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No. 24-10147

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JESSICA NELSON,

Plaintiff-Appellant,

v.

EXPERIAN INFORMATION SOLUTIONS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

No. 4:21-cv-894-CLM

APPELLANT'S OPENING BRIEF

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Jessica Nelson v. Experian Information Solutions, Inc.
Eleventh Circuit Case Number 24-10147

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, 1-2, and 1-3, Appellant Jessica Nelson provides the following Certified of Interested Persons and Corporate Disclosures Statement (CIP):

1. Central Source, LLC – U.S. based indirect subsidiary of Experian plc that is not wholly owned

2. Christian & Small, LLP – Counsel for Appellee

3. Cochrun & Seals, LLC – Counsel for Appellate

4. Experian Holdings, Inc. – Parent company of Appellee Experian Information Solutions, Inc.

5. Experian Information Solutions, Inc. – Appellee. Experian Information Solutions, Inc., is a wholly owned subsidiary of Experian Holdings, Inc., and the ultimate parent company is Experian plc.

6. Experian plc (EXPN:LON) – Indirect parent company of Experian Holdings, Inc., and ultimate parent company of Experian Information Solutions, Inc.

7. Jones Day – Counsel for Appellee

8. Maze, Hon. Corey L. – U.S. District Judge for the Northern District of Alabama

9. Methvin, Terrell, Yancey, Stephens & Miller, PC – Counsel for Appellant

10. Nelson, Jessica – Appellant

11. New Management Services LLC – based indirect subsidiary of Experian plc that is not wholly owned

12. Online Data Exchange LLC – U.S. based indirect subsidiary of Experian plc that is not wholly owned

13. Opt-Out Services, LLC – U.S. based indirect subsidiary of Experian plc that is not wholly owned

14. Proctor, Ryan M. – Counsel for Appellee

15. Rebarchak, Brooke Boucek – Counsel for Appellant

16. Roth, Jacob (Yaakow) – Counsel for Appellee

17. Seals, W. Whitney – Counsel for Appellant

18. Stander, Robert N. – Counsel for Appellee

19. Stephens, James Matthew – Counsel for Appellant

20. Tobitsch, Kerianne – Counsel for Appellee

21. VantageScore Solutions LLC – U.S. based subsidiary of Experian plc that is not wholly owned

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22. Vogt, John – Counsel Appellee

23. Young, Leius Jackson, Jr. – Counsel for Appellee

No other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

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CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief complies with FED. R. APP. P. 32(a)(7)(B) because this brief contains no more than 13,000 words, including footnotes, as counted using Microsoft Word 365.

Moreover, this brief complies with the typeface requirement of FED. R. APP. P. 32(a)(5) and the type styles requirement of FED. R. APP. P. 32(a)(6) because it was prepared in proportionally spaced Times New Roman 14-point typeface using Microsoft Word 365.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Jessica Nelson believes that oral argument would be helpful to the Panel. This appeal addresses issues involving statutory construction, adherence to the Eleventh Circuit precedent, and the standards for negligence and willfulness under the Fair Credit Reporting Act ("FCRA"). The result of this appeal will not only impact the involved Parties but also future FCRA litigants in this Circuit and beyond.

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JURISDICTIONAL STATEMENT

This matter was originally filed by Plaintiff-Appellant Jessica Nelson ("Nelson") in the Circuit Court of Etowah County, Alabama. Defendant Experian Information Solutions, Inc. ("Experian") removed this case from Etowah County Circuit Court to the United States District Court for the Northern District of Alabama. In its Notice of Removal, Experian represented that removal was proper and that the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1441 and 1446. [Doc. 1].[1]

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered a Final Order dated August 16, 2023, which granted Experian's Motion for Summary Judgment and disposed of Nelson's claims against Experian. [Doc. 84 and Doc. 85]. Nelson then filed a Motion to Alter or Amend the Judgment granting Experian's Motion for Summary Judgment Order on September 6, 2023. [Doc. 87]. The District Court entered an Order denying Nelson's Motion to Alter or Amend the Judgment granting Experian's Motion for Summary Judgment on December 11, 2023. [Doc. 90]. Nelson timely filed her Notice of Appeal from the Orders granting Experian's Motion for Summary Judgment [Doc. 84 and Doc. 85]

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[1] Citations to the record are to the District Court record in Case No. 4:21-cv-00894-CLM. Deposition transcripts [Doc. 69-2 and Doc. 69-19] in the record are condensed versions and are cited by the record document number and to the exact page and line number of the deposition transcript.

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and denying Nelson's Motion to Alter or Amend the Judgment granting Experian's Motion for Summary Judgment [Doc. 90] on January 4, 2024. [Doc. 91]. Nelson subsequently filed two Amended Notices of Appeal to clarify her appeal. [Doc. 95 and Doc. 96].

STATEMENT OF THE ISSUES

1. Whether the District Court erred when deciding it was not objectively unreasonable for Experian to believe Section 1681i of the Fair Credit Reporting Act ("FCRA") imposed no duty on it to reinvestigate the accuracy of Nelson's disputed Personal Identification Information ("PII").

2. Whether the District Court erred when applying the objectively reasonable statutory interpretation test of a willful violation of the FCRA under *Safeco* to Nelson's claim for negligent violation of Section 1681i of the FCRA.

STATEMENT OF THE CASE

I. Nature of the Case.

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681i, requires consumer reporting agencies to commence reinvestigations of consumer-initiated disputes "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." 15 U.S.C. §1681i(a)(1)(A) (emphasis added). Importantly, "[t]he term 'file,' when used in connection with information on any consumer, means ***all of the information on that consumer*** recorded and retained by a consumer reporting agency regardless of how the information is stored." 15 U.S.C. § 1681a(g) (emphasis added). This case arises from Nelson's multiple efforts

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to correct inaccurate personal identification information ("PII") – names, addresses, and a Social Security Number – that Experian reported.

