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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

v.

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

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

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Appellee/Cross-Appellant CoreLogic Rental Property Solutions, LLC n/k/a SafeRent Solutions, LLC states that it has no parent corporation and no publicly held corporation owns more than 10% of its stock.

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INTRODUCTION

WinnResidential denied Mikhail Arroyo's tenant application based on a record in his criminal background that WinnResidential obtained using CrimSAFE, a tenant screening software product offered by CoreLogic Rental Property Solutions, LLC n/k/a SafeRent Solutions, LLC ("RPS"). After WinnResidential repeatedly refused to accommodate Mr. Arroyo's disability, Plaintiffs sued WinnResidential under the Fair Housing Act ("FHA"), achieving a $50,000 settlement and permission for Mr. Arroyo to move into the apartment. Plaintiffs then brought a novel challenge against RPS, claiming that CrimSAFE violated the FHA.

Based on thorough fact-finding after a ten-day bench trial, and after adopting the expansive view of legal scope of the FHA proposed by Appellants, the district court properly found as a matter of fact that CrimSAFE does not make housing "unavailable," meaning that the FHA does not apply to RPS. The district court explained that CrimSAFE's principal function is to filter out criminal records so housing providers may focus on only those records they deem relevant for their housing policies and decisions. That filtering function enables housing *acceptances*, not denials. The district court also found that housing providers, *not RPS*, completely control how CrimSAFE is used in their process of making housing decisions. Those housing provider customers: (1) develop their tenant selection plans; (2) decide whether to use CrimSAFE; (3) decide the age, type, and categories

of criminal records they want to filter out or consider using CrimSAFE; (4) decide what message will appear on the CrimSAFE report when records match their self-selected criteria; (5) decide who within their organizations will be authorized to review the underlying criminal records; (6) apply their tenant selection plans and policies to any criminal records identified; and (7) make all housing-related decisions arising from the criminal screening process.

Next, the district court properly granted RPS summary judgment on two disability-based FHA claims concerning Carmen Arroyo's efforts as a conservator to obtain her son's (Mr. Arroyo) Fair Credit Reporting Act ("FCRA") file disclosure using invalid documentation. The district court found that RPS did not have a policy to deny conservators' requests or to only accept executed powers of attorney when consumer files were requested on behalf of another, meaning that there was no "policy" by which to predicate a claimed "disparate impact." Instead, RPS's written file disclosure policy required escalation to a manager if its written policies did not specifically cover a particular situation, as was the case with Ms. Arroyo's request. The district court also held that Plaintiffs' claimed "reasonable accommodation" – waiving the legal requirement that a probate court's conservatorship certificate have an impressed seal – was unreasonable, because such certificates must have impressed seals under Connecticut law and state as such on their face.

The district court, however, committed three legal errors by granting relief on Mr. Arroyo's FCRA claim after trial. First, once the district court correctly found Mr. Arroyo had no concrete injury from not obtaining his file disclosure – a finding he did not appeal – the district court was required to dismiss the claim because he lacked Article III standing.

Second, once the district court properly found Mr. Arroyo never submitted "proper identification" to obtain his file, the district court should have dismissed his FCRA claim on the merits because such identification is a statutory condition precedent to asserting a FCRA disclosure claim.

Third, with no notice to RPS, the district court improperly revived the FCRA claim it had previously dismissed on summary judgment and then granted judgment to Mr. Arroyo on that claim, awarding statutory and punitive damages. RPS was plainly prejudiced by that revival because it had no notice at trial it would be required to present evidence to defend against a previously-dismissed claim.

JURISDICTIONAL STATEMENT

The parties appealed from a final judgment of the district court. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 because the claims arose under federal law, namely 15 U.S.C. § 1681(p) and 42 U.S.C. § 3613, and it had supplemental jurisdiction over Plaintiffs' state law claim pursuant to 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a).

The district court entered judgment on July 21, 2023. ECF 318.[1] Appellants timely filed their notice of appeal on August 4, 2023 (ECF 320), and RPS timely filed its notice of cross appeal on August 14, 2023 (ECF 325).

STATEMENT OF ISSUES PRESENTED

Issues on Appeal

1. Whether the district court properly found that RPS did not make housing unavailable, and thus is not liable under the FHA, because RPS made no housing decisions and set no housing policy, whereas RPS's customer made all decisions on whether and how to use CrimSAFE and then made all decisions on tenant applications.

2. Whether the district court properly granted summary judgment to RPS on Appellants' disability-based FHA disparate impact claim when Appellants had no evidence of any systematic practice and did not identify a legitimate "less discriminatory alternative."

3. Whether the district court properly granted summary judgment to RPS on the disability-based FHA claim that RPS failed to afford the Arroyos a

[1] Citations to the record will be replaced with citations to the Joint Appendix in accordance with Fed. R. App. P. 30(c)(2)(B) and Local Rule 30.1(c). Citations to "ECF" are to district court filings, "Tr." to trial transcripts, "Ex." to trial exhibits (numbers-plaintiffs, letters-defendant), and "SOF" to the parties' stipulations of fact in their Joint Trial Memorandum (ECF 178).

"reasonable accommodation" when RPS refused to release Mr. Arroyo's consumer file based on the legally-invalid documentation submitted by Ms. Arroyo, and when there was no evidence that receipt of the consumer file was "likely necessary" for Mr. Arroyo to secure housing from WinnResidential.

Issues on RPS's Cross-Appeal

1. Whether the district court erred as a matter of law in awarding statutory and punitive damages to Mr. Arroyo under the FCRA, despite having properly found that Mr. Arroyo suffered no injury by not receiving his file disclosure, meaning that Mr. Arroyo lacked Article III standing to prevail on his claims.

2. Even if the district court had subject matter jurisdiction over Mr. Arroyo's FCRA claims, whether the district court erred as a matter of law in granting judgment to Mr. Arroyo under §§ 1681g(a) and 1681h of the FCRA, despite its finding that Ms. Arroyo never submitted "proper identification" to obtain Mr. Arroyo's file, which is a statutory condition precedent under the FCRA to obtaining a file disclosure.

3. Whether the district court procedurally erred as a matter of law in granting judgment to Mr. Arroyo under §§ 1681g(a) and 1681h of the FCRA when it had previously granted summary judgment to RPS on those claims but then *sua sponte* revived them post-trial without any notice to RPS.

STATEMENT OF THE CASE

This is an appeal taken from the final decisions of the Hon. Vanessa L. Bryant, United States District Court for the District of Connecticut.

Plaintiffs appealed portions of the district court's summary judgment order dated August 7, 2020 (ECF 194) ("SJ Order") dismissing their disability-related FHA disparate impact and reasonable accommodation claims. Plaintiffs also appealed portions of the district court's order dated July 20, 2023 following a ten-day bench trial (ECF 317) ("Order") ruling in favor of RPS on their FHA disparate impact claims. RPS appeals the portion of the Order granting Mr. Arroyo relief under the FCRA.

I. FACTUAL BACKGROUND

A. Mr. Arroyo's Injury and Application to WinnResidential

In 2015, Mikhail Arroyo suffered a traumatic brain injury, leaving him permanently and severely disabled. Order ¶¶ 1, 42; Tr. 3/14/2022 3:22-4:6, 5:9-22; SOF ¶¶ 13-14. Carmen Arroyo, his mother, was his primary caregiver. Order ¶¶ 1, 43; SOF ¶ 20. Ms. Arroyo and another individual were later appointed by Connecticut's probate court to serve as co-conservators of Mr. Arroyo's person and estate. Order ¶ 2; SOF ¶ 18. Mr. Arroyo was hospitalized for a lengthy period, through 2016. Order ¶¶ 1, 42; SOF ¶ 19; Tr. 3/14/2022 6:2-8.

In 2016, Ms. Arroyo occupied a one-bedroom unit at ArtSpace Windham, an apartment complex in Windham, Connecticut managed by WinnResidential. Order ¶ 5; Tr. 3/14/2022 6:23-7:7; Ex. 37. WinnResidential is a large, nationwide property management company with its own executive, legal, compliance, and operations teams. Tr. 3/14/2022 124:8-13, 124:21-125:6, 126:3-8, 168:19-169:5; Tr. 3/15/2022 166:7-15, 167:11-21. WinnResidential acknowledges the application of the FHA to its operations, and it has always had a policy to take FHA compliance "seriously" for "every applicant." Tr. 3/15/2022 167:22-168:16. And, at the time Ms. Arroyo applied, WinnResidential had an established policy to provide reasonable accommodations for disabled persons such as Mr. Arroyo. Tr. 3/15/2022 200:15-18; Tr. 10/25/2022 707:21-708:5.

In April 2016, Ms. Arroyo wanted to begin the process of eventually moving Mr. Arroyo in with her at ArtSpace Windham, but that was subject to WinnResidential approving Mr. Arroyo as a tenant and having a two-bedroom apartment available. Order ¶¶ 5, 47; SOF ¶ 21. Ms. Arroyo spoke to WinnResidential's on-site property manager and explained Mr. Arroyo's severe disabilities, his needs, and her desire to have him eventually move in with her. Order ¶ 47; Tr. 3/14/2022 48:23-49:6, 64:1-3, 103:24-104:8. Ms. Arroyo was then told to submit his application and paperwork so WinnResidential could run a background check on him. Order ¶ 47; SOF ¶ 21.

B. CrimSAFE Is a Software Tool Used by Property Managers to Screen Applicants

WinnResidential subscribed to an optional screening tool offered by RPS called "CrimSAFE." Order ¶¶ 5, 6, 31; SOF ¶¶ 3, 4, 9, 12; Tr. 3/14/2022 126:9-19. CrimSAFE allows customers to run criminal background screening reports and to limit the data that could be returned by filtering out categories of criminal records that RPS's customers have deemed irrelevant to their screening policies and housing decisions. Order ¶¶ 7, 10-12; Tr. 11/3/2022 4:23-25, 7:3-16, 17:5-16, 29:14-30:1, 31:4-32:3.

Before using CrimSAFE, WinnResidential – like all of RPS's customers – had to complete a CrimSAFE "matrix" across those criminal categories and choose which types, severity levels, and ages of crimes it wished to filter out from consideration. Order ¶¶ 20-21, 24; Tr. 11/7/2022 47:2-9, 48:6-20, 67:21-25, 70:12-71:21. The categories of criminal records used by CrimSAFE "largely mirror" the Federal Bureau of Investigation's established system for criminal classification. Order ¶ 8; Tr. 11/7/2022 62:1-12. The district court properly found that, during that setup process, RPS did "not make a recommendation on what the housing providers should choose [on their matrix] and expressly tells housing provider that the ultimate decision is theirs." Order ¶ 24; *see* Tr. 11/7/2022 121:2-19, 243:7-17.

CrimSAFE's filtering functionality dramatically reduces the number of applicants who might have criminal records identified during the screening process

by filtering out the great majority of extant criminal records. For example, approximately 95% of all criminal records were filtered out from the WinnResidential applicant pool. Order ¶¶ 10-12; Tr. 11/3/2022 29:14-30:1, 31:4-32:3; Tr. 11/7/2022 139:17-141:8 (testimony that out of 27,688 records available for WinnResidential applicants in 2018, CrimSAFE only returned 1,568 (5.6%) based on WinnResidential's filtering settings). Hence, almost all applicants screened using CrimSAFE simply pass the criminal screening process without any delay, while the *very* few applicants who have records found through CrimSAFE can receive closer review by property managers. Order ¶ 12; Tr. 11/7/2022 139:17-141:8; Tr. 11/8/2022 16:24-17:13.

RPS trained its customers on how to set up the CrimSAFE filters and how to access and review the full details of the very few criminal records identified by CrimSAFE. Order ¶¶ 20-22, 25, 28; Tr. 11/7/2022 80:21-22, 155:4-157:16. RPS also trained housing providers to consult their tenant selection policies when using CrimSAFE; policies that RPS had no role in formulating. Order ¶ 33; Tr. 11/7/2022 53:13-18, 162:12-16, 163:13-16, 165:25-166:4, 191:7-19. Indeed, RPS's customers often admitted applicants who had criminal records found through CrimSAFE. Order ¶ 34; 11/7/2022 151:7-22, 173:5-22; *see* Order at 41.

