UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF TEXAS
Marshall Division

ANN MIDDLETON,
Plaintiff,

Versus
Civil Action No.
2-04CV-319-TJW

TRANS UNION, LLC, ET AL
JURY DEMANDED

Defendants.
JUDGE T. JOHN WARD

PLAINTIFF'S RESPONSE AND OPPOSITION TO
MOTION TO DISMISS FILED BY STAGE STORES, INC.,
and WORLD FINANCIAL NETWORK NATIONAL BANK [WFNNB]

MAY IT PLEASE THE COURT:

Plaintiff respectfully opposes Stage Stores, Inc.'s ["Stage"] and World Financial Network National Bank's ["WFNNB"], [collectively movers] pending motions to dismiss or to transfer, as follows:

Though not filed as separate motions and simply embedded in their joint Answer, plaintiff believes she would be remise not to oppose and brief the issues vaguely raised in movers' Answer/motions.

Plaintiff's complaint provides a generous overview of facts and separation of counts as between the various defendants. Plaintiff's credit reports has been repeatedly plagued with false information reported by the defendants. Plaintiff contested the false credit reportings to the credit reporting agencies and to the furnishers-defendants-movers, Stage and WFNNB, directly. Per section 1681i, the agencies communicated with the movers however both movers failed to perform reasonable and adequate reinvestigations on each such occasion and did not take action to retract and remove the false information from plaintiff's credit files and consumer credit

reports. Subsequently, the agencies and their furnishers, Stage and WFNNB, along with several other furnishers, continued to assail plaintiff, with knowledge of the harm being done, and dunned plaintiff repeatedly over time despite clear notice of the inaccurate credit reportings. Plaintiff sustained a variety of damages due to movers' fault and violations of the FCRA. Plaintiff's complaint is well-plead and more than adequate and does comply with Federal Rule of Civil Procedure 8[a].

Notice Pleading

Under the federal practice of "notice pleading," Plaintiff must provide a short and plain statement of the claims alleging she is entitled to relief. Federal Rule of Civil Procedure 8[a]; Janke Construction Co. v. Vulcan Materials Co., 527 F.2d 772 [7th Cir. 1974]; Hrubec v. Nat. R. Pass. Corp., 981 F.2d 962 [7th Cir. 1992]. Plaintiff is not required under Rule 8[a] to allege a cause of action or legal theory of the case. Hostrop v. Board of Junior College District No. 1, 523 F.2d 569 [7th Cir. 1975], cert. denied, 425 U.S. 963, 48 L.Ed.2d 208, 96 S.Ct. 1748 [1975]. There are "no technical forms of pleading" and Plaintiff's Original Complaint conforms with Rules 8[a], 8[e], 8[f] and 10 of the Federal Rules of Civil Procedure. Maynard v. General Electric Company, 486 F.2d 538 [4th Cir. 1973]. Plaintiff is only required to set forth a short, concise and plain statement of their claim sufficient to advise the opposing party of the nature of the claim. Neizil v. Williams, 543 F.Supp. 899 [U.S.D.C. M.D. Fla. 1982]; Ambling v. Blackstone Cattle Co., 658 F.Supp. 1459 [U.S.D.C. N.D. Ill. 1987]. The complaint must be in general terms and need not be stated within a framework of a cause of action. Stanley v. Harper Buffing Machine Co., 28 F.R.D. 579 [U.S.D.C. Conn. 1961]. Legal conclusions or statements of law must not be alleged in the complaint. Curacao Trading Co. v. Fed. Ins. Co., 3 F.R.D. 203

[U.S.D.C. N.Y. 1942]. Further, plaintiff need not allege a theory of action. Id. Plaintiff need not specify under what law[s] his case arises. Ghebreslassie v. Coleman Secur. Svc., 829 F.2d 892 [9th Cir. 1987]. Plaintiff need not plead state laws. Lumbermans Mut. Cas. Co. v. Norris Grain Co., 343 F.2d 670 [8th Cir. 1965]. State laws should not be plead as the federal court will take judicial notice of applicable state laws. Bower v. Casanave, 44 F.Supp. 501 [U.S.D.C. N.Y. 1941]. Plaintiff need not state his legal theories and discuss all applicable laws or laws which might be applied by the court. Federal courts employ notice pleadings. Plaintiff has done much more than merely put Defendants on notice of his claims. Fed.R.Civ.Proc. 8.

Stage's and WFNNB's Motions to Dismiss Under Rule 12[b][2] Should Be Denied

Movers first claim that there is no personal jurisdiction over them in this District and that venue is improper. This statement is simply false. First, Stage has stores all over Texas,[1] as shown on the web site and the map on Stage's web site.[2] Therefore, plaintiff has shown, by Stages' own admissions in its company web site, that it has stores in each federal district in Texas, along with a very high concentration of Beall's and Palais Royal stores in the Eastern District of Texas. 28 U.S.C. 124[c][3].

Stage argues that there is no personal jurisdiction over it or WFNNB in this District. Stage operates stores under trade names all over Texas. According to Stage's own website, "Stage Stores, Inc. brings nationally recognized brand name apparel, accessories, cosmetics and footwear for the entire family to small and mid-size towns and communities with over 520 stores

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[1] http://www.stagestores.com/aboutStage/storeLocations.htm

[2] According to Stage Stores, Inc., "Stage Stores, Inc. is the parent company of over 520 stores in 28 states, operating under the names of Stage, Bealls, Palais Royal and Peebles. Our corporate headquarters is located in Houston, Texas. **Corporate Offices** 10201 Main Street, Houston, Texas 77025 1-800-324-3244." Id.

in 28 states. The company operates under the Stage, Bealls and Palais Royal names throughout the South Central states, and under the Peebles name throughout the Mid-Atlantic, Southeastern and Midwestern states."[3] Stage also states: "**Stage Stores**: has created one of the hottest retail destinations for small-town American shoppers. **Operating under the trade names** Stage, Palais Royal and Bealls, SSI's goal is to fulfill the market's demand for moderately priced, nationally recognized name-brand apparel, accessories, cosmetics and footwear for the entire family in a convenient, neighborhood shopping environment. Stock : SGE Corporate Communications (Stage Stores Inc.) 10201 Main Street Houston, Texas 77025 1-800-324-3244."[4]

Stage also solicits employees for all of its stores, including those in Texas, via its web site. Stage says: "Our corporate office is located in Houston, Texas, the 4th largest city in the U.S. and a major international hub. If you'd like to develop your career in a dynamic retail environment and enjoy being at the heart of the action, check out our latest job postings. Whether you'd like to work at our fast-paced Corporate headquarters, or are seeking a rewarding sales or management position at one of our more than 520 locations, an exciting career in retail awaits you at Stage Stores! Job listings are updated regularly, so check back often for the latest career opportunities. If you love fashion, are conscientious and have a "customer-first" attitude, you'll love working at Stage Stores. We value our associates and offer a competitive salary, a generous discount and other valuable benefits. To contact employment, write to us at: Stage

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[3] http://www.stagestores.com/aboutStage/aboutStage.htm.

