**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF NORTH CAROLINA**

| | | |
|---|---|---|
| **ERIC KELLER, on behalf of himself and others similarly situated,** | ) | Civil Action No. 1:23-cv-00409-LCB-LPA |
| **Plaintiff,** | ) | |
| **v.** | ) | |
| **EXPERIAN INFORMATION SOLUTIONS, INC.,** | ) | |
| **Defendant.** | ) | |

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

The Plaintiff opposes Defendant Experian Information Solutions, Inc.'s ("Defendant" or "Experian") Motion for Judgment on the Pleadings (Dkt. No. 24) (MJOP) Plaintiff's First Amended Class Action Complaint (Dkt. No. 11) (FAC).[1]

[1] Plaintiff intends to timely file a Motion for Reconsideration of the Dismissal of Counts II and II, and/or file a motion for leave to file a Second Amended Complaint to add additional facts that demonstrate not only the factual nature of the underlying dispute, but also that Experian possessed information sufficient to perform a reinvestigation and resolve the dispute in Plaintiff's favor.

## I. INTRODUCTION

Experian's motion should be denied out of hand because it tries to resuscitate much of what the court already considered and rejected in denying on Experian's prior motion to dismiss the Plaintiff's class claim that Experian's suspicious mail policy, as implemented and used against the Plaintiff, stated a claim that Experian violated the Plaintiff's Fair Credit Reporting Act rights.

Instead of fulfilling its minimum, mandatory duty to forward Mr. Keller's first dispute to the furnisher, Experian did nothing but falsely claim Mr. Keller had not sent or authorized his own disputes. Under the FCRA, Experian had an absolute duty to transmit Mr. Keller's dispute to the furnishers at a minimum, regardless of the nature of the dispute. Experian has cited no Fourth Circuit authority – because there is none -- that allows Experian to forego the most basic duty to transmit a dispute to the furnisher under 15 U.S.C. § 1681i(a)(2) unless it first makes a finding that the dispute is frivolous or irrelevant under 15 U.S.C. § 1681i(a)(3). And, there is no way to make such a finding if Experian makes a decision that the dispute isn't even worth reading. Further, assuming, *arguendo*, Experian believes that a particular credit dispute is legal in nature and is, therefore, not competent to conduct its own reinvestigation, then Experian should automatically assume all such disputes are not frivolous and forward them on so that someone the furnisher can competently investigate the dispute. Moreso, if Experian determined that a dispute was "legal" in nature, then it becomes more important to forward it to a furnisher to competently investigate. Just because a dispute implicates legal issues, that does not mean it is frivolous.

Once Experian was on notice of the dispute in the consumer's file, it was a violation of the FCRA to fail to use reasonable procedures to make sure that the information it reported about him was maximally accurate. Therefore, there is no cause to enter judgment at this stage on Mr. Keller's class claim against Experian.

## II. FACTUAL BACKGROUND

Plaintiff purchased a 2021 Toyota 4 Runner and financed the vehicle through non-party TD Auto Finance ("TD Auto"). FAC, ¶ 6. Plaintiff then refinanced the vehicle through non-party Truist Bank ("Truist"). *Id*. ¶ 7. Subsequently, Truist sent two payoff checks to TD Auto for the original loan. *Id*. ¶ 8, 9.

TD Auto refunded one of the payoff checks to Truist. *Id*. ¶ 10. Truist credited the money to Plaintiff's account as paid off. *Id*. ¶ 11. Truist released the title and sent a letter to the Plaintiff congratulating him for paying off the loan. *Id*.¶ 12; FAC, Ex. A, Dkt. No. 11- 1. In accordance with the refinancing terms, Plaintiff tendered numerous payments on the loan, which Truist refused to take because it was "paid off." *Id*. ¶ 14. There was simply no account open.

Thereafter, Truist realized it had made a mistake and reopened Plaintiff's account.[2] *Id*. ¶ 17. Truist reported that Plaintiff owed $5,202.05 as the current amount due, representing all the payments up to that point plus numerous late fees and interest. *Id*. ¶ 18.