In accordance with its own policy, each time Nelson sent Experian a letter disputing the inaccurate PII, Experian responded by sending her the same standard form letter response that it sends all consumers who dispute the accuracy of PII. Experian's form letter response instructed Nelson to contact the unidentified furnisher of the disputed information herself to correct the inaccuracies. Experian did no reinvestigation and did not notify the furnisher of the dispute. After repeatedly declining to reinvestigate Nelson's disputes, Nelson filed suit alleging that Experian willfully and/or negligently violated 15 U.S.C. § 1681i of the FCRA. Now Experian argues retroactively that it had no duty to reinvestigate Nelson's disputed PII because it was part of Nelson's credit "file" and did not affect Nelson's creditworthiness, unlike information on Nelson's credit "report."

II. Statement of Facts.

Experian is a credit reporting agency whose primary business is providing consumer credit reports and providing consumers with their personal disclosures. [Doc. 69-2, p. 26: 17-22]. Part of Experian's business as a credit reporting agency is to investigate information that consumers dispute on their credit reports. [Doc. 69-2, pp. 26: 23, 27: 1-5]. It is not uncommon for consumers, like Nelson, to dispute PII with Experian. [Doc. 69-2, pp. 72: 17-23, 73: 1-19].

When Experian receives a consumer dispute over inaccurate PII associated with an open or non-finalized account, it is Experian's policy to send a form letter to the consumer instructing the consumer to contact the furnisher of the inaccurate information to resolve the dispute. [Doc. 69-2, pp. 143: 7-23, 144: 1-14]. Between June 1, 2019 and June 1, 2021 Experian sent approximately 22,000 letters with the same form response to consumers who disputed PII, including Nelson. [Doc. 69-17, p. 26]. Though it is required by § 1681i(a)(2) to notify furnishers of disputed information as part of the reinvestigation process, Experian's policy is to not contact furnishers when it reinvestigates a consumer dispute regarding PII. [Doc. 69-2, pp. 139: 2-14, 131: 7-22].

On or about November 29, 2019, Jessica Nelson obtained a copy of her Experian credit report and saw that it contained inaccurate PII. [Doc. 69-19, pp. 16: 23-25, 17: 2-5; *accord* Doc. 69-22]. Specifically, Nelson noted that Experian was reporting two inaccurate addresses, an inaccurate social security number, and an inaccurate name as belonging to her. [Doc. 69-19, p. 17: 23-25]. Nelson sent a letter to Experian dated December 30, 2019, disputing this inaccurate PII. [Doc. 69-29]. Experian received Jessica Nelson's December 30, 2019 dispute letter on January 16, 2020. [Doc. 69-2, p. 72: 7-11].

Jessica Nelson provided Experian with sufficient information in her December 30, 2019 letter for Experian to investigate her disputes. [Doc. 69-2, pp.

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73: 20-23, 74: 2-6]. A dispute associate at Experian Services Chile processed Nelson's December 30, 2019 dispute. [Doc. 69-2, pp. 86: 20-23, 87: 2-12]. Neither the name disputed by Nelson nor the disputed address were currently being reported by any furnisher at the time that Nelson's December 30, 2019 dispute letter was processed by Experian. [Doc. 69-2, pp. 176: 14-23, 177: 1]. As such, Experian's corporate representative testified that the dispute associate, per Experian's policies, should have deleted the disputed address not reporting and disputed name but did not do so. [Doc. 69-2, p. 167: 17-21]. Experian's corporate representative testified that the dispute associate's failure to delete the disputed non-reporting address and disputed name was not in accordance with Experian policy and looked to her like a "human mistake." [Doc. 69-2, pp. 166: 19-23, 167: 1-16].

Experian sent Nelson the "Dispute Results" letter or "CDF" responsive to her December 30, 2019 dispute letter on January 22, 2020. [Doc. 69-9, Doc. 69-30, and Doc. 69-2, p. 177: 5-18]. This letter did not tell Nelson if any of the information she disputed was deleted or remained on her credit report as a result of her dispute. [Doc. 69-9, Doc. 69-30 and Doc. 69-2, p. 186: 4-22]. After receiving the results from Experian's investigation of her December 30, 2019 dispute letter, which did not state the results of her dispute, Nelson again disputed the inaccurate name, inaccurate social security number, and inaccurate addresses with Experian on February 7, 2020. [Doc. 69-10 and Doc. 69-2, p. 190: 8-22]. Nelson's February 7, 2020 dispute was

received by Experian on February 11, 2020. [Doc. 69-2, p. 190: 8-16]. Experian, in processing Nelson's second dispute of the same inaccurate information, removed the inaccurate name and one of the inaccurate addresses. [Doc. 69-2, p. 194: 1-10].

In response to Nelson's February 7, 2020 dispute letter, Experian sent the dispute results letter to Nelson on February 26, 2020. [Doc. 69-11 and Doc. 69-2, p. 208: 8-14]. The dispute results letter dated February 26, 2020 did not tell Nelson whether one of the disputed inaccurate addresses was deleted, remained, or was updated. [Doc. 69-11 and Doc. 69-2, p. 206: 5-10]. The dispute results letter further did not tell Nelson that the disputed name was deleted even though Experian's policy is to let a consumer know if a disputed name is deleted. [Doc. 69-11 and Doc. 69-2, pp. 208: 8-23, 209: 1-8].

On February 12, 2021, Nelson sent a third dispute letter to Experian that again disputed an inaccurate address and the inaccurate name and social security number. [Doc. 69-12 and Doc. 69-2, p. 210: 7-12]. Experian received this third dispute letter on February 24, 2021. [Doc. 69-12 and Doc. 69-2, p. 210: 3-6]. Experian sent a dispute results letter on February 28, 2021, which did not tell Nelson that one of the disputed inaccurate addresses remained on her credit report and that the name and social security number she disputed were deleted. [Doc. 69-13 and Doc. 69-2, pp. 217: 23, 218: 1-7].