Like all of RPS's customers, WinnResidential had the option to customize the feature of CrimSAFE that provides a message on a report's cover summarizing the

results based on the customer-selected settings. Order ¶¶ 27, 30; Tr. 11/3/2022 94:12-14; Tr. 11/7/2022 78:21-79:21. WinnResidential elected to use a default setting when CrimSAFE found records in the database matching its criteria that stated, "Record(s) Found," whereas other RPS customers opted to use language such as "Further Review." Order ¶ 27; Tr. 11/7/2022 73:8-12, 78:17-79:7; Ex. 30 at ARROYO000645. WinnResidential also chose to include a message instructing its users to "verify the applicability of these records to your applicant and proceed with your community's screening policies," Order ¶ 30(b) (citing Ex. 30), which is another default setting. *Id.* at 40-41; Tr. 11/7/2022 79:8-21.

RPS had no control over how CrimSAFE was employed by housing providers in their screening processes, and it generally lacked visibility into its customers' ultimate decision on applications. Order ¶¶ 18-20, 24-27, 30(b), 33, 35, 37-39, 45 (citing Ex. F), 48, 59; Tr. 3/14/2022 127:16-22; Tr. 10/25/2022 579:7-13, 579:25-580.9, 623:11-624:7; Tr. 11/7/2022 163:7-12, 210:10-13.

C. WinnResidential's Use of CrimSAFE to Screen Mr. Arroyo, Its Change in Criminal Screening Policies, and Its Refusal to Accommodate Him

On April 26, 2016, after receiving Mr. Arroyo's application, WinnResidential requested a screening report for Mr. Arroyo's criminal and credit history. Order ¶ 48; Tr. 11/3/2022 41:1-6; Ex. 30. CrimSAFE then found a record of a pending theft charge for Mr. Arroyo in Pennsylvania. Order ¶¶ 48, 55; Tr. 11/3/2022 46:2-25,

177:9-22. That was because, at that time, WinnResidential had configured its CrimSAFE matrix to identify pending cases for theft within the prior three years; criteria that Mr. Arroyo indisputably satisfied. Tr. 11/7/2022 111:21-112:6; 190:9-18, 191:24-194:14; Ex. 27; Ex. K at ARROYO000339. CrimSAFE thus identified to WinnResidential that there were "Record(s) Found," along with the actual record containing the full details of that record. Order ¶¶ 48, 55; Tr. 3/15/2022 153:1-7; Tr. 11/7/2022 204:24-205:2; Ex. 27 at ARROYO000539. CrimSAFE, therefore, worked as WinnResidential had configured it to operate. But then WinnResidential made several mistakes, none of which involved RPS.

First, WinnResidential denied Mr. Arroyo's application due to his pending criminal charge, completely disregarding the information previously provided by Ms. Arroyo that her son was severely disabled. Order ¶¶ 47, 55; Tr. 3/14/2022 103:24-104:8.

Second, WinnResidential's corporate representative testified it has a policy of making reasonable accommodations for known disabled applicants, which would have covered Mr. Arroyo's disabilities. Tr. 3/15/2022 200:15-18. And, because Ms. Arroyo informed WinnResidential of Mr. Arroyo's disabilities *before* he was ever screened, Order ¶ 47; Tr. 3/14/2022 103:24-104:8, WinnResidential plainly did not "proceed with [its] community's screening policies," as instructed on the face of the CrimSAFE results. Order ¶ 48 (quoting Ex. 30 at ARROYO000642).

Third, when Ms. Arroyo wanted to know the reason for WinnResidential's housing decision, WinnResidential refused to answer and instead referred her to RPS, even though RPS knew nothing about WinnResidential's decision and was not involved in that process. Order ¶¶ 50-51 (citing SOF ¶ 26); Tr. 3/14/2022 9:6-15; *see* Order ¶ 33; Tr. 3/14/2022 127:16-22; Tr. 10/25/2022 623:11-624:7.

Fourth, on April 15, 2016, *before* Mr. Arroyo was screened, RPS emailed WinnResidential and its other property manager clients about new fair housing guidance that recently had been issued by the U.S. Department of Housing and Urban Development ("HUD") on April 4, 2016. Order ¶ 45; Tr. 11/3/2022 55:11-56:15, 57:16-18; Tr. 11/7/2022 96:23-25; Ex. F. RPS advised WinnResidential and all its other customers that, while the "CrimSAFE® tool can help with categorization of criminal records," it was "the responsibility of each customer to set their own criteria for making tenancy decisions." Order ¶ 45 (quoting Ex. F). RPS further urged its customers to seek "legal counsel" to review their eligibility requirements "to ensure compliance with all federal and state laws." *Id.* That email went to *262* separate contacts at WinnResidential, including its executive and legal team. Tr. 11/3/2022 55:11-13, 57:21-58:5. RPS then contacted WinnResidential to ensure its personnel had received the email. Order ¶ 46; Tr. 11/7/2022 103:19-104:18; Ex. G at ARROYO000191. Confirming receipt the very next day, WinnResidential stated

that its "internal legal department" would discuss WinnResidential's response to the guidance. Tr. 3/15/2022 178:23-179:11, 179:24-180:1; Ex. G at ARROYO000191.

Just three weeks after Mr. Arroyo was screened, and because of the new HUD guidance, WinnResidential reconfigured its CrimSAFE matrix to filter out almost all types of pending offenses, including those for theft like Mr. Arroyo's. Tr. 3/15/2022 179:24-180:14. Hence, WinnResidential admitted at trial that, if its personnel had paid any attention to its criminal screening policies, Mr. Arroyo could have been rescreened and approved in May 2016.[2] Tr. 3/15/2022 199:8-24.

Fifth, from April 2016 through February 2017, Ms. Arroyo pressed WinnResidential to admit Mr. Arroyo due to his complete disability.[3] Order ¶ 51 (citing SOF ¶ 26). The Connecticut Fair Housing Center ("CFHC") began helping Ms. Arroyo in November 2016. *Id.* ¶ 3; Tr. 3/14/2022 20:16-21:1; Tr. 10/25/2022 654:3-24, 720:6-8. The CFHC communicated with WinnResidential in November and December 2016, re-emphasizing Mr. Arroyo's complete disability, providing his medical records, and demanding an accommodation under the FHA under threat

[2] Ms. Arroyo moved into a two-bedroom unit at the end of her existing one-year lease in November 2016. Order ¶¶ 52-53; Tr. 3/14/2022 35:20-22, 45:6-10. The district court concluded there was no evidence that a two-bedroom apartment was available at any time before November 2016. Order at 57.

[3] From April 2016 through June 2017, Ms. Arroyo did not apply to any other properties. Tr. 3/14/2022 105:8-12; *see* Order ¶ 59.

of litigation. Order ¶ 54; Tr. 10/25/2022 719:5-720:24, 722:25-723:14; Ex. AJ; Ex. BY. WinnResidential still would not relent, forcing Ms. Arroyo to sue WinnResidential in February 2017 before the Connecticut Commission on Human Rights and Opportunities ("CHRO"). Order ¶ 56 (citing SOF ¶ 29); Tr. 3/14/2022 22:8-23:12, 52:17-19. But WinnResidential *still* would not budge. Finally, after the CHRO conducted a fact-finding hearing, WinnResidential settled the matter in late June 2017 for a $50,000 payment to the Arroyos, compelled training on the FHA, and a consent order to abide by the FHA. Order ¶¶ 59-60; Tr. 3/14/2022 54:25-55:4; Ex. AP. Mr. Arroyo subsequently was allowed to move into ArtSpace Windham. Order ¶ 59 (citing SOF ¶ 30); Tr. 3/14/2022 57:4-6; Tr. 10/25/2022 735:14-17.

RPS had no role in any of the dealings among Ms. Arroyo, the CFHC, WinnResidential, and/or the CHRO throughout that litigation, and RPS also was not involved in WinnResidential's ultimate decision to reverse course and admit Mr. Arroyo. Order ¶ 59; Tr. 10/25/2022 726:24-727:1, 736:4-18.

All those mistakes were WinnResidential's alone. And not only did RPS lack power to control WinnResidential's decisions, RPS did not even know what those inexplicable decisions were as they were unfolding.

D. Ms. Arroyo's Submission of Invalid Documentation to RPS When Trying to Request Mr. Arroyo's File

Under the FCRA, consumers can request copies of their consumer files. Order ¶ 62 & n.5; SOF ¶ 33. The FCRA imposes strict legal requirements on RPS to

protect consumers' privacy by protecting the confidential information in its files. Order ¶ 62 & n.5; Tr. 10/28/2022 881:7-12, 881:25-882:15, 886:12-24. Due to his condition, Mr. Arroyo was unable to request his file himself. SOF ¶¶ 14, 16. For those types of circumstances, *i.e.*, where a person requests someone else's consumer file, RPS maintained a written third-party authentication policy. Order ¶ 64 (citing SOF ¶ 34); Ex. AF § 2.3 at ARROYO001706. That written policy allowed RPS to accept powers of attorney, and it also provided for escalation of requests for information by third parties, such as Ms. Arroyo, who could not provide a power of attorney. Order ¶ 64; Ex. AF § 2.3 at ARROYO001706; Tr. 10/28/2022 889:13-19. Based on that policy, the district court correctly concluded that in "any scenario" where the specific requirements cannot be fulfilled (*i.e.*, provision of a notarized power of attorney), "the RPS employee who is handling the file disclosure request is required to escalate the request to a 'supervisor.'" SJ Order at 80 (quoting Ex. AF § 2.3 at ARROYO001706).

In April 2016, Ms. Arroyo followed WinnResidential's instructions to contact RPS for information about WinnResidential's denial of Mr. Arroyo's application. Order ¶ 65; Tr. 3/14/2022 9:10-15. Although RPS did not know what WinnResidential did after it ran the CrimSAFE report (Order ¶¶ 33, 36 (quoting Ex. 30); Tr. 10/25/2022 634:3-9), RPS had a copy of that same report.

On April 27, 2016, one day after Mr. Arroyo's screening, Ms. Arroyo

telephoned RPS to request Mr. Arroyo's consumer file. Order ¶ 65; Tr. 3/14/2022 9:6-18; Ex. 24 at ARROYO000452. Because she was requesting a disclosure on behalf of another consumer, RPS immediately sent Ms. Arroyo a Consumer Disclosure Request Form to complete, which required Ms. Arroyo to identify herself and her ability to request a copy of Mr. Arroyo's private consumer file. Order ¶ 65; Tr. 10/28/2022 892:16-893:7; Tr. 3/14/2022 9:13-18; Ex. 24 at ARROYO000452. Two months later, in late June 2016, Ms. Arroyo returned the form to RPS. Order ¶ 66; Tr. 10/28/2022 894:2-3; Ex. 24 at ARROYO000453; Ex. 28. The returned form, however, was incomplete and was missing Mr. Arroyo's Social Security number and his current and prior addresses. Order ¶ 67; Ex. 28 at ARROYO000575-76. Even more, while Ms. Arroyo submitted a copy of a Connecticut Probate Court Form PC-450C "Fiduciary's Probate Certificate/Conservatorship" ("Conservatorship Certificate"), it did not contain an impressed seal, as required by the terms of that court form, which states it is "'NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED.'" Order ¶ 67 (quoting Ex. 28 at ARROYO000577).

Mr. Arroyo's situation was unique in RPS's experience, with RPS rarely receiving file disclosure requests from third parties (Order ¶ 64; Tr. 10/28/2022 888:23-889:1), and never before (or after) from an individual claiming to be the conservator of a totally-disabled individual. Tr. 10/28/2022 897:23-898:1; SJ Order at 21. Thus, upon receiving the incomplete Consumer Disclosure Request Form and

the invalid Conservatorship Certificate, and pursuant to its written policy, the request was escalated to a supervisor, but it was denied due to an inability to "accept [the] conservatorship court paper." Ex. 24 at ARROYO000453.

