**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| STEPHEN G. LEVINE,<br><br>Plaintiff,<br><br>v.<br><br>EXPERIAN INFORMATION SOLUTIONS, INC.,<br><br>Defendant. | ) | CIVIL ACTION FILE<br>NO. 1:04-CV-1283-BBM |

**DEFENDANT'S MEMORANDUM OF LAW**
**IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Gregory R. Hanthorn
(Ga. Bar No. 323937)
Michael Wolak, III
(Ga. Bar No. 773197)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053
(404) 521-3939/Telephone
(404) 581-8330/Facsimile

*Attorneys for Defendant*
*Experian Information Solutions, Inc.*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page**

## CASES

**STATUTES, REGULATIONS & RULES**

Defendant Experian Information Solutions, Inc. respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c).

## INTRODUCTION

*Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201, 2215-16 (2007), unequivocally establishes that Experian is entitled to summary judgment on plaintiff Stephen Levine's claim that Experian willfully violated the Fair Credit Reporting Act ("FCRA"). In *Safeco*, the Supreme Court held that an FCRA willfulness claim cannot survive summary judgment unless the rule at issue was clearly established—by Court of Appeals case law, binding FTC rules, or "pellucid" statutory language—at the time of the alleged violation. This standard compels summary judgment for Experian.

According to Levine, Experian violated the FCRA by permitting a credit card issuer to review information from Levine's credit file after he had voluntarily closed his account with that issuer. But the pertinent FCRA provision expressly permits a creditor to receive information in connection with "review or collection of an account" and says nothing limiting the meaning of an "account" to only open accounts. In addition, the only relevant case law at the time, *Wilting v. Progressive County Mutual Insurance Co.*, 227 F.3d 474 (5th Cir. 2000), had held, directly

contrary to Levine's claim, that the FCRA does *not* prohibit a creditor from obtaining the credit report of a customer whose account is closed. Further still, the Eleventh Circuit has stated, with regard to this very issue, that the FCRA provision is "ambiguous," "not explicit[]," and susceptible to a "difference of opinion." *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1122 (11th Cir. 2006). Under *Safeco*, this requires summary judgment in favor of Experian, because the rule that Levine asserts Experian violated was not, to say the least, clearly established at the time of the alleged violation.

Experian is entitled to summary judgment on a separate ground as well. When former defendant Alliance Data Systems sought credit information regarding Levine and other consumers in connection with its semi-annual account review program, Experian obtained an express certification from Alliance, in accordance with the FCRA, that Alliance sought this information for only "permissible purposes" as defined by the FCRA and only in connection with Alliance's "current customers." There is *no authority*—clearly established or otherwise—that put Experian on notice that it had to implement any further procedures here, in addition to those it already had in place, to protect against what Levine claims was Alliance's violation of the FCRA.

Levine's sole basis for contending that Experian committed a willful violation is that Alliance's certification was "implausible" with respect to his account because Experian's "own records" showed that his account had been closed. This argument in no way rebuts the fact—dispositive under *Safeco*—that under the only relevant case law at the time there was no prohibition on Alliance reviewing credit information in connection with closed accounts. Moreover, even if there had been such a prohibition, Levine can point to no authority establishing that a consumer reporting agency had a duty to search its own files to test the accuracy of certifications like those provided by Alliance. Indeed, at the pertinent time there was ample authority holding that the agency is generally *not* required to undertake any separate procedures to test a facially plausible certification by a creditor whose line of business (like Alliance's) gives rise to permissible purposes for requesting credit information.[1]

Because Experian did not violate any clearly established duty or prohibition under the FCRA, it is entitled to summary judgment in accordance with *Safeco*.

---

[1] At the time, this Court had already dismissed two nearly identical lawsuits by Levine, against a different consumer reporting agency, because Levine did not allege any reasonable basis for suspecting that the party requesting his report sought it for an impermissible purpose. *See Levine v. Beneficial Nat'l Bank, USA*, No. 1:99-CV-3172-WBH, slip op. at 3 (N.D. Ga. May 17, 2000); *Levine v. First Union Nat'l Bank*, No. 1:99-CV-3173-MHS, slip op. at 3-4 (N.D. Ga. May 5, 2000). Both decisions are attached as Exhibit N hereto.