[4] http://www.stagestores.com/aboutStage/storeLocations.htm.

Stores, Inc., Human Resources, 10201 Main St., Houston, TX 77025."[5]

Now, WFNNB[6] is closely tied to Stage and issues Stage's credit cards. Stage's web site states: "This web site is operated by World Financial Network National Bank (WFNNB). **WFNNB owns and issues your Bealls, Palais Royal, or Stage Credit Card Account**. When using this site, you will be providing your information to, and obtaining information from, WFNNB. For information on the WFNNB privacy policy, please review our Customer Privacy Statement."[7] Now, how can Stage Stores be operating so many stores in the Eastern District of Texas, with thousands, if not hundreds of thousands of customers buying on their private label WFNNB credit cards without WFNNB doing business in Texas and in the Eastern District of Texas?[8] Perhaps most striking are the words of President JimScarborough, CEO of State Stores,

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[5] http://www.stagestores.com/employmentAtStage/employmentAtStage.htm.

[6] WFNNB is the private-label credit card banking subsidiary of Alliance Data Systems. http://biz.yahoo.com/ic/120/120463.html; http://www.hoovers.com/world-financial-network-national-bank/--ID__120463--/free-co-factsheet.xhtml.

[7] https://onlineaccess.mycreditcard.cc/stagestores. This page in a direct link page on the www.stagestores.com web site. The site permits online applications for credit via its interactive web pages. https://onlineaccess.mycreditcard.cc/stagestores?Action=Stores.jsp. WFNNB states "As part of World Financial Network National Bank's (WFNNB) commitment to protecting your privacy on-line, WFNNB employs state-of-the-art Secure Socket Layer (SSL) software to ensure that the information you submit cannot be intercepted or read while being sent to us. All information submitted, including your credit card number, name, address, phone number, and e-mail address is encrypted while being transferred. When received by our secure server, the information is then decoded and processed. Your Bealls, Palais Royal, or Stage Credit Card web pages are on our domain which is a VeriSign Secure Site." https://onlineaccess.mycreditcard.cc/stagestores?Action=Security.jsp. Similarly, WFNNB solicits and issues credit cards for numerous other large retailers, ex., Fina, https://www.mycreditcard.cc/fina/intro.asp.

[8] According to WFNNB's parent corporation, Alliance Data Systems: "Alliance Data Systems provides credit services that make it easy for clients to build customer loyalty, increase sales, and extend their brand with private label card programs. We are able to finance and operate private label programs more effectively than a typical retailer can operate a stand-alone program. This is because we are able to fund receivables through our securitization program to achieve lower borrowing costs while having the infrastructure to support a variety of portfolio types and a large number of card holders. **Through our subsidiary, World Financial Network National Bank, we underwrite the accounts and fund purchases for over 60 private label credit clients, representing nearly 83 million cardholders and more than $3.1 billion of receivables as of December 31, 2003**." http://company.monster.com/alldatas/

Inc., when he said: "The first significant event of 2003 was the sale of our private label credit card portfolio to World Financial Network National Bank (the "Bank"), a subsidiary of Alliance Data Systems Corporation, in September. This transaction netted us approximately $172 million, after paying off our outstanding borrowings under our securitization facility and related transaction costs. Following the sale, the Bank assumed the responsibility for managing our credit card program, and we are confident that it will continue to provide our customers with superior credit products and friendly service. This transaction allowed us to eliminate the distractions associated with managing and financing our own credit card operations, while still being able to build and strengthen the vital relationship that we have with our private label credit card customers."[9]

There is no doubt that Stage and WFNNB are subject to jurisdiction and venue in this District. They also operate a web site soliciting customers from this District via its interactive advertising online media, credit applications online and issuance of credit in this District, not to mention Stage owns and operates Palais Royal and Bealls stores all over Texas. Unlike passive advertising web sites, Stage and WFNNB specifically target online shopping which involves purchases made through the web site as opposed to mere orders. Rather than bore this Honorable Court with a rehashing of the cases regarding internet related personal jurisdiction, plaintiff respectfully adopts the portions of her brief in response and opposition to Saks and McRae's similar motion, which addressed cases including: Stomp, Inc. v. NeatO, LLC, 61 F.Supp.2d 1074, 1999 Westlaw 635460 [U.S.D.C. C.D Cal. 1999], Compuserve v. Patterson, 89 F.3d 1257 [6th Cir. 1996], Zippo Manuf. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124

[9] Http://www.stagestores.com/attachments/2003AnnualReport.pdf.

[U.S.D.C. W.D. Pa. 1996], Mink v. AAAA Development LLC, 190 F.3d 333, 1999 U.S.App.Lexis 22783 [5th Cir. 1999], Mieczkowski v. Masco Corp., 997 F. Supp. 782, 785-86 [U.S.D.C. E.D. Tex. 1998], GTE New Media Services, Inc. v. Ameritech Corp., 21 F. Supp. 2d 27 (D.D.C. 1998).

WFNNB cannot deny its relationship to Stage and this District. Stage has an abundance of contacts in Texas and has numerous stores and credit customers in this District.[10] Further, WFNNB and Stage use a highly interactive web site which is more than adequate to show contacts with this District. WFNNB and Stage have not yet been deposed to further investigate its relationship and to document its contacts with this District. Plaintiff respectfully requests the ability to do so.[11] Venue is not improper in this District.

