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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 HARLEY MILNE,
7 Plaintiff,

Case No. 15-cv-05551-JST

8 v.

**ORDER DENYING DEFENDANT
SEARS HOLDINGS CORPORATION'S
MOTION TO DISMISS**

9 SEARS HOLDINGS CORPORATION,
10 Defendant.

Re: ECF No. 25

11
12 Before the Court is Defendant Sears Holdings Corporation's Motion to Dismiss the
13 Complaint. ECF No. 25. The Court denies the motion.

14 **I. BACKGROUND¹**

15 Plaintiff Harley Milne filed a Complaint against Defendants Sears Holding Corporation
16 ("Sears") and HireRight, LLC ("HireRight"), alleging violations of the Fair Credit Reporting Act
17 ("FCRA"). ECF No. 1 ¶¶ 68–73. Plaintiff's claims arise from an employment-related background
18 check performed by HireRight on behalf of Sears.

19 On April 30, 2015, Sears offered Plaintiff full-time employment as Senior Director of
20 eCommerce Operations. *Id.* ¶ 19. The offer was "contingent on [Plaintiff's] successful
21 completion of a background check." *Id.* ¶ 20. On or about May 6, 2015, Sears requested that
22 HireRight perform a background check on Plaintiff. *Id.* ¶ 23. HireRight completed the
23 background check on May 14, 2015 and set Plaintiff's "Adjudication Status"² as "Does Not Meet
24 Company Standards -- Education Report, Criminal Felony & Misdemeanor" on May 15, 2015. *Id.*

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26 ¹ For the purposes of this order, the Court accepts as true all of the well-pleaded factual allegations
27 contained in Plaintiff's Complaint, ECF No. 1. See *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
2001).

28 ² According to the Complaint, "[a]n adjudication status is a determination made by the consumer
reporting agency of whether the subject of a background report meets the pre-determined
employment criteria set by the user of the report." ECF No. 1 ¶ 24.

1 ¶¶ 23, 25.

2 On May 15, 2015, “[b]ased on HireRight’s adjudication, . . . Karen Lee, a Sears employee
3 located at corporate headquarters in Illinois, contacted Plaintiff via telephone to tell him that Sears
4 was unwilling to honor the job offer it had previously extended [him].” Id. ¶ 26. “During that
5 phone call, Plaintiff asked Ms. Lee to identify the exact reason that Sears was withdrawing his job
6 offer. In response, Ms. Lee told Plaintiff that she was unable to give Plaintiff more specific
7 information and that he should contact HireRight for further information.” Id. ¶ 27.

8 Three days later, on May 18, 2015, Sears sent Plaintiff a copy of his background report,
9 which Plaintiff alleges incorrectly adjudicated Plaintiff as “Does Not Meet Company Standards—
10 Education Report, Criminal Felony & Misdemeanor.” Id. ¶¶ 31, 33; ECF No. 1-2 at 7. Plaintiff
11 alleges that he does not have a criminal record. ECF No. 1 ¶ 34. Plaintiff further alleges that
12 “HireRight reported that it was ‘Unable to Verify’ Plaintiff’s degree from [Almeda] University,”
13 despite the fact that HireRight “never actually attempted to verify the degree.” Id. ¶ 35.

14 Later on May 18, 2015, Plaintiff submitted a dispute to HireRight via HireRight’s online
15 dispute form. Id. ¶ 37. On May 19, 2015, Plaintiff submitted to HireRight a copy of his Almeda
16 University diploma and “authenticated and notarized documents from the Department of State that
17 proved that Plaintiff had received a degree from Almeda University.” Id. ¶ 39; see also ECF No.
18 1-3.

19 On May 27, 2015, Plaintiff received a letter from Sears stating that Sears was “unable to
20 offer [him] employment.” ECF No. 1 ¶ 41; ECF No. 1-5 at 1. Sears stated that its “decision was
21 based in whole or in part on information contained in a [background] report from HireRight”
22 Id.

23 On June 14, 2015, Plaintiff sent a letter to Sears’ Human Resources Department stating
24 that he “did not wish to abandon the application process” and had “disputed the report with
25 HireRight” ECF No. 1 ¶ 42; ECF No. 1-6. Plaintiff continued to contact HireRight in an
26 attempt to correct the alleged errors in his background report. ECF No. 1 ¶ 43–47. On June 23,
27 2015, HireRight emailed Plaintiff to explain that “[p]er HireRight’s guidelines we are unable to
28 contact unaccredited schools,” such as Almeda University. Id. ¶ 46; see also ECF No. 1-10.

1 “Despite Plaintiff’s dispute, HireRight failed to consider the evidence of Plaintiff’s education
2 presented by Plaintiff, instead refusing to contact the educational institution from which Plaintiff
3 had received his degree simply because the institution was [allegedly] unaccredited” Id. ¶ 47.

4 On December 4, 2015, Plaintiff filed this action, asserting two claims against HireRight³
5 and a single claim against Sears under the FCRA. Id. ¶¶ 68–73. On February 18, 2016, Sears
6 filed a motion to dismiss, ECF No. 25, which motion the Court now considers.