[2] It was *Truist* that had a legal dispute at this point. The contract was closed and the lien was released. Truist should have sought to have a court adjudicate that it was entitled to reopen the contract. Instead, Truist used the credit reporting mechanism as its debt collection tool to coerce Plaintiff into paying amounts that Truist was not entitled to.

Plaintiff unsuccessfully attempted to correct the inaccurate reporting directly with Truist. *Id*., ¶ 19. Truist failed to correct the inaccuracy, and further reported that Plaintiff was several months in arrears. *Id.* ¶ 20. Such reporting was false because Truist closed the loan as paid in full and had repeatedly refused to accept Plaintiff's payments. *Id.* ¶ 21, 22. There was no open loan account during the months Truist reported to Experian that Plaintiff was delinquent.

Plaintiff worked with counsel to dispute the Truist Account. *Id*. ¶¶ 24-25. Once drafted, Plaintiff electronically signed the dispute and authorized counsel to send copies to all three credit bureaus, including Experian, certified, return receipt requested. *Id*. ¶¶ 26, 27, FAC, Ex. B, Dkt. No. 11-2.

The dispute and certified mail receipt were from "Eric Keller" with his home address. *Id*. ¶¶ 29, 33. The dispute clearly described the inaccuracy was due to "several mistakes" by Truist, such as accidental payoff and refusal to accept payment. *Id*. ¶ 30. Plaintiff clearly signed the dispute. *Id*. ¶ 31. FAC, Ex. C, Dkt. No. 11-3.

In response, Defendant refused to conduct a reinvestigation because it decided Plaintiff didn't send or authorize the dispute. *Id*. ¶ 34. Anyone who read the dispute letter could ascertain all necessary information to commence a reinvestigation. *Id*. ¶35-36. Nothing with regards to the dispute letter or mailing process would indicate to a reasonable person that someone was fraudulently attempting to access Plaintiff's credit file. *Id*. ¶37.

Experian employs a suspicious mail policy ("SMP") that allows employees to remove disputes based on arbitrary indicators Experian deems "suspicious." *Id*. ¶ 48, 49.

Experian does not track which employee marked a letter suspicious or why it was marked suspicious. *Id*. ¶ 50. Experian receives anywhere from 3,000 to 10,000 pieces of mail daily but employs only 10 to 14 sorters to review the mail for suspicious characteristics. *Id*. ¶ 51. Experian's policy dictates that suspicious letters are not reinvestigated without further action by the consumer. *Id*. ¶52. Plaintiff then sent a second dispute to Experian, which Experian then forwarded to Truist. *Id*.

Because Experian's conduct was in reckless disregard of the Plaintiff's consumer rights, the violations were willful based on cases such as *Younger v. Experian Info. Sols. Inc.*, 817 F.App'x 862 (11th Cir. 2020.) *Id*. ¶¶ 65-67. Experian's interpretation and reliance cases such as *Warner v. Experian Info. Sols., Inc.* is unreasonable. *Id*. ¶ 69-71.

Defendant filed a Motion for Judgment on the Pleadings to Dismiss Plaintiff's first claim of relief on the basis that Plaintiff failed to allege an inaccuracy as Plaintiff had actually not made payments, and that resorting to Plaintiff's payment obligation as suspended due to Truist's frustration of performance is a legal defense to payment not a factual inaccuracy. Dkt. No. 25, at 2-3.

However, Experian's presentation of the facts is inaccurate. In none of Plaintiff's pleadings or memoranda did Plaintiff contend that his tendering of the payments to Truist somehow excused the underlying debt or posed legal challenges to the validity thereof. Instead, Plaintiff repeatedly stated that it was inaccurate to portray Plaintiff as delinquent in making his Truist payments since the delinquency was entirely due to the fact that Truist closed the loan, released the lien, and did not have an open account for Plaintiff to be

delinquent upon.. *See* FAC, ¶ 21. Plaintiff further contended in the Complaint that the reporting failed to acknowledge that Truist did not allow Plaintiff to make payments despite his continued efforts to, thereby at the minimum constituting a deficient and misleading reporting. *Id*., ¶ 22. These same points were reiterated by Plaintiff in the Memorandum in Opposition to Defendant's Motion to Dismiss. Dkt. No. 17, at 6, 11.