On June 30, 2016, RPS mailed a response letter to Mr. Arroyo asking him to contact RPS to discuss the file disclosure request. Order ¶ 69; Ex. 25. The letter was mailed to the address Ms. Arroyo identified on the Consumer Disclosure Request Form as being Mr. Arroyo's current address. Order ¶ 69; Ex. 28 at ARROYO000575. But the letter was returned to RPS as undeliverable. Order ¶ 70; Ex. 25 at ARROYO000478. Ms. Arroyo did not contact RPS again until September 2016, and she later spoke with an attorney about her request for Mr. Arroyo's disclosure. Tr. 3/14/2022 82:5-7, 84:4-21. In November 2016, Ms. Arroyo again spoke with RPS, and she was advised that she would need to submit a Conservatorship Certificate with a visible seal. Order ¶ 78; Tr. 3/14/2022 86:25-87:6, Ex. 24 at ARROYO000456. While Ms. Arroyo did fax a new Conservatorship Certificate to RPS, it again lacked an impressed seal and thus was invalid. Order ¶ 79; Ex. 26 at ARROYO000484. In fact, Ms. Arroyo *never* sent RPS a Conservatorship Certificate with an impressed seal. Order ¶ 81.

Mr. Arroyo's asserted injury in connection with his FCRA file disclosure claim was that Ms. Arroyo could have used his consumer file to try and persuade WinnResidential to admit him earlier than June 2017. *Id.* at 56-57. The district court

correctly noted there was "no evidence" by which it could "determine how receipt of that report would have changed Mr. Arroyo's ability to move into Artspace [Windham]," including due to WinnResidential's intractable refusal to accept Mr. Arroyo long after knowing all the relevant facts. *Id.* at 57. Therefore, the district court held Mr. Arroyo had not proven any actual damages. *Id.* at 58.

II. PROCEDURAL HISTORY AND THE DISTRICT COURT'S DECISIONS

After settling their claims with WinnResidential (*id.* ¶¶ 56, 60), the Arroyos and the CFHC collectively sued RPS. ECF 1. Plaintiffs asserted six claims against RPS for violations of the FHA, 42 U.S.C. §§ 3601, *et seq.*, the FCRA, 15 U.S.C. §§ 1681, *et seq.*, and the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn Gen. Stat. §§ 42-110a, *et seq*. *Id.* at 48-55.

Count One alleged on behalf of all Plaintiffs that CrimSAFE has a disparate impact on Latino and African American housing applicants in violation of FHA §§ 3604(a) and 3604(b). *Id.* ¶¶ 193-99.

Count Two alleged on behalf of all Plaintiffs that RPS's procedures have a disparate impact on disabled applicants who submitted file disclosure requests through third persons in violation of FHA § 3604(f). *Id.* ¶¶ 200-05.

Count Three on behalf of the Arroyos alleged disability discrimination under FHA §§ 3604(f)(2) and (f)(3)(B) based on RPS's purported refusal to grant a

"reasonable accommodation" to Ms. Arroyo when she requested Mr. Arroyo's consumer file. *Id.* ¶¶ 206-09.

Counts Four and Five alleged on behalf of Mr. Arroyo only that RPS's failure to disclose his consumer file violated §§ 1681g and 1681h of the FCRA. *Id.* ¶¶ 210-23.

Count Six alleged on behalf of the Arroyos that RPS engaged in purported unfair and/or deceptive acts or practices in violation of CUTPA. *Id.* ¶¶ 224-34.

The Arroyos sought out-of-pocket and emotional distress damages. *Id.* ¶ 216. The CFHC sought damages in the form of "frustration of mission" and "diversion of resources," claiming that the CFHC had assisted clients who had been screened by CrimSAFE and that RPS had more generally frustrated "equal access" to housing in Connecticut. *Id.* ¶¶ 185-192.

On March 25, 2019, the district court denied RPS's motion to dismiss. ECF 41. After discovery, the parties cross-moved for summary judgment. *See* ECF 194. The district court denied Appellants' motions in their entirety. *Id.* at 2. The district court granted in part and denied in part RPS's motion. *Id.* The district court found disputed issues of material fact with respect to Appellants' disparate impact and treatment FHA claims based on race, denying summary judgment as to those claims. *Id.* at 30-67. The district court granted RPS's motion with respect to Appellants' disparate impact, disparate treatment, and reasonable accommodation disability-

related FHA claims. *Id.* at 78-86. The district court also partially granted summary judgment in favor of RPS on Mr. Arroyo's FCRA claims, dismissing the claims asserted under §§ 1681g and 1681h, but allowing Mr. Arroyo to proceed to trial on an un-plead claim under the FCRA's implementing regulation – 12 C.F.R. § 1022.137(a)(2)(iii)(C) – due to a potential failure to affirmatively educate Ms. Arroyo on how to cure the deficiencies in her requests for Mr. Arroyo's consumer file, but only for a limited time frame. *Id.* at 68-78. Finally, the district court denied the parties' cross-motions on the CUTPA claim. *Id.* at 86-90.

A ten-day bench trial occurred in 2022. The district court issued its post-trial decision on July 20, 2023. ECF 317. The district court granted judgment in favor of RPS on all remaining counts under the FHA and CUTPA, and it ruled in Mr. Arroyo's favor on the FCRA claim. *Id.* at 2.

On the FCRA claim, the district court agreed with RPS's trial arguments that Plaintiffs never actually raised a claim under 12 C.F.R. § 1022.137(a)(2)(iii)(C) in the Complaint, that the regulation does not provide a private cause of action, and that the regulation does not apply to RPS's operations. *Id.* at 49-51. The district court also held Mr. Arroyo failed to prove he had suffered any "actual damages" under the FCRA. *Id.* at 56-58. However, the district court unexpectedly revived the previously-dismissed claims under §§ 1681g and 1681h of the FCRA and awarded statutory and punitive damages to Mr. Arroyo of $4,000. *Id.* at 51-53, 58-60.

STANDARD OF REVIEW

This Court "review[s] a grant of summary judgment de novo." *Dallas Aero., Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). In reviewing the grant of summary judgment, this Court should affirm "where there are no genuine issues of material fact to be tried," and where the facts "warrant judgment in the moving party's favor as a matter of law." *Velez v. Sanchez*, 693 F.3d 308, 314 (2d Cir. 2012).

"'Following a bench trial, this Court 'reviews a district court's findings of fact for clear error, and its conclusions of law de novo.'" *Maricultura del Norte, S. de R.L. de C.V. v. Umami Sustainable Seafood, Inc.*, 769 F. App'x. 44, 50 (2d Cir. 2019) (citation omitted; alteration in original). "'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (citation omitted).

Whether reviewing orders on summary judgment or following a bench trial, this Court may affirm the district court's judgment "on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 222 n.4 (2d Cir. 2014) (bench trial); *see McElwee v. County of Orange*, 700 F.3d 635, 640 (2d Cir. 2012) (summary judgment).

SUMMARY OF ARGUMENT

1. Race-Based FHA "Disparate Impact": In *Bank of America Corp. v. City of Miami*, 581 U.S. 189 (2017), the Supreme Court limited FHA applicability and potential liability to those persons whose conduct is the "direct" proximate cause of a housing denial. That generally means that the alleged injury should follow almost automatically from the challenged conduct. The Supreme Court confirmed that even "foreseeable" housing denials are insufficient to establish proximate cause under the FHA as a matter of law. *Id.* at 201.

After adopting a broad view of the legal scope of the FHA, the district court properly held that RPS was not subject to the FHA based on the factual findings at trial. That was because Appellants did not meet their burden at trial of proving that RPS was the direct proximate cause of any housing denials. To the contrary, the trial record established that the principal purpose of CrimSAFE is to *filter out* criminal records. Under any standard, that principal purpose to facilitate housing acceptances does not trigger the FHA. And, for the very few applicants who have "records found" through CrimSAFE, the record established that RPS had no control over housing providers' use of CrimSAFE and no role in housing decisions. The district court thus properly held Appellants failed to prove that RPS made housing "unavailable" for Mr. Arroyo or anyone else.

In addition to their failed general attack on CrimSAFE, Appellants further failed to prove that RPS proximately caused the Arroyos' housing denial or any other damages specific to them. WinnResidential acted contrary to its own policies in multiple regards when screening and denying Mr. Arroyo, meaning that it (not RPS) was the direct cause of the decision to deny Mr. Arroyo's application. Furthermore, despite claiming that CrimSAFE had caused the CFHC damages by "frustrating its mission" and "diverting its resources," the CFHC failed to present any evidence at trial that it had represented *anyone* apart from Mr. Arroyo who was screened using CrimSAFE and then denied housing. Though Appellants simply ignore those Appellant-specific issues, which the district court did not need to reach in rendering its opinion, this Court also can affirm on them.

2. Disability-Based FHA "Disparate Impact": The district court properly dismissed Appellants' disability-based disparate impact FHA claims on summary judgment. RPS's file disclosure practices have no necessary connection to housing decisions. And there has never been any proof of any connection between RPS's disclosure of consumer files and the housing decisions separately and independently made by RPS's customers. In fact, the undisputed facts confirmed that WinnResidential's receipt of Mr. Arroyo's file would have made no difference on WinnResidential's decision to deny his application. There also was no evidence of any disabled applicant apart from Mr. Arroyo *ever* being denied a consumer file

from RPS or somehow losing housing due to a lack of a file disclosure. That FHA claim also hinged on the purported "less discriminatory alternative" that RPS waive a legal requirement imposed by Connecticut probate law for Conservatorship Certificates to have impressed seals. Appellants' proposed "alternative" fails because it would be unreasonable as a matter of law.

3. Disability-Based "Reasonable Accommodation": The district court properly granted summary judgment to RPS on the Arroyos' claim that RPS allegedly failed to provide Mr. Arroyo a "reasonable accommodation" by refusing to disclose Mr. Arroyo's consumer file to Ms. Arroyo. The district court properly found that the Arroyos did not prove the release of Mr. Arroyo's file was "likely necessary" to secure his housing. Appellants proffered no proof of the utterly-conjectural claim that the release of Mr. Arroyo's consumer file would have caused WinnResidential to approve his application. The district court also properly held that it would have been unreasonable for RPS to have accepted a Conservatorship Certificate that was facially invalid under Connecticut law. Finally, the Arroyos' newly-stated claim on appeal that it would have been "reasonable" for RPS to proactively assist Ms. Arroyo in correcting the deficiencies with the materials she submitted to obtain the file disclosure was never raised below and, in any event, would impose a requirement for an "interactive process" that has been rejected as a matter of law.

4. Mr. Arroyo's Lack of Article III Standing to Assert FCRA Claims: While the district court properly held that Mr. Arroyo suffered no harm on his FCRA claims – a ruling Mr. Arroyo has not appealed – the district court erred in deciding the FCRA claims on the merits. Once the district court concluded that Mr. Arroyo had proven no harm, the court should have dismissed the claims for lack of subject matter jurisdiction and proceeded no further.

5. The District Court's Error in Ruling in Mr. Arroyo's Favor under §§ 1681g(a) and 1681h of the FCRA: Even if Mr. Arroyo had standing to bring an FCRA claim, it failed for the additional reason that Ms. Arroyo never submitted "proper identification" for the disclosure of Mr. Arroyo's file, a statutory condition precedent for the receipt of a consumer file under the FCRA. Despite properly concluding that "proper identification" was never provided to RPS, the district court still found a violation of the FCRA. That was legal error.

6. The District Court's Improper Revival of the Previously-Dismissed FCRA §§ 1681g and 1681h Claims: The district court properly granted summary judgment to RPS on Mr. Arroyo's FCRA claims under §§ 1681g(a) and 1681h. The district court erred, however, when it *sua sponte* revived such claims after trial without any notice to RPS.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED IN RPS'S FAVOR ON THE RACE-BASED FHA DISPARATE IMPACT CLAIM

A. Appellants Advocate for an Erroneous Standard of Review

Appellants first invite this Court to apply the wrong standard of review to their race-based disparate impact FHA claims. Appellants boldly assert, without analysis, that "[t]he trial court's conclusion that an adverse CrimSAFE report does not make unavailable or deny housing for purposes of 42 U.S.C. § 3604(a) is a pure question of law subject to de novo review." Appellants' Br. at 22, 23-47. Not so. The district court's finding that RPS did not make "housing unavailable" under the FHA was a determination that RPS did not *proximately cause* housing to be unavailable, a factual issue subject to deferential clear error review.