Experian did not find any of Jessica Nelson's three disputes to be frivolous. [Doc. 69-2, p. 66: 9-17]. Furthermore, in response to all three disputes, Experian followed its policy of (1) refusing to contact the furnishers of the disputed information and (2) sending its standard form letter instructing Nelson to contact the unidentified furnishers of the disputed information herself to correct the inaccuracies. [Doc. 69-9, Doc. 69-11, and Doc. 69-13].

III. Statement of Proceedings.

Jessica Nelson filed the instant lawsuit against Experian on June 1, 2021 in the Circuit Court of Etowah County, Alabama alleging that Experian violated 15 U.S.C. §1681i by failing to delete inaccurate information in her credit file after receiving actual notice of such inaccuracies; by failing to conduct a reasonable and lawful reinvestigation; by failing to forward all relevant information to the furnishers; by failing to maintain reasonable procedures with which to filter and verify disputed information in her credit file; and by failing to provide notification of her dispute to the furnisher of such disputed information within five (5) business days after receiving her disputes. [Doc. 1-1]. Nelson alleged that Experian willfully (§ 1681n) or, alternatively, negligently (§ 1681o) violated the FCRA. [Doc. 1-1].

Experian removed the case to the United States District Court for the Northern District of Alabama on June 30, 2021. [Doc. 1]. Following removal, Experian filed a Motion for Judgment on the Pleadings on August 19, 2021. [Doc. 10]. Nelson

argued in response that the Motion was, in essence, an argument that Nelson lacked Article III standing such that the District Court had jurisdiction over the case. [Doc. 12, p. 3]. The District Court then asked the Parties to submit letter briefs regarding the issue of Article III standing. The District Court entered an Order on January 10, 2022, finding that Nelson had Article III standing. [Doc. 21].

Following discovery, both Parties moved for summary judgment. [Doc. 63 (Nelson) and 64 (Experian)]. The District Court held a hearing on Experian's Motion for Summary Judgment on August 9, 2023. Following the hearing, on August 16, 2023, the District Court entered an Order granting Experian's Motion for Summary Judgment. [Doc. 84]. Nelson then filed a Motion to Alter, Amend or Vacate the District Court's Order granting Experian's Motion for Summary Judgment based upon the District Court applying the same legal standard to Nelson's § 1681n willfulness claim and § 1681o negligence claim. [Doc. 87]. Nelson's Motion to Alter, Amend or Vacate was denied by the District Court on December 11, 2023. [Doc. 90]. Nelson filed Notice of this Appeal on January 4, 2024. [Doc. 91].

IV. Standards Of Review.

A. Summary Judgment: This Court reviews a district court's grant of summary judgment ***de novo***. *See Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1300 (11th Cir. 2016). In reviewing a district court's granting of summary judgment, this Court "view[s] all facts and reasonable inferences in the light most

favorable to the nonmoving party." *Jurich v. Compass Marine, Inc.*, 764 F.3d 1302, 1304 (11th Cir. 2014). "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Motion To Alter, Amend Or Vacate: This Court reviews the denial of a Motion to Alter, Amend or Vacate under an ***abuse of discretion*** standard. *See Lawson v. Singletary*, 85 F.3d 502, 507 (11th Cir. 1996) (per curiam) (quoting *Am. Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985)). This Court has held that "'[a] district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.'" *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (quoting *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1336 (11th Cir. 2002)). In the present case, Nelson contends that the District Court abused its discretion when it incorrectly applied the same legal standard for analyzing willful violations of the FCRA to negligent violations of the FCRA.

SUMMARY OF THE ARGUMENT

The District Court erred in granting summary judgment to Experian for two reasons. First, the District Court held that while the "plain language" of the FCRA required Experian to investigate Nelson's disputes regarding inaccurate PII because that information was contained in Nelson's "file," Experian's belief that it only had a duty to investigate information contained in a consumer "report" and affecting creditworthiness under § 1681i of the FCRA was not "objectively unreasonable." [Doc. 84, p. 1]. Experian's alleged "reasonable reliance" was based upon inapplicable FTC guidance that the District Court found "flouts" the plain language of the FCRA and two cases that the District Court disagreed with.[2] [Doc. 84, p. 12]. Despite disagreeing with Experian's position as to its duty and what Experian claimed to reasonably rely upon in determining that a consumer's disputed PII was not information that it was required to investigate, the District Court applied the analysis under *Safeco* and found Experian's reliance was not "objectively unreasonable", denying Nelson's willful and negligent violations under § 1681i of the FCRA.

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[2] The District Court, in its Order, cited to *Tailford v. Experian Info. Sols., Inc.* 26 F.4th 1092 (9th Cir. 2022), [Doc. 84, p. 11] as one of the two cases that Experian reasonably relied upon. However, as the District Court noted during oral argument, *Tailford* was decided after the events made the basis of this lawsuit. [Doc. 86, pp. 8-9]. As such, Experian could not have relied, reasonably or unreasonably, upon the decision in *Tailford* in relation to the events in this case that all predate the *Tailford* decision.

However, the "objectively reasonable" statutory interpretation test under *Safeco* does not apply in this case because the record is devoid of any evidence that shows Experian researched, interpreted, or adopted any interpretation of § 1681i at the time it violated the statute. Instead, the record shows Experian acted as it did in violation of § 1681i because it was in accordance with its own policy. [Doc. 69-2, pp. 131: 7-22, 134: 21-23, 135:1-23, 136: 1-8, 143:7-23, 144: 1-21 and Doc 69-8]. Even if Experian had adopted the interpretation of § 1681i of the FCRA it now relies on when it violated the statute, which it did not, Experian's interpretation of the FCRA, case law, and regulations, which it now claims instructed it that PII was not information contained in a credit "file" such that it had to investigate pursuant to § 1681i, was "objectively ***unreasonable***" given the plain meaning of the statute and the significant authority, including binding precedent, Experian ignored in reaching this conclusion. Moreover, Experian's policy to conduct no reinvestigation and its refusal to notify the furnisher of the disputed PII leaves consumers like Nelson without recourse.