7 **II. JURISDICTION**

8 The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

9 **III. MOTION TO DISMISS**

10 **A. Legal Standard**

11 On a motion to dismiss, the court accepts the material facts alleged in the complaint,
12 together with all reasonable inferences to be drawn from those facts, as true. Navarro v. Block,
13 250 F.3d 729, 732 (9th Cir. 2001). However, “the tenet that a court must accept a complaint’s
14 allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported
15 by mere conclusory statements.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). To be entitled to
16 the presumption of truth, a complaint’s allegations “must contain sufficient allegations of
17 underlying facts to give fair notice and to enable the opposing party to defend itself effectively.”
18 Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

19 To survive a motion to dismiss, a plaintiff must plead “enough facts to state a claim to
20 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
21 Plausibility does not mean probability, but it requires “more than a sheer possibility that a
22 defendant has acted unlawfully.” Iqbal, 556 U.S. at 687. “A claim has facial plausibility when the
23 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged.” Id.

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28 ³ On February 29, 2016, Plaintiff filed a notice of dismissal pursuant to Fed. R. Civ. P.
41(a)(1)(A)(i) regarding his claims against HireRight. ECF No. 31.

1 **B. Discussion**

2 **i. Failure to Provide Pre-Adverse Action Notice**

3 Plaintiff’s sole claim against Sears alleges that Sears violated the FCRA by “negligently
4 and willfully failing to” provide him with pre-adverse action notice as required by 15 U.S.C.
5 § 1681(b)(3). *Id.* ¶¶ 72–73. Under the FCRA, “in using a consumer report for employment
6 purposes, before taking any adverse action based in whole or in part on the report, the person
7 intending to take such adverse action shall provide to the consumer to whom the report relates . . .
8 (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this
9 subchapter” 15 U.S.C. § 1681b(b)(3)(A); *Moore v. Rite Aid Headquarters Corp.*, No. 13-cv-
10 1515, 2015 WL 3444227, at *4 (E.D. Pa. May 29, 2015) (“Section 1681b(b)(3)(A) thus requires
11 an employer to provide job applicants with their background report, summary of rights, and a ‘real
12 opportunity’ to contest the contents of the background report before the employer relies on the
13 report to take an adverse action against the applicant.”). The FCRA defines an “adverse action” to
14 include “a denial of employment or any other decision for employment purposes that adversely
15 affects any current or prospective employee.” 15 U.S.C. § 1681a(k)(1)(B)(ii).

16 Plaintiff alleges that Sears failed to provide him with pre-adverse action notice because
17 Sears’ representative, Ms. Lee, told Plaintiff via telephone “that Sears was unwilling to honor
18 [Plaintiff’s] job offer” three days before Sears sent Plaintiff a copy of his background report. ECF
19 No. 1 ¶ 26 (Plaintiff’s telephone call with Ms. Lee occurred on May 15, 2015); *Id.* ¶ 31 (HireRight
20 did not send Plaintiff a copy of his report until May 18, 2015); *see also* ECF No. 1-2. Sears argues
21 that Ms. Lee’s telephone conversation with Plaintiff did not constitute an adverse action because
22 “[t]he only plausible conclusion from the Complaint is that Ms. Lee telephoned Plaintiff to inform
23 him that Sears intended to withdraw his conditional offer but that she could not give him any
24 further information because the decision was not final and the FCRA process still needed to play
25 out.” ECF No. 25 at 8 (emphasis in original).

26 In the Ninth Circuit, “[i]f there are two alternative explanations, one advanced by
27 defendant and the other advanced by plaintiff, both of which are plausible, plaintiff’s complaint
28 survives a motion to dismiss under Rule 12(b)(6). Plaintiff’s complaint may be dismissed only

1 when defendant’s plausible alternative explanation is so convincing that plaintiff’s explanation is
2 implausible.” Starr, 652 F.3d at 1216 (emphasis in original). Here, the Court concludes that
3 Plaintiff plausibly states a claim for relief under the FCRA because Sears’ plausible alternative
4 explanation of the facts is not “so convincing that [P]laintiff’s [alternative] explanation is
5 implausible.” Id. (emphasis in original).

6 The Complaint alleges: “Based on HireRight’s adjudication, [on May 15, 2016] [Ms.] Lee,
7 a Sears employee located at corporate headquarters, contacted Plaintiff via telephone to tell him
8 that Sears was unwilling to honor the job offer it had previously extended [to him]. . . . During that
9 phone call, Plaintiff asked Ms. Lee to identify the exact reason that Sears was withdrawing his job
10 offer. In response, Ms. Lee told Plaintiff that she was unable to give Plaintiff more specific
11 information and that he should contact HireRight for further information.” ECF No. 1 ¶¶ 23, 26,
12 27. These allegations plausibly plead that Sears took an adverse action against Plaintiff on May
13 15, 2016 by withdrawing his offer of employment. See 15 U.S.C. § 1681a(k)(1)(B)(ii) (defining
14 “adverse action” to include “a denial of employment or any other decision for employment
15 purposes that adversely affects any current or prospective employee.”). Nothing in the Complaint
16 suggests, let alone requires the Court to conclude, that Ms. Lee’s telephone conversation with
17 Plaintiff constituted a mere communication of an intent to withdraw the job offer. Accordingly,
18 the Court holds that Plaintiff has plausibly stated a claim that Ms. Lee’s telephone call to Plaintiff
19 constituted an adverse action prior to Plaintiff’s receiving notice of his background report in
20 violation of the FCRA.⁴

