CASE NO. 2181

In the United States Court of Appeals for the Third Circuit

MICHAEL RITZ AND ANDREW RITZ,

Plaintiffs-Appellants,

v.

EQUIFAX INFORMATION SERVICES LLC, EXPERIAN INFORMATION SOLUTIONS INC., TRANSUNION LLC, AND NISSAN INFINITI LT,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN OPPOSITION TO PLAINTIFFS-APPELLANTS' APPEAL

SUBMITTED BY:
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The Consumer Data Industry Association respectfully submits this brief in support of Appellee Nissan Motor Acceptance Corporation's ("NMAC") opposition to Appellants Andrew Ritz and Michael Ritz's ("Ritzes") appeal of the decision of the district court.

STATEMENT OF INTEREST OF AMICUS CURAE

The Consumer Data Industry Association ("CDIA")[1] is a trade association representing consumer reporting agencies ("CRAs"), including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition, expanding consumers' access to financial and other products suited to their unique needs.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), CDIA represents that all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), CDIA represents that no party or party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Further, no person other than *amicus* CDIA and its non-party members contributed money that was intended to fund the preparation or submission of this brief.

CDIA is interested in the outcome of this appeal because CDIA's members are subject to an intricate and comprehensive regulatory scheme under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, which governs the collection, use, maintenance, and dissemination of consumer report information, and this case seeks to determine the scope of certain obligations of CRAs thereunder. CDIA members process over 50 million updates to consumer report information each day.[2] Thus, the issues raised in this appeal addressing the scope of "accuracy" under the FCRA and whether the FCRA dispute process may be used to collaterally attack an on-going legal dispute between a consumer and a furnisher has implications reaching far beyond the parties in this case. Court have recognized that there is a limit to a CRA's duty to conduct a reasonable investigation, as a CRA does not have the ability, expertise, or obligation to adjudicate a legal dispute.[3]

A ruling by this Court in favor of Ritzes finding that an investigation into the "accuracy" of an item means that the furnisher (or CRA) must essentially adjudicate a collateral legal dispute that goes beyond the objectively verifiable facts would expand the scope of the FCRA, and possibly result in the removal of factually accurate information from credit reports any time a consumer raises a collateral

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[2] *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day").

[3] *See* pp. 5-8, *infra.*

dispute. CDIA has been involved in the consumer reporting industry for more than a century and is therefore uniquely qualified to assist this Court in understanding the impact of the positions advocated by the parties and the implications of those on the greater credit reporting ecosystem.

ARGUMENT

The FCRA is not a strict liability statute, rather the standard is one of reasonableness. *Bryant v. TRW, Inc.*, 689 F.2d 72, 78 (6th Cir.1982). The collateral attack doctrine recognizes that furnishers, and CRAs, may only take a dispute reinvestigation so far. The collateral attack doctrine rightly stands for the proposition that a consumer may not use the credit reporting dispute process to seek to invalidate a contract or to obtain a legal determination of their rights under a contract. And where, as here, the dispute between the consumer and the furnisher boils down to a legal disagreement over the meaning of a contract, and the parties' respective rights and obligations under that contract, the furnisher cannot be held liable under the FCRA for maintaining its position with respect to its interpretation of the legal contract.

This case demonstrates why the collateral attack doctrine exists and is inherently logical. In essence, the Ritzes argue that they were not obligated to make payments under their vehicle lease because, as they interpret their lease contract, NMAC had no right to charge them a monthly fee for the vehicle. NMAC obviously