Second, the District Court erred by applying the *Safeco* standard of objectively reasonableness for willful violations of the FCRA to Nelson's negligent violation claim. The proper standard applicable to a negligent violation of the FCRA is "reasonableness." Rather than leaving the determination of whether Experian acted reasonable to the trier of fact, the District Court improperly applied the *Safeco*

test of willfulness – whether Experian's interpretation of § 1681i under the FCRA was "objectively unreasonable" – to Nelson's negligent violation claim. The District Court's cumulative errors should be reversed, and Nelson's case should be remanded for further proceedings.

ARGUMENT

I. The District Court Erred When Deciding It Was Not Objectively Unreasonable for Experian to Believe § 1681i of the FCRA Imposed No Duty to Reinvestigate the Accuracy of Nelson's Disputed PII.

In addition to finding that the plain language of § 1681i imposed a duty on Experian to investigate the accuracy of Nelson's PII, the District Court further held that: the term "any information contained in a consumer's file" as used in § 1681i, included names, addresses and Social Security numbers; that the court "rejects Experian's interpretation of the FCRA"; and that the court "disagrees with Experian's precedent" (the caselaw and regulations Experian retroactively relied upon). [Doc. 84, pp. 1, 6, 10, 12]. Despite determining that Experian's interpretation of the FCRA, case law, and regulations were all wrong, the District Court held that "the court cannot say that Experian's interpretation is objectively unreasonable." [Doc. 84, p. 12]. The District Court's sole rationale for holding that Experian's misplaced reliance and interpretation were not "objectively unreasonable" is that "[n]o caselaw told Experian that its interpretation was wrong, and other circuits' precedent and FCPB and FTC regulations suggested that Experian could be right."

[Doc. 84, p. 13]. However, the plain language of the FCRA, as well as the cases of *Collins, Nunnally,* and *Ricketson*, strongly suggested to Experian that its interpretation of § 1681i is **wrong**.

a. The Objectively Reasonable Statutory Interpretation Test Under *Safeco* Does Not Apply Because There Is No Evidence That Experian Researched, Interpreted, or Adopted Any Interpretation of § 1681i of the FCRA.

The District Court, in its Memorandum Opinion, relied on *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), when it held that it was objectively reasonable for Experian to believe that the duties imposed on it by § 1681i do not apply to PII disputes. [Doc. 84, pp. 10, 12]. The District Court's holding was erroneous because Experian presented no evidence that it researched, interpreted, or adopted an interpretation of § 1681i of the FCRA ***at the time*** it violated the statute. Experian's purported reliance on case law and regulations to formulate its interpretation occurred only after this litigation commenced, which is insufficient.

The "objectively reasonable interpretation" safe harbor available under *Safeco* requires that the defendant ". . . have 'adopt[ed]' and acted on an interpretation of the statute." *Milbourne v. JRK Residential Am., LLC*, 202 F. Supp. 3d 585, 591 (E.D. Va. 2016) (quoting *Safeco*, 551 U.S. at 70, n.20). In other words, the "objectively reasonable" analysis of *Safeco* does not apply absent evidence that a defendant acted in reliance on an interpretation of the relevant provision of the FCRA when it took

the actions that violated the FCRA. *See Safeco*, 551 U.S. at 68-70 (discussing the information available to Safeco at the time it acted and holding that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless"); *Milbourne,* 202 F. Supp. 3d at 591-92; *see also Rodriguez v. Gen. Info. Servs.*, No. 5:16-cv-01067-MHH, 2019 WL 691403, at *10 (N.D. Ala. Feb. 19, 2019) (looking to what the defendant relied on and what guidance was available to the defendant in construing the FCRA to determine whether a question of fact existed as to defendant's willfulness); *cf. Ajomale v. Quicken Loans, Inc.*, No. CV 1:17-539-JB-MU, 2020 WL 1308333, at *3 (S.D. Ala. Mar. 19, 2020), *aff'd*, 860 F. App'x 670 (11th Cir. 2021) (explaining plaintiff's burden to show a willful violation of FCRA requires evidence that defendant knew it was violating the law); *Sullivan v. Wells Fargo Bank, N.A.*, 418 F. Supp. 3d 939, 949-50 (S.D. Ala. 2019) (finding allegations that defendant recklessly violated the FCRA to be plausible because it was reasonable to infer that "a large commercial bank such as the defendant was aware" of a line of cases predating the defendant's conduct).

The District Court also erred by relying on *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017) to find that Experian's interpretation was objectively

reasonable. [Doc. 84, pp. 10, 12-13]. Applying *Safeco*, this Court in *Pedro* analyzed the interpretation that the defendant had ***adopted*** and acted upon when reporting credit information. *See Pedro*, 868 F.3d at 1280-81. Thus, the initial question is whether the record shows that Experian actually interpreted § 1681i when it breached its duty to initiate an investigation and notify the furnishers of Nelson's three disputes. *See Milbourne*, 202 F. Supp. 3d at 592; *see also Figueroa v. Baycare Health Sys., Inc.*, No. 8:17-cv-1780-T-30JSS, 2017 WL 4654582, at *3 (M.D. Fla. Oct. 17, 2017) ("[T]he Court would need to know whether Defendant researched the FCRA and/or attempted to interpret the FCRA prior to [its alleged violation of FCRA].").