Defendants' Motions to Transfer Under Rule 12[b][3] and sec. 1404 Should Be Denied

Movers next claim that this action should be transferred to the Northern District of Texas, Dallas Division, by claiming that venue is not met under section 1391[b] or [c]. Since the venue test is one of personal jurisdiction essentially, plaintiff submits that venue is proper in this District. All of the defendants are corporations and each defendant "resides" in Texas. 28 U.S.C. 1391[c]. Contrary to movers' argument, only two other defendants, represented jointly like these movers, Saks and McRaes, have argued a lack of personal jurisdiction in this District. Plaintiff

[10] How can Stage Stores, Inc., seriously say "...WFNNB and Stage Stores have no contacts with this District sufficient to allow for an exercise of personal jurisdiction over it."...? Page 2, Stage/WFNNB Original Answer.

[11] In Mohamed v. Mazda Motor Corp., 90 F.Supp.2d 757 [U.S.D.C. E.D. Tex. 2000], Judge Heartfield expressed a reluctance to rule on a motion to transfer or for lack of personal jurisdiction before there had been any "meaningful discovery." It is further clear that WFNNB has clients-debtors in this District and State due to WFNNB's appearance in numerous bankruptcy actions in Texas bankruptcy courts, ex., 02-45941, ED Texas, In re: William D. Fleming and Sherry L Fleming.

showed that the argument was not accurate in brief opposing.

Movers also argue that it is plaintiff's burden to prove proper venue. It is not. Under a motion to transfer venue, the movers, not plaintiff, bear the burden of proving that an alternate forum is warranted. Gardipee v. Petroleum Helicopters, Inc., 49 F.Supp.2d 925, 928 [U.S.D.C. E.D. Tex. 1999]; In re Air Crash Disaster Near New Orleans, 821 F.2d 1147 [5th Cir. 1987]. Factual and evidentiary disputes must be resolved in favor of plaintiff and in favor of enforcing plaintiff's choice of forum and proper venue. Noerr Motor Freight v. Eastern Railroad President Conference, 113 F.Supp. 737, 745 [U.S.D.C. E.D. Pa. 1953]. Movants were required to bring forth competent evidence to support its contentions. Stop-A-Flat Corp. v. Electra Start of Michigan, Inc., 507 F.Supp. 647, 652 [U.S.D.C. E.D. Pa. 1981]. The proper time to submit evidence is with the moving papers and not in a Reply.[12] This Honorable Court has broad discretion in considering a motion to transfer venue and the resulting ruling is a non-appealable, interlocutory ruling. Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 [5th Cir. 1989]; Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 951 [9th Cir. 1968].

Mover's requests are made under section 1404[a],[b] and not section 1406. 28 U.S.C. 1404, 1406. Movers argue that the Eastern District of Texas is not a proper venue and argue its belief that the Northern District of Texas is a more convenient and proper forum. Courts have noted that a motion to transfer under section 1404[a],[b], is merely a "change of courtrooms" and nothing more. Van Dusen v. Barrack, 376 U.S. 612, 639, 84 S.Ct. 805, 820-21 [1964]. Venue rules balance the conveniences of the parties with other policy factors in selecting a proper forum

[12] Bank One, Tex., N.A. v. Capital Assocs. Int'l, Inc., 2000 U.S.Dist.Lexis 7146, at *7, fn.3 [U.S.D.C. N.D. Tex. 2003]; Racetrac Petroleum, Inc. v. J.J.'s Fast Stop, Inc., 2003 U.S.Dist.Lexis 1569 [U.S.D.C. N.D. Tex. 2003]; Springs Industries, Inc. v. American Motorists Ins. Co., 137 F.R.D. 238, 239-40 [U.S.D.C. N.D. Tex. 1991] [Fitzwater, J.] [The purpose "of the reply brief permitted by Rule [7].1[f] is to rebut the non-movant's response, thereby persuading the court that the movant is entitled to the relief requested by the motion. The document is to contain argument, not new supporting materials."].

for trial. 28 U.S.C. 1391; Denver & Rio Grande Railroad v. Brotherhood of Railroad Trainmen, 387 U.S. 556, 560, 87 S.Ct. 1746, 1748 [1961]. Venue is determined as of the time an action is commenced. Tenefrancia v. Robinson Export & Import Corp., 921 F.2d 556, 559 [4th Cir. 1990]. Venue in federal question cases is essentially a personal jurisdiction test in the judicial district at issue. 28 U.S.C. 1391[c]; Morgan v. Coushatta Tribe of Indians of La., 214 F.R.D. 202 [U.S.D.C. E.D. Tex. 2001]; Tranor v. Brown, 913 F.Supp. 388, 390 [U.S.D.C. E.D. Pa. 1996].

This Honorable Court has broad discretion in considering a motion to transfer venue and the resulting ruling is a non-appealable, interlocutory ruling. Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 [5th Cir. 1989]; Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 951 [9th Cir. 1968]. In connection with the motion to transfer, three factors have been enunciated: [1] convenience of the parties; [2] convenience of the witnesses; and [3] interests of justice. 28 U.S.C. 1404[a]; Lopez Perez v. Hufstedler, 505 F.Supp. 39, 41 [U.S.D.C. D.C. 1980]. These three factors involve a consideration of the facts shown in evidence. Movers filed absolutely no evidence, while plaintiff has shown that Stage and WFNNB, contrary to their jointly defective pleading, have numerous stores and solicit and issue credit in mass in this District. Plaintiff has shown that Alliance is the parent company of WFNNB and Stage operates a large number of stores all over America and in this District. Plaintiff has shown that Stage and WFNNB use highly interactive web sites, even jointly, to solicit and conduct business nationwide. Absent the ability to conduct further discovery at this time, plaintiff is unable to afford the court with more evidence of Stage's and WFNNB's ties to this District.

