

UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

MARICELA MENDOZA,
Plaintiff,

CIVIL ACTION NUMBER:
H-02-2465

Versus

EXPERIAN INFORMATION
SOLUTIONS, INC, ET AL
Defendants.

JURY DEMANDED

**PLAINTIFF'S RESPONSE AND OPPOSITION TO EXPERIAN INFORMATION
SOLUTIONS' MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY,
MOTION FOR PARTIAL SUMMARY JUDGMENT**

MAY IT PLEASE THE COURT:

Plaintiff respectfully responds to and opposes each part of Experian's Motion For Summary Judgment, as follows:

Plaintiff has suffered through a credit reporting nightmare which the defendants caused. Those facts are uncontested. Plaintiff is a lifelong resident of Texas and she has lived in Houston for years. Plaintiff has never lived in Colorado and does not know anyone there.¹ Plaintiff had her identity [personal identifiers] stolen by an imposter,² who was located in Denver, Colorado. The imposter used plaintiff's personal identifiers to apply for and obtain a fraudulent Verizon/Airtouch³ cellular telephone account. The imposter made a large number of calls in the

¹ **Id. at ¶2, Plaintiff's Response and Statement of Material Facts.**

² "Identity theft," also called "application fraud," is rampant. The credit and credit reporting industries are well aware of the out-of-control problem. **Id. at ¶2, fn.2, Plaintiff's Response and Statement of Material Facts.**

³ Airtouch Cellular has been succeeded by Verizon Wireless, who is now the proper defendant. Exhibit V-69, to Verizon/Gabriel deposition, [Verizon's subscriber contracts] identify the furnisher defendant as "Airtouch Support Services, LLC, a Delaware Corporation, DBA Verizon Wireless."

couple of months following activation of the fraudulent cellular account. Many calls were made originating from within Colorado while some calls originated in towns along the Texas-Mexico border.⁴ Neither the imposter nor any of the phone calls have any connection whatsoever with plaintiff, other than that her identity was misused to create the Verizon/Airtouch account by the still unknown impostor[s].

After the imposter naturally did not pay for the fraud account charges, Verizon/Airtouch reported the negative credit information about the fraud account to the national credit reporting agencies and attributed the negative data to plaintiff. Plaintiff found out about the false information and contested the information to Verizon/Airtouch but, perhaps more importantly under the FCRA scheme, plaintiff disputed the Verizon/Airtouch account reportings to the consumer credit reporting agencies, Equifax/CSC,⁵ Experian and Trans Union.⁶

After plaintiff contested the false information with the credit reporting agencies and directly to Verizon/Airtouch, she sustained a variety of damages. It should be noted that even during depositions taken in this lawsuit, Verizon has steadfastly continued, in the face of overwhelming proof to the contrary, to espouse the view that plaintiff is the imposter and that plaintiff is liable for the subject fraud account balance.⁷

In April, 2000, plaintiff first contacted Experian and advised them of the facts she had

⁴ Exhibits V-3 through V-7, to Verizon/Gabriel deposition. Plaintiff does not even know anyone in Colorado. Plaintiff's deposition, pp.27,55,135-137,178.

⁵ Though settled out of this case, it should be noted that CSC and Equifax share the same database system and contractually assume certain duties as to the shared data files.

⁶ 15 U.S.C. 1681i[a] and 1681s-2[b].

⁷ Pp.37-38,175-176,204-218, Verizon/Gabriel deposition; **Id. at ¶24,40, Plaintiff's Response and Statement of Material Facts.**

learned and requested protective measures.⁸ Experian placed a “security alert” which did precious little at all.⁹ Though Experian could have done much more and could have easily discerned how to stop the fraud and fix the reporting errors, it failed to do so.¹⁰ Experian had a wealth of information at its fingertips but simply chose to ignore the signs. Id. Plaintiff followed up with a letter on April 28, 2000, to Experian providing Experian with her identifiers, the fact that she learned her identity was stolen, and requesting a protective statement.¹¹ Experian sent plaintiff a copy of her credit report on May 3, 2000., but did nothing else to respond to the problem presented.¹² Experian did not remove her file to an offline status or otherwise take necessary steps to cure the false data. Experian knew that Verizon was reporting a very negative charged off account and listing a Colorado address in connection with the account but did nothing to reinvestigate it despite plaintiff’s advice of her residency.¹³ Experian could see that Verizon had made an inquiry on November 22, 1998, using the Colorado address.¹⁴ Other than Verizon, plaintiff’s credit file listed perfect and positive credit.¹⁵

Most critical, on May 28, 2000, after plaintiff learned of the Verizon account specifically,

⁸ Id. at ¶2, fn.2, Plaintiff’s Response and Statement of Material Facts.

⁹ Id. at ¶2, fn.3, ¶12, Plaintiff’s Response and Statement of Material Facts.

¹⁰ Id. at ¶4, Plaintiff’s Response and Statement of Material Facts.

¹¹ Id. at ¶2, fn.2, Plaintiff’s Response and Statement of Material Facts.

¹² Id. at ¶12-13,15, Plaintiff’s Response and Statement of Material Facts.

¹³ Id. at ¶4,7-9,12,14,15, Plaintiff’s Response and Statement of Material Facts.

¹⁴ Id. at ¶11,15, Plaintiff’s Response and Statement of Material Facts.

¹⁵ Id. at ¶14,31, Plaintiff’s Response and Statement of Material Facts.

plaintiff's counsel wrote Verizon, Experian and the other agencies and advised them all of the fraudulent Verizon/Airtouch account and demanded removal of the account from plaintiff's credit reports.¹⁶ Experian apparently ignored this letter, for reasons which cannot be explained.¹⁷

By October, 2000, it was clear that the problem persisted and plaintiff again wrote Experian and advised them of the problem and her disputes.¹⁸ On October 20, 2000, Mr. Beustring authored another dispute letter for his client and advised Verizon, Experian and the other agencies of the fraudulent Verizon/Airtouch account and demanded removal of the account from plaintiff's credit reports.¹⁹ This time, Experian added another "90 day" security alert.²⁰ Experian removed the "E 97th" Colorado address and claimed to remove the "W 76th" Colorado address though the latter continued to appear in the file and on credit reports thereafter.²¹ Experian defiantly left the Verizon/Airtouch charged off fraud account on plaintiff's credit file.²²

Experian claimed it conducted a "reinvestigation" by sending a form ACDV to Verizon, who in turn, "verified" its reporting and directed Experian to keep on reporting the account about

¹⁶ **Id. at ¶13,16, Plaintiff's Response and Statement of Material Facts.**

¹⁷ **Id. at ¶16, Plaintiff's Response and Statement of Material Facts.**

¹⁸ **Id. at ¶13,17, Plaintiff's Response and Statement of Material Facts.**

¹⁹ **Id. at ¶13,17, Plaintiff's Response and Statement of Material Facts.**

²⁰ **Id. at ¶18, Plaintiff's Response and Statement of Material Facts.**

²¹ **Id. at ¶19-20, Plaintiff's Response and Statement of Material Facts.**

²² **Id. at ¶21, Plaintiff's Response and Statement of Material Facts.**

plaintiff.²³ Experian solely uses the ACDV to “recheck” with the furnisher.²⁴ As far as Experian is concerned, the “buck stops with Verizon’s word.” *Id.* This useless process has been used by Experian and its predecessors, TRW and Chilton, for years.²⁵ Experian retained the illegal process despite judicial opinions finding it improper, agency actions, and plenty of lawsuits over the issue.²⁶ When Verizon “verified” it, Experian chose to keep on reporting it.²⁷

Of course, Experian also failed to share with Verizon a wealth of information contained in Experian’s records which might have proven useful to the perfunctory ACDV process.²⁸ Experian knew it was compiling monthly, affirmative historical and current reportings which contradicted.²⁹

Of course, at the same time, Experian conceded and deleted Verizon inquiries which plaintiff also contested as well as an inquiry by Lexicon School of Language in Los Angeles, all of which were tied to Colorado addresses and Experian knew it.³⁰ Experian sent plaintiff another credit report on November 27, 2000, completing the process as far as Experian was concerned.