Here, there is no evidence that Experian researched § 1681i of the FCRA, interpreted § 1681i of the FCRA, or adopted an interpretation of § 1681i of the FCRA ***when it violated the relevant provisions***. Rather, Experian acted as it did simply because it was its standard policy to do so. [Doc. 69-2, pp. 131: 7-22, 134: 21-23, 135: 1-23, 136: 1-8, 143: 7-23, 144: 1-21 and Doc 69-8]. There is nothing in the record from which the District Court could infer that anyone at Experian made a decision as to what § 1681i required in relation to investigating disputed PII or that anyone at Experian ever sought advice on whether refusing to investigate disputes over inaccurate PII was permissible at the time Experian violated the statute or at any point thereafter. Therefore, the "objectively reasonable" analysis called for by

Safeco does not apply in this case, and the District Court's holding was erroneous. Because Experian cannot show its actions were objectively reasonable under *Safeco*, the question of whether it willfully or recklessly violated the FCRA should have been left to the trier of fact.[3] *See Safeco,* 551 U.S. at 70-71 (holding that because defendant's conduct was not objectively unreasonable, the trier of fact was not required to resolve the question of willfulness or recklessness).

b. The Plain Meaning of § 1681i of the FCRA Imposes a Duty on Experian to Reinvestigate Nelson's Disputes of Inaccurate PII.

Even if Experian had adopted the interpretation of § 1681i of the FCRA it now relies on at the time of Nelson's disputes, its interpretation that its duty to reinvestigate disputes of "any item of information contained in a consumer's file" does not include the accuracy of Nelson's disputed PII is objectively unreasonable. 15 U.S.C. § 1681i(a)(1)(A). The District Court correctly stated that "[b]ecause

[3] This conclusion comports with other federal district courts that have analyzed this identical issue. *See, e.g.*, *Milbourne*, 202 F. Supp. 3d 585 (denying a motion for judgment as a matter of law by concluding that the "objectively reasonable" safe harbor espoused in *Safeco* does not apply if there is no evidence that a defendant relied on an interpretation of the relevant provision of the FCRA when it took the actions that violated the FCRA); *see also Graham v. Pyramid Healthcare Solutions, Inc.*, No. 8:16–cv–1324–T–30AAS, 2017 WL 2799928, at *3 (M.D. Fla. June 28, 2017) (denying summary judgment and holding that the "objectively reasonable" standard of *Safeco* did not apply when there was no evidence that defendant researched the FCRA, interpreted the FCRA, or adopted an interpretation of the FCRA at the time of the offending conduct).

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Experian cannot point to any provision of the FCRA that limits information contained in the consumer's file to information that bears on credit worthiness, the court refuses to do so." [Doc. 84, p. 9 and Doc. 86, p. 19: 10-14] ("So you are asking me to ignore the text for Congress's intent, that the text is not supreme, it is what Congress intended to do, and I am supposed to assume in 2003 it wasn't changing the statute by changing the statute. That seems very odd and incorrect."). Unlike *Safeco*, where the United States Supreme Court noted the "dearth of guidance and the less-than-pellucid statutory text" in finding Safeco's reading of the FCRA was not objectively unreasonable, the plain meaning of the text at issue here is abundantly clear. 551 U.S. at 70. And as the District Court did in its Memorandum Opinion [Doc. 84, p. 4] and stated at the summary judgment hearing, the best place to begin an analysis of whether Experian's interpretation is objectively reasonable is by looking at the text of the Act itself. [Doc. 86, p. 9] (stating "I think that if the answer lies in the text, we shouldn't go beyond that, at least from a starting standpoint. So that's where we are going to start.").

Section 1681i(a) of the FCRA requires a consumer reporting agency, such as Experian, to conduct a reasonable reinvestigation of a consumer's dispute "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." 15 U.S.C. §1681i(a)(1)(A) (emphasis added). The

District Court noted in its Memorandum Opinion that "[t]he question presented is whether a consumer's name, address, or Social Security number is considered 'any item of information contained in a consumer's file' that must be reinvestigated if a consumer files a dispute under § 1681i." [Doc. 84, p. 3]. Importantly, "[t]he term 'file,' when used in connection with information on any consumer, means *all of the information on that consumer* recorded and retained by a consumer reporting agency regardless of how the information is stored." 15 U.S.C. § 1681a(g) (emphasis added). "[A]ll of the information on that consumer recorded and retained by a consumer reporting agency" includes a consumer's PII such as name, address, and social security number, and the District Court even agreed. *Id.*; *see also* [Doc. 84, pp. 9-10]. Despite the plain language of the statute articulating its duties, Experian argued that PII, such as a consumer's name, address, and social security number, is not information contained in a consumer's file and therefore it had no duty to reinvestigate. [Doc. 86, pp. 5-6] (Counsel for Experian stated: "Our position is that we had no duty to do it at all . . . because that's outside the scope of 1681i entirely."). But the District Court disagreed with Experian's unsound belief, and a transitive reading of the text avoids this interpretative game entirely. [Doc. 84, pp. 6-10].

The District Court succinctly stated that "[t]o remove [names, addresses, and SSNs] from the consumer's file because they do not bear on a consumer's credit worthiness would require the court to ignore the FCRA's plain language and multiple

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canons of instruction" and noted that Experian therefore "had a duty to reinvestigate the accuracy of Nelson's name, addresses, and SSN when Nelson filed a direct dispute." [Doc. 84, pp. 9-10] ("find[ing] that name, addresses, and SSNs fit within the phrase 'any item of information contained in a consumer's file,' 15 U.S.C. § 1681i"). Courts are not free to stray "from an express statutory definition" unless, in the rare instance, that defined word is "'incompatible with Congress['s] regulatory scheme' or would 'destro[y] one of the statute's major purposes.'" *Dept. of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 144 S. Ct. 457, 472 (2024) (quoting *Digital Realty Trust, Inc. v. Somers*, 583 U.S. 149, 160 (2018).