Courts uniformly state that plaintiff's choice of forum is given significant weight in considering a motion to transfer proper venue. Lewis v. ACB Business Services, Inc., 135 F.3d

389, 413 [6th Cir. 1998].[13] Great deference is afforded that choice. Time, Inc. v. Manning, 366 F.2d 690, 698 [5th Cir. 1966]; Lewis v. ACB Business Services, Inc., supra, at 413. Plaintiff selected this court due to its superior disclosure, discovery and trial procedures. The Eastern District of Texas has a disclosure process which is far superior to other districts, including the Northern District of Texas. The Eastern District of Texas affords the greatest efficiency through the Discovery Hotline to resolve discovery disputes without needless, wasteful and time-consuming paper motion practice which bogs down most Northern District of Texas cases. Trial preparation is greatly simplified and costs are contained. Access to the court in discovery disputes is crucial in these types of cases. This court is likewise very familiar with the legal issues and discovery issues confronted by both sides in these types of cases. This court's trial docket is much less congested than that of Dallas. In placing the burden on the moving litigants, courts have stated that the plaintiff's choice of forum should not be disturbed, unless the balance of factors strongly favors the defendant. Time, Inc. v. Manning, 366 F.2d 690, 698 (5th Cir.1966); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 91 L.Ed. 1055, 67 S.Ct. 839 [1947]; Peteet v. Dow Chemical Co., 868 F.2d 1428, 1436 [5th Cir. 1989]; Mohamed v. Mazda Motor Corp., 90 F.Supp.2d 757, 771-74 [U.S.D.C. E.D. Tex. 2000].

Here, the transactions and events took place in both Louisiana, Texas, and other states, as the furnishers-defendants reported false information to Experian, located in this District [Allen, Texas], Equifax [Atlanta, Texas], Trans Union [Chicago, Illinois], and CSC [Houston, Texas; like Stage]. Further, there will be an abundance of evidence to be elicited regarding the

[13] There is a "strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." Schexnider v. McDermott Int'l, Inc., 817 F.2d 1159, 1163 [5th Cir. 1987], cert. denied, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 [1987].

furnishers' credit reportings and reinvestigation issues through Experian, located in the Eastern District of Texas, and CSC Credit Services, located in Houston, Texas. Further, Stage's headquarters are in Houston and their testimony would, presumably, be taken there as in prior cases. While plaintiff does reside in Louisiana and has experienced credit denials and other damages in north Louisiana, it does not follow that all of the events are outside this District. The furnishers are scattered across the United States and there is simply no focal point or central location of the events and transactions. This District is conveniently situated between the plaintiff and Stage's location in Houston, though both movers inconsistently argue that they are not located in Texas.

The court should also consider the location of witnesses, the anticipated content and importance of their testimonies and the possible relevance of their anticipated testimonies. A.J. Industries v. United States District Court, 503 F.2d 384, 389 [9th Cir. 1974]. Again, this District is optimal as it is central to the main body of witnesses and the plaintiff.

While plaintiff resides in Bossier City, part of Shreveport-Bossier, this location is about 15 minutes from the Texas state line with Louisiana and plaintiff resides roughly 40 minutes from Marshall. That is hardly a cause for concern in terms of convenience or travel.

It is anticipated that defendants' credit reporting witnesses will be produced at various locations across the United States. This Honorable Court is familiar with the geographic disparity of witnesses in a computer and credit data dissemination case like this one. That is by design on the part of the defendants, not the plaintiff. Unfortunately, unlike car accidents, credit reporting cases do not occur all in one place.

Experian Information Solutions, one of the credit bureaus reporting data at the furnishers'

behest and who also received and re-transmitted disputes to the furnishers, including movers, under sections 1681i[a] and 1681s-2[b] of the FCRA, is located in the Eastern District of Texas, at 701 Experian Parkway, in Allen, Texas. CSC Credit Services, a defendant, another of the credit bureaus reporting false data at the furnishers' behest and who also received and re-transmitted disputes to the furnishers, including movers, under sections 1681i[a] and 1681s-2[b] of the FCRA, is located at 652 Sam Houston Parkway [North Belt East], Houston, Texas.

Multiple potential witnesses live outside of both Texas and Louisiana and will testify about credit denials and other false reportings if deposed for trial purposes. One such set of witnesses would be in WFNNB's credit dispute processing department in Ohio.

There are a number of possible witnesses in north Louisiana. These witnesses are all located about between 20 minutes to 1 hour from Marshall. More importantly, each of these witnesses appear to be within the compulsory process territory of this court, i.e., the 100 mile bulge. Fed.R.Civ.Proc. 45[b][2].[14]

Judge Cobb in Ledoux v. Isle of Capri Casinos, Inc., 218 F. Supp.2d 835 [U.S.D.C. E.D. Tex. 2002], refused to grant defendant's motion to transfer from the Eastern District of Texas to the Western District of Louisiana, finding most significant that his courthouse was 55 miles from the Western District of Louisiana courthouse sought by defendants. In this case, the distance is slightly farther to Dallas, but not by much. The Dallas Division is roughly a little over one hundred miles from Marshall. Dallas would not share the same bulge.

In Morgan v. Coushatta Tribe of Indians of La., 214 F.R.D. 202 [U.S.D.C. E.D. Tex.

[14] "...all witnesses, including defense witnesses, are within the forum court's subpoena power." Morgan v. Coushatta Tribe of Indians of La., 214 F.R.D. 202 [U.S.D.C. E.D. Tex. 2001] [also denying a transfer from the Eastern District of Texas to the Western District of Louisiana].

2001], Magistrate-Judge Hines recommended that a motion to transfer be denied to the defense where the defense sought to transfer a case from the Eastern District of Texas to the Western District of Louisiana. The court found that Eastern District of Texas to be a proper and convenient forum which was equally convenient to all witnesses and that both Districts had identical compulsory process powers as to the witnesses at issue. The same would be true of the Dallas Division.

In McClave v. Bank One Corp., 2004 WestLaw 439991 [U.S.D.C. E.D. Tex. 2004],[15] Your Honor refused to transfer a credit reporting case from this District to the Western District of Louisiana. Here, Your Honor held that "[T]he court generally requires a defendant to show that it would be materially more convenient to try the case in the proposed transferee forum. See Gulf Oil v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). That burden is significant when, as in this case, the proposed transferee forum is only approximately thirty (30) miles away." Again, Dallas is slightly farther but not by much, as proposed by movers.[16]

In a similar credit reporting case, Judge Clark in Cole v. Sherman Financial Group LLC, 2003 WestLaw 22976283 [U.S.D.C. E.D. Tex. 2003], also refused a battery of venue and transfer motions by defendants. Similarly, defendant sought a transfer to Houston, Texas. Judge Clark analyzed the factors and found that this District was proper and just as convenient as any other. The court noted that convenience to the lawyers is not a factor and is wholly irrelevant, though

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[15] Your Honor also recently denied a motion to transfer in Cummins-Allison Corp. v. Glory Ltd., 2004 WL 1635534 [U.S.D.C. E.D. Tex. 2004], where the opinion stated: "To prevail, the litigant must demonstrate that the balance of convenience and justice substantially weighs in favor of transfer, and unless the balance of conveniences weighs heavily in the favor of the defendant, the plaintiff's choice of forum will rarely be disturbed. [numerous citations omitted]."