read the contract differently, and asserts that it had the right to charge the monthly fee. This is a quintessential contract dispute that requires an adjudication by a court of law as to the parties' respective rights. It is important to note that NMAC did fulfill its obligations to conduct a reinvestigation of fourteen disputes submitted by the Ritzes to the credit bureaus, and further reviewed multiple customer service complaints from them; – the Ritzes simply disagree with the *outcome* of that dispute reinvestigation (i.e., NMAC's interpretation of the lease agreement). *See* Brief of Appellee Nissan Infiniti LT, p. 10-11. The district court correctly found that the plaintiff's dispute reinvestigation claim under section 1681s-2(b) of the FCRA failed because "[r]egardless of whether the conditions in the lease were met for assessing additional monthly charges, Plaintiffs' dispute concerns not 'patently incorrect' information, but rather the legal validity of an additional monthly charge. And that dispute can only be resolved by a court of law." *Ritz v. Nissan-Infiniti LT*, No. CV 20-13509-GC-DEA, 2023 WL 3727892, at *6 (D.N.J. May 30, 2023). Summary judgment in favor of NMAC in this case was therefore proper, and this Court should affirm the ruling of the district court.

I. Appellants Failed to Establish an "Inaccuracy" for the Purpose of Stating a Claim Under the FCRA.

The balance of courts that have examined the issue of whether a "legal question" can render a consumer report inaccurate have consistently found that a

factual inaccuracy is necessary to state a claim under the FCRA. These cases demonstrate why the district court below properly dismissed the claim.

To establish a claim under section 1681s-2(b) of the FCRA, a plaintiff must make "a prima facie showing that the furnisher's report was inaccurate." *Gross v. CitiMortgage, Inc.*, 33 F. 4th 1246, 1251 (9th Cir. 2022); *see also Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1313 (11th Cir. 2018) (holding a plaintiff must demonstrate that "had the furnisher conducted a reasonable investigation, the result would have been different; i.e., that the furnisher would have discovered that the information it reported was inaccurate or incomplete…"); *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 37 (1st Cir. 2010) (holding that "plaintiff had to demonstrate some causal relationship" between the furnisher's investigation "and the failure to discover inaccuracies in his account."). A report is inaccurate when it is either "patently incorrect" or "misleading in such a way and to such an extent that it can be expected to have an adverse effect." *Saunders v. Branch Banking and Tr. Co. of VA*, 526 F.3d 142, 148 (4th Cir. 2008). More recently, the Second Circuit Court of Appeals ruled that a report is inaccurate when it is not "objectively and readily verifiable." *Sessa v. Trans Union, LLC*, 74 F.4th 38, 43 (2d Cir. 2023).

Several courts have examined the issue of whether a "legal dispute" establishes an "inaccuracy" under the FCRA, answering that question in the negative. For nearly fifteen years, courts have declined to require that CRAs act as

mini courts of law and settle disputes between a furnisher and a consumer, uniformly prohibiting "collateral attacks" against account validity couched as FCRA claims. Likewise, for over a decade, courts have extended the bar against collateral attacks to furnishers in cases arising out of § 1681s-2(b), where consumers seek to litigate an ongoing dispute over a collateral issue through the guise of a credit reporting dispute.

The First Circuit first applied the collateral attack doctrine to bar an FCRA claim where the consumer challenged the legal validity of a debt instrument in a dispute filed with the CRA. *See DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008). In that case, after verifying the reported information in response to an initial dispute, the plaintiff's creditor continued to report the account to the CRA, believing the contract to have been ratified by the consumer's conduct in accepting the goods and making payments on the account. *Id.* The plaintiff sued the creditor and mailed a copy of the lawsuit to the CRA, demanding the CRA stop reporting the debt. *Id.* at 64. The CRA followed its normal dispute reinvestigation procedure, but ultimately did not delete or modify the account. *Id.*

The First Circuit found that there was no "inaccuracy" reflected in the information reported by the CRA for the purpose of stating an FCRA claim under § 1681i(a), holding that the plaintiff could not collaterally attack the validity of the

underlying debt instrument between the parties using the FCRA dispute process. *Id.* at 64-65. The court stated:

> Whether the mortgage is valid turns on questions that can only be resolved by a court of law, such as whether DeAndrade ratified the loan. This is not a factual inaccuracy that could have been uncovered by a reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA. ... In essence, DeAndrade has crossed the line between alleging a factual deficiency that Trans Union was obliged to investigate pursuant to the FCRA and launching an impermissible collateral attack against a lender by bringing an FCRA claim against a consumer reporting agency.