Defining the term ***file*** as "***all of the information on that consumer*** recorded and retained by a consumer reporting agency regardless of how the information is stored" to include PII is in no way incompatible with Congress's regulatory scheme and would not destroy any of the FCRA's major purposes which are remedial in nature.[4] 15 U.S.C. § 1681a(g) (emphasis added). Indeed, Congress specifically told Experian it is required to reinvestigate when a consumer, like Nelson, disputes the

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[4] The Fair Credit Reporting Act is a remedial statute with "consumer oriented objectives" that must be read liberally. *See Cortez v. Trans Union, LLC,* 617 F.3d 688, 706 (3d Cir. 2010) (quoting *Guimond v. Trans Union Credit Info. Co.,* 45 F.3d 1329, 1333 (9th Cir. 1995)); *accord Jones v. Federated Fin. Reserve Corp.,* 144 F.3d 961, 964 (6th Cir. 1998) ("[T]he FCRA is to be liberally construed in favor of the consumer.").

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accuracy of any information in her ***file***, including her name, address, and Social Security number. Neither Experian nor the District Court are free to deviate from the statutory definition of "file" in the FCRA or the plain meaning of the statute.

Despite holding that pursuant to the plain language of the FCRA Experian had a duty to reinvestigate the PII Nelson disputed, the District Court held that Experian's interpretation was not "objectively unreasonable" and granted summary judgment for Experian. [Doc. 84, p. 13]. The District Court explained that "[n]o caselaw told Experian that its interpretation [that PII is not information contained in a 'file'] was wrong, and other circuits' precedent and CFPB and FTC regulations suggested that Experian could be right." [Doc. 84, p. 13]. A review of the case law is therefore in order.

c. This Court's Binding Precedent and Cases in Which Experian Was a Party Show Experian Has a Duty to Reinvestigate the Accuracy of Disputed PII under §1681i of the FCRA.

In addition to the plain language of the FCRA, three cases provide guidance on the issue at hand: *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330 (11th Cir. 2015), *Nunnally v. Equifax Info. Servs., LLC*, 451 F.3d 768 (11th Cir. 2006), and *Ricketson v. Experian Info. Sols., Inc.*, 266 F. Supp. 3d 1083 (W.D. Mich. 2017).

Importantly, Experian was a party in *Collins* and *Ricketson*.[5] In both cases, the court specifically told Experian that a consumer's file and report are not the same under the FCRA.

Collins involved a claim under § 1681i that Experian litigated and appealed. This Court clearly delineated the terms ***file*** and ***report*** for Experian in *Collins*. The *Collins* case answers the question of whether the reinvestigation requirement in §1681i only applies to information contained in a credit report that would be distributed to third parties. The Eleventh Circuit informed Experian as follows:

> The important distinction in this case is the difference in the FCRA's definitions of the terms "consumer report" and "file." Congress provided definitions in the FCRA for both of these terms and gave them different meanings. A "consumer report" is defined as:
>
> > any written, oral, or other *communication* of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for ... credit or insurance ...; employment purposes; or any other purpose....
>
> 15 U.S.C. § 1681a(d)(1) (emphasis added). In contrast, "[t]he term 'file', when used in connection with information on any consumer, means all of the information on that consumer *recorded and retained by a consumer reporting agency* regardless of how the information is stored." 15 U.S.C. § 1681a(g) (emphasis added). According to the

[5] In fact, attorney L. Jackson Young, Jr., counsel of record for Experian in this case, was also counsel for Experian in *Collins*.

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> FCRA's definitions, a "consumer report" is communicated by the consumer reporting agency, while a "file" is retained by the consumer reporting agency.
>
> . . . .
>
> . . . Thus, by its plain terms, § 1681i(a) does not require communication to a third party; it provides a consumer reporting agency violates that provision if a consumer notifies the agency there is inaccurate information contained in his *file* and the agency does not conduct a reasonable reinvestigation into the matter. A file is simply the information retained by a consumer reporting agency.

Collins v. Experian Info. Sols., Inc., 775 F.3d 1330, 1334-35 (11th Cir. 2015). *Collins* clearly sets out the distinction between a ***file*** and a ***report***. However, Experian did not rely upon *Collins* in assessing its duty under § 1681i(a) and the District Court did not address it in its Memorandum Opinion despite Experian having cited *Collins* in its own Brief. [Doc. 67, p. 32].

In addition to *Collins*, Experian also cited *Nunnally v. Equifax Info. Servs., LLC*, 451 F.3d 768 (11th Cir. 2006) in its Brief [Doc. 67, p. 32]. *Nunnally* involved a claim under § 1681i(a)(6)(B)(ii), which requires a credit reporting agency to disclose a consumer's report with the results of a reinvestigation of a consumer's dispute. The Eleventh Circuit contrasted the terms ***file*** and ***report*** by noting the distinct definitions for each while also instructing that "conflat[ing] the meaning of 'consumer report' with 'file' would make the terms redundant." *Nunnally v. Equifax Info. Servs.*, 451 F.3d 768, 773 (11th Cir. 2006) (noting the "cardinal principle of statutory construction"). Despite this clear prohibition on conflating the terms ***file***

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and ***report***, Experian argued for doing just that in this case by taking the position that ***report*** swallows and supersedes the term ***file***.

Experian should have also relied upon *Ricketson v. Experian Info. Sols., Inc.*, 266 F. Supp. 3d 1083 (W.D. Mich. 2017), another case in which **Experian was a party**. *Ricketson* involved a § 1681i reinvestigation claim like *Collins* and the case at bar. Experian argued that the plaintiff in *Ricketson* could not recover damages under § 1681i because it did not publish the inaccurate information to a third party. *See id.* at 1094. Relying on this Court's ruling in *Collins* and noting that "Section 1681i(a) ties liability to inaccuracies in a consumer's *file*", the court in *Ricketson* found that "by its plain terms, Section 1681i(a) is aimed at ensuring the completeness or accuracy of *consumer files* retained by CRAs." *Id.* at 1095.