## III. LEGAL STANDARD

### 1. A Rule 12(c) motion is improper when it reiterates the same arguments as or could have been raised in a Rule 12(b)(6) Motion.

A motion for judgment on the pleadings is not an opportunity to re-litigate issues raised and decided in a motion to dismiss, or that could have been raised in a prior motion to dismiss. However, in very limited circumstances, the Federal Rules allow a defendant to assert the defense of failure to state a claim in a Rule 12(c) motion for judgment on the pleadings even if he previously raised it in a Rule 12(b)(6) motion to dismiss. *Crawford v. Senex Law, P.C.*, Civil Action No. 3:16-CV-00073, 2017 U.S. Dist. LEXIS 184297 (W.D. Va. Nov. 7, 2017); accord *Pike v. Wells Fargo Bank, N.A.*, No. 7:20-CV-00219-M, 2022 U.S. Dist. LEXIS 73312 (E.D.N.C. Apr. 21, 2022)(citing *Estep v. City of Somerset, Ky.*, No. 10CV286-ART, 2011 WL 845847, at *2 (E.D. Ky. Mar. 8, 2011)). Courts should only grant such motions in limited circumstances. *Id*. In *Pike,* the Court "'identifie[d] some situations when courts should consider granting a Rule 12(c) motion that raise[] another round of arguments for dismissal, including when:

(1) the court's decision denying the motion to dismiss raises new or unexpected issues;
(2) the defendant produces legal authority and/or evidence in response to the court's

decision; (3) the plaintiff's claim must fail as a matter of law and cannot be saved with any amount of discovery, and (4) dismissing the claim will save the parties' and the court's resources.

2022 U.S. Dist. LEXIS 73312, at *6-7.

In *Estep*, the Court explained "[i]f the defendant's 12(c) motion simply reiterates the same arguments that he made in his 12(b)(6) motion, the court should deny it out of hand. If the defendant raises new arguments in his 12(c) motion that he could (and should) have raised in his 12(b)(6) motion, the court should usually deny the 12(c) motion, lest its first opinion be rendered merely advisory." *Id*.[3] Nevertheless, there are some unique situations

[3] Federal Practice & Procedure, 3d edition, has an interesting discussion of Rule 12(c):

> In light of the battery of pretrial motions available under the federal rules and the conversion provision in Rule 12(c) itself, there probably is little need for retaining the judgment on the pleadings as a separate procedure for testing the sufficiency of the pleadings. Its essential function, that of permitting the summary disposition of cases that do not involve any substantive dispute that justifies a full trial, can be handled more effectively under the summary judgment procedure or, on occasion, the Rule 12(b)(6) motion. Its incidental function under Rule 12(h)(2) of permitting certain procedural defects to be raised after the close of the pleadings, can be achieved more simply by expressly providing in Rule 12(h) that these special defenses can be raised by motion at any time and under their own name.
>
> At this point in time the Rule 12(c) motion is little more than a relic of the common law and code eras. Its preservation in the original federal rules undoubtedly was due to the undeveloped character of the summary judgment procedure and the uncertain scope of the Rule 12(b)(6) motion.
> ***
> If a party believes that it will be necessary to introduce evidence outside the formal pleadings in order to demonstrate that no material issue of fact exists and he is clearly entitled to judgment, it is advisable to proceed directly under Rule 56 rather than taking the circuitous route through Rule 12(c). Moreover, the Rule 12(c) path may present certain risks because the court, in its discretion, may refuse to permit the introduction of matters beyond the pleadings and insist on treating the motion as one under Rule 12(c)

where allowing the defendant a second opportunity to raise arguments in favor of dismissing a claim is appropriate: (1) the court's decision denying the motion to dismiss raises new or unexpected issues, (2) the defendant produces legal authority and/or evidence in response to the court's decision, (3) the plaintiff's claim must fail as a matter of law and cannot be saved with any amount of discovery, and (4) dismissing the claim will save the parties' and the court's resources, ruling on the defendant's 12(c) motion may be appropriate. *Id.*