[16] Mohamed v. Mazda Motor Corp., 90 F.Supp.2d 757 [U.S.D.C. E.D. Tex. 2000] [court denied transfer].

defendants argue this issue as well here.[17]

Judicial economy and protection of resources, including time and expenses should be considered as well. Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 809 [1964]; Republic of Bolivia v. Philip Morris Cos., Inc., 39 F.Supp.2d 1008, 1009-1010 [U.S.D.C. S.D. Tex. 1999]. It makes little sense to transfer the case such a short distance where no consequential difference results except to change courthouses and Judges. Given that the case is more easily handled in Marshall than Dallas supports no transfer. Further, the relative ease of access to proof should be considered. Van Dusen v. Barrack, 376 U.S. 612, 643, 84 S.Ct. 805, 823 [1964]. The ease of access to proof is equal between the two districts.

The availability of compulsory process must be considered. Reed v. Fina Oil & Chemical Co., 995 F.Supp. 705, 714 [U.S.D.C. E.D. Tex. 1998]. As mentioned above, the Eastern District of Texas has compulsory process over the local witnesses, but compulsory process in the Dallas federal court would be limited given that few if any witnesses are there. Oddly, Stage argued for a Dallas forum despite it precluding compulsory process over Houston witnesses where its operations are located. Thus, its former employees could not be compelled to appear live at trial.

The place of the wrong is hard to determine under the evidence now at hand. Movers' and furnishers' functions and misconduct occurred in Texas, Louisiana, Ohio, Georgia, Illinois and possibly other sites. The geographic disparity of these separate functions and offices should not inure to movers' benefit.

The relative docket control and docket congestion of the courts at issue must be

[17] It appears that only movers' counsel will be inconvenienced however it was movers who chose to retain counsel who do not reside or practice within this District.

considered. Kasay v. Molybdenum Corporation of America, 408 F.2d 16, 20 [9th Cir. 1969]. As mentioned above, the Dallas docket is greatly congested. Shifting this case across several counties to a more congested docket would not appear to be warranted. Plaintiffs would suffer delay in litigating their case and would suffer prejudice as a result. Delay and prejudice are relevant factors. In re Horseshoe Entertainment, 305 F.3d 354, 358 [5th Cir. 2002].

Movers suggest that the Eastern District of Texas lacks an interest in adjudicating this case and impliedly that its citizens would lack interest in being jurors. To the contrary, we believe that this court and its juror pool are well positioned for the handling of this case and would be capable and willing to resolve the dispute. Not every trial involves a plaintiff in his or her own home town. Likewise, not every trial involves a national bank litigating in the home of its headquarters or base of operations. The potential jurors would welcome the opportunity to assess plaintiffs' claims and the allegations and defenses of the defendants. As stated by Judge Heartfield in Mohamed v. Mazda Motor Corp., 90 F.Supp.2d 757 [U.S.D.C. E.D. Tex. 2000], "Simply put, residents of the Eastern District of Texas would be interested to know whether there are currently defective products offered for sale in the Eastern District of Texas. Indeed, residents of the Eastern District of Texas would also be interested to know whether they were exposed to these allegedly defective products in their everyday lives. Thus, this factor does not support transfer." Similarly, from past experience, we know that jurors are very interested in identity theft and how the credit reporting system abuses these victims over and over again. Many such victims live in this District as we know from prior jury voir dire.

Of course, convenience of counsel is not a factor to be considered. In re Horseshoe Entertainment, 305 F.3d 354, 358 [5th Cir. 2002]; Solomon v. Continental American, 472 F.2d

1043, 1047 [3rd Cir. 1973]; Hernandez v. Graebel Van Lines, 761 F.Supp. 983, 991 [U.S.D.C. E.D. N.Y. 1991]. Familiarity with the law, state or federal, is not a factor. The decisions indicate that the district courts are presumed to know the law and be capable of handling any legal issue presented. Cargill, Inc. v. Prudential Insurance Company of America, 920 F.Supp. 144, 148 [U.S.D.C. Colo. 1996]. In fact, it appears that where credit reporting issues are concerned, this court is fairly consistent with prior rulings of its Sister Courts.[18] Plaintiffs assert that Louisiana laws might be applied to most or all of the state law claims asserted. Movers' credit reportings transmitted to the agencies from their headquarters for credit reporting to Experian's system in Allen, Texas [this District], to Equifax in Atlanta, CSC in Houston, and Trans Union, in Chicago. The re-reportings occurred in Louisiana and other states. Plaintiff sustained her damages in Louisiana. Plaintiff asserts that there is no advantage to movers' position in that regard. Plaintiff has adequately plead a factual basis for jurisdiction and venue in this court.

Movers argued that Dallas has two airports and it is a superior place to be for that reason too. Page 5, movers' pleading. East Texas has hundreds of airports. No one has ever had trouble finding them and landing here. After all, Stage has dozens of stores in this District and WFNNB has thousands, if not tens of thousands, of credit customers here too.

