (1) (i) who Asurion informed could not proceed with the hiring process, or (ii)
3 whose name was requested to be removed from Asurion’s list of expected new
4 employees (2) before Asurion provided a copy of the report to the individual.” (*Id.*)

5 Class 2 or the “Sterling Class” represents “[a]ll individuals in the United States
6 about whom Sterling, from October 23, 2012 to present, (1) prepared a background
7 screening report containing the results of a search for criminal records, (2) based on a
8 request submitted through a client’s pre-employment background screening program (3)
9 where Sterling furnished the report to its client through its ScreeningDirect,
10 SterlingDirect (East), or AISS background screening platforms, and (4) either (i) the
11 report contained an adjudication of ‘Fail,’ ‘Alert,’ ‘Yellow’ ‘Level2,’ ‘Red,’ or ‘Level3,’
12 or (ii) to whom Sterling mailed, at the request of the client and in connection with the
13 report, a pre-adverse action letter on the same day as it delivered the report to the client.”
14 (*Id.*)

15 **A. Rule 23(a)(1): Numerosity**

16 The first prerequisite of Rule 23 is that the class be “so numerous that joinder of
17 all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “A proposed class of at least
18 forty members presumptively satisfies the numerosity requirement.” *Tait v. BSH Home*
19 *Appliances Corp.*, 289 F.R.D. 466, 473 (C.D. Cal. 2012) (citing *Jordan v. L.A. Cty.*, 669
20 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds by Cty. of L.A. v. Jordan*, 459
21 U.S. 810 (1982)). No party contends that numerosity is not met with respect to any of the
22 classes.

23 **B. Rule 23(a)(2)–(4): Commonality, Typicality, and Adequacy**

24 A Rule 23 class is certifiable only if “there are questions of law or fact common to
25 the class.” Fed. R. Civ. P. 23(a)(2). Further, “the claims or defenses of the representative
26 parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The
27 representative parties must also “fairly and adequately protect the interests of the class.”
28 Fed. R. Civ. P. 23(a)(4). These three inquiries “tend to merge.” *Wal-Mart Stores, Inc. v.*

1 *Dukes*, 564 U.S. 338, 349 n.5 (2011). That is so here, and the Court will discuss only
2 those aspects of the inquiry that each class fails to satisfy. *See id.*

3 **1. Sterling Class**

4 Mix asserts two common questions of law, each going to a different sub-part of
5 the overall class. As such, Mix’s putative Sterling Class may be understood as
6 comprising two informal, overlapping “sub-classes.” The first “sub-class” represents
7 individuals for whom Sterling prepared a background check and “adjudicated” the
8 background check with a negative⁵ rating (“adjudication sub-class”). The second “sub-
9 class” represents individuals to whom Sterling sent a pre-adverse action letter that also
10 contained a copy of the background check (“notice sub-class”).⁶ Mix asserts as to the
11 adjudication sub-class the common question of “whether Sterling takes adverse action
12 against a consumer under § 1681b(b)(3) when (1) it communicates an adverse score or
13 rating on the client’s matrix or adjudication grid” (Doc. 65 at 21.) As to the notice
14 sub-class, Mix asserts the common question of “whether Sterling takes adverse action
15 against a consumer under § 1681b(b)(3) when . . . (2) [it] sends a pre-adverse action letter
16 containing language that makes it appear that the adverse decision has already been
17 made.” (*Id.*) Mix herself, and presumably a significant number of potential Sterling
18 Class members, would be in both “sub-classes.” Similarly, the two common legal
19 questions ultimately boil down to one: whether Sterling, a CRA, *can* engage in adverse
20 action subject to § 1681b(b)(3) by furnishing adjudicated background checks or sending
21 pre-adverse action notices on behalf of clients. The notice sub-class also implicates

22
23 ⁵ Specifically, “‘Fail,’ ‘Alert,’ ‘Yellow[,]’ ‘Level2,’ ‘Red,’ or ‘Level3.’” (Doc. 65
24 at 11.)