²³ **Id. at ¶21-24,56, Plaintiff’s Response and Statement of Material Facts.**

²⁴ **Id. at ¶23,28,56, Plaintiff’s Response and Statement of Material Facts.**

²⁵ **Id. at ¶23, fn.35,¶56, Plaintiff’s Response and Statement of Material Facts.**

²⁶ Discussed *infra*; *Id.*

²⁷ **Id. at ¶25, Plaintiff’s Response and Statement of Material Facts.**

²⁸ **Id. at ¶22,56, Plaintiff’s Response and Statement of Material Facts.**

²⁹ **Id. at ¶22, Plaintiff’s Response and Statement of Material Facts.**

³⁰ **Id. at ¶25-28, Plaintiff’s Response and Statement of Material Facts.**

The report listed the negative and false Verizon account and inconsistent “recheck” results.³¹

On July 2, 2001, plaintiff again wrote Experian and requested a protective statement and advised Experian of her identifiers.³² Experian “updated” her 90 day [expired] security alert.³³

On July 25, 2001, Plaintiff’s Experian credit report still contained the Verizon fraud account and was still the only derogatory item on the file.³⁴

On October 17, 2001, plaintiff suffered a credit denial from MBNA followed by denials from First USA Bank.³⁵ Plaintiff needed a credit card but was unable to secure credit.

On November 7, 2001, according to Experian, an entity called Credit Protection Associates inquired into plaintiff’s credit report and listed a “S Decatur” Colorado address as part of the inquiry input.³⁶

On November 17, 2001, plaintiff’s efforts to secure a mortgage came to a screeching halt when she was denied credit by Secure Mortgage.³⁷ Causation to damage on each denial discussed was very clear and the reasons involved alleged delinquent credit listed on her Experian credit report. Id. Plaintiff was stymied in her efforts to obtain credit and was prescribed

³¹ Id. at ¶28, Plaintiff’s Response and Statement of Material Facts.

³² Id. at ¶29, Plaintiff’s Response and Statement of Material Facts.

³³ Id. at ¶29-30, Plaintiff’s Response and Statement of Material Facts.

³⁴ Id. at ¶31, Plaintiff’s Response and Statement of Material Facts.

³⁵ Id. at ¶32-33, Plaintiff’s Response and Statement of Material Facts.

³⁶ Id. at ¶34, Plaintiff’s Response and Statement of Material Facts.

³⁷ Id. at ¶35, Plaintiff’s Response and Statement of Material Facts.

Paxil by a medical doctor with whom she had discussed her symptoms and her problems.³⁸

On July 25, 2002, Experian again accessed plaintiff's credit file. Experian again knew that plaintiff had previously advised them that she never lived in Colorado yet Experian kept reporting Colorado addresses in her file and reports. One such address is even shown as a "business service" and "non-residential."³⁹ In July, 2002, plaintiff again disputed the Verizon fraud account to Experian.⁴⁰ Experian used the same, old ACDV form and sent it to Verizon. This time, Verizon responded to "delete" the account without stating a reason.⁴¹ Verizon was still reporting the "W 76th" Colorado address. *Id.* Nonetheless, as of July 25, 2002, the Verizon account is back on the file and still reporting as a charge-off.⁴² Oddly, on August 5, 2002, after this lawsuit was filed and service perfected on Experian, Experian sent yet another ACDV to Verizon regarding the fraud account. On August 8, 2002, Verizon "verified" the reporting and directed Experian to keep reporting the account about plaintiff.⁴³

Experian's counsel concurrently had the Credit Protection Associates reporting and "S Decatur" address removed from plaintiff's credit file.⁴⁴ In mid to late August, 2002, Experian attempted to phone Verizon, in a first time use of a telephonic reinvestigation, to ask Verizon

³⁸ **Id. at ¶35, Plaintiff's Response and Statement of Material Facts.** Dr. Eraj was also plaintiff's employer at the time and plaintiff received free medical treatment as a perk.

³⁹ **Id. at ¶36, Plaintiff's Response and Statement of Material Facts.**

⁴⁰ **Id. at ¶37, Plaintiff's Response and Statement of Material Facts.**

⁴¹ **Id. at ¶37, Plaintiff's Response and Statement of Material Facts.**

⁴² **Id. at ¶39, Plaintiff's Response and Statement of Material Facts.**

⁴³ **Id. at ¶40, Plaintiff's Response and Statement of Material Facts.**

⁴⁴ **Id. at ¶38, Plaintiff's Response and Statement of Material Facts.**

whether to keep reporting the fraud account.⁴⁵ Experian was unable to pass through the telephonic maze and had to ultimately leave a message.⁴⁶ According to Experian, on August 15, 2002, Verizon now told Experian to delete the account again.⁴⁷

On August 26, 2002, plaintiff's second effort to secure a mortgage resulted in yet another denial caused by the false and negative Experian credit report.⁴⁸ Plaintiff later received her credit report after requesting it from Experian and, now, Experian listed a false and negative Credit Protection Associates account.⁴⁹ Oddly, now the "S Decatur" Colorado address is back on the report. *Id.* The false "Lafayette St." Colorado address has never been removed and is still on the Experian report. *Id.* Plaintiff's counsel discussed the continued presence of the Credit Protection Associates data in plaintiff's file with Experian's counsel and Experian issued an ACDV to that furnisher. On January 30, 2003, Experian claimed it received an ACDV response to "delete" the account item reported by Credit Protection Associates [CPA] though its own records suggest removal on March 28, 2003.⁵⁰ Despite the removal of this CPA account, Experian left the Colorado addresses on the file!⁵¹ It was not until a few months ago, April 28, 2003, that

⁴⁵ **Id. at ¶41, Plaintiff's Response and Statement of Material Facts.**

⁴⁶ **Id. at ¶41, Plaintiff's Response and Statement of Material Facts.**

⁴⁷ **Id. at ¶42, Plaintiff's Response and Statement of Material Facts.**

⁴⁸ **Id. at ¶43, Plaintiff's Response and Statement of Material Facts.**

⁴⁹ **Id. at ¶44, Plaintiff's Response and Statement of Material Facts.**

⁵⁰ **Id. at ¶45-46,48, Plaintiff's Response and Statement of Material Facts.** Experian treats the process as though it must have the furnisher's approval to do what the law commands.

⁵¹ **Id. at ¶46, Plaintiff's Response and Statement of Material Facts.**

Experian claims it removed the two remaining Colorado addresses from plaintiff's credit report.⁵²

As of April 29, 2003, plaintiff's Experian credit report listed five improper and illegal credit report inquiries by Verizon. These inquiries occurred during this litigation and are illegal.⁵³ Compounding the matter, Experian continued to allow Verizon to access plaintiff's credit file and report well after Experian knew that plaintiff disputed Verizon's reportings.⁵⁴ Verizon lacked a permissible purpose and Experian knew that. Experian released the data file/credit report to them anyway in violation of section 1681b of the FCRA.

Plaintiff reasonably, throughout this ordeal, has suffered real symptoms and non-economic damages, as well as economic damages.⁵⁵ The variety of damages are addressed in evidentiary offerings and are the types of damages one would readily expect in a case such as this.