"Following a bench trial, [this Court] review[s] a district court's findings of fact for clear error, and its conclusions of law de novo," and a "District Court's finding of proximate causation . . . is a finding of fact that is subject to the clear error standard of review." *Carco Grp., Inc. v. Maconachy*, 718 F.3d 72, 79 (2d Cir. 2013); *Maricultura del Norte*, 769 F. App'x at 50 ("Following a bench trial . . . the district court's determinations regarding proximate and intervening causes are factual findings reviewed for clear error."). As the Supreme Court has recently explained, "the standard of review for a mixed question all depends – on whether answering it entails primarily legal or factual work." *U.S. Bank Nat'l Ass'n ex rel. CWCapital*

Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 583 U.S. 387, 396 (2018). So, if the mixed question "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," then the "appellate courts should typically review [the] decision de novo." *Id.* However, if the "mixed questions immerse courts in case-specific factual issues – compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what [the Supreme Court has] . . . called 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" then "appellate courts should usually review [the] decision with deference." *Id.* (citation omitted).

The district court was immersed in such "case-specific factual issues" for ten days. The clear error standard applies to the district court's proximate cause finding.

B. The District Court Properly Found that RPS Did Not Make Housing Unavailable

To prevail on their race-based disparate impact claims under FHA § 3604(a), Appellants had to establish that RPS, based on race, "refuse[d] to sell or rent" or "otherwise ma[d]e unavailable or den[ied]" housing to an applicant. 42 U.S.C. § 3604(a). Claims under § 3604(a) can be asserted under a theory of "disparate treatment" or "disparate impact." *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534 (2015). Appellants stake the appeal of their

loss under § 3604(a) on a claim of disparate impact, which Supreme Court has emphasized carries "[a] robust causality requirement." *Id.* at 521.[4]

Based on the facts adduced at trial, the district court properly held that Appellants failed to prove that RPS's actions made housing "unavailable," meaning that their FHA claim failed. In seeking reversal, Appellants propose an erroneous standard of review, seek to re-argue the district court's well-supported factual findings, and invoke legal authority that only supports affirming the district court's post-trial judgment for RPS. Appellants also ignore the numerous facts that apply to their individual claims, which independently negated any attempted showing of proximate cause as to them specifically.

1. The District Court Properly Evaluated Proximate Cause Principles When Holding that RPS Did Not Make Housing Unavailable

Appellants acknowledge, as they must, that whether a defendant "otherwise make[s] unavailable or den[ies] housing'" is "tethered to a proximate cause

[4] To prevail on a disparate impact claim, "a plaintiff . . . must come forward with a prima facie case; and second, the defendant . . . may rebut the prima facie case by proving that the 'challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent'. . . . [Third], the burden of proof shifts back to the *plaintiff* to show that the 'substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has less discriminatory effect.'" *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016) (quoting 24 C.F.R. § 100.500(c)) (emphasis in original).

requirement." Appellants' Br. at 22-23 (citing *City of Miami*). Indeed, in *City of Miami*, the Supreme Court specifically addressed the scope of the FHA's potential applicability, holding that FHA applicability hinges on a showing of "proximate cause." 581 U.S. at 201-02. In reversing the Eleventh Circuit, the Supreme Court held that "foreseeability alone is not sufficient to establish proximate cause under the FHA," and there must instead be a "*direct relation* between the injury asserted and the injurious conduct alleged" to establish proximate cause. *Id*. (emphasis added).

Under the "direct-relation" standard, proximate cause is generally absent where the alleged damages implicate "separate actions carried out by separate parties." *City of Oakland v. Wells Fargo & Co.*, 14 F.4th 1030, 1040 (9th Cir. 2021) (*en banc*) (citing *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 3 (2010)). Indeed, in *City of Miami*, the Supreme Court held that the "direct-relation" standard of proximate cause under the FHA generally requires a court "not to go beyond the 'first step' of the causal chain," which here would be the housing providers (*e.g.*, WinnResidential) that made housing decisions. 581 U.S. at 202-03.

Accordingly, the FHA does not apply when proximate cause is absent, and proximate cause is absent where the claimed housing denial does not flow "more or less automatically" from a defendant's conduct. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 140 (2014) (applying the "direct-relation" standard).

2. The District Court Properly Found That RPS Did Not Make Housing Unavailable Based on the Facts Adduced At Trial

After allowing Appellants to survive a motion to dismiss and motion for summary judgment to give them the opportunity to prove their claims *with facts*, the district court properly found that Appellants failed to prove at trial that RPS made housing unavailable through the CrimSAFE software. But, before reviewing the district court's well-supported factual findings, it is notable that the district court *embraced* the legal concepts Appellants advance before this Court regarding the potential legal scope of the FHA.

Appellants (and their amici) attempt to characterize the district court's finding as being focused on identifying only the final decision-maker, but the district court's actual ruling took a much broader view of potential FHA applicability. In its Order, the district court confirmed that "'[t]he phrase 'otherwise make unavailable' has been interpreted to reach a wide variety of discriminatory housing practices,'" citing many of the same cases identified by Appellants to this Court. Order at 36 (citations omitted). The district court also held: (1) "an entity other than a landlord or property seller can be liable for violating the FHA," *id.* at 43; and (2) that such an entity "can be liable under the FHA even when they are not the ultimate decisionmaker." *Id.* Having adopted Appellants' own view of the potentially-expansive reach of the FHA, Appellants cannot (and do not) contend the district court erred in the legal standards it applied to assess RPS's conduct under the FHA.

Then, after reciting dozens of pages of factual findings and applying Appellants' own view of the law, the district court found that Appellants "failed to prove by a *preponderance of the evidence* that [RPS's] use of CrimSAFE denies or otherwise makes unavailable housing pursuant to section 3604(a)."[5] *Id.* at 46 (emphasis added). That intensely-factual conclusion was correct under any standard of review, but certainly so under the applicable clear error standard.

First, in determining what CrimSAFE *does*, the district court identified that CrimSAFE is a software tool that permits housing providers to remove from potential consideration vast quantities of criminal records. If a housing provider does not deem certain categories and/or ages of criminal records relevant, then the housing provider can configure CrimSAFE to filter out *all* records that do not meet its own standards. *Id.* ¶ 10; Tr. 11/7/2022 62:1-64:11. That filtering function works remarkably well. The trial record established that 14% of applicants screened by RPS have historically had some form of criminal history. Order ¶ 11; Tr. 11/3/2022

[5] Indeed, while Appellants and their amici repeatedly invoke the FHA's remedial purpose, that purpose cannot override proximate cause requirements established by the *City of Miami* precedent. For instance, like the FHA, federal antitrust laws were intended to be "given broad, remedial effect." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 568-569 & n.6 (1982). RICO is likewise to be "read broadly" and "liberally construed." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985). But in applying principles from the Clayton Act and RICO to the FHA, the Supreme Court had no problem in concluding that directness principles precluded the Eleventh Circuit's overly-permissive FHA "foreseeability" standard of proximate cause. *See City of Miami*, 581 U.S. 202-03.

29:14-20. When housing providers chose to use CrimSAFE, however, only 6% of applicants screened by RPS had an identified criminal result. *Id.* Further, because CrimSAFE's filtering logic is fully customizable, that numerical difference can be even more pronounced for certain customers. WinnResidential, for instance, had less than 3% of its applicants receive a CrimSAFE "hit," meaning that more than 97% of applicants simply passed criminal screening without delay. Tr. 11/7/2022 134:8-13; Ex. 43 at ARROYO001533. In fact, due to that filtering process, CrimSAFE, on average, identified criminal records for only *two* applicants for each WinnResidential property, *per year*.[6]

Indeed, in identifying that RPS had established the "filtering function" as *the* reason "why" customers pay extra for CrimSAFE, the district court held:

> By filtering out records a housing provider deems irrelevant to their housing decision, CrimSAFE *increases the number of automatic acceptances* for individuals that have older and minor criminal histories. This unburdens the housing provider's staff and provides faster processing of tenant applications. The filtering function is an added feature, which is why CrimSAFE is more expensive . . . .

Order ¶ 12 (emphasis added). So, the principal functionality of CrimSAFE is to remove barriers to approvals, something that is *not* regulated by the FHA under any

[6] The record reflects WinnResidential had 3,317 CrimSAFE "hits" across its properties from January 2016 to July 2019. Ex. 38 at ARROYO000875. WinnResidential was managing over 550 properties during this time. Tr. 3/15/2022 168:19-22. Those 3,317 "hits" spread across 550 properties for three years equals roughly two applicants per year; a remarkably small number.

view of the law. And, with most criminal records filtered out, housing providers can spend more time reviewing the very few applicants who have records found. Tr. 11/3/2022 31:14-32:3, 224:3-7.

Second, the district court determined RPS undertook several other actions to train/educate its customers that they alone bear the obligation to decide how to use CrimSAFE. RPS required FHA compliance as a matter of contract for all customers. Order ¶¶ 5, 19; *id.* at 42; Ex. J at ARROYO000256. RPS also repeatedly informed its customers about the April 4, 2016 HUD guidance and its stated directive for individualized review of criminal records identified during a screening process. Order ¶ 45; Tr. 3/15/2024 173:21-24; Tr. 11/3/2022 55:11-56:15; Tr. 11/7/2022 96:23-25; Ex. F. RPS trained housing providers on the product's operation, including how to access the full details of any criminal records identified through CrimSAFE, if the housing provider chose to limit those details to its managerial staff. RPS also trained housing providers to consult their own tenant selection policies when using the CrimSAFE product and built language into the product specific to that directive.

Third, and in sharp contrast to those narrow software functions, the district court identified what RPS and CrimSAFE *do not do*; a lengthy list of omissions that cover virtually every aspect of the housing application process. The district court identified that RPS did not engage in the following actions:

1. Establishing the tenant selection plans (Order ¶ 33; Tr. 11/7/2022 53:3-18, 163:13-16);

2. Deciding whether to use the optional CrimSAFE product (Order ¶¶ 12, 18; Tr. 11/7/2022 62:13-19);

3. Determining a housing provider's initial CrimSAFE settings (Order ¶ 24; Tr. 10/25/2022 583:15-24, Tr. 11/7/2022 243:7-17);

4. Changing housing provider CrimSAFE settings after initial setup (Order ¶ 24; Tr. 11/7/2022 73:17-74:14, 121:2-19);

5. Determining which language to use on CrimSAFE reports, including whether to deviate from the default "records found" language (Order ¶ 27; Tr. 11/7/2022 78:21-79:21);

6. Determining whether to limit the full details of any records identified by CrimSAFE to managerial staff or whether to make such details available to all personnel (Order ¶¶ 25-26; *id.* at 38; Tr. 11/7/2022 80:21-22, 115:1-14);

7. Accepting applications for housing or interacting with applicants (Order ¶ 29; *id.* at 37; Tr. 11/7/2022 53:5-12);

8. Establishing policies regarding how applications are processed or reviewed by the housing provider (Order at 39; Tr. 11/3/2022 66:24-67:7, 118:5-10);

9. Determining which applicants would be admitted or rejected, including whether to accept an applicant with "records found" through CrimSAFE (Order ¶ 34; *id.* at 39, 41, 44; Tr. 11/7/2022 151:7-22);

10. Determining whether to send an applicant an adverse action letter informing the applicant their application was rejected (Order ¶ 35; Tr. 11/3/2022 48:19-49:11; *see* Order at 40; Tr. 11/7/2022 157:19-22); and

11. Overriding the property manager's initial negative or positive housing decision (Order at 44; Tr. 11/3/2022 9:21-10:4).[7]

See Order at 46. Instead, RPS's housing provider customers (*e.g.*, WinnResidential) performed each of those steps.