25 ⁶ The class, as defined, includes only those individuals who received a negative
26 rating or a pre-adverse action letter, or both. Mix asserts that “forensic analysis” of
27 Sterling’s servers would provide a method of ascertaining the class membership, (Doc. 65
28 at 22), and presents evidence indicating that this is feasible, (Doc. 65-16 at 1–2). The
alleged injury is simply receiving the negative rating or the pre-adverse action letter, and
there would thus be no need for the Court to conduct numerous “mini-trials” to adjudicate
whether a particular class member suffered the alleged harm. *See United Steel, Paper &
Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO,
CLC v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010).

1 § 1681b(b)(1), under which a CRA must obtain a certification from an employer that the
2 employer will comply with § 1681b(b)(2) and § 1681b(b)(3). There is thus a factual
3 question of whether Sterling obtained such a certification from each of its employer-
4 clients.

5 Sterling asserts that Mix’s proposed common questions of law are legally
6 foreclosed. Specifically, Sterling argues that CRAs are not typically subject to
7 § 1681b(b)(3) duties because a CRA’s conduct of adjudicating or furnishing consumer
8 reports to employers or pre-adverse action letters to prospective employees on behalf of
9 clients cannot constitute adverse action. Courts have held to the contrary. Section
10 1681a(k)(1)(B)(ii) defines adverse action in the employment context as “a denial of
11 employment or any other decision for employment purposes that adversely affects any
12 current or prospective employee.” In *Adams v. Nat’l Eng’g Serv. Corp.*, 620 F. Supp. 2d
13 319 (D. Conn. 2009), the court, focusing on the “any other decision” language of
14 § 1681a(k)(1)(B)(ii), held that a jury could find that a CRA who simply “made the
15 decision to furnish a background” report to an employer for employment purposes which
16 contained information adverse to the prospective employee engaged in adverse action
17 subject to the requirements of § 1681b(b)(3). *Id.* at 332–33. In *Goode v. LexisNexis Risk*
18 *& Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 538–39 (E.D. Pa. 2012), the court
19 found that a CRA who negatively “adjudicated” a prospective employee, and sent a
20 report to an employer who did not review it, likewise engaged in adverse action. *Id.*

21 Sterling focuses on *Goode*⁷ and contends that although the *Goode* court found that
22 a CRA could have § 1681b(b)(3) duties, it was because there were facts that the
23 “employers wholly delegated initial and final authority to make employment decisions on
24 to the CRA” (Doc. 81 at 11.) Sterling asserts that if such a specific type of

25
26 ⁷ The Court likewise finds *Goode* more applicable here. The CRA in *Adams* was
27 an employment staffing agency that provided employees to client-employers on a
28 contract basis, rather than—as here and in *Goode*—a background check agency that
“adjudicated” the prospective employee. *Adams*, 620 F. Supp. 2d at 322–23. The *Goode*
court rejected this distinction in dicta but ultimately based its holding on the CRA in its
case having done “more than simply send[ing] the report to plaintiffs’ employers.”
Goode, 848 F. Supp. 2d at 539.

1 relationship between the employer and the CRA is necessary, then to certify the class, the
2 relationships between Sterling and each of its clients would need to be individually
3 analyzed, thus defeating commonality. (*Id.* at 22.) But *Goode* did not require such an
4 explicit delegatory relationship between the employer and the CRA for the CRA to
5 engage in adverse action. To the contrary, *Goode* noted that “any person who takes an
6 adverse action must comply with § 1681b(b)(3)(A), be it a CRA, an employer, or a
7 staffing agency . . . even [if] the party taking the adverse action did not have the ultimate
8 authority to make the hiring decision.” *Id.*

9 But it is consistent with *Goode* and with the language of § 1681a(k)(1)(B)(ii) to
10 find that the *degree* of review and particular method of use undertaken by Asurion and
11 every other Sterling client “is relevant to whether Sterling has 1681b(b)(3) duties.” (Doc.
12 81 at 22.) *Goode*, for example, highlighted that the employer in that case “did not
13 conduct any review of the adjudication” by the CRA before making an employment
14 decision, such that the CRA’s “adjudication of plaintiffs [was], quite literally,” an
15 adverse action. 848 F. Supp. 2d at 539. “[A]dverse action occurs when the decision is
16 carried out, when it is communicated or actually takes effect.” *Id.* at 540. *Goode*
17 explained that the CRA’s “adjudication of plaintiffs . . . actually [took] effect before [the
18 CRA] sent out the pre-adverse action letters because there was no real opportunity for
19 plaintiffs to contest the adjudication or change its outcome thereafter. This scheme is
20 missing the crucial last step . . . where the employer makes a final decision based on both
21 the report and any information the employee uses to contest the report.” *Id.* An
22 employer’s degree of review or particular use of the adjudicated report are thus relevant
23 to determine when a decision is carried out, communicated, or takes effect such that the
24 decision constitutes an adverse action. Thus, individual inquiries into each of Sterling’s
25 client’s interactions with Sterling’s reports would be necessary.