It should be noted that Experian also reported Colorado addresses despite plaintiff's disputes and, at some point in time, Experian, itself, actually began reporting false information under its own internal subscriber code.⁵⁶ Experian replaced Verizon's reporting of a known false Colorado address with Experian's own subscriber code and listed the address as being reported by Experian.⁵⁷ Experian even contrived a ruse to suggest that US Department of Education had

⁵² **Id. at ¶47, Plaintiff's Response and Statement of Material Facts.**

⁵³ **Id. at ¶49-50, Plaintiff's Response and Statement of Material Facts.**

⁵⁴ **Id. at ¶11, Plaintiff's Response and Statement of Material Facts.**

⁵⁵ **Id. at ¶32-33,35,43,49-50,52-53 Plaintiff's Response and Statement of Material Facts.**

⁵⁶ **Id. at ¶4-10, Plaintiff's Response and Statement of Material Facts.**

⁵⁷ **Id. at ¶10, Plaintiff's Response and Statement of Material Facts.**

caused the mis-reported Colorado address data.⁵⁸ Experian purposefully left false Colorado address data in plaintiff's credit file and reports it prepared and published.⁵⁹

Plaintiff's credit reports substantiate many inquiries by third parties, who took adverse action against plaintiff, and show proof of the continued issuance of false credit reports. As a credit reporting agency, Experian is an authorized agent and mouthpiece for Verizon/Airtouch.⁶⁰

Plaintiff has shown that she contested the Verizon/Airtouch false reportings and that Experian claimed that it conducted a "reinvestigation," which under Experian's processes amounts to nothing more than asking the furnisher to reverify or restate the same data the furnisher reported in and which is contested by the victim, in the form of a CDV⁶¹ communication to Verizon/Airtouch, the furnisher.⁶²

Experian's Motion

Experian's motion is a typical motion in suits they defend. Experian contends that it did not violate sections 1681e[b] or 1681i[a]. Experian goes on to argue that, even if it did, that plaintiff cannot show damages, of any kind, and that plaintiff cannot make a causal connection under Experian's hyper-technical view of evidentiary rules and the document intensive nature of

⁵⁸ **Id. at ¶4-8, Plaintiff's Response and Statement of Material Facts.**

⁵⁹ **Id. at ¶9, Plaintiff's Response and Statement of Material Facts.**

⁶⁰ **Id. at ¶57, Plaintiff's Response and Statement of Material Facts.**

⁶¹ A "CDV" [or its automated version, an "ACDV"] is a consumer dispute verification communication, which is standard in formatting, and is sent to the furnisher of data by the credit reporting agency upon the agency's receipt of a dispute from the consumer. 15 U.S.C. 1681i[a]. Under the agencies' guidelines, the furnisher is obliged to reinvestigate the data and respond with accurate information to the agency. 15 U.S.C. 1681s-2[b]. A "CDV" is a paper form communication while the "ACDV" is an automated, e-mailed version of the same standard format communication. The Fifth Circuit in **Stevenson v. TRW, Inc.**, 987 F.2d 288 [5th Cir. 1993], addressed the CDV process and use. TRW is Experian's predecessor.

⁶² **Id. at ¶23-24,28,40,56, Plaintiff's Response and Statement of Material Facts.**

these cases. Experian even suggests that plaintiff cannot show that an Experian's credit report was the sole factor for any of the damage. Experian goes on to argue that there is no proof of malice or willful intent. As a catch-all position, Experian last argued that plaintiff's state law claims should all be preempted and that Experian should enjoy qualified immunity for its acts, omissions and credit reportings.

Experian's Violations of sections 1681e[b] and 1681i[a] of the FCRA

The FCRA was crafted to protect consumers from the transmission of inaccurate information about them.⁶³ It is to be liberally construed in favor of consumers, not in favor of the credit and credit reporting industries.⁶⁴ The FCRA was crafted "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report."⁶⁵

Courts have held that a credit reporting defendant is liable for the harm from the initial reporting and any and all republications which were reasonably foreseeable, particularly since the reportings were made via their authorized agents, the credit reporting agencies.⁶⁶ Each transmission of a consumer's credit report is a separate and distinct tort.⁶⁷ An erroneous or

⁶³ **Kates v. Croker National Bank**, 776 F.2d 1396, 1397 [9th Cir. 1995].

⁶⁴ **Guimond v. Trans Union Credit Information, Co.**, 45 F.3d 1329 [9th Cir. 1995] [Cal.]; **Kates v. Croker National Bank**, 776 F.2d 1396, 1397 [9th Cir. 1995]; **Litschitz v. American Express Co.**, 560 F.Supp. 458 [U.S.D.C. Pa. 1983]; **Jones v. Federated Financial Reserve Corp.**, 144 F.3d 961 [6th Cir. 1998] [Mich.]; **Klapper v. Shapiro**, 586 N.Y. S.2d 846 [N.Y. Sup. 1992]; **Hovater v. Equifax, Inc.**, 823 F.2d 413, 417 [11th Cir. 1987].

⁶⁵ **Equifax, Inc. v. Federal Trade Comm'n**, 678 F.2d 1047, 1048 [11th Cir.1982], quoting S.Rep. No. 517, 91st Cong., 1st Sess. 1 [1969].

⁶⁶ **Luster v. Retail Credit Co.**, 575 F.2d 609 [8th Cir. 1978] [Ark.]; **Sheppard v. Nabb**, 581 A.2d 839 [Md. 1990]; **Sears, Roebuck & Co. v. Ulman**, 412 A.2d 1240 [Md. 1980].

⁶⁷ **James Young v. Equifax Credit Information Services**, 294 F.3d 631 [5th Cir. 2002]; **Hyde v. Hibernia Nat. Bank in Jefferson Parish**, 861 F.2d 446 [5th Cir. 1988], cert. denied, **Credit Bureau Services - New Orleans v. Hyde**, 109 S.Ct. 3199, 491 U.S. 910, 105 L.Ed.2d 706.

careless report serves no purpose but to substantially damage the target of the report, who after publication can do little to correct the damage caused by the report.⁶⁸

To recover against a credit reporting agency under 15 U.S.C. 1681e[b], Plaintiff must present proof tending to show that:

- a) The agency was negligent or wilful in that it failed to follow and use reasonable procedures to assure maximum possible accuracy of information about the Plaintiff;
- b) The agency reported inaccurate information⁶⁹ about the Plaintiff;
- c) Plaintiff was injured; and
- d) The agency's negligence or wilful conduct was the proximate cause of such injury.⁷⁰

More recently in **Parker v. Parker**,⁷¹ the court held that "*a plaintiff may present his case to the jury on the issue of reasonable procedures merely by showing an inaccuracy in the consumer report and nothing more...*," citing **Philbin**, infra, at 965, which interpreted the Eleventh

⁶⁸ **Bartels v. Retail Credit Co.**, 175 N.W.2d 292 [Neb. 1970].

⁶⁹ The standard of accuracy for credit reports embodied in the FCRA is objective measure that should be interpreted in even-handed manner toward interests of consumers and creditors in fair and accurate reporting. **Cahlin v. GMAC**, 936 F.2d 1151 [11th Cir. 1991] [Fla.]. "Technical accuracy" is not the standard, as a consumer credit report must be accurate to the maximum possible extent. In essence, the trier of fact must weigh the potential that the disputed information will create a misleading impression against availability of more accurate information and the burden of providing such information. **Alexander v. Moore & Associates, Inc.**, 553 F.Supp. 948 [U.S.D.C. Hawaii 1982]; **Cisneros v. U.S. Registry, Inc.**, 46 Cal.Rptr.2d 233, 39 C.A.4th 548 [Cal. App. 2d Dist. 1995]. The consumer reporting agency's and furnisher's duties to conduct reasonable reinvestigations, after the accuracy of information is disputed, is not terminated by fact that information is accurate about someone else if that information is presented in such a manner as to create inaccurate impressions as to the credit history of a particular individual. **Lowry v. Credit Bureau, Inc. of Georgia**, 444 F.Supp. 541 [U.S.D.C. Ga. 1978].