## BACKGROUND

### A. The Facts Underlying Levine's Claim

The facts giving rise to Levine's claim are undisputed. Sometime before 1998, Levine opened a store credit card with Structure, Inc. an owner of retail clothing stores, who used its affiliate World Financial Network National Bank ("World Financial") to issue Structure credit cards. (Ex. A at 113:4-13; First Am. Compl. ¶ 7.)[2] Levine voluntarily closed his account with Structure in 1998 and, when he did, it reflected a zero balance. (Ex. A at 113:14-16; Ex. P; First Am. Compl. ¶ 8.)

In January and July 2002, Alliance, Structure's corporate parent, undertook its Semi-Annual Account Review Program for credit accounts held through World Financial. (Ex. B at 35:6-9; Exs. I, J.) Through this program, Alliance sought and obtained credit information from Experian on more than 36 million consumers who had accounts through World Financial, including consumers like Levine who had Structure credit cards. (Ex. E ¶ 5; Ex. D at 11:11-18.) Alliance had in place a Subscriber Service Agreement with Experian in which Alliance certified that it would use credit information obtained from Experian only in connection with credit transactions or for other "permissible purposes" under the FCRA:

[2] Documents cited in the form "(Ex. __.)" are attached as exhibits to this memorandum in accordance with Local Civil Rule 56.1(C).

> Subscriber hereby certifies and warrants that it will request and use credit information received from Experian solely in connection with credit transactions, or, if applicable, for employment purposes (e.g., hiring, promotion, transfer or security-related issues), or for other "permissible purposes" as defined by the FCRA.

(Ex. C ¶ 4.) Alliance also represented in its Subscriber Agreement that the data Alliance provided to Experian would "pertain[] to individuals with whom it [Alliance] has a credit relationship." (*Id.* ¶ 3.) And, in separate letter agreements with Experian, Alliance further represented that "[t]he purpose of this [account review] program is to provide the [credit] Score on *current customers* of Alliance Data Systems." (Exs. I &J) (emphasis added).

In March 2004, approximately two years after Alliance performed the account review programs at issue here, Levine requested a credit report from Experian. (Ex. F ¶ 20.) The report that Experian provided to Levine noted that Structure had requested information concerning Levine's credit history in May 2002 and August 2002. (Ex. G.) The report also noted that the inquiry from Structure and other listed entities was being reported "**only** to you as a record of activities, and we do not include **any** of these requests on credit reports to others." (*Id.*, emphasis in original.) Levine acknowledges that Alliance's request for Levine's credit information was not shown to any actual or potential creditors, did not have any adverse impact on his credit score or credit history, did not cause him

to lose any opportunity to obtain credit or employment, and did not cause him any monetary loss. (Ex. L ¶¶ 12-13, 16-17, 27-30.)

**B. Levine's Complaint and Experian's Motion to Dismiss**

Levine brought his original complaint against Structure, World Financial, and Experian, claiming that all three defendants willfully and negligently violated the FCRA. Defendants moved to dismiss, and this Court granted the motions. The Court noted "different pieces of non-binding authority" on whether, under the FCRA, a creditor may seek credit information concerning a customer whose account has been closed: the Fifth Circuit's decision in *Wilting v. Progressive County Mutual Insurance Co.*, 227 F.3d 474 (5th Cir. 2000), and two informal, non-binding opinion letters by the staff of the Federal Trade Commission. (Order, 11/8/2004, at 9.) This Court agreed with the Fifth Circuit that "the FCRA does not suggest that a credit report may only be permissibly obtained for account review during particular points in the parties' relationship." (*Id.* at 10.) With regard to the certification of permissible use received by Experian under § 1681e, the Court also held that Experian had "no duty to inquire into whether a facially valid reason for a requested consumer report is in fact valid." (*Id.* at 11, 13-16.)