Movers argued that plaintiff is harassing them by filing suit in this District. These

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[18] Compare: Whitesides v. Equifax, 125 F.Supp.2d 813, 816 [U.S.D.C. W.D. La. 2000], and Amber Dawn Williams v. Experian, 2002 WestLaw 31133235 [U.S.D.C. E.D. Tex. 8/02] and Campbell v. Baldwin, 90 F.Supp.2d 754, 756 [U.S.D.C. E.D. Tex. 2000]. Both courts have found private rights of action under section 1681s-2[b] and have refused defendant's pleas for qualified immunity under 1681h[e] consistent with the statute. Further compare: Gordon v. Greenpoint Credit, 2003 U.S. Dist.Lexis 9948 [U.S.D.C. Iowa 2003] [note that the Jaramillo decision cited was reversed by the court on reconsideration, as shown below, but the reversal has never been picked up by the federal supplement reporter system], Sehl v. Safari Motor Coaches, Inc., et al, 2001 U.S.Dist.Lexis 12638, cause no. C01-1750-S1 [U.S.D.C. N.D. Cal. 2001]; Kronstedt v. Equifax, 2001 U.S.Dist.Lexis 25021, at p.48 [U.S.D.C. W.D. Wisc. 2001]; Luis A. Jaramillo v. Experian, et al, 2001 U.S.Dist.Lexis 10221, Civil Action No. 00-5876 [U.S.D.C. E.D. Pa. 6/20/01]; Dornhecker v. Ameritech Corp., 99 F.Supp.2d 918, 927 [U.S.D.C. N.D. Ill. 2000]; McAnly v. Middleton & Reutlinger, P.S.C., 77 F.Supp. 2d 810, 814-815 [U.S.D.C. W.D. Ky. 1999].

defendants would be more pleased if they could just continue to negatively report data about plaintiff and have plaintiff shut up and accept the consequences regardless of the fact that the data and negative remarks really should be attributed to her.

Stage's and WFNNB's Motions to Dismiss Under Rule 12[b][6] Should Be Denied

Movers also claim that plaintiff failed to state a claim. Pursuant to Federal Rules of Civil Procedure 12[b][6], and the jurisprudence construing same, when faced with a Motion to Dismiss under Rule 12[b][6], the court must treat the facts alleged in the complaint as admitted. Ward v. Hudnall, 366 F.2d 247 [5th Cir. 1966]; Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, 677 F.2d 1045, 1050 [5th Cir. 1982]. Furthermore, the complaint is sufficient if it shows that plaintiff is entitled to any relief, regardless of whether it alleged the proper theory of the case. Janke Construction Co. v. Vulcan Materials Co., 527 F.2d 772 [7th Cir. 1974]; Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 1833 [1989]. Plaintiff's allegations must be treated and presumed as true and correct in all respects and plaintiff's factual allegations are to be liberally construed so that plaintiff is likewise afforded each and every favorable inference to be drawn therefrom. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 [1974]; Miree v. Dekalb County, Georgia, 433 U.S. 25, 97 S.Ct. 2490 [1977]. If admitted and taken as true, the allegations of the plaintiff's complaint do state claims upon which relief can be granted. Motions to Dismiss are not favored and are granted only when it appears to a certainty that no set of facts could be proven at trial which would entitle plaintiff to any relief. Dann v. Studebaker-Packard Corp., 288 F.2d 201 [6th Cir. 1961].

Movers' argument is that plaintiff cannot assert negligence, defamation or privacy actions due to alleged preemption under section 1681h[e], which has been termed by some courts to be a

qualified immunity provision. Of course, more recent case law has exposed the flawed early interpretations of section 1681h[e]. There currently exists two lines of case law, one favoring the industry and providing a qualified immunity for all communications, and the second line of cases liberally construing section 1681h[e] in favor of consumers and refusing to read out portions of the language of section 1681h[e]. The latter group of courts have included this Honorable Court. Like others, this Honorable Court found that the language of section 1681h[e] limited the qualified immunity to those communications under sections 1681g, 1681h and 1681m, as stated in section 1681h[e]. Thus, the qualified immunity under section 1681h[e] is confined to those communications which the furnisher or credit reporting agency have directly with the consumer and does not apply to communications in the conduit between the reporting subscriber, through the agency and then onto a second subscriber-user of credit report data. Movers' arguments have been previously reiterated in many prior cases before this court and are still unavailing. Movers have not and indeed cannot point to a single authority or reason for this court to reverse itself.

Courts, including Your Honor, have refused to dismiss state law and common law claims in the nature of negligent credit reporting,[19] defamation, negligent enablement of the imposter,[20]

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[19] Amber Dawn Williams v. Experian, 2002 Westlaw 31133235 [U.S.D.C. E.D. Tex. 2002], citing the decisions in Whitesides v. Equifax, 125 F.Supp.2d 807, 813 [U.S.D.C. W.D. La. 2000] [Judge Walter], correcting a misinterpretation of section 1681h[e]. In accord: Kronstedt v. Equifax, 2001 U.S.Dist.Lexis 25021 [U.S.D.C. W.D. Wisc. 2001]; McAnly v. Middleton & Reutlinger, P.S.C., 77 F.Supp. 2d 810, 814-815 [U.S.D.C. W.D. Ky. 1999]; Yeager v. TRW, 984 F.Supp. 517, 522 [U.S.D.C. E.D. Tex. 1997]; Retail Credit Co. v. Dade County, 393 F. Supp. 577, 584 [U.S.D.C. S.D. Fla. 1975], and others.

[20] Brown v. Bank One Corp., 2002 U.S.Dist.Lexis 22692 [U.S.D.C. N.D. Ill. 2002] ["In this case, similarly, Bank One's alleged misconduct in issuing false loans in plaintiffs' names does not raise a challenge to the information supplied to consumer reporting agencies and, thus, is not regulated by the FCRA.]

invasion of privacy, etc.[21] The Fair Credit Reporting Act does not preempt state or common law claims as long as the state or common law is not inconsistent with the Fair Credit Reporting Act.[22] The Fair Credit Reporting Act does not preempt a state law cause of action for defendant's negligence in communicating erroneous credit data about a consumer.[23]

Initially, movers invite this Honorable Court to reverse itself.[24] We see no flaw in this Honorable Court's prior rulings, including Amber Dawn Williams v. Experian, 2002 Westlaw 31133235 [U.S.D.C. E.D. Tex. 2002], and the cases that followed Williams in this court. Movers do not cite a single authority for its position.