⁷⁰ **Guimond v. Trans Union Credit Info. Co.**, 45 F.3d 1329, 1333 [9th Cir. 1995] [Cal.]; **Cahlin v. GMAC**, 936 F.2d 1151 [11th Cir. 1991]; **Jensen v. Experian Info. Solutions, Inc.**, 2001 U.S. Dist. Lexis 15134 [U.S.D.C. E.D. Tex. 2001].; **Dalton v. Capital Associated Industries**, 257 F.3d 409 [4th Cir. 7/16/01]; **Bryant v. TRW, Inc.**, 487 F.Supp. 1234, 1238 [U.S.D.C. E.D. Mich. 1980], affirmed, 689 F.2d 72 [6th Cir.1982]; **Richardson v. Fleet Bank**, 190 F.Supp. 2d 81, 87-88 [U.S.D.C. Mass. 2001]; **Zala v. Trans Union, LLC**, 2001 U.S. Dist. Lexis 549 [U.S.D.C. N.D. Tex. 2001]; **Richardson v. Fleet Bank**, 190 F.Supp.2d 81 [U.S.D.C. Mass. 2001].

⁷¹ 124 F.Supp.2d 1216 [U.S.D.C. N.D. Ala. 2000].

Circuit's ruling in **Cahlin**, supra.⁷² The court noted that upon proof of an error, the "*burden shifts to the defendant to prove as an affirmative defense the presence of reasonable procedures.*" Id.

In this case, Experian suggests that it is plaintiff's burden of proof.

Again, the credit bureau may only prevail, *before the burden shifts to the defendant*, upon showing that the credit report was accurate. **Cahlin**, supra, at 1156. The **Parker** court, following **Cahlin**, held that if the report contains an error, then "whether defendants had in place reasonable procedures to report information and detect disparities is a question for the jury, not the court." Summary judgment was again denied.

Courts have held that a showing of factual inaccuracies in a single report or inconsistencies between two files on one consumer may be adequate to prove lack of reasonable procedures to assure the maximum possible accuracy of information in each consumer's file held by the agency.⁷³

In this case, plaintiff has shown a large number of credit reports which were prepared and published by Experian, both before and after Experian received notice[s], which contained inaccurate information. Further, those reports were published to third parties who, in fact, took adverse action against plaintiff. Plaintiff sustained credit denials caused by Experian credit

⁷² "The question that must be decided is did Experian follow reasonable procedures in creating Plaintiff's credit report. Experian has presented evidence explaining the procedures it follows in creating credit reports. The Court finds that in this case this decision cannot be settled by a motion for summary judgment. The question of whether Experian followed reasonable procedures must be decided by the trier of fact at trial. Summary judgment should be denied on Plaintiff's claim that Experian violated §§ 1681e[b]." **Jensen v. Experian Info. Solutions, Inc.**, 2001 U.S. Dist. Lexis 15134 [U.S.D.C. E.D. Tex. 2001]. *Jensen* was a "mixed" credit file case where plaintiff moved for summary judgment on liability. While denying the motion, the court noted serious questions about Experian's practices under section 1681i[a], the reinvestigation duty. Also in accord: **Guimond v. Trans Union Credit Info. Co.**, 45 F.3d 1329 [9th Cir. 1995] [Cal.].

⁷³ **Stewart v. The Credit Bureau, Inc.**, 734 F.2d 47 [D.C. Cir. 1984]; **Morris v. Credit Bureau of Cincinnati**, 563 F.Supp. 962 [U.S.D.C. S.D. Ohio 1983]; **Bryant v. TRW, Inc.**, 487 F.Supp. 1234 [U.S.D.C. Mich. 1980], affirmed, 689 F.2d 72 [6th Cir. 1982].

reports. Experian has established a role as a conduit whereby it acts as an authorized mouthpiece for Verizon and like furnishers who re-report data onto other subscribers.

This Honorable Court should note that the issue of Experian's procedures under section 1681e[b] and 1681i[a] have been the subjects of more recent motion practice in **Jensen v. Experian Info. Solutions, Inc.**, 2001 U.S.Dist.Lexis 15134 [U.S.D.C. E.D. Tex. 2001] and **Whitesides v. Equifax**, 125 F.Supp.2d 813 [U.S.D.C. W.D. La. 2000], where in both cases, Experian moved for summary judgment. *Jensen* involved a mixed credit file⁷⁴ and *Whitesides*, like here, was an identity theft victim. In both cases, Experian claimed that its procedures were reasonable and that its reinvestigation was lawful. The "reinvestigation" process at Experian has not changed a single bit in any material respect since these lawsuits were filed. In this case, **Mendoza**, Experian was forced to concede that all it did upon receipt of a dispute from plaintiff, in conformity with Experian's chosen and designed procedures, is to send an Automated CDV [ACDV] to the furnisher, Verizon. However and whatever Verizon responded became the final word. End of story.⁷⁵ That useless reinvestigation process was the same complaint raised with Experian's procedures in both **Jensen** and **Whitesides**, and many other cases against Experian. Experian has historically made a conscious business decision to accept the word of its corporate subscribers [meaning "its clients"], over the word of the consumers-victims [its "commodity" in terms of data]. Experian's motion in **Whitesides** was denied. Plaintiff's motion in **Jensen** was denied though the court noted "serious questions" about Experian's practices. Neither case reached the trial on the merits due to settlements.

⁷⁴ Though Experian suggested that there was a possible identity theft.

⁷⁵ Deposition of Experian/Stafford, pp.53-56, 56-59,59-61,131-140.

Regarding section 1681i[a], Circuit Courts have interpreted this section as imposing a duty on the credit reporting agency to maintain and actually use reasonable procedures to investigate and correct inaccurate or incomplete information brought to its attention by the consumer or otherwise.⁷⁶ According to the court, when a consumer brings a claim for violation of this duty, a court is "called upon to determine whether the credit reporting agency could have discovered an error in a particular report through a reasonable investigation." *Id.* A claim under 1681i[a] is properly raised when "a particular credit report contains a factual deficiency or error that could have been remedied by uncovering additional facts that provide a more accurate representation about a particular entry."⁷⁷ An agency must act impartially and in good faith in carefully evaluating all information and making a thorough and complete investigation before disseminating information to its subscribers.⁷⁸ Both of the **Swoager**, *infra*, and **Bryant v. TRW**, *supra*, courts held that it is unreasonable for the agency in reinvestigation to rely solely on the creditor's representatives who had biased views in order to "verify" disputed data.

The Fifth Circuit stated that an agency, TRW in particular, may not reinvestigate fraud or numerous disputed accounts, like in *Mendoza*'s case, on one credit report by mere CDV [Consumer Dispute Verification] form communications. **Stevenson v. TRW, Inc.**, 987 F.2d 288, 293 [5th Cir. 1993]. Of course, in this case, Experian chose to remove some of the fraudulent data conceding its inaccuracy while leaving the Verizon negative, fraud account reportings intact

⁷⁶ **Cahlin v. General Motors Acceptance Corp.**, 936 F.2d 1151, 1160 [11th Cir. 1991]; **Dalton v. Capital Associated Industries**, 257 F.3d 409 [4th Cir. 2001].

⁷⁷ **Williams v. Colonial Bank**, 826 F.Supp. 415 [U.S.D.C. M.D. Ala. 1993].

⁷⁸ **Bartels v. Retail Credit Co.**, 175 N.W.2d 292 [Neb. 1970].

despite the severe damage the reportings caused plaintiff.

Experian has chosen to use a reinvestigation process which is nothing more than parroting the position of the furnisher.⁷⁹ Experian undertakes no “reinvestigation” at all.

Experian’s argument is that it must merely “check” back with Verizon to see if Verizon meant what Verizon had just recently reported to Experian.⁸⁰ Experian seeks to reduce its “reasonable reinvestigation” burden to a perfunctory “re-check” rather than what Congress envisioned.⁸¹ In reinvestigation, after a consumer complains, a consumer reporting agency's procedure of asking the original creditor to restate whether the reporting is accurate will not be satisfactory. **Schueller v. TRW, Inc.**, 892 F.2d 1046 [Table, Unpublished] [9th Cir. 1989]; **Bryant v. TRW**, 689 F.2d 72, 77 [6th Cir. 1982] [where TRW knew of the dispute between the consumer and the reporting

⁷⁹ In a very similar case to **Mendoza**, the court in **Richardson v. Fleet Bank**, 190 F.Supp.2d 81 [U.S.D.C. Mass. 2001], held that the summary judgment was denied as there were genuine issues of material fact where Equifax failed to follow reasonable procedures by merely relying on creditors for purportedly accurate credit information. Such a procedure was not a reasonable procedure, as a matter of law, since Equifax had reason to know of the dispute between the consumers and the reporting creditor/furnisher. The plaintiffs, identity theft victims, sent dispute notices to Equifax regarding errors in their credit history on at least three occasions. Equifax kept preparing erroneous credit reports and simply parroting the duped furnisher’s reportings in their credit reports. Equifax knew of the disagreement between the consumer’s view and the furnisher and had a duty to get in between them and sort it out in a “real” reinvestigation.