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22 ⁴ The Court also rejects Sears’ argument that Plaintiff “fails to allege sufficient facts that the
23 decision [to withdraw Plaintiff’s job offer] was based in whole or in part on his background
24 check,” as is required for a claim under 15 U.S.C. § 1681b(b)(3)(A). ECF No. 25 at 9. The
25 Complaint alleges that Ms. Lee called Plaintiff to withdraw his job offer on May 15, 2015, the
26 same day that HireRight set Plaintiff’s Adjudication Status as “Does Not Meet Company
27 Standards -- Education Report, Criminal Felony & Misdemeanor.” ECF No. 1 ¶¶ 23, 25–26.
28 Moreover, the Complaint alleges that Ms. Lee “told Plaintiff that she was unable to give Plaintiff
more specific information [as to the reasons for withdrawing the job offer] and that he should
contact HireRight for further information.” Id. ¶ 27. Finally, the letter that Sears sent to Plaintiff
on May 27, 2015, stated that Sears would be unable to offer Plaintiff employment “based in whole
or in part on information contained in a report from HireRight.” ECF No. 1 ¶41. Based on these
allegations, the Court concludes that it is reasonable to infer that Sears’ decision to withdraw the
job offer on May 15, 2015 was based in whole or in part on Plaintiff’s background check.

1 alleges that Sears willfully violated the FCRA under 15 U.S.C. § 1681n.⁵

2 Plaintiff also plausibly states a claim that Sears negligently violated the FCRA. Under 15
3 U.S.C. § 1681o, “[a]ny person who is negligent in failing to comply with any requirement
4 imposed under [the FCRA] is liable to that consumer in an amount equal to the sum of . . . (1) any
5 actual damages sustained by the consumer as a result of the failure; and (2) . . . the costs of the
6 action together with reasonable attorney’s fees” Sears argues that “Plaintiff’s negligence
7 theory fails because he does not plead actual damages plausibly resulting from Sears’ alleged non-
8 compliance.” ECF No. 25 at 18.

9 The Court disagrees. Plaintiff alleges that, as a result of Sears’ violation of the FCRA (1)
10 he “was unemployed for six months despite his best efforts to find employment”; (2) he suffered
11 emotional and financial distress; and (3) he “continues to suffer damages as his new employment
12 does not provide a compensation and benefits package on par with what he would have received
13 from Sears.” ECF No. 1 ¶¶ 53–56. These injuries plausibly resulted from Sears’ alleged violation
14 of the FCRA because had Sears given Plaintiff his background report prior to taking adverse
15 action against Plaintiff, it is certainly plausible that he would have been able to correct the alleged
16 mistakes in that report or otherwise explain to Sears any deficiencies in the report. Plaintiff need
17 not prove at this stage that he suffered actual injury. Rather, Plaintiff need only plausibly allege
18 that he suffered actual injury as a result of Sears’ violation of the FCRA.

19 The Court concludes that Plaintiff plausibly alleges that he suffered actual damages as
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21 ⁵ Sears argues that “it was neither objectively unreasonable nor involving an unjustifiably high
22 risk of violating the FCRA for Sears to interpret the statute as permitting the formation of an intent
23 to withdraw an offer and communicate that intent before mailing the pre-adverse action notice.”
24 ECF no. 25 at 12. This argument is at best premature, because a factfinder has not yet determined
25 whether Ms. Lee’s telephone call with Plaintiff constituted an “intent to withdraw an offer,” as
26 Sears claims, or a withdrawal of an offer, as Plaintiff alleges. If the latter, Sears does not argue
27 that it would be reasonable to interpret the FCRA to allow for the withdrawal of an offer of
28 employment based on a background report prior to notice of the background report. Ultimately,
the Court cannot decide this issue at the pleading stage because “[t]he reasonableness of the
procedures and whether [a defendant] followed them will be jury questions in the overwhelming
majority of cases.” *Hawkins*, 2016 WL 107197, at *3 (quoting *Guimond v. Trans Union Credit
Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995)).

1 result of Sears' alleged failure to comply with the FCRA. As a result, Plaintiff has sufficiently
2 pleaded that Sears' failure to comply with the FCRA was negligent.

3 **CONCLUSION**

4 Plaintiff has plausibly alleged that Sears violated the FCRA by failing to provide Plaintiff
5 with pre-adverse action notice of his background report. Further, Plaintiff has plausibly alleged
6 that Sears' violation of the FCRA was willful and/or negligent. Accordingly, the Court denies
7 Sears' Motion to Dismiss Plaintiff's Complaint.

8 IT IS SO ORDERED.

9 Dated: April 26, 2016

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11 _____
12 JON S. TIGAR
13 United States District Judge