26 Mix set forth evidence as to how Asurion reviews and uses Sterling’s adjudicated
27 background checks across Sterling’s various platforms. Mix presented, for example,
28 statistics on the number of background checks Sterling adjudicated “red” versus the

1 number of pre-adverse action notices Asurion ordered to be sent. (*See* Doc. 88 at 5–8.)
2 The evidence was extensive and delved into details of Asurion and Sterling’s relationship
3 and interaction. But Sterling has over 8,000 unique clients, each with their own number
4 of individuals on whom Sterling ran background checks and to whom Sterling sent pre-
5 adverse action notices. (Doc. 81 at 17–20.) Each client may (and likely does) review and
6 use Sterling’s adjudicated background checks in a unique manner. Mix argues that she
7 also presented evidence that other clients interacted with Sterling in a similar fashion, and
8 that other clients used a three-tiered client matrix like Asurion. Even if Mix’s evidence
9 proved that those clients acted similarly to Asurion, it covers only a small fraction of the
10 thousands of Sterling clients Mix attempts to include in the Sterling Class. Moreover, the
11 utilization of a three-tier client matrix does not by itself create commonality. A client
12 matrix simply provides Sterling with a guideline on how it is to rate the results of an
13 individual’s background check against the client’s specific hiring parameters; it does not
14 shed light on how and whether any particular application of a particular client matrix
15 could be identified as an adverse action.

16 The “common” question of whether Sterling engaged in adverse action under
17 FCRA can only be answered by examining the relationship and interaction between
18 Sterling and each of its clients. Even if the Court were to determine that Sterling and
19 Asurion have the requisite relationship, and it is not at all clear that they do, such a
20 determination would not indicate whether Sterling and a different client do as well. Mix
21 fails to establish that any evidence could prove such a relationship across the entire class
22 without the need for the Court to engage in numerous impermissible threshold “mini-
23 trials.” *See United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv.*
24 *Workers Int’l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir.
25 2010). There is no evidence that will provide the requisite “common answer[] apt to
26 drive the resolution of the litigation”; there is no common contention that is capable of
27 resolving each putative class member’s claim “in one stroke.” *Dukes*, 564 U.S. at 350.
28 Moreover, while in theory each putative class member who was subject to adverse action

1 may have suffered from a common violation of § 1681b(b)(3), they may not have
2 suffered from the same injury, because it cannot be determined through common
3 evidence whether Sterling is engaging in adverse action or whether, on the basis of
4 specific facts about the particular Sterling-client relationship, it is the client who engages
5 in adverse action. *See id.* Nevertheless, Mix claims that she “will be able to present
6 common evidence to show that Sterling is aware that its clients . . . merely [provide] ‘a
7 *pro forma* period between the preliminary and final decision.’” (Doc. 88 at 12 (quoting
8 *Magallon v. Robert Half Int’l, Inc.*, 311 F.R.D. 625, 633 (D. Or. 2015).) Even if true, this
9 does not solve the commonality issue with respect to § 1681b(b)(3), because while such
10 evidence could indicate that Sterling’s clients are violating § 1681b(b)(3), it does not
11 prove that Sterling is engaging in adverse action.

12 Further, with respect to § 1681b(b)(1) and Count V, Mix presents no factual basis
13 on which this Court could conclude that Sterling failed to obtain a required certification
14 from *every* one of over 8,000 employer-clients. She claims that she will provide such a
15 basis, but such unsupported assurances are not sufficient for this Court to certify the
16 class.