Just two years after the *Collins* ruling, the district court in *Ricketson* informed Experian that the terms ***file*** and ***report*** were not synonymous and that the duty to reinvestigate under § 1681i is not limited solely to disputed information contained in a credit report and published to third parties. *Ricketson*, 266 F. Supp. 3d at 1095 (adopting the holding in *Collins*). Despite the rulings Experian received in both *Collins* and *Ricketson*, it continues to conflate "file" and "report" to justify its actions on an ad hoc basis. Experian briefed and argued its position in *Collins* and *Ricketson*, and both times lost based in part upon those Court's explaining that "file" and "report" are not synonymous terms under the FCRA. Despite the clear wording of

the FCRA and explicit guidance from both the Eleventh Circuit and the federal district court in Michigan, which clarified that the information requiring investigation in a consumer's ***file*** is different from information in a ***report*** published to third parties, Experian retroactively decided its actions at the time of Nelson's disputes were based solely on *Gillespie v. Trans Union Corp.*, 482 F.3d 907 (7th Cir. 2007), *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092 (9th Cir. 2022), and non-binding regulatory opinions that apply to information furnishers.

d. Experian's Cited Authority to Retroactively Bolster Its Position That It Had No Duty to Reinvestigate the Accuracy of Nelson's Disputed PII Under § 1681i of the FCRA Is Misplaced.

i. Experian's Cited Case Law Is Inapplicable.

The two cases that Experian primarily relied upon in its assertion that PII was not information it had to investigate, and that the District Court cited in its Memorandum Opinion, were *Gillespie v. Trans Union Corp.*, 482 F.3d 907 (7th Cir. 2007), and *Tailford*, 26 F.4th 1092 (9th Cir. 2022). [Doc. 67 and Doc. 84, pp. 10-11]. It is unclear why the District Court referenced *Tailford* in its Memorandum Opinion at all given the District Court acknowledged at the hearing that *Tailford* came out in 2022, after the events made the basis of this lawsuit. [Doc. 86, pp. 8-9]. Because *Tailford* did not exist in 2020 and 2021 when Nelson sent her dispute letters, Experian could not have relied upon *Tailford* in making its determination that PII falls outside the category of information contained in a consumer's file.

That leaves *Gillespie*, a Seventh Circuit case from 2007, which involves claims arising under 15 U.S.C. § 1681g(a)(1), not §1681i. In *Gillespie*, the plaintiffs claimed that Trans Union, a credit reporting agency like Experian, failed to include "purge dates" in the credit reports that it sent to the plaintiff consumers despite their requests for their entire credit files pursuant to § 1681g(a)(1). "Purge dates" were described by the court in *Gillespie* as follows: "Trans Union uses the date to generate, for its internal purposes, what it calls a 'purge date,' that is a date when the information will be removed from the reports that it issues." 482 F.3d at 908. The Seventh Circuit held that the internal "purge date" information was not included in a consumer's ***file*** because that information would not be of the type included in a consumer ***report***. But even the District Court disagreed with this holding and found the Seventh Circuit's reliance on FTC commentary and Senate Committee Reports to "craft a credit worthiness-limitation that (in this Court's opinion) flouts the FCRA's plain language" and was inapposite. [Doc. 84, p. 12].

ii. Experian's Purported Reliance on Regulatory Decisions to Excuse Its Duties Under the FCRA Is Misplaced Because These Regulations Apply Only to Furnishers of Information, Not Credit Reporting Agencies Like Experian.

In addition to its reliance on inapplicable case law, Experian looks to 12 CFR § 1022.43(b)(1)(i) and 16 CFR § 660.4(b)(1)(i) to support its incorrect belief that it had no duty to reinvestigate the accuracy of Nelson's disputed PII. Yet both

regulations apply only to ***furnishers of information***, not credit reporting agencies, like Experian. *See* 12 CFR § 1022.43(b)(1)(i); 16 CFR § 660.4(b)(1)(i). These regulations deal with consumers' direct disputes to information furnishers which are not covered under the FCRA. Despite this clear difference, Experian argues that the regulations applicable to information furnishers equally apply to credit reporting agencies, like Experian. The CFPB regulations could have been drafted to include credit reporting agencies in regulations involving direct disputes to furnishers, but they were not. Neither has Congress amended the FCRA to exclude PII from the dispute process. Indeed, the clear obligations imposed upon furnishers and credit reporting agencies under the law are different; thus, Experian's after-the-fact reliance on these regulations is far from objectively reasonable.

e. Experian's Refusal to Notify Furnishers of Consumers' Disputed PII Deprives Consumers of Their Rights Under the FCRA.

As a matter of public policy, Experian's refusal to contact furnishers of disputed PII prevents a consumer, like Nelson, from asserting any claim under the FCRA against a furnisher. "[T]here are two things that a CRA, a credit reporting agency, has to do if they get a consumer dispute under i(1)(A). They have to do their own reinvestigation and they have to notify the furnisher of the disputed information." [Doc. 86, p. 4: 12-16]. Experian's refusal to notify furnishers of a consumer's disputed PII deprives consumers like Nelson of a right of action against

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recalcitrant furnishers that refuse to correct inaccurate name, address, or social security information regarding that consumer. As this Court has found, "the only private right of action consumers have against furnishers is for a violation of § 1681s-2(b), which requires furnishers to conduct an investigation following notice of a dispute." *Felts v. Wells Fargo Bank, Nat'l Ass'n*, 893 F.3d 1305, 1312 (11th Cir. 2018) (citations omitted) (emphasis added). Indeed, Experian's policy of sending the consumer a form letter response advising the consumer to contact the unidentified furnisher of the disputed PII not only violates § 1681i of the FCRA, but it ultimately leaves the consumer at a dead end. [Doc. 86, p. 37: 11-15].

Even if the consumer were to know the identity of the furnisher of the inaccurate PII, notice of a consumer's dispute **must** come from a credit reporting agency, like Experian, to trigger a furnisher's duty to reinvestigate. *See* 15 U.S.C. § 1681s-2(b)(1). By refusing to provide furnishers of PII with notices of consumers' disputes, Experian's policy prevents thousands of consumers, like Nelson, from exercising their statutory rights against those furnishers under the FCRA. The wholesale foreclosure of thousands of consumers' potential claims under the FCRA

against furnishers because of Experian's policy of not notifying furnishers of disputed PII does not align with the purposes of the FCRA.[6]

II. The District Court Erred in Using the Same Legal Standard Under *Safeco* for Nelson's Willful and Negligent Violation of § 1681i Claims.

a. The Proper Standard Applicable to a Negligent Violation of the FCRA Is "Reasonableness."