Your Honor may recall that in Amber Dawn Williams v. Experian, supra, this Honorable Court adopted the decision by Judge Don Walters, in Whitesides v. Equifax,[25] in correcting a misinterpretation of section 1681h[e]. Historically, courts accepted industry's position that section 1681h[e] provided a "safe harbor" and "qualified immunity" from certain state law actions. Over time that position has begun to be shown as flawed. Other courts have agreed with the same reasoning shown in Your Honor's ruling. Kronstedt v. Equifax, 2001 U.S.Dist.Lexis

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[21] Sehl v. Safari Motor Coaches, Inc., 2001 U.S.Dist.Lexis 12638 [U.S.D.C. N.D. Cal. 2001]; Whitesides v. Equifax, 125 F.Supp.2d 807, 813 [U.S.D.C. E.D. Tex. 2000]; Dornhecker v. Ameritech Corp., 99 F.Supp.2d 918 [U.S.D.C. N.D. Ill. 2000]; McAnly, supra; Olexy v. Interstate Assur. Co., 113 F.Supp.2d 1045 [U.S.D.C. S.D. Miss. 2000]; Mayberry v. Ememessay, Inc., 201 F.Supp.2d 687 [U.S.D.C. W.D. Va. 2002]; Johnson v. Federal Express, 147 F.Supp.2d 1268 [U.S.D.C. M.D. Ala. 2001]; Thomasson v. Bank One, Louisiana, N.A., 137 F.Supp.2d 721 [U.S.D.C. E.D. La. 2001]; Amber Dawn Williams, supra.

[22] See, for example, Credit Data of Arizona, Inc. v. State of Arizona, 602 F.2d 195 [C.A. Ariz. 1979].

[23] Hughes v. Fidelity Bank, 709 F.Supp. 639 [U.S.D.C. E.D. Pa. 1989]; Equifax Services, Inc. v. Cohen, 420 A.2d 189 [Me. 1980], cert. denied, 450 U.S. 916 [1981].

[24] Other defendants have urged these same issues previously on multiple occasions and have been rejected, usually, without opinion. Most recently, Trans Union filed such a motion in Shon Coleman v. Trans Union, et al, 2-03-CV-0225-TJW [U.S.D.C. E.D. Tex.], and it too was rejected in a oral opinion by Your Honor.

[25] 125 F.Supp.2d 807, 813 [U.S.D.C W.D. La. 2000].

25021 [U.S.D.C. W.D. Wisc. 2001]; McAnly v. Middleton and Reutlinger, P.S.C., 77 F.Supp. 2d 810, 814 [U.S.D.C. W.D. Ky. 1999]; Retail Credit Co. v. Dade County, 393 F.Supp. 577 [U.S.D.C. Fla. 1975] [quoting Sen. Proxmire in colloquy with Sen. Javits, 115 Cong.Rec. 13908 [November 6, 1969]]. Unfortunately, the issue has not been squarely presented to our appellate courts or the Supreme Court. Perhaps that should be done in the future.

As in the Whitesides and Williams cases, which are directly on point factually and legally with this case, this Honorable Court should reject defendants'[26] arguments that plaintiff's claims were preempted or barred. Like here, plaintiff's claims and damages arose from communications not directly with the plaintiff but with other third parties. In sum, section 1681h[e] only affects claims where the claim arises from communications between the defendant and the consumer. While the FCRA is "no model of clarity,"[27] this interpretation makes sense and no other interpretation gives meaning to the language of the statute.[28]

The state and common law claims are not limited, preempted or barred by the FCRA. Whitesides, supra; McAnly v. Middleton & Reutlinger, P.S.C., 77 F.Supp.2d 810 [U.S.D.C. W.D. Ky. 1999]; Hughes v. Fidelity Bank, 709 F.Supp. 639 [U.S.D.C. E.D. Pa. 1989]; Equifax

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[26] Both defendants, a furnisher and a consumer reporting agency, making motions.

[27] McAnly v. Middleton & Reutlinger, P.S.C., 77 F.Supp.2d 810 [U.S.D.C. W.D. Ky. 1999].

[28] The appellate circuits, following the United States Supreme Court in U.S. v. Menasche, 348 U.S. 528, 538-39 [1955], and Matthiesen v. Banc One Mortgage Corp., 173 F.3d 1242 [10th Cir. 1999] "[I]t is our duty to give effect, if possible, to every clause and word of a statute.". It is "a **cardinal principle of statutory construction**" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, **no clause, sentence, or word shall be superfluous, void, or insignificant**." Citing Duncan v. Walker, 533 U.S. 167 , 121 S.Ct. 2120, 2125, 150 L. Ed. 2d 251 [2001], Montclair v. Ramsdell, 107 U.S. 147, 152, 27 L. Ed. 431, 2 S. Ct. 391 [1883]. In Andrews, the court, addressing another provision in the FCRA, section 1681p, added: "'[W]ere we to adopt [Andrews'] construction of the statute,' the **express exception would be rendered "insignificant, if not wholly superfluous**." Duncan, 533 U.S. at , 121 S.Ct. at 2125. We are 'reluctant to treat statutory terms as surplusage in any setting,' 121 S. Ct., at 2125." TRW Inc. v. Andrews, 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339, 2001 U.S.Lexis 10306 [2001].

Services, Inc. v. Cohen, 420 A.2d 189 [Me. 1980], cert. denied, 450 U.S. 916 [1981]; Retail Credit Co. v. Russell, [1975], 218 S.E.2d 54, 234 Ga. 765, at 767; Thomas v. Equifax, Inc., 142 Ga.App. 422, 236 S.E.2d 154; 16 C.F.R.App. to Pt. 610 – Condition of Disclosure, p.6 ["the privilege extended by [s.1681h[e]] **does not apply** to an action brought by a consumer if the action is based on information **not disclosed pursuant to Sections [1681g, 1681h, or 1681m]**]; Baxter v. Reliable Oldsmobile, Inc., 1986 Westlaw 13584 [Ohio App.] Nov. 26, 1986 [Dissent]; 16 C.F.R.App. to Pt. 610 – Condition of Disclosure, p.6 ["the privilege extended by [s.1681h[e]] does not apply to an action brought by a consumer if the action is based on information not disclosed pursuant to Sections [1681g, 1681h, or 1681m]].