17 For these reasons, Mix has not satisfied Rule 23(a)(2)’s requirement of
18 commonality. Mix’s motion to certify the Sterling Class is thus denied.⁸

19 2. Asurion Class and Asurion Sub-Class

20 “The purpose of the typicality requirement is to assure that the interest of the
21 named representative aligns with the interests of the class.” *Hanon v. Dataproducts*
22 *Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “The test of typicality ‘is whether other
23 members have the same or similar injury, whether the action is based on conduct which is
24 not unique to the named plaintiffs, and whether other class members have been injured by
25 the same course of conduct.’” *Id.* (internal citation omitted). “Typicality refers to the
26 nature of the claim or defense of the class representative, and not to the specific facts
27 from which it arose or the relief sought.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970,

28 ⁸ Sterling’s motion for leave to file a sur-reply (Doc. 94) is denied.

1 984 (9th Cir. 2011) (quoting *Hanon*, 976 F.2d at 508) (internal quotation marks omitted).

2 The “adequacy requirement” means “the named plaintiffs and their counsel [do
3 not] have any conflicts of interest with other class members” and will “prosecute the
4 action vigorously on behalf of the class.” *Id.* at 985. This inquiry has a tendency to
5 overlap with the commonality and typicality criteria of Rule 23(a). *Amchem Prods., Inc.*
6 *v. Windsor*, 521 U.S. 591, 626 n.20 (1997). These requirements serve to ensure that “the
7 named plaintiff’s claim and the class claims are so interrelated that the interests of the
8 class members will be fairly and adequately protected in their absence.” *Gen. Tel. Co. of*
9 *Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). A named plaintiff does not satisfy the
10 typicality or adequacy requirements if she is subject to unique defenses that threaten to
11 become the focus of the litigation. *Ellis*, 657 F.3d at 984.

12 The Asurion Class and the Asurion Sub-Class, dealing as they do with a single
13 employer rather than 8,000, do not suffer from the same defect in commonality as does
14 the Sterling Class. Mix alleges that the initial FCRA disclosure was improperly included
15 with other documents, and that Asurion informed her of its intent to revoke her
16 employment offer because of the results of Sterling’s background check, placed Mix’s
17 name on the “will not start” list, and prevented her from starting all before she received a
18 copy of her background check and a description of her rights under FCRA in compliance
19 with § 1681b(b)(3). The proposed Asurion Class and Asurion Sub-Class mirror those
20 claims.

21 Asurion, however, cites certain facts to show the existence of unique defenses
22 against Mix’s claim. Asurion notes that Mix did not dispute her background report even
23 after eventually receiving it. But whether a class member actually disputed their
24 background check is ultimately irrelevant to the alleged FCRA violation underlying the
25 Asurion Sub-Class: that Asurion did not provide putative class members with a “real
26 opportunity” to contest the background check because Mix did not receive a copy of the
27 background check (and instruction that she could contest it) until, at the earliest, she
28 received a letter from Asurion (sent by Sterling) informing her that her offer had been

1 revoked. *See Magallon*, 311 F.R.D. at 634 (quoting *Goode*, 848 F. Supp. 2d at 540).

2 Asurion also argues that Mix’s background check revealed that she had pending
3 criminal charges “involving dishonesty,” which, if they resulted in a conviction, would
4 fall under the CCLEA and legally prohibit Asurion from hiring her. (Doc. 79 at 20–21.)
5 It may be that Mix’s claim is atypical as to the nature of her background check results,
6 and the possible legal restraints placed on Asurion as a result. But these issues are
7 ultimately beside the point. The underlying results of an individual’s background check
8 are irrelevant to whether Asurion’s actions violated FCRA. The alleged injuries are
9 deprivations of informational rights and privacy rights. These rights are equally
10 implicated whether the prospective employee was ultimately hired, ultimately not hired
11 on the basis of accurate information, or ultimately not hired on the basis of inaccurate
12 information. “Differing factual scenarios resulting in a claim of the same nature as other
13 class members does not defeat typicality.” *Ellis*, 657 F.3d at 985 n.9.

14 What does defeat typicality, along with adequacy, is that Mix’s claim is *not* of the
15 same nature as other potential class members in important respects. She can bring no
16 claims for negligent infringement of the statute by the Defendants, because she suffered
17 no actual damages from any of the Defendants’ actions. She can thus only bring a claim
18 for statutory damages which requires her, on behalf of all class members to establish a
19 higher degree of scienter on the part of the Defendants to establish any claim. It further
20 limits the recovery of all class members to the limited statutory damages set forth in the
21 statute when some class members could qualify to receive actual damages which could be
22 significant.