This is not one of the cases where the Defendant has carried its burden of demonstrating that the motion is proper or should be granted. In fact, it is merely a request to reconsider the court's decision in denying Experian's previous motion to dismiss Count I.

Experian has not argued that the court's previous decision (1) raised new or unexpected issues or that (2) there is legal authority contrary to the court's decision. In fact, Experian barely acknowledges that the court denied its motion to dismiss Count I, and espouses no different facts or argument from that which it made in its Motion to Dismiss.

The Court has already found that Plaintiff's allegations sufficiently establish a claim for violation of the FCRA at this stage of the ligation because Experian terminated its reinvestigation without first showing grounds for doing so under § 1681i(a)(3)(A) for then

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requiring Plaintiff provide further identifying information before commencing any reinvestigation under §1681i(a) (1)(A). Mem. Opinion at 9. (ECF 21).

## IV. ARGUMENT

**Experian is obligated to promptly forward the disputes it receives to the furnisher of the disputed information so that the furnisher will have the opportunity to resolve the dispute. This obligation is mandatory.**

The FCRA is clear: within five business days of receiving a dispute directly from a consumer, it "shall provide notification of the dispute to any person who provided any item of information in dispute" and "shall include all relevant information regarding the dispute that the agency has received from the consumer."[4] 15 U.S.C. § 1681i(a)(2); see, e.g., *Hammond v. Citibank, N.A.*, No. 2:10-CV-1071, 2011 U.S. Dist. LEXIS 109818, at *38

[4] 15 U.S.C. § 1681i provides in pertinent part:

> (2) Prompt notice of dispute to furnisher of information
> (A) In general
>
> Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.
>
> (B) Provision of other information
>
> The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(S.D. Ohio Sep. 27, 2011.)

Not only does the statute contain mandatory language, the regulatory agencies and the case law make it clear that this requirement is not optional, subject to a suspicious mail policy, or even can be terminated unless there is a finding it is irrelevant or frivolous. At a minimum, the CRA must treat every dispute as a *bona fide* dispute, unless there is evidence to the contrary. *40 Years of Experience with the Fair Credit Reporting Act, an FTC Staff Report with Summary of Interpretations*, at 77 (2011). There are no prerequisites to a CRA's duty to investigate disputed items. *Id.* The lack of prerequisites and presumption that all disputes are *bona fide* is necessary to serve the remedial purpose of the FCRA, which the Fourth Circuit has instructed must be "liberally construed in favor of the consumer" and read "in a manner consistent with the statutes other provisions. *Saunders v. Equifax Info. Servs., LLC.*, 469 F. Supp. 2d 343 (E.D. Va. 2007)(citing *Jones v. Federated Fin'l Reserve, Corp.*, 144 F.3d 961, 964 (6th Cir. 1998)). The application of this standard requires courts to ensure that it meets the needs of commerce and in a manner that is fair and equitable to the consumer. *Saunders v. Branch Banking & Tr. Co.*, 526 F.3d 142, 147 (4th Cir. 2008); see also, *Merck v. Walmart, Inc.*, No. 2:20-cv-2908, 2021 U.S. Dist. LEXIS 55517, at *12 (S.D. Ohio Mar. 24, 2021).

It is axiomatic that when a statute uses the word "shall," it is a command that must be obeyed, with "no discretion on the part of the person instructed to carry out the directive.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007)(citations omitted.)

In this case, the FAC sets forth facts demonstrating that Experian failed to perform its mandatory, statutory obligation to do the simplest and most basic task required by the FCRA – to transmit the disputes to the furnishers. 15 U.S.C. § 1681i(a)(2).