Id. at 68 (emphasis added). Therefore, the collateral attack doctrine does not bar a complaint because CRAs should be "exempt" from liability as a policy matter; rather, it is because the question of the legal validity of a contract requires a legal determination that only a court of law should undertake. Thus, the *DeAndrade* court distinguished those inaccuracies that are rightly within the CRA's bailiwick as "factual," versus "legal" inaccuracies, which are not. 523 F.3d at 68.

The First Circuit extended the collateral attack doctrine from CRAs to furnishers in *Chiang v. Verizon New England Inc.*, 595 F. 3d 26 (1st Cir. 2010). In *Chiang*, the plaintiff sued Verizon and its agent with whom it contracted to perform credit reporting services, alleging, among other claims, that they failed to perform an adequate reinvestigation of the plaintiff's disputes submitted to the CRAs. *Id.* at 30. The plaintiff argued, as the Ritzes do here, that he was charged fees on his accounts that he did not owe due to the fact that he had ended his contractual

relationship with Verizon. Verizon's agent investigated each of the plaintiff's disputes, and responded to the CRAs that the information reported was accurate. *Id.* at 33. The plaintiff did not identify a specific factual inaccuracy other than he did not agree with Verizon that the charged fees were owed by him, which the court found insufficient to state a claim under section 1681s-2. *Id.* at 38. The court held that a plaintiff must demonstrate a "*factual* inaccuracy, rather than the existence of disputed legal questions. Like CRAs, furnishers are 'neither qualified nor obligated to resolve' matters that 'turn on questions that can only be resolved by a court of law.'" *Id.* (quoting *DeAndrade*, 523 F.3d at 68).

Following *Chiang*, several courts have likewise applied the collateral attack doctrine to section 1681s-2(b) claims against furnishers, including the Eleventh Circuit Court of Appeals. In *Hunt v. JPMorgan Chase Bank, N.A.*, the Eleventh Circuit Court of Appeals held that the plaintiff's claim that the bank/furnisher inaccurately reported late payments following the filing of a foreclosure action did not establish a factual inaccuracy: "Whether Hunt was obligated to make payments on the mortgage after the Foreclosure Action was filed is a currently unresolved legal, not a factual, question. Thus, even assuming JPMC furnished information that turned out to be legally incorrect under some future ruling, JPMC's purported legal error was an insufficient basis for a claim under the FCRA." *Hunt v. JPMorgan Chase Bank, Nat'l Ass'n*, 770 F. App'x 452, 458 (11th Cir. 2019).

Several courts within this Circuit have applied the collateral attack doctrine to disputes under § 1681s-2(b). *See Esperance v. Diamond Resorts*, 2022 WL 1718039 (D. N.J. May 27, 2022); *Hopkins v. I.C. Sys., Inc.*, No. CV 18-2063, 2020 WL 2557134, at *1 (E.D. Pa. May 20, 2020). *See also Van Veen v. Equifax Info.*, 844 F. Supp. 2d 599, 607 (E.D. Pa. 2012) (holding that furnisher had no duty to investigate dispute regarding whether plaintiff was legally billed for telephone service because no factual inaccuracy was alleged); *Farrington v. Freedom Mortg. Corp.*, No. CV 20-4432 (KMW-AMD), 2022 WL 16552779 (D.N.J. Oct. 31, 2022), reconsideration denied, No. CV 20-04432 KMW-AMD, 2023 WL 4287777 (D.N.J. June 30, 2023) (finding that plaintiff's claim that mortgage servicer inaccurately reported balance owing on mortgage by failing to credit insurance proceeds constituted a "legal issue" which furnishers are not required to investigate.). In *Esperance*, the plaintiffs stopped making payments on a timeshare property and allegedly tendered possession of the timeshare back to the timeshare resort. *Id.* at *1-2. The timeshare resort continued to report the plaintiffs' account as open to the CRAs. *Id.* at *2. The plaintiffs sued, claiming that the timeshare resort failed to conduct a reasonable investigation into the inaccurately furnished information. *Id.* at *4. The district court disagreed, finding that the alleged inaccuracy involved a legal dispute which was "outside the scope of a furnisher's investigatory responsibilities." *Id.* at *6.