The ***many*** intervening steps in this extended causal chain place Appellants' alleged injuries far beyond the "first step" of causation under the FHA's "direct relation" proximate causation standard. As the district court found, it was clear based on the record that "there is no direct connection" between any decision by a property manager to make housing unavailable and RPS. Order at 45. That factual determination was well grounded in both fact and law. *See, e.g.*, *City of Oakland*, 14 F.4th at 1040 (rejecting municipalities' FHA claim challenging defendant's lending practices as discriminatory because the "theory of liability rests not just on separate actions, but separate actions carried out by separate parties"); *Mhany Mgmt.*, 819 F.3d at 621 (dismissing FHA claim against a county that had "no clear power of override" over a city's zoning decision, and also where there was no persuasive evidence that any "limited power of non-binding disapproval carries any weight"); *Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer*, 6 F. Supp. 3d 1272, 1294

[7] Indeed, while those facts have been established, Appellants continue to lean heavily on dated marketing materials for descriptions of CrimSAFE's functionality, which the district court discounted as being "in conflict with more recent materials," Order at 40.

(S.D. Fla. 2014) (rejecting FHA liability "[b]ecause Trapani had nothing to do with that vote and had no authority over Sabal Palm's decision, the unlawful action was fundamentally Sabal Palm's, not Trapani's"); *Dixon v. Margolis*, 765 F. Supp. 454, 460 (N.D. Ill. 1991) (dismissing Title VII disparate impact claims where named co-defendant had "the exclusive responsibility for selecting, administering and evaluating the written examination").

3. The District Court Did Not Commit Clear Error by Rejecting Appellants' False Characterization of RPS's Role in the Screening Process

Having failed in their factual proof at trial, Appellants contort the record and cite inapposite cases in this Court.

First, Appellants improperly exaggerate RPS's narrow role in the screening process. For instance, Appellants state that CrimSAFE "not only locates and retrieves an applicant's criminal records—but proceeds to interpret those records" against the "relevant landlord's admission policy" by categorizing those records and then determining their age and severity level based on the data points extant in the public record. Appellants' Br. at 25, 42. But that administrative categorization and selection of records is equally true of any software system that responds to a query submitted by its user. *Much* more is required for direct-relation proximate cause. *See, e.g.*, *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 912 F.3d 1192, 1195, 1197 (9th Cir. 2019) (considering whether an entity that provided a software interface that

"automatically applies [the lender's underwriting] guidelines" to assess "a loan's eligibility for purchase" could be held liable under the FCRA, but rejecting that claim because of the "commonsense principle" that "when a person uses a tool to perform an act, the person is engaging in the act; the tool's maker is not").

Second, property managers can choose to configure CrimSAFE so that the full details of any criminal records found are identified to designated supervisory staff, but not to on-site property managers.[8] Appellants claim that such a process could prevent individualized review of records by housing providers.[9] Appellants' Br. at 28. To enable that functionality, however, a housing provider must choose to deviate from CrimSAFE's default setting of *full* availability for all users. Order ¶¶ 25-26; Tr. 11/7/2022 80:21-22, 115:1-14. As the district court logically held, "th[at] feature can

[8] Appellants' amici similarly rely on a misleading picture of CrimSAFE's actual functionality. The United States claims that CrimSAFE provides a report "without any detail" of the records. United States Br. at 4. The National Fair Housing Alliance, *et al.*, similarly contends that CrimSAFE fails to provide information that would permit an individualized review. National Fair Housing Alliance Br. at 27. That was a central disputed fact at trial, and, as discussed above, the district court rejected those false contentions as a matter of fact. The National Fair Housing Alliance, *et al.*, also describe background screening products that operate quite differently from CrimSAFE, discussing products that score records and those that consider eviction records, neither of which CrimSAFE does. *Id.* at 13-15, 17-19.

[9] Plaintiffs pled throughout this case that CrimSAFE "does not provide any information about the [criminal] record itself." *See, e.g.*, ECF 1 ¶ 4. That was false. CrimSAFE always ensures that "housing providers ha[ve] access to the full information on criminal records matched to the applicant." Order at 30.

hardly serve the role of decisionmaker where the program's default provides unlimited access." Order at 46. The district court also noted the providers that choose to enable that setting have good reason for it, because it allows them to have the few records identified by CrimSAFE to receive individualized review by managers "specially trained" in that process. *Id.* at 38. And, as the district court further noted, "it is not uncommon for business organizations to limit what type of information some employees" can access. *Id.*

Third, Appellants assert that CrimSAFE could create a "presumption of ineligibility," with "no guarantee" that any applicant who has records found through CrimSAFE will "receive the benefit of any further review." Appellants' Br. at 26. Any such general "presumption" – itself an assumption Appellants make – would be based on tenant selection criteria and policies that RPS has no role in formulating or implementing. And, any decision to forego further individualized review would be contrary to the specific training and literature provided by RPS and, in any event, would be made entirely by the housing provider. The "fact that some housing provider staff members fail to comply" with RPS's directives "is not wrongful conduct that can be imputed to [RPS]." Order at 39.

At bottom, while Appellants salute *City of Miami*, they are forced to argue for the existence of proximate cause in a way that is flatly inconsistent with the Supreme Court's actual holding. Appellants' brief is replete with factually-unsupported

arguments claiming that CrimSAFE "foreseeably" caused the denial of housing for Mr. Arroyo; that CrimSAFE "tends to shape" the decisioning process; and that CrimSAFE "exerts influence" on the housing decisions made by housing providers. *See, e.g.*, Appellants' Br. at 25-26, 29, 32, 38, 43. But such assertions, even if supported by the record (they are not), would amount to nothing more than "foreseeable"/indirect outcomes the Supreme Court said were insufficient to establish proximate cause under the FHA. *City of Miami*, 582 U.S. at 202.[10]

The caselaw Appellants rely on does not compel a different conclusion. Appellants invoke various, inapposite decisions to argue that the FHA should have

[10] Appellants' amici not only (remarkably) fail to even cite *City of Miami*, they also argue for a test to apply the FHA that is foreclosed by that case's holding. The United States contends that the FHA applies if a party "assisted" or "affect[ed]" the housing decision, a test that is satisfied if the party withholds a "prerequisite" for obtaining housing. United States Br. at 14, 15. The National Fair Housing Alliance, *et al.*, argue that the FHA applies if a party makes it "more difficult" to obtain housing. Nat'l Fair Hous. All. Br. at 25-32. Neither brief acknowledges that the Supreme Court in *City of Miami* has squarely held that but-for causation or even foreseeable causation is not enough.

Also, while the United States cites various informal HUD guidance, the applicable HUD regulations incorporate that robust proximate causation standard by limiting liability for the conduct of third-party housing providers to circumstances where a defendant has the "power to correct" the third-party's discriminatory housing practice, which in turn requires "control" of the third party's conduct. 24 C.F.R. § 100.7(a)(1)(iii); *see Floyd v. City of Sanibel*, No. 2:15-cv-795, 2018 WL 5295819, at *1 (M.D. Fla. July 23, 2018) (citing 24 C.F.R. § 100.7(a)(1)(iii)). In other words, HUD recognizes proving proximate cause under the FHA requires showing: (1) but-for causation; *and* (2) control over the discriminatory housing decision. The amici's proposed tests are contrary to both *City of Miami* and the government's own regulations.

applied to RPS. But each of those cases – virtually all of which predate the Supreme Court's 2017 decision in *City of Miami* – only *underscore* the distinctions between the software-focused role of RPS and conduct that is truly covered by the FHA.

Appellants first cite cases involving persons who dealt directly with applicants (*e.g.*, housing owners, real estate brokers, and property managers), and who denied housing and/or refused to show properties to applicants based on their race.[11] In contrast, RPS had no interactions with applicants and made no housing decisions. It did not know the race of Mr. Arroyo or any other applicant. Those cases have no possible analogue here.

Appellants then reference various cases in which the discriminatory actions were carried out by property managers based on the discriminatory directives of the apartment owners.[12] RPS does not set policies or implement decisions. Moreover, the defendants in those cases exercised their independent judgment in deciding to carry out the owner's discriminatory directives. In contrast, RPS was in no position to correct or reject any discriminatory policies of any of its housing provider

[11] *See Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994); *Gilead Cmty. Servs., Inc. v. Town of Cromwell*, 432 F. Supp. 3d 46 (D. Conn. 2019); *Thurmond v. Bowman*, 211 F. Supp. 3d 544, 564 (W.D.N.Y. 2016); *Lowman v. Platinum Prop. Mgmt. Servs., Inc.*, 166 F. Supp. 3d 1356, 1360 (N.D. Ga. 2016).

[12] *See Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119 (7th Cir. 1974); *Short v. Manhattan Apts., Inc.*, 916 F. Supp. 2d 375 (S.D.N.Y. 2012).

customers, as RPS had no role in setting policy, no visibility into the decisions made by its housing provider customers, and no ability to override any such decisions.[13]

Appellants also substantially discuss *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), an employment-related case decided before *City of Miami*, to argue that RPS and housing providers can both be liable for discrimination. Provided the high standards for proximate cause could be satisfied, RPS does not dispute there can be more than one proximate cause of housing denials. But *Staub* does not help Appellants. There, multiple supervisors who were motivated by hostility to Mr. Staub's military obligations made a series of false complaints to a higher-ranking executive about him, which triggered the executive to conduct an independent investigation into Mr. Staub's performance, leading to his termination. The Supreme

[13] Appellants also complain that CrimSAFE did not automatically filter out "non-conviction offenses," older offenses, or offenses assertedly bearing "little or no relationship to housing." Appellants' Br. at 44. But RPS is a "consumer reporting agency," and it reports criminal records consistent with the express legislative guardrails set by the FCRA, which allows non-convictions to be reported for seven years and convictions to be reported without limitation. *See* 15 U.S.C. § 1681c. RPS cannot have "discriminated" against applicants by reporting records in a manner expressly permitted under the federal law that regulates its core business model. *See, e.g.*, *Glenn v. Fuji Grill Niagara Falls, LLC*, No. 14-CV-380S, 2016 WL 1557751, at *7 (W.D.N.Y. Apr. 18, 2016) (a court "cannot second-guess" a "legislative policy decision") (quoting *Millea v. Metro-North R.R.*, 658 F.3d 154, 167 (2d Cir. 2011)).

In any event, Appellants and their amici again fail to appreciate CrimSAFE is a *filtering* tool. If housing providers want to remove older records or non-conviction records from consideration based on their view of HUD guidance, CrimSAFE can easily facilitate that filtering.

Court held those supervisors could be sued for their discriminatory intent and actions that prompted the executive's review. *Id.* at 419.

Appellants somehow attempt to analogize RPS to the biased employees who lied to the executive. But the theory of liability adopted in *Staub* – termed the "cat's paw" theory – has limits. Most notably, it is predicated on the underlying *animus* of a "biased supervisor." *Id.* at 422 ("[I]f a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable."). In the absence of underlying animus, there is no basis to find proximate cause under the narrow cat's paw theory of liability. *See, e.g.*, *Gomez v. City of New York*, No. 12-cv-6409, 2014 WL 4058700, at *5 (S.D.N.Y. Aug. 14, 2014) ("Courts in this Circuit have declined to extend the cat's paw theory beyond the circumstances described in *Staub*.") (collecting cases); *Ameen v. Amphenol Printed Cirs., Inc.*, No. 12-cv-365-LM, 2013 WL 6834648, at *8 (D.N.H. Dec. 23, 2013) (holding that the cat's paw theory is inapplicable where reported information was accurate), *aff'd*, 777 F.3d 63 (1st Cir. 2015). There is, of course, no evidence that RPS acted on racial animus towards Mr. Arroyo or reported inaccurate information. It did not even know his race and his record was accurate.