In this case, the Plaintiff disputed the inaccurate reporting exactly the way provided by the FCRA: through Experian as provided in 15 U.S.C. §§ 1681i and 1681s-2(b), and also by sending the disputes directly to the furnishers under 15 U.S.C. § 1681s-2(a). However, only §1681s-2(b) gives rise to liability, thus only the dispute made through the CRA has any enforcement effect. A consumer who fails to dispute through a CRA and disputes only to the furnisher has no remedies under the FCRA at all. *Campbell v. Wells Fargo Bank, N.A.*, 73 F. Supp. 3d 644, 651-2 (E.D.N.C. 2014)(collecting cases); see also *Chiang v. Verizon New England, Inc*., 595 F.3d 26, 38 (1st Cir. 2010)(holding that if a CRA fails to provide all the relevant information to a furnisher, the consumer's private right of action is against the CRA and not the furnisher.)

So, when a CRA fails to treat a dispute as *bona fide*, and doesn't even bother to read the letter to see if it came from the consumer or what documents were provided, the consumer is left without any remedy at all. *Wilson v. Carrington Mortg.*, No. 2:22-cv-03595-BHH-MHC, 2023 U.S. Dist. LEXIS 203749, at *8 (D.S.C. Oct. 23, 2023)(explaining "[u]nder the FCRA, when a debtor disputes the completeness or accuracy of a credit report with a CRA, the CRA must promptly notify the furnisher of information of the dispute. 15 U.S.C. § 1681i(a)(2)"); see also, *Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 943 (6th Cir. 2020)(observing, "[a]fter all, bad behavior among CRAs, not

furnishers, initially drove the passage of the FCRA" and noting "that furnishers were not regulated under the FCRA until 1996, when Congress amended the statute")(internal citations omitted).

Experian deprived the Plaintiff of his congressionally-mandated right to have his disputes transmitted to the furnishers, so that the furnishers could have the opportunity to conduct a searching inquiry and correct the inaccurate reporting, or to have liability attach when it failed to do so. *Wilson*, 2023 U.S. Dist. LEXIS 203749, at *8; see also, *McDaniel v. Credit Mgmt. LP*, No. 5:23-CV-408-D, 2024 U.S. Dist. LEXIS 3230 (E.D.N.C. Jan. 8, 2024) and *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 616 (6th Cir. 2012).

By failing to perform its mandatory duty of transmitting the disputes to the furnisher, Experian not only violated the FCRA's requirements that it follow reasonable procedures to assure maximum possible accuracy of the information it reported about the Plaintiff and to transmit their disputes to the furnisher, but also obliterated the opportunity for the furnisher to correct the account or, if they did not, for the Plaintiff to be able to sue the furnishers for not conducting a reasonable investigation. *Id.* Whether the dispute could be framed as a legal dispute or a factual dispute has no bearing on the duty of the furnisher to conduct a reasonable investigation. *Gross v. CitiMortgage, Inc.*, 33 F.4th 1246, 1253 (9th Cir. 2022). But, the prerequisite for liability is that the dispute be transmitted through a CRA. To hold that the CRA had no duty to under § 1681i(a)(2) would lead to an absurd result under the carefully-crafted FCRA scheme. The result would be to deprive consumers of a meaningful remedy under this remedial statute, which must be liberally construed.

*Wilson*, 2023 U.S. Dist. LEXIS 203749, at *8. A CRA is obliged to transmit the dispute to the furnisher and the consumer is only able to enforce his FCRA rights if the furnisher received the dispute from a CRA.