"[C]ourts have routinely held that furnishers are not required to investigate the legal validity of the underlying debts they report." *Id.*

District courts in Pennsylvania have likewise held that matters of legal accuracy are not enough to sustain a § 1681s-2(b) claim. In *Hopkins*, the plaintiff sued a collection agency for failure to adequately investigate an inaccuracy on her credit report stemming from an alleged delinquency on her residential lease agreement. 2020 WL 2557134, at *1. The plaintiff in *Hopkins* alleged that the debt collector had the wrong person and that the debt had already been settled. The court acknowledged applicability of the collateral attack doctrine, although ultimately finding that the inaccuracies alleged were factual rather than legal – "[t]he question is not whether the plaintiff alleges that she does not owe the debt, but the question is why the plaintiff alleges that she does not owe the debt… If a plaintiff argues, for example, that she already paid the debt, that is not a legal dispute… But if the plaintiff argues that the debt is *invalid because the creditor breached a contract, that dispute would be legal*." *Id.* at *8 (emphasis added).

Likewise, in *Alston v. Wells Fargo Home Mortg.*, No. CV TDC-13-3147, 2016 WL 816733 (D. Md. Feb. 26, 2016), the United States District Court for the District of Maryland found that the plaintiff failed to prove that Wells Fargo's reporting of delinquent payments was factually inaccurate. Specifically, Wells Fargo initially reported the plaintiff's account as current for the month of August

based on receipt of an invalid cashier's check, but later modified the account to reflect a delinquency after the cashier's check was returned. *Id.* at *9. The court held that:

> Wells Fargo was faced with the legal question whether Alston's cashier's check containing Alston's confusing and misleading annotations was a legally valid payment, and it gave Alston the benefit of the doubt on that question. This provisional determination cannot be deemed patently incorrect because it is not a factual question, but a legal one.

Id. at *10 (D. Md. Feb. 26, 2016).

It is undisputed that the Ritzes did not make the August 9th lease payment. What is disputed is whether the Ritzes legally owed the August 9th lease payment. The Ritzes argue that NMAC had "'no contractual or legal right,' in the lease or otherwise, to assess [the disputed] charges" *Ritz v. Nissan-Infiniti LT*, 2023 WL 3727892 at *8. NMAC obviously believes it was entitled to do so under the lease. There is also a question as to the legal effect of the Ritzes' attempted surrender of the vehicle, and whether it was acceptable under the terms of the lease. The resolution of these open questions requires one to engage in a legal analysis of the terms of the lease; consideration of relevant evidence presented by the Ritzes; evidence presented by the dealership, and NMAC; and the application to those facts to the terms of the contract as governed by applicable vehicle leasing law. That is a job reserved to the courts.

II. Public Policy Supports the Long-Standing Interpretation That Accuracy Under the FCRA Does Not Include Legal Disputes.

The courts that have held that the FCRA does not require CRAs or furnishers to arbitrate unresolved legal disputes between the original parties to a transaction regarding the factual accuracy of the reported information have done so on strong public policy grounds. First, requiring furnishers or CRAs to resolve legal questions would necessitate analysis of statutes and case law, a role best left to courts of law. From a practical perspective, such a rule would require furnishers and CRAs to hire in-house attorneys who were licensed to give such advice across all jurisdictions, or to engage outside counsel to resolve often novel and complex, legal questions that such legal challenges would reasonably present. If resolved through a dispute process, CRAs and furnishers would be subject to the reinvestigation timeline set forth by the FCRA – the reinvestigation must be completed within 30 days' receipt of the consumer's dispute (with an additional 15 days if more information is received by the consumer related to the dispute). 15 U.S.C. §§ 1681i(a)(1)(A) and (B). As this Court is well aware, civil cases take months, if not years, to run their course. And unlike courts, CRAs and furnishers do not have subpoena power to assist the parties in obtaining relevant evidence. Developing a process, and staffing such a process to meet these timeframes, would be hugely burdensome to furnishers and CRAs alike, and could lead to a rise in transaction costs throughout the industry and ultimately the cost of credit for consumers.