Levine appealed from this Court's dismissal order. While his appeal was pending, Levine settled his claims against Structure and World Financial (Ex. L ¶

2)—the parties that, according to Levine, "lied" to Experian and did not have a permissible purpose for seeking Levine's credit information (Ex. A at 81). In its decision, the Eleventh Circuit stated that it required a "more fully developed record" to address Levine's claims that Experian violated the FCRA and reversed this Court's dismissal order. *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1122 (2006). The Eleventh Circuit noted, as this Court also had, that "[t]here is a difference of opinion on whether the ambiguous language in FCRA contains an absolute prohibition against the sale of credit reports to former creditors whose accounts are closed and paid in full." *Id.* The appeals court "reserve[d] judgment" on this question and stated that Levine could proceed with discovery on whether Experian had "reasonable grounds" for believing that Structure intended to use credit information for an impermissible purpose and whether Experian had made "reasonable efforts" to verify Structure's request. *Id.*

As to Levine's claim for a willful violation of the FCRA, the Eleventh Circuit—writing before the Supreme Court issued *Safeco*—stated only that "[t]he question of whether this noncompliance, if it exists at all, results from willful defiance or negligence is also not resolved by the pleadings." *Id.* at 1122-23.

### C. Levine's Amended Complaint

Levine amended his complaint after the appeal. In his amended complaint, Levine claims that Experian willfully violated the FCRA by providing credit information about Levine to Structure in May and August 2002, at a time when Levine's credit account with Structure had been voluntarily closed and reflected a zero balance. (Doc. No. 41 ¶¶ 6-17, 30-36.) Levine further contends that Experian did not maintain reasonable procedures to ensure that Experian released credit information only for the permissible purpose listed in 15 U.S.C. § 1681b. (*Id.* ¶¶ 19, 32.) Pursuant to § 1681n(a)(1)(A), Levine seeks statutory damages for Experian's alleged willful violation of the FCRA. (*Id.* ¶ 36.)

Levine's amended complaint includes a claim for "negligent" violation of the FCRA, under § 1681o. (*Id.* ¶¶ 37-43.) For a negligent violation, a plaintiff must prove actual damages. *See* 15 U.S.C. § 1681o(a)(1). In discovery, Levine has admitted that he "has suffered no direct financial loss as a result of Defendant Experian's actions," and he has dropped his claim for "emotional harm." (Ex. L ¶¶ 29-30; Ex. A at 54, 96.) Both Levine and his counsel have also represented that "the only damages being sought or pursued are statutory damages," *i.e.*, damages for a willful violation, and that Levine is not pursuing his claim for a negligent

violation of the FCRA on behalf of the putative class. (Ex. A at 53-54, 96, 109; Ex. M at 3-4; Order, 6/12/2007 at 2 n.1.)[3]

**D. Levine's Motion for Class Certification**

After the Supreme Court's decision in *Safeco*, this Court ordered the parties to proceed with discovery on whether Experian willfully violated the FCRA under *Safeco* and, on the issues outlined by the Eleventh Circuit, "whether Experian had 'reasonable grounds' to believe that Structure intended to use Levine's consumer report for an impermissible purpose or whether Experian made 'reasonable efforts' to verify the validity of Structure's request." (Order, 6/12/2007, at 1.) The Court directed the Clerk to administratively terminate Levine's then-pending motion for class certification and ordered that it would be reactivated only if Levine's complaint survives Experian's motion for summary judgment. (*Id.* at 2.)

[3] Levine's counsel told the Court that he would inform the Court in June 2007 whether Levine is still pursuing his negligence claim. (Ex. O at 16-18.) To our knowledge, counsel never did that. In any event, the record shows that Levine has withdrawn his claim that he suffered any damages due to a negligent violation of the FCRA, and he also has no evidence to support it. *See Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37, 45 (E.D.N.Y. 2005) (granting summary judgment on claim for negligent violation of the FCRA where plaintiff "has not presented sufficient evidence of damages"); *Spector v. Experian Info. Servs. Inc.*, 321 F. Supp. 2d 348, 356 (D. Conn. 2004) (same).