Finally, Appellants unconvincingly attempt to distance themselves from this Court's 2016 FHA decision in *Mhany*. In *Mhany*, the plaintiffs argued that, "despite

knowing the law to be discriminatory, the County did not exercise its advisory power to disapprove the zoning law" and that "the County's failure to formally disapprove a shift it knew was discriminatory implicates the County in [the] City's discrimination." 819 F.3d at 621. This Court held that such facts did not establish causation. First, this Court noted the "[p]laintiffs [had] provide[d] no evidence" that the County's disapproval of any action in the past had changed the City's approved course of action. *Id.* Additionally, even assuming successful prior advocacy by the County, this Court held "the County's causal role in the ultimate decision is tenuous. In contrast to previous cases, there is no clear power of override, nor is there evidence that the limited power of non-binding disapproval carries any weight." *Id.*

Similarly here, Appellants advanced no evidence that RPS was in a position to advocate against a customer's decision to deny housing. Indeed, unlike the County in *Mhany*, RPS does not even have insight into those decisions. Order at 44; Tr. 11/7/2022 163:7-12. Additionally, like the County, RPS has no power to override housing policies or decisions of its customers. Order at 44; Tr. 11/3/2022 9:21-10:4. Appellants try and distinguish *Mhany* by claiming that RPS is like *the City* that directly took the discriminatory action. Appellants' Br. at 34. But it was the City in *Mhany* that set policy, with the clear analogy being to the *housing provider*, not RPS. For those reasons, the district court properly held "the connection

between [RPS] and the decision on housing availability is as tenuous, if not more, than the county in *Mhany Management*." Order at 43.

4. This Court May Affirm on the Alternative Ground that Factors Specific to Appellants Belie Proximate Cause

While Appellants exclusively brief their view of whether CrimSAFE makes "housing unavailable" for applicants writ large, they ignore the facts adduced at trial as to *their* circumstances, which preclude a showing of proximate cause. The Court may affirm on that alternative ground.

Appellants all individually claimed that RPS had proximately caused them damages under the FHA. As to the CFHC specifically, it claimed RPS proximately caused damages relating to the CFHC's work on criminal screening in the form of "diverted resources" and "frustration of mission." The CFHC's corporate representative admitted on cross examination, however, that the damages claimed by the CFHC related to work done on criminal background screening *generally*, unconnected to RPS. Tr. 10/28/2022 745:13-746:15, 803:9-11, 808:15-19, 814:16-18, 815:23-816:1, 816:17-23. In fact, apart from Mr. Arroyo, the CFHC did not present proof that a single client it ever assisted was screened by RPS, let alone using the optional CrimSAFE product.[14] *See id.*

[14] While the CFHC belatedly sought to introduce a "damages log" into evidence at trial to try to connect its more general work to clients screened by RPS, the district court properly rejected that attempt, including because the damages log was never timely placed on Appellants' exhibit list. Tr. 10/28/2022 878:1-880:20.

The CFHC also presented no evidence of the cost of the abstract and undeveloped "educational" campaign that it wished to launch in Connecticut to counteract its "frustrated" mission, nor did the CFHC demonstrate a need for a campaign to educate RPS's customers on FHA compliance, especially when those customers had already been trained on the HUD guidance by RPS. That fundamental failure of proof means that the CFHC cannot establish RPS caused any of their claimed damages. *See, e.g.*, *Borum v. Brentwood Village, LLC*, No. 16-1723, 2020 WL 1508906, at *12 (D.D.C. Mar. 30, 2020) (denying request for organizational damages under the FHA due to a lack of causation: "What is missing . . . is any evidence that connects up any of ONE DC's specific education, counseling, or advocacy efforts to Defendants' alleged discriminatory statements.").

With respect to the Arroyos, the trial record established WinnResidential's refusal to admit Mr. Arroyo was not proximately caused by CrimSAFE's identification of Mr. Arroyo's then-pending criminal proceeding. Order at 57-58. The housing denial was, instead, caused by WinnResidential's decisions. *Id.*

First, any claimed causal link between CrimSAFE and Mr. Arroyo's rental decisions is negated by the fact WinnResidential violated its own policies concerning Mr. Arroyo's disabilities, which WinnResidential admitted should have resulted in his approval when he applied in April 2016. WinnResidential's corporate representative testified that WinnResidential had a policy of making reasonable

accommodations for known disabled applicants, which would have included Mr. Arroyo. Tr. 3/15/2022 200:15-18; Tr. 10/25/2022 707:21-708:5. Ms. Arroyo testified she alerted WinnResidential representatives of Mr. Arroyo's disability even *before* he applied. Tr. 3/14/2022 103:24-104:8. Accordingly, under WinnResidential's own accommodation policies, Mr. Arroyo should have been immediately admitted, irrespective of any CrimSAFE result, meaning that CrimSAFE was not the "direct" and "automatic" cause of any housing denials. *See, e.g.*, *Amsterdam Tobacco Inc. v. Philip Morris Inc.*, 107 F. Supp. 2d 210, 218-19 (S.D.N.Y. 2000) (finding the amended complaint failed to plead proximate cause: "'When factors other than the defendant's [action(s)] are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions.'") (citation omitted).

Second, any claimed causal link between CrimSAFE's April 2016 result and Mr. Arroyo's inability to move into a two-bedroom apartment with Ms. Arroyo in November 2016 is further discredited by Mr. Arroyo's *eligibility* for admission to the ArtSpace Windham just weeks after he was initially screened, but he was still not admitted then. Tr. 3/15/2022 199:8-24. In response to the April 2016 HUD guidance and RPS's related communications, WinnResidential changed its CrimSAFE settings on May 19, 2016 to filter out virtually all non-conviction offenses, including pending theft charges. Tr. 3/15/2022 179:24-180:14; Tr.

11/7/2022 121:23-122:10, 124:7-23; Ex. H. WinnResidential also testified that it had the ability to re-run Mr. Arroyo's application at any time. Tr. 3/15/2022 199:22-24. WinnResidential thus admitted at trial that, if anyone had simply re-run Mr. Arroyo's application after May 2016, he would have been approved. Hence, by as early as May 19, 2016, WinnResidential was once again acting contrary to its own criminal screening policies. *See, e.g.*, *Ehlers v. Siemens Med Sols., USA, Inc.*, 251 F.R.D. 378, 390 (D. Minn. 2008) ("[I]f the hospital staff had followed the known safety procedures this accident would not have occurred. This failure . . . broke any causal connection between Siemens's alleged design defect and Ehlers's injury.").

Third, the insinuation that RPS caused a housing denial through CrimSAFE is destroyed by WinnResidential's overall pattern of conduct. For almost a full year *after* learning Mr. Arroyo was completely disabled and unable to commit any crimes, WinnResidential still continued to reject his application. Order at 57-58. That indefensibly stubborn refusal continued until June 2017 when it finally resolved the CHRO proceeding. Order ¶¶ 59-60 (citing SOF ¶ 30).

Based on those facts, the "direct" proximate causes of Mr. Arroyo's housing denial were the independent actions taken by *WinnResidential*, not a configurable software tool offered by RPS.[15] *See, e.g.*, *In re Xarelto (Rivaroxaban) Prod. Liab.*

[15] Appellants' amici mention none of these case-specific facts. The United States and HUD also contend the Court should find the FHA applies and then remand the case for a "proximate cause" determination. That attempt to divorce the proximate

Litig., No. 15-cv-03913, 2021 WL 2853069, at *8 (E.D. La. July 8, 2021) ("[B]etween Defendants' alleged misleading marketing and Plaintiffs' prescription reimbursements 'lies a vast array of intervening events' including the independent judgment of both PBMs and physicians. . . . The Court therefore concludes that Plaintiffs' RICO claims do not meet the 'direct relation' test . . . and are insufficient as a matter of law to establish proximate causation.").

II. THE DISTRICT COURT PROPERLY RULED IN RPS'S FAVOR ON THE DISABILITY-BASED FHA CLAIMS

Appellants seek reversal of summary judgment on their FHA claim that RPS's file disclosure practices had a "disparate impact" on disabled applicants. The district court's decision, however, was proper on several grounds.[16]

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cause analysis from the issue of FHA applicability is inconsistent with *City of Miami*. In any event, the United States and HUD ignore that the district court *did* conduct a proximate cause analysis in connection with the issue of statutory application, meaning there is no need for remand, even if the district court erred in finding a lack of statutory applicability. *See Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 309 (3d Cir. 2020) (disagreeing with the district court's interpretation of a prison's grievance procedures, but then affirming the judgment on alternative grounds supported in the record).

[16] Appellants repeatedly reference the *trial record* to argue they should have survived summary judgment on their disability-based claims. *See, e.g.*, Appellants' Br. at 58-60. That is completely improper. As this Court held in *Griffin v. Sirva Inc.*, "[u]pon review of a grant by a district court of a motion for summary judgment, a federal appellate court may examine *only the evidence which was before the district court*." 835 F.3d 283, 287 (2d Cir. 2017) (emphasis added). The "district court's grant of summary judgment must be examined independently of the evidence presented at trial," meaning that "[n]either the evidence offered subsequently at the trial nor the verdict is relevant." *Id.* (citation omitted).

A. The Undisputed Facts Establish that RPS Did Not Cause Housing Denials Based on Its File Disclosure Practices

As set forth above, the FHA requires RPS's conduct to have been the "direct" cause of Mr. Arroyo's housing denial. *City of Miami*, 581 U.S. at 202. But the file disclosure process is independent from the screening process, and the failure to provide Ms. Arroyo with a copy of Mr. Arroyo's disclosure had no correlation to WinnResidential's housing decision. Appellants proffered no evidence at summary judgment to support their assertion that Ms. Arroyo's receipt of Mr. Arroyo's consumer file would have somehow resulted in WinnResidential reversing its decision to deny his tenant application. Nor did they provide such evidence for *any* other disabled applicant (none of whom were identified in discovery).

To support their proximate cause theory on this claim, Appellants simply declared that Mr. Arroyo's "application would almost certainly have been approved on individualized review, as his significant disabilities made him extremely unlikely to engage in criminal behavior in the future." ECF 87-1, Pls.' Br. in Supp. of Mot. Summ. J. ("Pls.' MSJ") at 16. That was rank speculation. At summary judgment, Plaintiffs, of course, had to support any claim regarding what WinnResidential would have done with testimony from *WinnResidential*. *See, e.g.*, *Xue Ming Wang v. Abumi Sushi, Inc.*, 262 F. Supp. 3d 81, 92 (S.D.N.Y. 2017) ("A party may not rely on conclusory allegations or unsubstantiated speculation' on summary judgment.") (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d. 423, 428 (2d Cir. 2001)). Yet,

the summary judgment record was devoid of any such evidence. *See generally* Pls.' MSJ (citing no testimony from WinnResidential). To the contrary, every reasonable inference from the summary judgment record was contrary to Plaintiffs' speculative claim. Even though WinnResidential was explicitly informed of Mr. Arroyo's disability *many* different times in 2016 and 2017 – both by Ms. Arroyo and the CFHC on her behalf – Appellants had to sue WinnResidential in a CHRO lawsuit before WinnResidential would finally admit Mr. Arroyo in June 2017. *See supra* 13-14. There was no proof that a file disclosure would have made any difference to that timeline.

B. Appellants Proffered No Proof of Any Broader Housing-Related Disparate "Impact" on Anyone Due to RPS's File Disclosure Practices

"[T]o make out a *prima facie* case under the FHA on a theory of disparate impact, a plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect." *Fair Hous. in Huntington Comm., Inc. v. Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003). Yet, Appellants did not proffer any evidence at summary judgment of anyone other than Mr. Arroyo being impacted by RPS's file disclosure practices. RPS likewise had never encountered any situation like Mr. Arroyo's, both at the time of his request and thereafter. Tr. 10/28/2022 897:23-898:1; *see* ECF 114-6, Decl. of A. Barnard ("Barnard Decl.") ¶¶ 20-21. Accordingly, the claim fails. *Reidt v. Cty. of Trempealeau*, 975 F.2d 1336,

1341 (7th Cir. 1992) ("Discriminatory impact cannot be established where you have just one isolated decision.") (quoting *Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 451 (10th Cir. 1981)).