⁸⁰ Merely contacting a subscriber/furnisher about disputed data is **not** a reasonable procedure to investigate disputes. **Swoager v. Credit Bureau of Greater St. Petersburg**, 608 F.Supp. 972 [U.S.D.C. M.D. Fla. 1985]; **Cushman v. Trans Union Corp.**, 1996 Westlaw 153218 [U.S.D.C. E.D. Pa. 1996] [“the decisive inquiry is whether Trans Union could have determined that the accounts were opened fraudulently if it had reasonably investigated the matter.” *Id.* at p.2.]. A consumer reporting agency is liable where it failed to verify derogatory information after receipt of complaint and dispute by consumer. An agency must do more than its mimic subscriber/furnisher. **Bryant v. TRW, Inc.**, 689 F.2d 72 [6th Cir. 1982][Mich.]; **Dynes v. TRW Credit Data**, 652 F.2d 35 [9th Cir. 1981][Cal.]. In reinvestigation, Experian bears responsibility for evaluating the accuracy of the information obtained from its subscribers. **Stevenson v. TRW, Inc.**, 987 F.2d 288, 293 [5th Cir. 1993]; **Swoager**, *supra*; **Schueller v. TRW, Inc.**, 892 F.2d 1046 [Table, Unpublished] [9th Cir. 1989]; **McPhee v. Chilton Corp.**, 468 F.Supp. 494, 496 [U.S.D.C. Conn. 1978]; **Bryant v. TRW**, 689 F.2d 72, 77 [6th Cir. 1982]; **Cahlin v. GMAC**, 936 F.2d, at 1160 [11th Cir. 1991]. Note that Chilton Corp. was TRW’s predecessor and TRW was Experian’s predecessor. Experian/TRW/Chilton have continued to raise the frivolous mimicing/parroting argument for years.

⁸¹ Not surprising, Experian has continued to argue, despite decisions to the contrary, that it can simply parrot its furnishers. Experian erroneously argued that it can do no more than simply take Verizon’s word for the reported fraud account. The **Stevenson** Court disagreed with TRW/Experian and placed the burden of reinvestigation “squarely” on TRW/Experian. **Stevenson v. TRW, Inc.**, 987 F.2d 288, 293 [5th Cir. 1993].

creditors, confirming consumer's credit information with the creditors constituted an unreasonable procedure]. Here, TRW, now Experian, has known, as the Sixth Circuit told them, that their perfunctory process is illegal.

Still other courts have told the agencies not to simply parrot. In **Barron v. Trans Union Corp.**,⁸² the court found that Trans Union credit reporting agency was initially entitled to rely on incoming reported information from credit grantors, as it would be unduly burdensome and inefficient to require an agency on the very front end/receipt to look beyond the face of every item of incoming data. However, once the agency notified that the consumer disputed the information contained in such records, exclusive reliance on the creditor is neither reasonable or justified.

In **Henson v. CSC Credit Servs.**,⁸³ the Seventh Circuit found that a credit reporting agency was entitled to rely on court dockets to correctly recite consumer's credit history until it received some notice or dispute that information is inaccurate. In **Gill v. Kostroff**,⁸⁴ the District Court held that "[a] credit reporting agency that has been notified of potentially inaccurate information in a consumer's credit report is in a very different position than one who has no such notice." citing **Henson**, 29 F.3d, at 286. In **Cushman v. Trans Union**, 115 F.3d, at 226, the court noted the denial of Trans Union's motion for summary judgment in claim for failure to reinvestigate where it merely verified negative information with the credit grantors despite consumer's warning that information was inaccurate. In **Stevenson v. TRW**, 987 F.2d, at 293,

⁸² 82 F.Supp.2d 1288, 1295-96, 2000 U.S.Dist.Lexis 971 [U.S.D.C. M.D. Ala. 2000].

⁸³ 29 F.3d 280, 285 [7th Cir. 1994].

⁸⁴ 2000 U.S.Dist.Lexis 1161, Civ.A. 98-930- T17A, 2000 WestLaw 141258, at *6 [U.S.D.C. M.D. Fla. 2000].

the Fifth Circuit affirmed a finding that TRW's procedure was unreasonable where TRW failed to reinvestigate and merely verified negative information with the duped furnishers despite consumer's warning that information was inaccurate.⁸⁵

In **Pinner v. Schmidt**,⁸⁶ the Fifth Circuit noted the denial of defendant's motion for new trial for failure to reinvestigate where the consumer-victim informed Chilton credit reporting agency of his personal dispute with credit grantor, yet Chilton relied solely on the credit grantor for information during its alleged investigation.

Congress and the courts have decided that Experian must exercise its "grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. 1681[a][4][2003]. Section 1681i provides: If the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly of such dispute, the agency shall reinvestigate.

The Third Circuit Court of Appeals in the leading decision discussing the reinvestigation function "emphasized that such agencies must do more than 'merely parrot information received from other sources. Therefore, a 'reinvestigation' that merely shifts the burden back to the consumer and the credit grantor cannot fulfill the obligations contemplated by the statute.'"

Cushman v. Trans Union Corp., 115 F.3d 220, 225 [3d Cir. 1997] [also an identity theft case].

⁸⁵ "In a reinvestigation of the accuracy of credit reports, a credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers." **Stevenson**, 987 F.2d, at 293.

⁸⁶ 805 F.2d 1258, 1262 [5th Cir. 1986], cert. denied, 483 U.S. 1022, 97 L. Ed. 2d 766, 107 S. Ct. 3267 [1987] and cert. denied sub nom. **Credit Bureau Services-New Orleans v. Pinner**, 483 U.S. 1032, 97 L. Ed. 2d 780, 107 S. Ct. 3276 [1987].

The Third Circuit went on to hold that "the scope of an agency's duty to go beyond the original source depends on a number of factors, including: [1] whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency knows or should know that the source is unreliable; and [2] the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer." Id. "Whatever considerations exist, it is for 'the trier of fact [to] weigh these factors in deciding whether [an agency] violated the provisions of section 1681i.'" Id. at 225-26 [quoting the Seventh Circuit in **Henson v. CSC Credit Servs.**, 29 F.3d 280, 287 [7th Cir. 1994] ["heightened" duty of reinvestigation and "more thorough reinvestigation"]].

The agency must ask questions about adverse data it receives, such as verification of the correct identity of the consumer to whom the data attaches, the relationship of the data to the consumer and investigate any extenuating circumstances concerning the derogatory data. The agency must do more than be a *mere post hoc correction of erroneously reported data*.⁸⁷

Is it "willful" to refuse to change your "reinvestigation" procedure in the face of numerous judicial opinions defining what "reinvestigation" means? Is it "willful" to refuse to change your "reinvestigation" procedure in the face of judicial opinions and an abundance of "notice" of the defects via suits and motion practice? Experian cannot argue that it was not "knowing" in that regard. How much "notice" and "warning" is enough before a corporate defendant must be severely punished? How many times must they be told before it is "willful?"