## ARGUMENT

Levine's only remaining claim in this case is that Experian committed a "willful" violation of the FCRA, under 15 U.S.C. § 1681n(a), and that he and a putative class of similarly situated persons are therefore entitled to statutory damages. This claim fails as a matter of law, because *Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201 (2007), requires Levine to show that Experian violated a FCRA duty or prohibition that was clearly established at the time of the conduct at issue. Levine's claim fails this test in two separate ways, because there was no established authority holding either that (1) a creditor was prohibited from reviewing credit information for a consumer whose account was closed; *or* (2) a consumer reporting agency has a duty to search its consumer records to test a creditor's facially valid "permissible purpose" certification.

### A. The Supreme Court's *Safeco* Decision

In *Safeco*, the Supreme Court held that even where a defendant has violated a provision of the FCRA, the defendant is entitled to summary judgment on a claim for a willful violation under § 1681n where the conduct at issue was not clearly established as unlawful at the time it occurred.

The Court first set forth a general standard for a willfulness claim under the FCRA, explaining that such a claim requires, at a minimum, a showing of "reckless disregard," 127 S. Ct. at 2208-10, and 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.

*Id.* at 2216 (footnote omitted). However, the Court stated that this general standard will not apply, and there can be no willful violation under § 1681n(a), where—as in *Safeco* itself—a defendant's reading of the FCRA, "albeit erroneous, [is] not objectively unreasonable." *Id.* The Court then spelled out what it meant by "objectively unreasonable," emphasizing the absence of any authoritative guidance from the courts of appeals or the FTC:

> This is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC (which in any case has only enforcement responsibility, not substantive rulemaking authority for the provisions in question).

*Id.* at 2217. The Court concluded that, "[g]iven this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively

unreasonable" and therefore could not, as a matter of law, give rise to willfulness liability. *Id.* at 2216. Accordingly, the Court ordered that Safeco was entitled to summary judgment on plaintiffs' claim. *See id.*

Significantly, *Safeco* made clear that the threshold inquiry into whether a defendant acted in an "objectively unreasonable" manner does *not* depend on the defendant's state of mind. As the Court explained, even "subjective bad faith," *i.e.*, a showing that a defendant believed it might be violating the FCRA, cannot support a finding of willfulness when "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Id.* at 2216 n.20. Accordingly, there can be no liability for a willful violation of the FCRA for "those who followed an interpretation that *could* reasonably have found support in the courts, whatever their subjective intent may have been." *Id.* (emphasis added).

### B. Under *Safeco*, Experian Is Entitled to Summary Judgment on Levine's Claim of a Willful Violation of the FCRA

Experian is entitled to summary judgment under the *Safeco* standard. To prevail on his willfulness claim here, Levine must show it was clearly established *both* that Experian (1) was not permitted to provide credit information to Alliance regarding a consumer whose account was, at the time of the request, closed, *and* (2) had a duty to implement further procedures, in addition to those that Experian already had in place, to protect against Alliance obtaining such information.

Levine cannot make *either* of these showings. As in *Safeco*, the FCRA is "less-than-pellucid" and there was a "dearth of guidance" on whether a creditor may seek information for an individual whose account is closed. There is also no authority—let alone clearly established authority—that put Experian on notice that it had a duty to verify the accuracy of Alliance's facially valid certification that it was seeking credit information only for "permissible purposes" under the FCRA and only in connection with its "current customers."

### 1. The Rule That Levine Claims Experian Violated Was Not Clearly Established

#### a. The Only Relevant "Guidance" Under *Safeco* Favored Experian's Interpretation of the Statute

The FCRA rule that Levine claims Experian violated by furnishing his credit information to Alliance was not clearly established at the time of Experian's alleged violation. In *Safeco* the Court noted that the defendant did not have the benefit of any authoritative case law because "no court of appeals had spoken on the issue." 127 S. Ct. at 2216. This case presents an even stronger ground for granting summary judgment than in *Safeco*.