23 Class members who may have lost an employment opportunity thanks to an
24 erroneous report, and therefore suffered actual damages, would be precluded from
25 seeking actual damages. Mix acknowledges this, but argues that she is an adequate
26 representative because any actual damages would not exceed the statutory damage
27 maximum. This—so goes the argument—is because if Asurion had “given the class
28 members a copy of their report and notice of their rights on the first day of training and

1 given them the entire first week to address the content of their report,” then that would
2 not have been a FCRA violation, and therefore “the most damages could reach is a single
3 week’s pay.” (Doc. 87 at 8.) But this conclusion only follows if it is assumed that every
4 putative class member is someone whose background check results were accurate. A
5 prospective employee whose background check was erroneous, but who, thanks to late
6 notice of the problem, was forced to take a different and lower-paying job, might well
7 have actual damages which would easily exceed the statutory limit. Crucially, Mix
8 proffers no evidence that the great majority of the class comprises people whose
9 background checks were accurate. Without this, Mix’s assumption that this Court would
10 be justified in eliminating the recovery of actual damages for any class members who
11 might be entitled to such damages is not accurate. Without this, Mix can hardly argue
12 that she is a typical or adequate representative.

13 Other courts have held in the context of different claims that the possibility of
14 some class members being eligible for actual damages should not preclude certification
15 of a class with a representative seeking only statutory damages. *See, e.g., Murray v.*
16 *GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (“Unless a district court finds
17 that personal injuries are large in relation to statutory damages, a representative plaintiff
18 must be allowed to forego claims for compensatory damages in order to achieve class
19 certification. When a few class members’ injuries prove to be substantial, they may opt
20 out and litigate independently. . . . Only when all or almost all of the claims are likely to
21 be large enough to justify individual litigation is it wise to reject class treatment
22 altogether.”); *Santoro v. Aargon Agency, Inc.*, 252 F.R.D. 675, 683 (D. Nev. 2008)
23 (finding a named plaintiff seeking statutory damages adequate to represent putative class
24 members who suffered actual damages while holding open possibility of “ordering
25 joinder of [plaintiff seeking actual damages] as a co-class representative to ensure
26 adequate representation of the whole class”). The facts of those cases, however, were
27 different in an important respect. The Seventh Circuit in *Murray* addressed a “credit
28 solicitation” letter sent in violation of certain FCRA requirements. 434 F.3d at 950. The

1 District of Nevada in *Santoro* addressed “form collection letters” sent in violation of
2 certain requirements under the Fair Debt Collection Practices Act. 252 F.R.D. at 679. In
3 each case, because of the nature of the violation, it was reasonable for the court to assume
4 that only “a few class members’ injuries [would] prove to be substantial.” *See Murray*,
5 434 F.3d at 953. This case, on the other hand, involves employment-related background
6 checks. As discussed above, it is more reasonable here to assume that “personal injuries
7 [may be] large in relation to statutory damages,” *see id.*, for a significant number of class
8 members. This potential differentiation as to the extent and amount of actual damages
9 within the proposed class weigh against a finding that Mix is a typical or adequate
10 representative.

11 Limiting all class claims to those for the Defendants’ willful infringement of the
12 statute for which the class members would only then receive statutorily limited damages
13 does make the claims more amenable to class treatment. It does so, however, at the
14 expense of legitimate claims that are held by class members who may have suffered
15 significant actual damages and who could establish the less demanding negligence
16 standard. Certifying the class as a 23(b)(3) class would ultimately terminate such claims
17 of any class member who did not opt out, when there is no compelling basis to believe
18 that notices of class action are read or understood by most of those who receive such
19 notices. *See Mohsen Manesh, The New Class Action Rule: Procedural Reforms in an*
20 *Ethical Vacuum*, 18 *Georgetown J. Legal Ethics* 923, 933–34 (2005) (“Notices sent to
21 class members are often lengthy, confusing, and largely ineffective. These notices are
22 written in cryptic legalese, some incomprehensible to a trained lawyer[,] let alone an
23 ordinary class member.”). Further, it is not necessary to accumulate such claims to
24 attract attorney-representation to bring them since Congress has authorized attorney’s
25 fees awards for those who bring such claims successfully.⁹