Experian's actions are consciously designed and credit reporting is not by happenstance. It is a function with a determined purpose. The information repeatedly reported and re-reported

⁸⁷ **Miller v. Credit Bureau, Inc.**, 4 CCH [Consumer Credit Guide] p.99,173 [D.C. Super. Ct. 1972].

in this case is patently false. Contrary to the affidavit which Experian claims was penned by Kimberly Hughes, as attached to their motion, Experian's procedures actually used, as opposed to those expressed by counsel in the affidavit and brief, are nothing more than a perfunctory re-check to Verizon. Experian did nothing to get in between Mrs. Mendoza and Verizon and to try and determine if her disputes were valid. That perfunctory re-check occurred each time plaintiff contested the data to Experian.

Though Experian's citation, on page 12 of brief, to the FTC Commentary, 55 Fed.Reg. 18823 exists as 16 C.F.R. Pt.600, section 611, Experian failed to supply the court with the complete statements and other commentary explaining its persuasive remarks. In subsection [a] to section 611, the FTC remarked "...the *consumer reporting agency shall within a reasonable period of time reinvestigate ...*" The FTC also advised in subsection [c] that "(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the *consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.*" Experian failed to take any steps to flag or mark the Verizon account as "disputed" when it issued subsequent reports.

Most importantly, the FTC in subsection [d][2] to section 611 of the FTC Commentary, supra, stated that "[A] *consumer reporting agency conducting a reinvestigation must make a good faith effort to determine the accuracy of the disputed item or items.*" The facts here really speak for themselves. While the FTC Commentary is often viewed as vague and merely persuasive commentary on the FCRA, the FTC has repeatedly criticized Experian's

reinvestigation practices and handling of consumer contacts.⁸⁸

Actual Damages and Causation

Actual damages under the FCRA are not limited to out-of-pocket expenses and may instead include humiliation and mental distress.⁸⁹ In fact, out-of-pocket expenses are not even required but Mendoza had such damages.⁹⁰ Even though Mendoza has credit denials, a credit denial is not even required to recover under the FCRA.⁹¹ Further, stress induced maladies alone are sufficient as damages under FCRA.⁹² If willfulness is proven, plaintiff need not even show any actual damages.⁹³

⁸⁸ "Nation's Big Three Consumer Reporting Agencies Agree to Pay \$2.5 Million to Settle FTC Charges of Violating Fair Credit Reporting Act," <http://www3.ftc.gov/opa/2000/01/busysignal.htm>; *FTC v. Experian*, Cause No. 3-00CV0056-L [U.S.D.C. N.D. Tex.]; *Experian Consent Decree*: <http://www3.ftc.gov/os/2000/01/experianconsent.htm>. At a minimum, it appears that Mrs. Hughes' testimony by affidavit is unreliable. Comparably in **James J. O'Connor v. Trans Union Corp.**, No. 97-4633 [U.S.D.C. E.D. Pa. 11/4/98], <http://www.paed.uscourts.gov/opinions/98D1115P.htm> the court noted that originally, based on the affidavit of Eileen Little, Trans Union's legal liaison and proffered witness, the court held such material sought and information sought were irrelevant assuming it was not a mixed file case. Plaintiff asserted that Little was "not credible." Little's affidavit was not consistent with her prior deposition testimony. The court found evidence upon which "...the court can no longer rely on Ms. Little's affidavit."

⁸⁹ **Cousin v. Trans Union**, 246 F.3d at 369 [5th Cir.]; **Casella v. Equifax Credit Information Servs.**, 56 F.3d 469, 474 [2nd Cir. 1995]; **Guimond v. Trans Union Credit Information Co.**, 45 F.3d 1329, 1333 [9th Cir. 1995]; **Bryant v. TRW, Inc.**, 487 F. Supp. 1234, 1240 [E.D. Mich. 1980].

⁹⁰ **Stevenson v. TRW, Inc.**, 987 F.2d 288, 294 [5th Cir. 1993].

⁹¹ **Guimond v. Trans Union Credit Info. Co.**, 45 F.3d 1329 [9th Cir. 1995] [Cal.]; **Cushman v. Trans Union Corporation**, 920 F.Supp. 80 [U.S.D.C. E.D. Pa. 1996].

⁹² **Cushman v. Trans Union**, 1996 Westlaw 153218, at p.3 [U.S.D.C. E.D. Pa. 1996]; **Arriola v. Safeco**, 15 F.3d 1082 [Table, unpublished] 1993 Westlaw 530480 [9th Cir. 1993] [Idaho].

⁹³ **Northrop v. Hoffman of Simsbury, Inc.**, 12 Fed.Appx. 44, 50 [2nd Cir. 2001] ["Actual damages are not a statutory prerequisite to punitive damages"]; **Bakker v. McKinnon**, 152 F.3d 1007 [8th Cir. 1998]; **Yohay v. City of Alexandria Employees Credit Union, Inc.**, 827 F.2d 967, 972 [4th Cir.1987] ["award of punitive damages in the absence of any actual damages, in an appropriate case, comports with the underlying deterrent purpose of the FCRA"]; **TRW, Inc. v. Andrews**, 534 U.S. 19, 122 S. Ct. 441, 451, 151 L. Ed. 2d 339 [U.S. 2001] ["Punitive damages, which [plaintiff] sought in this case, could presumably be awarded at the moment of TRW's alleged wrongdoings, even if 'actual damages' did not accrue at that time."]; **Casella v. Equifax Credit Information Services**, 56 F.3d 469, 476 [2nd Cir. 1995] [N.Y.].

In light of defendants' efforts to suggest that plaintiff simply cannot recover any damages, plaintiff respectfully submits that the case law is uniform in allowing a variety of "actual damages" under the FCRA, including humiliation,⁹⁴ mental distress/anguish,⁹⁵ injury to reputation and credit rating/worthiness,⁹⁶ anxiety,⁹⁷ embarrassment,⁹⁸ sleeplessness and nervousness,⁹⁹ future damages,¹⁰⁰ out-of-pocket expenses for attorney's fees incurred by a plaintiff prior to litigation of her FCRA claims,¹⁰¹ and other out-of-pocket expenses.¹⁰²

In **Stevenson v. TRW, Inc.**,¹⁰³ the Fifth Circuit considered another identity theft victim's bench trial awards where Judge Sanders awarded about \$30,000 in actual damages, including an award of damages for pain and suffering where the victim experienced humiliation resulting from

⁹⁴ **Bryant v. TRW, Inc.**, 487 F.Supp. 1234 [U.S.D.C. Mich. 1980], affirmed, 689 F.2d 72 [6th Cir. 1982]; **Johnson v. Department of Treasury, I.R.S.**, 700 F.2d 971, 984 [5th Cir. 1983]; **Thompson v. San Antonio Retail Merchants Assn.**, 682 F.2d 509, 514 [5th Cir. 1982].

⁹⁵ **Fischl v. GMAC**, 708 F.2d 143 [5th Cir. 1983]; **Thompson v. San Antonio Retail Merchants Assn.**, 682 F.2d 509, 514 [5th Cir. 1982]; **Jones v. Credit Bureau of Huntington**, 399 S.E.2d 694 [W. Va. 1990].

⁹⁶ **Fischl v. GMAC**, 708 F.2d 143 [5th Cir. 1983]; **Jones v. Credit Bureau of Huntington**, 399 S.E.2d 694 [W. Va. 1990]. Loss of reputation can be inferred from nature of false publication that reflects adversely on consumer. **Collins v. Retail Credit Co.**, 410 F.Supp. 924 [U.S.D.C. Mich. 1976].

⁹⁷ **Bryant v. TRW, Inc.**, 487 F.Supp. 1234 [U.S.D.C. Mich. 1980], affirmed, 689 F.2d 72 [6th Cir. 1982]; **Bakker v. McKinnon**, 152 F.3d 1007 [8th Cir. 1998] ["mere mental pain and anxiety" are adequate as actual damages]..

⁹⁸ **Bryant v. TRW, Inc.**, 487 F.Supp. 1234 [U.S.D.C. Mich. 1980], affirmed, 689 F.2d 72 [6th Cir. 1982].

⁹⁹ **Millstone v. O'Hanlon Reports, Inc.**, 383 F.Supp. 269 [U.S.D.C. Mo. 1974], affirmed, 528 F.2d 829 [8th Cir].