Appellants inevitably will respond that RPS's alleged "policy" of denying file disclosures to conserved individuals will "predictably" have a discriminatory effect on any such individuals in the future. But, as the district court held on summary judgment, there was no such "policy" on which to predict any future outcomes. SJ Order at 80 (citing Barnard Decl. ¶ 8 & Ex. A at 3). When a written power of attorney could not be provided, RPS's documented policy was to escalate any such requests to a supervisor. Ex. AF § 2.3, at ARROYO001706. As the district court noted, based on RPS's written policy, in "'any scenario'" where the specific requirements cannot be fulfilled (*e.g.*, provision of an executed power of attorney), "the RPS employee who is handling the file disclosure request is required to escalate the request to a 'supervisor.'" SJ Order at 80 (quoting Ex. AF § 2.3).

Ms. Arroyo's request demonstrated that policy in action. Ms. Arroyo's disclosure request was denied after a supervisor's review. ECF 114-6, Barnard Decl. ¶¶ 22-38 & Ex. B. RPS would have followed that escalation policy for anyone else, and RPS would then have made a decision based on the facts and circumstances for each such consumer.

Mr. Arroyo's experience is, therefore, not predictive of the experience of any future disabled applicant. The district court agreed, holding Appellants had "not presented evidence" on summary judgment that RPS would "invariably" act in any specific way to any other disabled individual requesting a file disclosure, meaning Appellants had not established "'an actual or predictable disparate impact.'"[17] SJ Order at 82.

C. The District Court Properly Held as a Matter of Law that Appellants' Less Discriminatory Alternative Was Not Legitimate

In its summary judgment order, the district court held Appellants failed to prove a "less discriminatory alternative" for their disability-related disparate impact claim. SJ Order at 82; *see Mhany*, 819 F.3d at 616-20 (if an FHA defendant meets burden of proving legitimate interest, then the burden shifts to plaintiff to prove less discriminatory alternative). The district court thus properly granted summary judgment to RPS on that claim.

Appellants argue to this Court that RPS "had a less-discriminatory alternative of making consumer disclosures to conservators." Appellants' Br. at 57. But that highly-generalized contention glosses over why summary judgment was properly

[17] The district court proceeded to grant judgment after trial to Mr. Arroyo under the FCRA based on his individual circumstances and account notes. While RPS disagrees with that judgment, the facts on which the district court found in favor of Mr. Arroyo were still in every way specific to ***his*** individual facts and circumstances and account notes.

granted to RPS on this issue; it was due to the incomplete and invalid forms submitted by Ms. Arroyo, and not to any policy to deny file disclosures to disabled individuals. SJ Order at 80, 82.

A proposed less discriminatory alternative "must serve a defendant's legitimate interests." *Mhany Mgmt. Inc. v. Cty. of Nassau*, No. 05-cv-2301, 2017 WL 4174787, at *8 (E.D.N.Y. Sep. 19, 2017). A business, of course, has a legitimate interest in obeying the law. Under Connecticut law, a conservator is deemed an arm of the court. *Maefair Health Care Ctr., Inc. v. Noka*, No. CV-22-5049030S, 2023 WL 2385771, at *2 (Conn. Super. Ct. Mar. 2, 2023). Conservators are given only limited, not plenary, decision-making rights. Their rights are set forth in a Probate Court Form 450C, "Fiduciary's Probate Certificate/Conservatorship." The Conservatorship Certificate on its face states that it is "NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED." Ex. 26 at ARROYO000484. It is undisputed that Ms. Arroyo attempted to obtain Mr. Arroyo's file disclosure based on a Conservatorship Certificate that lacked an impressed seal, as required by the form itself. Ex. 28 at ARROYO000577; Ex. 26 at ARROYO000484.

Put another way, the requirement for an impressed seal was imposed by the Connecticut probate court, under authority of law; *it was not imposed by RPS*.[18] *See*

[18] That is just one of many instances under Connecticut law where an impressed seal is required for legal effect. *See, e.g.*, Conn. Gen. Stat. §§ 7-36 to 7-78 (vital records);

Johnson v. Raffy's Cafe I, LLC, No. CV-106002069S, 2015 WL 2166123, at *3 (Conn. Super. Ct. Apr. 6, 2015) (finding probate certificate valid for purposes of establishing jurisdiction after finding "it contained the raised seal," while also noting that a "probate certificate . . . is not valid without a probate seal impressed"), *aff'd*, 163 A.3d 672 (Conn. App. Ct. 2017). Accordingly, it is not legitimate to require RPS to waive, ignore, or override the Connecticut court's requirement of having an impressed seal.[19]

Conn. Gen. Stat. §§ 1-28 to 1-41 (Uniform Acknowledgment Act); Conn. Gen. Stat. § 3-94k (notary practice).

In their brief, Appellants contend that courts outside of Connecticut have permitted copies without seals. The cases Appellants cite are outside Connecticut, so they are irrelevant. Also, none involved a fiduciary conservatorship certificate. The cases also are readily distinguishable. *Smith v. Nat'l Credit Sys., Inc.*, No. 13-cv-4219, 2015 WL 12780446, at *2 (N.D. Ga. May 22, 2015), is inapposite because, unlike here, the relevant inquiry was whether statements in an affidavit had been sworn to before an officer authorized to administer an oath. In *Warfield v. Byron*, 137 F. App'x 651, 655 (5th Cir. 2005), and *Oliver v. N.Y. State Police*, Nos. 17-cv-1157, 18-cv-732, 2019 WL 453363, at *3 (W.D.N.Y. Feb. 5, 2019), the federal summonses did not require an impressed seal for the summonses to be valid. Finally, *In re Robinson*, 403 B.R. 497, 503 (Bankr. S.D. Ohio 2008), and *Schwab v. GMAC Mortgage Corp.*, 333 F.3d 135, 138 (3d Cir. 2003), both concerned whether mortgages were valid, which turned on the requirements of Ohio and Pennsylvania law, respectively.

[19] To the extent that Appellants argue on reply that another proposed less discriminatory alternative was for RPS to have better communicated its documentary requirements to disabled applicants, that too would fail. The district court properly held that Appellants failed to prove the existence of any categorical policy of non-communication with disabled applicants or any required script. SJ Order at 82.

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RPS ON THE ARROYOS' REASONABLE ACCOMMODATION CLAIM UNDER THE FHA

To prevail on a failure to "reasonably accommodate" FHA claim, a plaintiff must prove: (1) the plaintiff had a disability; (2) the defendant knew of the disability; (3) the requested accommodation was likely necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling; (4) the accommodation was reasonable; and (5) the defendant refused to make the accommodation. *Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 156 (2d Cir. 2014). The Arroyos base their reasonable accommodation claim on RPS's FCRA-centric file disclosure practices, which have *no relation* to the housing decisions made by RPS's customers. In fact, RPS is aware of no decision that has ever found an FHA violation based on challenged file disclosure practices. It is, therefore, unsurprising that the Arroyos failed to satisfy several of those required elements of their reasonable accommodation FHA claim.

A. The Arroyos' Requested Accommodation Was Not Reasonable

It is axiomatic that a reasonable accommodation requires the requested accommodation itself be "reasonable." *See Taylor v. Harbour Pointe Homeowners Ass'n*, 690 F.3d 44, 49 (2d Cir. 2012). The Arroyos' requested accommodation – accepting an official court record without an impressed seal − was not reasonable because it would contravene both Connecticut law and the FCRA.

As noted above, a Conservatorship Certificate is invalid without an impressed probate court seal in Connecticut. *Johnson*, 2015 WL 2166123, at *3; *see* Conn. Gen. Stat. § 45a-11 (fiduciary conservatorship certificate without a court seal is valid only if it is a certified copy). And, given the vital importance that a Connecticut Conservatorship Certificate plays in protecting the interests of conserved persons,[20] it would have been unreasonable for RPS to override the court-imposed requirement of an impressed seal, even if RPS was technically capable of doing so. Thus, the reasonable accommodation claim was properly dismissed. *See, e.g.*, *Doe v. Hous. Auth. of Portland*, No. 3:13-cv-1974-SI, 2015 WL 758991, at *6 (D. Or. Feb. 23, 2015) ("Plaintiff's requested accommodation is patently unreasonable because if granted, it would violate federal regulations."), *aff'd*, 644 F. App'x 722 (9th Cir. 2016); *Williams v. New York City Hous. Auth.*, 879 F. Supp. 2d 328, 338 (E.D.N.Y.

[20] Ms. Arroyo was appointed as a co-conservator pursuant to Conn. Gen. Stat. § 45a-655. The legislative history shows the transformative changes to Connecticut probate law in 1998 and 2007 aimed at protecting conserved persons by abolishing plenary conservatorships and limiting conservators' rights. 2007 Conn. Acts 116 (Reg. Sess.); 1998 Conn. Acts 219 (Reg. Sess.). "Both the text and the legislative history of the 2007 act indicate that 'the legislature intended . . . for a conservatorship to be as *limited in scope as possible*, [as well as for] the conservatorship [to] be carried out so as to maintain the most independence and self-determination for the conserved person.'" *Day v. Seblatnigg*, 268 A.3d 595, 604 (Conn. 2022) (emphasis and alteration in original) (citation omitted). Together, the legislative history and statutory framework confirm that, because a conservator's powers are limited, proof of a valid conservatorship certificate is of paramount importance because it details and authorizes a conservator's limited rights.

2012) (holding the requested accommodation "would be patently unreasonable" because "[i]f the court concluded otherwise, the [NYC Housing] Authority would find itself whipsawed between the conflicting obligations of the federal consent decree and the requirements of the FHA and its state and city analogs").

B. The Requested Accommodation Was Not "Likely Necessary" to Secure Housing for Mr. Arroyo

The district court's summary judgment ruling in RPS's favor on the FHA failure to accommodate claim may also be affirmed on the ground that the requested accommodation was not "likely necessary" to secure housing for Mr. Arroyo.

To prevail on a reasonable accommodation claim, the Arroyos were required to prove that, "but for the accommodation, they likely [were] denied an equal opportunity to enjoy the housing of their choice." *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003) (citation omitted). As noted above, the summary judgment record reflected that, even if RPS had disclosed Mr. Arroyo's file to Ms. Arroyo, WinnResidential would not have allowed Mr. Arroyo to secure housing any sooner. That was evidenced by WinnResidential's refusal to admit Mr. Arroyo even after the CFHC became involved in November 2016 and confronted WinnResidential repeatedly about Mr. Arroyo's disability. ECF 99-3, Dep. of C. Arroyo 7/24/2019 38:1-24; ECF 112-7 Ex. B, Dep. of E. Kemple 7/23/2019, 235:4-236:10. At the very least, Appellants offered no proof of any claim to the contrary.

"[T]he [likely] necessity element is a causation inquiry that asks whether the accommodation 'would' – not might – redress injuries inhibiting disabled residents' enjoyment of their property." *Dayton Veterans Residences Ltd. P'ship v. Dayton Metro. Hous. Auth.*, No. 22-3935, 2023 WL 8081677, at *6 (6th Cir. Nov. 21, 2023) (unpublished). Because the undisputed facts at summary judgment established that Appellants failed to prove the requested accommodation was the cause of a housing denial by WinnResidential to Mr. Arroyo, this Court may affirm.

C. Appellants' New Request for an "Interactive Process" Should Be Rejected Because it Was Not Raised Below and is Contrary to Law

The Arroyos suggest on appeal, for the very first time, that RPS was required to explain to Ms. Arroyo the errors in the forms she provided and/or to independently research Ms. Arroyo's status as co-conservator by contacting the Connecticut clerk of probate court. Appellants' Br. at 55-56. Put another way, the Arroyos claim that RPS should have engaged in "interactive processes" with Ms. Arroyo and/or the Connecticut state court clerk, and that RPS's failure to do so denied the Arroyos a "reasonable accommodation" under the FHA.

As a threshold matter, any argument predicated on those new proposals was waived. The Arroyos never identified such proposals in their Complaint, *see* ECF 1, nor did they ever make those reasonable accommodation arguments on summary judgment. They cannot make them now. *Bogle-Assegai v. Conn.*, 470 F.3d 498,

504-07 (2d Cir. 2006) (failure to make argument before district court at summary judgment stage waived appellate consideration of "unpreserved argument").