Here, the only pertinent authority from a court of appeals that was available in 2002, when Experian furnished the credit information at issue to Alliance, was the Fifth Circuit's decision in *Wilting v. Progressive County Mutual Insurance Co.*,

227 F.3d 474 (5th Cir. 2000). In that case, the Fifth Circuit expressly *rejected* the same argument Levine makes here: that the FCRA "only allows a creditor to obtain a consumer credit report on 'existing accounts' and not for previous accounts." *Id.* at 476. The Fifth Circuit noted "that neither the Act nor the FTC's commentary on the Act suggests that a report may only be permissibly obtained during particular points in the parties' relationship." *Id.* Accordingly, the only court of appeals authority to have spoken on the issue at the pertinent time had held that, under the FCRA, a creditor *may* request credit information concerning a customer whose account had been terminated at the time of the request. On this ground alone, Experian is entitled to summary judgment on Levine's claim of a willful violation.[4]

---

[4] In the wake of *Safeco*, several courts have dismissed or ordered summary judgment on claims for a willful violation of the FCRA where there was not, at the time of the conduct giving rise to the claim, any clear authority from a court of appeals that foreclosed the defendant's interpretation of the statutory provision at issue. *See Murray v. Indymac Bank, F.S.B.*, 2007 WL 2741650, at *9-10 (N.D. Ill. Sept. 13, 2007) (plaintiff cannot show willfulness by pointing to a court of appeals decision issued *after* the conduct at issue); *Murray v. GMAC Mortgage Corp.*, 2007 WL 2317194, at *4-6 (N.D. Ill. July 23, 2007) (granting summary judgment to defendant, where it "adopted the interpretation of 'firm offer' later rejected by the Seventh Circuit," but the rule at issue was not "clearly established" at the relevant time and defendant's construction was supported by other opinions); *see also Forrest v. JP Morgan Chase Bank, N.A.*, 2007 WL 2773518, at *5 (E.D. Pa. Sept. 21, 2007) (dismissing claim for willful violation where a Seventh Circuit decision supported plaintiff's construction of the FCRA provision at issue but other decisions supported defendant's interpretation).

Experian asked Levine during discovery whether there is any case law that supports his interpretation of the pertinent FCRA provision. (Ex. Q ¶ 1.) In response, Levine's counsel cited only a single district court decision, *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808 (W.D. Ky. 2003), as support for his view that a consumer reporting agency is not permitted to provide credit information to a creditor for "account review" purposes when the consumer's account with the creditor has been closed. (*Id.*) This decision is of course not from a court of appeals. *See Safeco*, 127 S. Ct. at 2216 (noting absence of authority "from the courts of appeal"). In any event, Experian could not be held to have willfully disregarded even *Bob Smith Chevrolet* because that decision was issued in August 2003, at least a year *after* the conduct that Levine claims gave rise to a willful violation of the FCRA.

**b. The Pertinent Language of the FCRA Is Not Clear**

The pertinent provision of the FCRA is also, at best for Levine, ambiguous. Under § 1681b(a)(3)(A), a consumer reporting agency may disclose a consumer report to a person for "review or collection of an account of[] the consumer," but the statute does not specify whether "account" excludes accounts that have been voluntarily closed. Indeed, *in this case* the Eleventh Circuit noted that the FCRA is "ambiguous" on this point and that the issue has given rise to a "difference of

opinion." *Levine*, 437 F.3d at 1121 (FCRA "does not explicitly state whether ['account review'] includes the review of accounts that have been paid in full and closed"). Under *Safeco*, Experian cannot be held to have willfully violated a provision of the FCRA that is, in pertinent part, ambiguous and susceptible to a difference of opinion. *See*, *e.g.*, *Murray*, 2007 WL 2317194, at *5-6 (defendant was entitled to summary judgment on willfulness claim where no authority provided "objective clarity" on FCRA provision at issue and rule advocated by plaintiff was not "clearly established").