¹⁰⁰ **Bryant v. TRW, Inc.**, 487 F.Supp. 1234 [U.S.D.C. Mich. 1980], affirmed, 689 F.2d 72 [6th Cir. 1982].

¹⁰¹ **Thomas v. Trans Union**, 1992 Westlaw 280516, at *4 [U.S.D.C. N.D. Ill. 1992]; **Casella v. Equifax Credit Information Services**, 56 F.3d 469, 474 [2d Cir. 1995] [N.Y.].

¹⁰² **Thomas v. Trans Union**, 1992 Lexis 15049 [U.S.D.C. E.D. Ill. 1992]; **Cook v. Equifax**, 1992 Westlaw 356119 [U.S.D.C. Md. 1992].

¹⁰³ 987 F.2d 288, 296-97 [5th Cir. 1993].

three credit denials and lengthy dealings with TRW, and \$100,000 in punitive damages in favor of plaintiff and against TRW. The Fifth Circuit affirmed the award of actual damages.

The courts have uniformly adopted the causation standard set forth in the Third Circuit's opinion in **Philbin v. Trans Union Corp.**¹⁰⁴ The court held that an FCRA plaintiff need not show that any item of damage was "solely" caused by any violation of the FCRA or any credit report but a plaintiff must show that "the inaccurate entries were a substantial factor in bringing about Philbin's [plaintiff's] injuries." The causation test is "substantial factor," not "sole factor."¹⁰⁵ In this case, the denial letters clearly listed that the denials were caused in whole or in part by the [only] derogatory item on her Experian credit reports, the fraudulent Verizon account. The Verizon account had a maximum derogatory status ["9"] and was the only negative item in the Experian reports up to the time the Credit Protection Associates fraud account was added by Experian.

The **Richardson v. Fleet Bank**,¹⁰⁶ court specifically addressed Experian's hyper-technical and unavailing evidentiary arguments regarding the credit denial letters, as follows:

"To establish a prima facie case pursuant to section 1681e[b], the plaintiff must 'produce evidence from which a reasonable trier of fact could infer that the inaccurate entry was a 'substantial factor' that brought about the denial of credit.' **Philbin**, 101 F.3d at 968. Here, the plaintiffs submit two letters from BP Oil dated August 27, 1997, rejecting their

¹⁰⁴ 101 F.3d 957, 970 [3d Cir. 1996].

¹⁰⁵ See, ex., **O'Connor v. Trans Union Corp.**, 1999 U.S. Dist. Lexis 14917 [U.S.D.C. E.D. Pa. 1999]; **Richardson v. Fleet Bank**, 190 F. Supp. 2d 81, 87-88 [U.S.D.C. Mass. 2001]; **Lang v. Trans Union Corp.**, 1999 U.S. Dist. Lexis 18584 [U.S.D.C. W.D. Pa. 1999]; **Frost v. Experian**, 1999 U.S. Dist. Lexis 6783 [U.S.D.C. S.D. N.Y. 1999].

¹⁰⁶ 190 F. Supp. 2d 81, 87-88 [U.S.D.C. Mass. 2001].

applications for credit, and citing to an Equifax credit report as the "primary reason" for the denial of credit. In addition, the parties agree that the Equifax credit reports obtained by the plaintiffs in March 1997 and in October 1997 contained inaccurate, negative information. Therefore, the Court concludes that a reasonable jury could infer that inaccurate, negative information contained in the Equifax credit reports constituted a substantial factor in BP Oil's decision to decline the plaintiffs' credit applications.

Equifax's citation to **Cahlin v. General Motors Acceptance Corp.**, 936 F.2d 1151, 1160 [11th Cir. 1991], moreover, is unavailing. There, the court granted summary judgment to the defendant in an FCRA dispute on the issue of causation after all of the credit reporting agency's records were reviewed and there emerged no evidence that any credit report produced by the defendant had ever been used in making an adverse credit decision against the plaintiff. **Cahlin**, 936 F.2d at 1156, 1161. Here, by contrast, the plaintiffs have produced the credit denials issued by BP Oil that specifically reference Equifax credit reports. While the plaintiffs' case 'might have been stronger had [they] deposed or taken affidavits of those responsible for the decision, *such evidence is not essential to make out a prima facie case pursuant to [section 1681e[b]].*'" **Philbin**, 101 F.3d at 968."

Experian Wilfully Violated the Act

To be in willful non-compliance with the FCRA, thereby triggering potential punitive damages recovery, a defendant must have knowingly and intentionally committed an action or inaction in conscious disregard for the rights of others. Proof of malice or evil motive is not

necessary.¹⁰⁷ The law is clear that questions involving a party's state of mind are generally appropriately resolved by a jury rather than on summary judgment.¹⁰⁸

The standard of conduct by which the trier of fact must judge the adequacy of a consumer reporting agency's procedures is "what a reasonably prudent person would do under the circumstances."¹⁰⁹ The question of whether an agency followed "reasonable procedures" is typically a fact question reserved for the jury.¹¹⁰

Reasonableness of a defendant's behavior and procedures are assessed by balancing "the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy."¹¹¹ An erroneous or careless report serves no purpose but to substantially damage the target of the report, who after publication can do little to correct the damage caused by the report.¹¹²

¹⁰⁷ **Stevenson v. TRW, Inc.**, 987 F.2d 288, 293 [5th Cir. 1993]; **Pinner v. Schmidt**, 805 F.2d 1258, 1263 [5th Cir. 1986]; **Fischl v. GMAC**, 708 F.2d 143, 151 [5th Cir. 1983]; **Jones v. Credit Bureau of Huntington, Inc.**, 703 F.Supp. 897 [U.S.D.C. Kan. 1988]; **Thornton v. Equifax, Inc.**, 619 F.2d 700 [8th Cir. 1980]; **Sheffer v. Experian Info. Solutions, Inc.**, 2003 U.S. Dist. LEXIS 12728 [U.S.D.C. E.D. Pa. 2003]; **Trans Union Corporation v. Crisp**, 896 S.W.2d 446 [Ark. App. 1995].

¹⁰⁸ **Moore, Owen, Thomas & Co. v. Coffey**, 992 F.2d 1439, 1447 [6th Cir. 1993]; **Thibodeaux v. Rupers**, 196 F.Supp.2d 585 [U.S.D.C. S.D. Ohio 2001]. "Questions involving a party's state of mind are generally appropriately resolved by a jury rather than on summary judgment." **Smith v. Bob Smith Chevrolet, Inc.**, 2003 U.S. Dist. Lexis 13464 [U.S.D.C. W.D. Ky. 2003]. The Fourth Circuit, in applying the "conscious disregard for the rights" of the consumer" standard, noted that "summary judgment is 'seldom appropriate' on whether a party possessed a particular state of mind." **Dalton v. Capital Assoc. Indus., Inc.**, 257 F.3d 409, 418 [4th Cir. 2001]. "...[W]hether the defendants [Experian and TRW] acted willfully or maliciously in erroneously reporting that the plaintiff was a judgment debtor in the amount of \$495,696 raises questions of material fact." **Frost v. Experian**, 1999 U.S. Dist. Lexis 6783 [U.S.D.C. S.D. N.Y. 1999].

¹⁰⁹ **Bryant v. TRW, Inc.**, 689 F.2d 72, 78 [6th Cir. 1982]; **Boris v. Choicepoint Servs.**, 249 F.Supp.2d 851, 2003 U.S. Dist. Lexis 4050 [U.S.D.C. W.D. Ky. 2003].

¹¹⁰ **Cousin v. Trans Union Corp.**, 246 F.3d 359 [5th Cir. 2001]; **Cahlin v. General Motors Acceptance Corp.**, 936 F.2d 1151, 1156 [11th Cir. 1991]; **Boris v. Choicepoint Servs.**, 249 F.Supp.2d 851, 2003 U.S. Dist. Lexis 4050 [U.S.D.C. W.D. Ky. 2003].