Moreover, even if preserved, the Arroyos' new accommodation proposals are contrary to law. It is well established under the FHA that a proposed "reasonable accommodation" cannot force a defendant to engage in an "interactive process" with a plaintiff. "[T]he FH[A] does not forbid a landlord from failing to engage with a tenant requesting an accommodation that has no basis in law or fact . . . . [T]he statute prohibits failing to 'make reasonable accommodations,' not failing to 'interactively engage.'" *Howard v. HMK Holdings, LLC*, 988 F.3d 1185, 1193 (9th Cir. 2021) (agreeing with Third and Sixth Circuits, which explained there is no "'language in the [FHA] or in the relevant sections of [HUD]'s implementing regulations'") (citations omitted; alterations added); *accord Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 456 (3d Cir. 2002) (notwithstanding the "interactive process" requirements in the Americans with Disabilities Act and Rehabilitation Act, "the FH[A] imposes no such requirement"). Accordingly, this Court should reject Appellants' effort to raise a new claim on appeal and instead should affirm the district court's ruling.[21]

[21] There also is no proof that those proposed interactive processes would have been successful in curing the deficiencies in the forms submitted. Because this argument was never advanced below, Appellants presented no evidence on summary judgment that the Connecticut probate court clerk would have provided a valid certificate to RPS, even assuming it could have provided one to a non-conservator given the

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

This Court should vacate the district court's judgment on Counts Four and Five under the FCRA and dismiss these claims for lack of jurisdiction.

The district court properly held Mr. Arroyo suffered no actual damages from the alleged FCRA violation.[22] Order at 56-58. Hence, as a threshold matter, the district court lacked subject matter jurisdiction over Mr. Arroyo's FCRA claim.

"To reach the merits of a case, an Article III court must have jurisdiction." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). A plaintiff's burden to prove the facts establishing Article III standing increases as the litigation progresses, "[a]nd at the final stage," each element of standing "must be supported adequately by the evidence adduced at trial." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

An essential element of Article III standing is that a plaintiff must show he "suffered an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). Importantly, in the specific context of FCRA file disclosures, the Supreme Court "has rejected the proposition

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sensitive nature of probate court proceedings. Also, Ms. Arroyo never supplied proper identification, even after she was repeatedly informed of the deficiencies in the certificate she submitted. SJ Order at 75.

[22] Appellants did not appeal the finding that Mr. Arroyo proved no actual damages.

that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Id.* at 426 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). Instead, *Ramirez* made clear that Article III standing for purported FCRA file disclosure violations requires proving "downstream consequences" flowing from a failure to receive a file disclosure. 594 U.S. at 442 (dismissing FCRA file disclosure claim: "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III").

In *Harty v. West Point Realty, Inc.*, this Court relied on *Ramirez* to conclude, even assuming that the plaintiffs were deprived of information to which they were legally entitled in connection with their hotel stays, that they were required to allege "'downstream consequences from failing to receive the required information' in order to have an Article III injury in fact." 28 F.4th 435, 444 (2d Cir. 2022) (citation omitted). Because the plaintiffs did not do so, the claim failed. *Id.*

Here, no such "downstream consequences" from the claimed informational injury exist. As noted above, Mr. Arroyo's asserted claim of informational injury was that Ms. Arroyo could have used the file disclosure to try and convince WinnResidential to admit Mr. Arroyo sooner because he was disabled and therefore could not commit any future crimes. Order at 56-57. Based on the facts adduced at trial, the district court properly found that Mr. Arroyo failed to prove "by a

preponderance of the evidence that WinnResidential would have accepted Mr. Arroyo's application sooner had Ms. Arroyo received Mr. Arroyo's consumer report sooner." *Id.* at 58. Once the district court concluded Mr. Arroyo's claimed "injury" resulting from the alleged § 1681g violation was not "supported adequately by the evidence adduced at trial," *Lujan*, 504 U.S. at 561, the court was obligated to dismiss the claim for lack of subject matter jurisdiction. *See, e.g.*, *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 162 (2d Cir. 2012) (vacating judgment and dismissing action where the district court improperly entered judgment despite lack of Article III standing).

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING IN MR. ARROYO'S FAVOR ON THE FCRA CLAIM, BECAUSE HE FAILED TO MEET A CONDITION PRECEDENT

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

Under the FCRA, a consumer reporting agency is required "upon request, and subject to section 1681h(a)(1) of this title, [to] clearly and accurately disclose to the consumer" their consumer file. 15 U.S.C. § 1681g(a). The FCRA also prohibits a consumer reporting agency from disclosing a file unless the requesting party provides "proper identification." 15 U.S.C. § 1681h(a)(1) ("A consumer reporting

agency shall require, *as a condition of making the disclosures* required under section 1681g of this title, that the consumer furnish proper identification.") (emphasis added). That requirement furthers the FCRA's goal of promoting consumer privacy with respect to the confidential information that is contained in consumer files. 15 U.S.C. § 1681 (noting that the FCRA was enacted, in part, to protect "the consumer's right to privacy").

Based on that clear statutory text, a consumer's obligation to provide proper identification is "a condition precedent necessary to trigger Defendants' FCRA disclosure obligation." *Samuel v. SageStream, LLC*, No. 1:22-cv-01277, 2023 WL 4048695, at *4 (N.D. Ga. Apr. 28, 2023) (dismissing § 1681g claim); *see Hicks v. Smith*, No. 3:17-CV-251-CHB, 2020 WL 5824031, at *7-8 (W.D. Ky. Sept. 30, 2020) (same); *Ogbon v. Beneficial Credit Servs., Inc.*, No. 10-cv-3760, 2013 WL 1430467, at *7-8 (S.D.N.Y. Apr. 8, 2013) (same).

The district court granted partial summary judgment to RPS on Mr. Arroyo's FCRA claims, holding the claims under §§ 1681g and 1681h failed as a matter of law because Ms. Arroyo had failed to provide "proper identification," a condition precedent to RPS's duty to provide a consumer file disclosure. SJ Order at 73-76. The district court logically reasoned that, "[w]here state law defines the validity of an identification document, state law defines 'proper identification' under the FCRA." *Id.* at 73 (citing *Menton v. Experian Corp.*, No. 02-cv-4687, 2003 WL

941388, at *1 (S.D.N.Y. Mar. 6, 2003)). Ms. Arroyo attempted to obtain Mr. Arroyo's file by providing photocopies of a Conservatorship Certificate without the legally required impressed seal. Ex. 28 at ARROYO000577; Ex. 26 at ARROYO000484. The district court thus concluded "no reasonable factfinder could find" that proper identification was provided. SJ Order at 75; *see id.* at 73-74. Once the district court found Mr. Arroyo failed to prove proper identification, the inquiry into whether RPS violated §§ 1681g and 1681h necessarily should have resulted in judgment for RPS. *See, e.g.*, *Samuel*, 2023 WL 4048695, at *4.

VI. THE DISTRICT COURT ERRED BY REVIVING MR. ARROYO'S STATUTORY FCRA CLAIM AFTER HAVING DISMISSED IT BEFORE TRIAL

The district court entered judgment for Mr. Arroyo on his FCRA §§ 1681g and 1681h claim after trial. ECF 318. That was reversible error, as the district court previously granted summary judgment on those same claims, and the district court never provided any notice it would revive such claims post-trial, resulting in distinct prejudice to RPS. SJ Order at 75-76.

"Once a district judge issues a partial summary judgment order removing certain claims from a case, the parties have a right to rely on the ruling [at trial] by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989). If "the judge subsequently changes the initial ruling and broadens the scope of the

trial, the judge *must inform the parties* and give them an opportunity to present evidence relating to the newly revived issue." *Id.* (emphasis added).

Multiple other courts of appeals have also affirmed that a trial court's failure to provide notice before changing its pre-trial ruling causes substantial prejudice, it constitutes reversible error. *Hayduk v. City of Johnstown*, 386 F. App'x 55, 60-62 (3d Cir. 2010) (concluding district court erred when it found no disputed issues of material fact on an issue on summary judgment only to inform the parties after the close of evidence that it would submit the issue to the jury); *Alberty-Velez v. Corporacion De Puerto Rico Para La Difusion Publica*, 242 F.3d 418, 423 (1st Cir. 2001) (holding trial court's "unexpected reversal" of its summary judgment ruling at the end of the trial constituted substantial prejudice).

The First Circuit's decision in *Alberty-Velez* is instructive. In *Alberty-Velez*, the district court "stated flatly" in its summary judgment order it had determined the plaintiff was the defendant's employee, which was an element of her employment discrimination claim. 242 F.3d at 423-25. Nevertheless, the district court "unexpected[ly]" chose to reconsider its ruling on that issue after the plaintiff had rested her case. *Id.* On appeal, the plaintiff "suggest[ed]" how she "might have tried her case differently" if she had known that the court would reconsider the issue, including that she "would have expanded her own testimony" and may have called additional witnesses. *Id.* at 425. The First Circuit then concluded that "[e]ven this

brief outline of potential evidence" revealed the prejudice caused to her case, which "could not be more palpable." *Id.*

As in *Alberty-Velez*, the prejudice to RPS here is palpable. The district court's summary judgment order held Mr. Arroyo's FCRA §§ 1681g and 1681h claims failed because Ms. Arroyo never provided proper identification. SJ Order at 75. The only sliver left of Mr. Arroyo's FCRA claim after summary judgment was whether RPS violated a *separate* duty – found only in the regulations under 12 C.F.R. § 1022.137(a)(2)(iii)(C) – to affirmatively inform Ms. Arroyo of the defects in her submitted documentation. SJ Order at 75-76. In reliance on the district court's pre-trial order, RPS prepared a trial defense only to the regulatory claim.[23] RPS's challenge was successful, leading the district court to dismiss that regulatory claim based on RPS's arguments.[24] Order at 50-51.

Nonetheless, in its post-trial Order, the district court unexpectedly resurrected the statutory claim under § 1681g, stating "even though Ms. Arroyo never furnished proper identification as required under the FCRA . . . [RPS] may be liable for

[23] RPS successfully defended against that regulatory claim at trial by arguing: (1) it was never properly pled or disclosed before Appellants' summary judgment reply brief; (2) the regulation, which was promulgated under a completely different section of the FCRA (§ 1681j), applies only to "Nationwide Specialty Consumer Reporting Agencies," which RPS is not; and (3) no private right of action exists to enforce the regulation. Order at 50-51.

[24] Appellants did not appeal that dismissal of the regulatory claim.

violating the FCRA by making it impossible for a consumer to exercise its rights to their consumer file." Order at 52. The district court cited no case law or other authority to support the (flawed) proposition that liability under § 1681g is possible where the statutory prerequisite of proper identification has not been satisfied.

Regardless, had RPS been on notice that the § 1681g claim would be revived, it would have presented additional evidence regarding its procedures for escalating consumer disclosure requests, which would have further shown it does not have any policy exclusively requiring a power of attorney to obtain a report on behalf of a third party. RPS would also have had the opportunity to cross-examine Ms. Arroyo to establish she knew or should have known that a photocopy of the Conservatorship Certificate was not valid without an impressed seal (as was stated on the face of the certificate) and that she previously had obtained such certificates with impressed seals from the probate court, rendering irrelevant the district court's finding that RPS "did not direct Ms. Arroyo to submit one with an original seal." Order at 53.[25]

CONCLUSION

This Court should affirm the district court's rulings in favor of RPS on Appellants' FHA claims on summary judgment and at trial. Additionally, this Court

[25] Indeed, under Connecticut law, conservators must fully understand the scope of their duties, because their powers are limited. *See* Conn. Gen. Stat. § 45a-650(k) (version effective Oct. 1, 2014 to Sept. 30, 2016); *see also Maefair Health*, 2023 WL 2385771, at *2 (explaining that conservators have limited powers).

should vacate the district court's rulings against RPS on Counts Four and Five under the FCRA and dismiss them for lack of jurisdiction.

Dated: February 16, 2024

Respectfully submitted,

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