Further, it is significant that, as in *Safeco*, this Court previously agreed with Experian's reading of the statute. (Order, 11/8/2004, at 10.) The Court was persuaded by the Fifth Circuit's analysis in *Wilting* and also noted that, unlike the provision at issue here which does not specify whether an "account" must be only a then-existing account, elsewhere in the FCRA Congress made clear that consumer reporting agencies are permitted to furnish a report only in connection with "an existing credit obligation." *See* 15 U.S.C. § 1681b(a)(3)(E). Citing 15 U.S.C. § 1681s-2(a)(2), the Court also noted that the "FCRA can be read as affirmatively *requiring* consumer reporting agencies and creditors to maintain the accuracy of consumer credit information, even after a consumer's account has been closed." (Order, 11/8/2004, at 10; emphasis in original.)

On appeal, the Eleventh Circuit saw the issue differently. Similarly, in *Safeco* both the Ninth Circuit *and* the Supreme Court disagreed with the district court's construction of the pertinent FCRA provision. But the Supreme Court nevertheless ruled that Safeco had not willfully violated the FCRA as a matter of law because, *inter alia*, its reading of the FCRA had "a foundation in the statutory text and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor." *Safeco*, 127 S. Ct. at 2216 (citation omitted). For the same reasons, Experian's conduct cannot, as a matter of law, be deemed "objectively unreasonable" here.

**c. There Was No Authoritative Guidance from the FTC**

As in *Safeco*, the FTC also has not issued any authoritative guidance on the statutory provision at issue. The FTC's official commentary on the FCRA does not elaborate on the phrase "review or collection of an account" and, specifically, does not address whether "account" as used in this provision means only then-existing accounts or includes closed accounts.[5]

[5] *See* 16 C.F.R. § 600, App. (commentary on "Permissible Purposes of Reports"; "section 604(3)(A) permits the furnishing of a consumer report for use in connection with a credit transaction involving the consumer, primarily for personal, family or household purposes, and involving the extension of credit to, or review or collection of an account of, the consumer").

Levine relies on two FTC staff opinion letters—which he admits are not binding authority—as support for his proposed reading of the statute.[6] (Ex. Q ¶ 8.) *Safeco* expressly rejects reliance on such letters as a basis for willfulness. In *Safeco*, the plaintiffs similarly invoked an opinion letter from the FTC's staff that supported their reading of the statute. The Supreme Court ruled, however, that this letter was not "authoritative guidance" of the type that might have "warned [Safeco] away from the view it took." *Safeco*, 127 S. Ct. at 2216.[7] The Court noted that the FTC "has only enforcement responsibility, not substantive rulemaking authority" for the FCRA. *Id.* Also, like the letters Levine points to here, the FTC letter invoked by the plaintiffs in *Safeco* "explicitly indicated that it was merely 'an informal staff opinion . . . not binding on the Commission,'" and it therefore did not provide support for plaintiffs' claim that Safeco had willfully violated the FCRA. *Id.* at 2216 n.19; *see also Broessel v. Triad Guar. Ins. Corp.*, 2007 WL 2155691, at *3 (W.D. Ky. July 25, 2007) (granting summary judgment

---

[6] *See* Ex. Q ¶ 8 ("The only official expression given by the FTC on the propriety of selling a consumer account for 'account review' purposes when the consumer's account with the requesting entity is closed are two FTC staff opinion letters. . . . Mr. Levine admits they are persuasive, not binding, authority.").

[7] *See also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

on willfulness claim notwithstanding two FTC staff opinion letters that supported plaintiff's interpretation of the FCRA provision at issue).

* * *

In sum, when Alliance conducted its account reviews in 2002, it was not clearly established (nor is it clearly established now) that the FCRA prohibited a creditor from obtaining credit information on a consumer whose account with the creditor had been closed. Under *Safeco*, Experian thus did not willfully violate the FCRA as a matter of law by providing Levine's credit information to Alliance, and is entitled to summary judgment on Levine's claim.

### 2. Experian Did Not Have a Clearly Established Duty To Search Its Records To Test Alliance's Certification

Levine's claim also fails under *Safeco* on the independent ground that there was no authority requiring Experian to implement *any* further procedures beyond obtaining the certifications it had from Alliance—let alone a duty requiring Experian to search its own records to *test* the accuracy of Alliance's certifications.