¹¹¹ **Jones v. Credit Bureau of Garden City, Inc.**, 703 F.Supp. 897 [U.S.D.C. Kan. 1988].

¹¹² **Bartels v. Retail Credit Co.**, 175 N.W.2d 292 [Neb. 1970].

Evidence of Experian's Willful Conduct and Malice

In Mendoza v. Experian Info. Solutions, Inc., 2003 U.S. Dist. Lexis 7121, this Honorable Court discussed the interplay between 15 U.S.C. 1681h[e] and 15 U.S.C. 1681t[b][1][F], in connection with Verizon's motion, and found that 1681h[e] required a showing of malice¹¹³ or willful intent to proceed with state law claims. Some courts have rejected the notion that any qualified immunity is afforded.¹¹⁴ For example, Judge John Ward found a cause of action for "negligent credit reporting" in Amber Dawn Williams v. Experian,¹¹⁵ which also adopted the decisions in Whitesides v. Equifax,¹¹⁶ correcting a misinterpretation of section 1681h[e] and following a line of cases correcting earlier misinterpretations of 1681h[e].¹¹⁷

In the Whitesides case, the court rejected Experian's arguments that plaintiff's claims

¹¹³ Malice means a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." See, e.g., Whelan v. Trans Union Credit Reporting Agency, 862 F. Supp. 824, 834 [E.D.N.Y. 1994] [citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 [1964]]." Stafford v. Cross Country Bank, 2003 U.S. Dist. Lexis 8215 [U.S.D.C. W.D. Ky. 2003]. "Reckless disregard of the truth is not measured by whether a reasonably prudent person would have published or would have investigated before publishing; there must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of the communication." Furgason v. Clausen, 785 P.2d 242, 248 [N.M. Ct. App. 1989].

¹¹⁴ Amber Dawn Williams v. Experian, 2002 WestLaw 31133235 [U.S.D.C. E.D. Tex. 8/02]; Kronstedt v. Equifax, 2001 U.S. Dist. Lexis 25021, at p.48 [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]; Whitesides v. Equifax Credit Information Services, et al, 125 F. Supp. 2d 807 and 125 F. Supp. 2d 813 [U.S.D.C. W.D. La. 2000].

¹¹⁵ 2002 WestLaw 31133235 [U.S.D.C. E.D. Tex. 8/02] [Judge John Ward].

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

¹¹⁷ See McAnly v. Middleton & Reutlinger, P.S.C., 77 F. Supp. 2d 810, 814-815 [U.S.D.C. W.D. Ky. 1999]; Kronstedt v. Equifax, 2001 U.S. Dist. Lexis 25021, at p.48 [U.S.D.C. W.D. Wisc. 2001]; Baxter v. Reliable Oldsmobile, Inc., 1986 Westlaw 13584 [Ohio App.] Nov. 26, 1986 [Dissent]; 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]**."; 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."].

were preempted or barred by section 1681h[e]. Like here, plaintiff's claims arose from communications not directly with the plaintiff but with other third parties [credit reports sent to third parties causing credit denials and other damages]. In sum, section 1681h[e] only affects claims where the claim arises from communications between the defendant and the consumer. The **Whitesides** 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*. 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. . . ."*¹¹⁸ Section 1681h[e] deals only 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.

While the FCRA is "no model of clarity," this interpretation makes perfect sense and is the only reasonable interpretation of that section. Plaintiffs' state and common law claims are not limited, preempted or barred by the FCRA. *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.*¹¹⁹ The Fair Credit Reporting Act does not preempt a state law cause of

¹¹⁸ The Tenth Circuit, following the United States Supreme Court in **U.S. v. Menasche**, 348 U.S. 528, 538-39 [1955], has repeated that "[I]t is our duty to give effect, if possible, to every clause and word of a statute." **Matthiesen v. Banc One Mortgage Corp.**, 173 F.3d 1242 [10th Cir. 1999]. Also, **Mendoza**, supra, at fn.3: "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous or insignificant." See **United States v. Campos-Serrano**, 404 U.S. 293, 301 n. 14, 30 L. Ed. 2d 457, 92 S. Ct. 471, [1971]."

¹¹⁹ See, for example, **Credit Data of Arizona, Inc. v. State of Arizona**, 602 F.2d 195 [C.A. Ariz. 1979].

action for defendant's negligence in communicating erroneous credit data about a consumer.¹²⁰

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.¹²¹

Here, plaintiff complains of false reportings issued by Verizon to Experian and from Experian onto third party subscribers who then denied credit and gave other adverse action 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 Verizon and re-reported on a number occasions by Experian, as an agent and mouthpiece for Verizon. Experian acts as the authorized agent and mouthpiece for its furnishers, like Verizon.

Summary Judgment Standard

Summary judgment is only proper pursuant to Rule 56 of the Federal Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹²² Any issues of fact, doubts, and inferences to be drawn therefrom are interpreted in favor of the non-moving party.¹²³ Rule

¹²⁰ **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].

¹²¹ See, for example, **Matthews v. GEICO**, 23 F.Supp.2d 1160 [U.S.D.C. S.D. Cal. 1998]. The state law claims asserted by plaintiff herein supplement and are not inconsistent [are consistent] with the express purposes of the Fair Credit Reporting Act. **Retail Credit Co. v. Dade County**, 393 F.Supp. 577 [U.S.D.C. S.D. Fla. 1975]

¹²² **Celotex Corp. v. Catrett**, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 [1986]; **Hysten v. Burlington N. & Sante Fe Ry.**, 296 F.3d 1177 [10th Cir. 2002].

¹²³ **Williams v. Rice**, 983 F.3d 177 [10th Cir. 1993]. The trial court must resolve all reasonable doubts in favor of the party opposing the motion. **Jensen v. Experian Info. Solutions, Inc.**, 2001 U.S.Dist.Lexis 15134 [U.S.D.C. E.D.

56 mandates the entry of summary judgment, only after adequate time for discovery and upon prima facie motion, against a party who fails to make a showing sufficient to establish an essential element of that party's case, and on which that party will bear the burden of proof at trial.¹²⁴

Of course, that burden of production by the non-movant is only triggered when the movant has brought forth evidence countering the claims of the non-movant and such evidence must be adequate to cause the court to test the non-movant's claims. The moving party has the initial burden of proof and, only once a prima facie case is made, the non-moving party must respond with evidence to contradict and show the existence of a genuine issue of material fact.¹²⁵ If the movant demonstrates a prima facie showing, including its burden of production of evidence and not mere assertions, then and only then the non-movant must show the existence of at least one genuine issue of material fact. *Id.* Only where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the non-movant should summary judgment should be granted.¹²⁶

Conclusion

Plaintiff opposes each and every respect of Experian's motion. Plaintiff submits that Experian's motion must be denied in all respects.

Respectfully submitted:

Tex. 2001]; **Casey Enterprises, Inc. v. Am. Hardware Mut. Ins. Co.**, 655 F.2d 598, 602 [5th Cir. 1981].

¹²⁴ **Willis v. Roche Biomedical Laboratories, Inc.**, 61 F.3d 313, 315 [5th Cir. 1995]; **Riggs v. Anthony Auto Sales**, 32 F.Supp.2d 407 [U.S.D.C. W.D. La. 1998].

¹²⁵ **Whitesides v. Equifax**, 125 F.Supp.2d 813, 816 [U.S.D.C. W.D. La. 2000].

¹²⁶ **Armstrong v. City of Dallas**, 997 F.2d 62, 67 [5th Cir. 1993].

**BODENHEIMER, JONES, SZWAK & WINCHELL,
LLP**

By: _____

DAVID A. SZWAK, LBR#21157

401 Market St., Ste. 240

Shreveport, Louisiana 71101

[318] 424-1400

FAX 424-1476

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by placing a copy of same in the United States Mail, properly addressed and first class postage pre-paid on this the ____ day of _____, 2003.

OF COUNSEL