Despite *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), and *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017) (relying on *Safeco*) only involving willful violations of the FCRA, the District Court relied upon both in finding that Experian's interpretation of its duties under the FCRA was not "objectively unreasonable." [Doc. 84, p. 10]. The District Court held that in order to prove that Experian "either negligently (15 U.S.C. § 1681o) or willfully (15 U.S.C. § 1681n) failed to satisfy its duty to reinvestigate," Nelson "must show that Experian's interpretation of the FCRA was objectively unreasonable." [Doc. 84, p. 10]. When analyzing a willful violation of the FCRA in *Safeco*, the United States Supreme Court interpreted willfulness to include recklessness but was silent as to a standard for negligent violations of the FCRA. Likewise, *Pedro*, which largely relies on the holding in *Safeco*, dealt only with a claim of willful or reckless violation of the

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[6] The Fair Credit Reporting Act is a remedial statute with "consumer oriented objectives support[ing] a liberal construction" of its terms in favor of the consumer. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 706 (3d Cir. 2010).

FCRA, not a negligent violation. *See* 868 F.3d at 1280 (citing *Safeco* 551 U.S. at 70 n.20) ("A consumer reporting agency that adopts an objectively reasonable reading of the Act does not knowingly violate the Act."). But even if this Court were to decide that Experian's interpretation under the FCRA was objectively reasonable, which it should not, the "objectively reasonable" standard for willful violations under *Safeco* cannot equally apply to Nelson's claim for a negligent violation of § 1681i under the FCRA.

The standard applicable to a negligent violation of the FCRA is "reasonableness" as was articulated by this Court in the *Losch v. Nationstar Mortg., LLC*, 995 F.3d 937 (11th Cir. 2021). Like here, the plaintiff's claim in *Losch* was that Experian either negligently or willfully violated the FCRA when it did not reinvestigate the plaintiff's dispute. This Court reversed summary judgment as to the plaintiff's negligent violation in *Losch* and noted that "[w]hether a credit-reporting agency acted reasonably under the FCRA 'will be a jury question in the overwhelming majority of cases.'" *Id.* at 944, 48 (citation omitted). Looking at the reasonableness of Experian's reinvestigation, this Court explained that where Experian "did nothing, although it easily could have done something with the information that [the plaintiff] provided, . . . a jury could find it negligently discharged its obligations to conduct a reasonable investigation and reinvestigation into the disputed information." *Id.* at 946. Similarly, a jury could find Experian

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dismissed its duty here because there is no reinvestigation to even consider in assessing reasonableness as to Experian's reinvestigation of Nelson's disputes; per Experian's own policy, a reinvestigation was admittedly not done. [Doc. 69-2, pp. 131: 7-22, 134: 21-23, 135:1-23, 136: 1-8, 143:7-23, 144: 1-21 and Doc 69-8].

Losch demonstrates that willfulness or recklessness "is a higher standard" than the reasonableness standard applicable to negligent violation claims. *Id.* at 947. A defense to a claim of willfully violating the FCRA is to point to an interpretation of the FCRA that could have found support under the law. However, that defense is inapplicable to claims where a defendant ***negligently*** violated the FCRA.

Finally, and perhaps more importantly, in both *Collins* and *Losch*, this Court reversed a trial court's granting Experian summary judgment on those respective plaintiffs' negligence claims. In doing so, this Court applied the proper "reasonableness" standard and held that Experian's taking no steps other than contacting the data furnisher with an ACDV was sufficient to deny Experian summary judgment on negligence. *See Losch*, 995 F.3d at 946-47 (citing *Collins*, 775 F.3d at 1331-33); *Collins*, 773 F.3d at 1336. In both cases this Court held that a "reasonable reinvestigation" by a credit reporting agency, like Experian, "consists largely of triggering the investigation by the furnisher." *Losch*, 995 F.3d at 947; *see also Collins*, 775 F.3d at 1336. In the case at bar, Experian did not even take the step of sending an ACDV to the entities furnishing the PII disputed by Nelson. [Doc. 69-

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2, p. 139: 2-14, p. 131: 7-22]. Applying the correct "reasonableness" standard to Experian's failure to even send an ACDV precludes summary judgment on Nelson's § 1681o claims. Reliance on the text of the Act, judicial precedent or guidance from administrative agencies does not allow Experian to avoid liability for Nelson's claim that it ***negligently*** violated FCRA. Accordingly, the District Court's ruling should be reversed.

CONCLUSION

Based on the foregoing, Jessica Nelson requests that the Court reverse the Order granting Experian's Motion for Summary Judgment, and that the case be remanded for further proceedings.

Respectfully submitted on March 22, 2024,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B), counsel certifies that this brief contains 9,021 words, including footnotes as counted using Microsoft Word 365.

Moreover, the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirement of FED. R. APP. P. 32(a)(6). The brief is prepared in proportionally spaced Times New Roman 14-point typeface using Microsoft Word 365.

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CERTIFICATE OF SERVICE

I hereby certify in compliance with 11th Cir. R. 31-5, that on March 22, 2024, a true and correct copy of the foregoing Brief of Appellant Jessica Nelson was electronically filed with the Clerk of the Court using the Court's E-system, which will send notification of such filing to the following:

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I further hereby certify on March 22, 2024, a true and correct copy of the foregoing Brief of Appellant Jessica Nelson is being served by electronic mail to the above and the required 4 paper copies of the brief are being sent to the Clerk of the Court pursuant to 11th Cir. R. 25-3(a) and 31-3.

/s/Brooke B. Rebarchak