Second, requiring furnishers or CRAs to act as arbiters of legal disputes in the first instance would raise practical questions about the implications of such a reinvestigation. If this were the case, it would lead one to ask what would be the implications of such a process – would there be a legal effect on the debt itself, for example. Consumers could be misled into believing that they had somehow "won" the issue and that the debt was no longer owed to the furnisher. Another question is what role the courts would play in such a process – would they become a new form of an appellate panel, reviewing the legal analysis conducted by the furnisher or CRA, and under what standard. This is not a job the courts would be prepared to undertake.

Respectfully, the rule the Ritzes and the Consumer Financial Protection Bureau urge this Court to adopt is one that allows the consumer to force the removal of a debt the creditor believes it is owed simply because the consumer contests the debt amount. The CFPB argues in its amicus brief that:

> [a] court may be the ultimate arbiter of whether the debt is owed (in a debt-collection action or a declaratory judgment action by the consumer, for example). But this is true whether a dispute raises legal or factual questions. Thus, a furnisher maintains an obligation to consider disputes that raise legal questions, conduct a reasonable investigation, and determine whether, in light of the issues raised in the dispute, it has a sufficient basis to verify the debt.

CFPB Brief, [ECF No. 34] p. 24. The result would be that, even where the creditor believes it is owed certain amounts under the contract with the consumer, it may not

continue to report the amount owed (i.e., "to verify the debt") to the CRAs. Under the FCRA, if a CRA cannot verify the disputed account information, it must be removed from the CRA's file. 15 U.S.C. § 1681i(a)(5). The result would be that furnishers and CRAs would be held hostage, and forced to remove information they reasonably believe to be accurate, or be faced with lawsuits where the question is not whether the furnisher or CRA conducted a reasonable investigation, as the FCRA requires, but whether they reached the right legal conclusion.

Here, it is clear from the record that NMAC actually conducted a reinvestigation of the disputes – to the extent it was able to do so. It reviewed account notes and documents within the file, and determined that its actions were legally correct *under its interpretation of the contract*. NMAC completed its reinvestigation of the disputes, and the consumer was notified of the same. Thus, the public policy concerns that the CFPB raised – that the collateral attack rule would "allow furnishers to evade their statutory obligations by characterizing nearly any dispute as a 'legal' one," CFPB Brief, [ECF No. 34] p. 12, – is belied by the very facts of this case.

CONCLUSION

In sum, what the Ritzes seek in this FCRA case *is a legal determination by a court of law that NMAC's interpretation of the lease terms was incorrect*. Instead

of raising that question in a proper contract action, the Ritzes attempt to shoehorn that question into an FCRA reinvestigation claim. The FCRA claim rightly failed because, under the collateral attack doctrine, a furnisher cannot be liable under the FCRA where the dispute raised such a legal conclusion. *Amicus* Consumer Data Industry Association urges this Court to affirm the district court's order granting summary judgment in favor of Appellee, Nissan Motor Acceptance Corporation.

Dated: April 8, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 3,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. R. App. P. 32(f).

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3. This brief complies with the Court's rules and identical to one another and the electronic PDF version.

4. Adobe Acrobat detection program has been run on the file and that no virus was detected.

/s/ *Jennifer L. Sarvadi*

Jennifer L. Sarvadi

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April 2024, I electronically filed the foregoing Brief of Amicus Curiae Consumer Data Industry Association in Opposition to Plaintiff-Appellant's Appeal with the clerk of this Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the CM/ECF system.

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