In Whitesides, supra, the court found that Section 1681h[e] of the Fair Credit Reporting Act did not bar any state or common law claims *except those based upon communications directly by the consumer reporting agency to the consumer*. In Whitesides, the Court reviewed the provision and found that consumer credit reports issued by any consumer reporting agency to its subscribers *are not reports disclosed "pursuant to Section 1681g, 1681h, or 1681m of this title. . . ."* Section 1681h[e] deals with consumer credit reports which are *issued directly to a consumer*. It makes sense that if a credit reporting agency sent a credit report directly to the consumer then that consumer should not be able to file an action against the credit reporting agency, based upon that report, unless plaintiff could show malice or willful intent to injure the consumer. Section 1681h[e] has likewise been interpreted by other Courts. Id.

Here, plaintiff complains of false reportings issued by the furnishers to the agencies and from the agencies onto third party subscribers who then denied credit to plaintiff. Plaintiff suffered credit denials and other adverse affects which naturally and foreseeably flowed through

the reporting of false and derogatory credit information about plaintiff which was wrongfully supplied by the furnisher defendants and re-reported on a number occasions by the consumer reporting agency defendants. As plead, the consumer reporting agencies act as the authorized agents and mouthpieces for the creditors/furnishers/ subscribers to whom they provide reporting and data access services.

In further support, courts have uniformly found that the FCRA does not entirely preempt the area of credit reporting. In fact, courts have uniformly rejected creditor's and consumer reporting agencies' arguments that the FCRA bars state law claims.[29] As succinctly stated by Sehl v. Safari Motor Coaches, Inc.[30]: "Furnishers are still subject to state statutes which are not inconsistent with the FCRA."

It follows that the FCRA likewise does not preempt the entire area of credit reporting generally and the agencies are still bound by state laws which are not specifically regulated by the Act. The FCRA has not completely preempted the area. Other Court decisions have found the Fair Credit Reporting Act to be the exclusive remedy only if there is no state statute or common law rights or cause of action.[31] The state law claims asserted by plaintiff herein supplement and are not inconsistent [and are consistent] with the express purposes of the Fair Credit Reporting

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[29] See Sehl v. Safari Motor Coaches, Inc., 2001 U.S.Dist.Lexis 12638 [U.S.D.C. N.D. Cal. 2001][for detailed discussion]; Harper v. TRW, 881 F.Supp. 294 [U.S.D.C. S.D. Mich. 1995]; Rule v. Ford Receivables, 36 F.Supp.2d 335 [U.S.D.C. S.D. Va. 1999]; Watkins v. Trans Union, 118 F.Supp.2d 1217 [U.S.D.C. N.D. Ala. 2000]; Swecker v. Trans Union, 31 F.Supp.2d 536 [U.S.D.C. E.D. Va. 1998]; Saia v. Universal Card Svc., 2000 U.S.Dist.Lexis 9494, 2000 Westlaw 863979 [U.S.D.C. E.D. La. 2000]; Sherron v. Private Issue by Discover, 977 F.Supp.2d 804 [U.S.D.C. N.D. Miss. 1997]; Hughes v. Fidelity Bank, 709 F.Supp.2d 639 [U.S.D.C. E.D. Pa. 1989].

[30] 2001 U.S.Dist.Lexis 12638 [U.S.D.C. N.D. Cal. 2001].

[31] See, for example, Matthews v. GEICO, 23 F.Supp.2d 1160 [U.S.D.C. S.D. Cal. 1998].

Act.[32]

Defamation Statute of Limitations

Stage and WFNNB cite a Texas statute claiming plaintiff's defamation claims must be time-barred if occurring before August 30, 2003. Several things should be considered: [1] Texas law should not be applied on the issue of statute of limitations; [2] the one year liberative prescription statute[33] for negligence, defamation and privacy claims [tort/delicts claims] under Louisiana law runs from the day injury or damage is sustained; and [2] contra non valentum is a judicially created exception, under Louisiana law, to prescription and means that prescription cannot run against a person who does not know of their injury/damage or know the source of their injury/damage and prescription commences only upon the date the person knew or reasonably should have known both of these matters.[34] In this case, plaintiff submits that she learned of the credit reporting problem in a series of events, as discussed for example in paragraphs 17, 24 and 49, among others in her complaint. How could any of her claims be prescribed? They are not. Stage's and WFNNB's arguments are merit less. As before, just for argument sake, let's assume some claim could be found to be prescribed. The facts, events and transactions underlying even a prescribed claim are admissible nonetheless.[35]

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[32] Retail Credit Co. v. Dade County, 393 F.Supp. 577 [U.S.D.C. S.D. Fla. 1975]; S.Rep.No. 517, 91st Congress 1st Session 8 [November 5, 1969] [". . .No state law would be preempted unless compliance would involve a violation of federal law."].

[33] La. C.C. article 3492.

[34] Boutte v. Jefferson Parish Hospital Service District No. 1, 759 So.2d 45 [La. 4/11/00]; Jason v. Brown, 637 So.2d 749 [La. App. 1 Cir. 5/20/94].

[35] In Lazar v. Trans Union, 195 F.R.D. 665, 672 (U.S.D.C. C.D. Cal. 2000), the court found that plaintiff may plead facts and show history of events, even prescribed possible claims outside of two year window, in support of damage claims within the two year FCRA statute from filing suit. Undersigned counsel represented Dr. Lazar, an Oncologist from Encino, California. He had a roughly ten year battle with Trans Union over repeated

Conclusion

Plaintiff submits that Stage's and WFNNB's motions should be denied in all respects and, in connection with claims of lack of personal jurisdiction over WFNNB and Stage, plaintiff respectfully submits that additional discovery *might* be required to further convince this Honorable Court that these defendants are indeed subject to personal jurisdiction in this State and in this District.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed, by first class mail, properly addressed, with prepaid postage affixed, to opposing counsel of record, on this the 19th day of October, 2004.

S/ DAVID A. SZWAK

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DAVID A. SZWAK

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mixed file problem. His file kept mixing with a Felon Lazar, who had numerous bad public records entries on file with Trans Union. *The court, following other authorities, found that events pre-dating the two year statute mark were admissible and would not be stricken.* Also unreported decisions holding the same in Pace v. Experian, 2-03CV045, [U.S.D.C. E.D. Texas 2004] [unreported oral ruling by Judge Ward], and Comeaux v. Experian, 2-02CV0304 [U.S.D.C. E.D. Texas 2004] [unreported oral ruling by Judge Folsom].