26
27 ⁹ Courts differ on the significance of attorney’s fee provisions in the class action
28 analysis. *Compare, e.g., Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449
(6th Cir. 2002) (finding a statutory “provision of the award of attorney’s fees and costs to
successful plaintiffs eliminates any potential financial bar to pursuing individual
claims”), *with Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422 JVS (ANx), 2009

1 There is another problem of typicality with respect to damages, even setting aside
2 the issue of actual damages. FCRA sets statutory damages at between \$100 and \$1,000,
3 without further guidance as to how to decide what amount to award a plaintiff. As such,
4 it is arguable that, even under a statutory damages regime, any individual plaintiff's
5 actual injury may be relevant to calculating their statutory damage amount. The Ninth
6 Circuit suggested this in *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301
7 (9th Cir. 1990), a case involving the Farm Labor Contractor Registration Act
8 ("FLCRA"), which also provides for statutory damages in the absence of proof of actual
9 injury. *Id.* at 1306. There, the Ninth Circuit invalidated as excessive a district court's
10 award of statutory damages in a class action because certain "individual awards exceeded
11 what was necessary to compensate any potential injury from the violations." *Id.* at 1309;
12 *see also Andrade v. Chase Home Finance, LLC*, No. 04 C 8229, 2005 WL 3436400, at *6
13 (N.D. Ill. Dec. 12, 2005) (noting that "evidence of actual damages" is "potentially quite
14 meaningful" in "calculating the appropriate amount of statutory damages"); *but compare*
15 *Ashby v. Farmers Ins. Co. of Or.*, 592 F. Supp. 2d 1307, 1318 (D. Or. 2008) ("The Court
16 concludes the factor most germane to the amount of a statutory-damages award to class
17 members is the jury's perception of the importance, and hence the value, of the rights and
18 protections conferred on the consuming public by FCRA's adverse-action notice
19 requirements."). Within the statutory range, then, there could be wide variation between
20 class members who suffered actual damages—which should be reflected in the statutory
21 award they receive—and those who did not.

22 To certify a class with Plaintiff Mix as class representative would forego the
23 ability of any class member to pursue actual damages. Further, it would shoehorn
24 potentially meritorious suits seeking actual damages on a negligence theory into a class

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26 WL 2169883, at *9 (C.D. Cal. July 16, 2009) ("The Court is not convinced that the fact
27 that an individual plaintiff can recover attorney's fees in addition to statutory damages of
28 up to \$1,000 will result in enforcement of the FCRA by individual actions of a scale
comparable to the potential enforcement by way of class action."). Here, the availability
of attorney's fees underscores the fact that potentially numerous plaintiffs with actual
damages would have everything to gain and nothing to lose by pursuing individual suits
instead of a class action.

1 that would only recover, if successful, statutory damages on a harder-to-prove willfulness
2 theory. Class certification as to the Asurion Class and the Asurion Sub-Class must
3 therefore fail for lack of typicality and adequacy under Rule 23(a)(3) and (a)(4).¹⁰

4 **CONCLUSION**

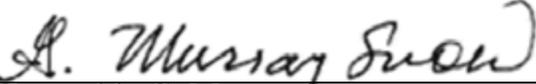
5 Plaintiff Amanda Mix has standing to bring her claims against Defendants Asurion
6 Insurance Services Inc. and Sterling Infosystems, Inc. Plaintiff's proposed classes,
7 however, fail to meet the requirements of Federal Rule of Civil Procedure 23(a).

8 **IT IS THEREFORE ORDERED** that the Motion for Class Certification of
9 Plaintiff Amanda Mix (Doc. 65) is **DENIED**.

10 **IT IS FURTHER ORDERED** that the Motion for Leave to File a Sur-Reply of
11 Defendant Sterling Infosystems, Inc. (Doc. 94) is **DENIED**.

12 **IT IS FURTHER ORDERED** that the Motion to Dismiss of Defendant Sterling
13 Infosystems, Inc. (Doc. 107) is **DENIED**.

14 Dated this 14th day of December, 2016.

15 
16 _____
17 Honorable G. Murray Snow
18 United States District Judge

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¹⁰ For the same reasons, Mix would not be a typical or adequate representative for the proposed Sterling class, which therefore fails under Rule 23(a)(3) and (a)(4) in addition to, as discussed earlier, Rule 23(a)(2).