The allegations of this case are especially egregious because Experian received the Plaintiff's disputes and then refused to fulfill its statutory obligations based on *pretext* that the consumer had not signed or authorized the disputes, when clearly he had. The CFPB has issued a circular directly on-point, admonishing consumer reporting agencies like Experian that

> *Consumer reporting agencies must provide to the furnisher all relevant information regarding the dispute that it received from the consumer.*
>
> Enforcers may bring a claim if a consumer reporting agency fails to promptly provide to the furnisher "all relevant information" regarding the dispute that the consumer reporting agency receives from the consumer. Through its supervision, the CFPB has found that consumer reporting agencies tend to ingest dispute information from consumers using automated protocols, and they also share dispute information with furnishers electronically. The use of these technologies has reduced the cost and time to transmit relevant information.
>
> When transmitting information about a dispute, a consumer reporting agency may be able to demonstrate that it has transmitted "all relevant information" even if it does not provide original documents in paper form. However, given that primary sources of evidence provided by consumers can be dispositive in determining whether there has been a furnishing error, and given that the character of a primary source of evidence is probative and thus relevant to the investigation, it will be difficult for a consumer reporting agency to prove that it complied with the FCRA if it does not provide electronic images of primary evidence for evaluation by the furnisher.
>
> The consumer reporting agency's failure to provide the furnisher with all relevant information limits the *furnisher's* ability to reasonably investigate the dispute. A furnisher must "review all relevant information" provided by

> the consumer reporting agency. Accordingly, consumer reporting agency compliance with the obligation to provide all relevant information is crucial to the consumer's right to have their dispute reasonably investigated.

Consumer Financial Protection Circular 2022-07, Reasonable Investigation of Consumer Reporting Disputes, https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-07-reasonable-investigation-of-consumer-reporting-disputes/, last visited April 23, 2024. (footnotes omitted).

The CFPB circular makes it clear that Experian knew of its duty, but refused to transmit the information to the furnisher anyway.

In this case, once Experian received the first disputes from the Plaintiff, it was on notice that the information may be inaccurate. See, e.g., *Losch v. Nationstar Mortg., LLC.*, 995 F.3d 937, 946 (11th Cir. 2021)(overturning the district court's grant of summary judgment that the CRA's only reinvestigation obligation was to transmit the dispute to the furnisher, and holding that a "reasonable reinvestigation consists largely of triggering the investigation by the furnisher.")(internal citations omitted.) However, because of the application of the Experian suspicious mail policy to the Plaintiff's dispute, neither the consumers nor the furnishers would ever have the benefit of the furnisher seeing the dispute, let alone to have the opportunity to investigate and correct it. Experian followed an unreasonable procedure designed *not* to assure maximum possible accuracy when it discarded the Plaintiff's dispute, but rather to maximize its profits.

These cases hold that a CRA is not liable for failure to reinvestigate a dispute that is purely legal in nature, but do not address the CRAs absolute duty to forward disputes to

the furnishers that are in the best position to determine the status of the disputed tradeline.

None of the cases relied upon in the Court's dismissal of Counts II and III address the class allegations against Experian in this case: that Experian refused to do anything in response to the Plaintiff's dispute because it falsely claimed the dispute wasn't sent by the consumer. Experian didn't make a decision that the dispute was legal in nature, it made a decision that it wanted to refuse or delay the reinvestigation and, hopefully, get rid of the dispute by baselessly categorizing it as suspicious.

There is no case that can be read to alleviate Experian's mandatory, clear statutory duty in accord with the CFPB guidance: it is not within the CRAs discretion to refuse to forward a dispute to the furnisher. Thus, despite the court's finding that the dispute is legal in nature, Experian is not excused from its responsibility to forward disputes to furnishers. Thus, Experian's Motion for Judgment on the Pleadings should be denied.

## V. CONCLUSION

For these reasons, the Defendant's Motion for Judgment on the Pleadings must be denied.

Respectfully submitted,

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## CERTIFICATION OF WORD COUNT

The undersigned hereby certifies that the foregoing document contains 4,097 words and does not exceed the word count set forth in L.R. Civ. Pro. 7.3. In making this certification, the undersigned relies upon the word count reported by its word processing software.

Respectfully submitted this 24th day of April 2024,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 24, 2024, a copy of the foregoing document was served electronically through the CM/ECF filing system upon the following:

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