Under the FCRA, consumer reporting agencies must have prospective users of credit information "identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose." 15 U.S.C. § 1681e(a). Experian complied with this requirement, to the letter, by obtaining from Alliance a signed certification that "it will request and use

credit information received from Experian solely in connection with credit transactions" or "for other 'permissible purposes' as defined by the FCRA." (Ex. C ¶¶ 3-4.) Alliance further represented to Experian, in two separate letter agreements that Alliance executed in connection with the account review programs at issue here, that "[t]he purpose of this [account review] program is to provide the [credit] Score on *current customers* of Alliance Data Systems." (Exs. I & J, emphasis added.)

To be sure, as the Eleventh Circuit recognized, a certification alone is not sufficient if the consumer reporting agency has "reasonable indications" that the requester is seeking credit information for an impermissible purpose. *See Levine*, 437 F.3d at 1122. However, in the absence of such "reasonable indications," the certification procedure is sufficient as a matter of law to satisfy a consumer reporting agency's duties under the FCRA and shields it from any liability in connection with a creditor that uses a report (contrary to its certification) for an impermissible purpose. *See, e.g.*, *Pintos v. Pac. Creditors Ass'n*, ___ F.3d ___, 2007 WL 2743502, at *5 & n.6 (9th Cir. Sept. 21, 2007); *Wilson v. Sessoms*, 1998 U.S. Dist. LEXIS 8154, at *13-14 (M.D.N.C. Mar. 16, 1998).

Indeed, there was ample authority at the relevant time establishing that a consumer reporting agency may rely on a requester's certification that it will use

credit information only for permissible purposes—and the agency therefore cannot be held liable for a creditor's use of such information in alleged violation of the FCRA—where, as in this case, the *type* of entity requesting the credit information is not one (such as a criminal investigator or a political campaign) that would put the agency on notice of a need for extra scrutiny.[8] The FTC's official commentary on the FCRA makes a similar point.[9] And, before Experian furnished the credit

---

[8] *See, e.g., Lusk v. TRW, Inc.*, 173 F.3d 429, *1 (6th Cir. 1999) (table, text in Westlaw) (affirming summary judgment; credit reporting agency had sufficient reason to believe certification as the "stated purpose for the request, pre-rental screening, constituted a legitimate business need even though it was erroneous"); *Dobson v. Holloway*, 828 F. Supp. 975, 977 (M.D. Ga. 1993) (granting summary judgment to credit bureau where auto dealer certified that it sought credit reports for permissible purposes); *Davis v. Asset Servs.*, 46 F. Supp. 2d 503, 508 (M.D. La. 1998) (granting summary judgment to credit reporting agency where it "had no reason to doubt" collection agency was "accessing its on-line database for a permissible purpose" in accordance with its certification); *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71 (S.D.N.Y. 1982) (credit reporting agency was not liable for requester's impermissible use of a report where requester "is primarily in the business of requesting reports for proper purposes (employment) and there was no showing that TRW knew of the improper purpose for the report issued"; "certification to TRW constituted sufficient 'reason to believe' on the part of TRW that [requester] had a legitimate business need for the report").

[9] *See* 16 C.F.R. § 600, App. (Part 2.C of commentary on § 607 of the FCRA; a consumer reporting agency should obtain separate certifications for each request when "furnishing reports to users that typically could have both permissible and impermissible purposes for ordering consumer reports (e.g., attorneys and detective agencies)," but need not obtain separate certifications for "a user (e.g., a creditor) that typically has a permissible purpose for receiving a consumer report"); *see also id.* (Part 2.D; noting that "*when doubt arises* concerning any user's compliance with its contractual certification, a consumer

information at issue to Alliance, this Court had dismissed two nearly identical lawsuits by Levine against another consumer reporting agency due to Levine's failure to allege any reason to suspect that the requester sought his report for an impermissible purpose. *See supra* n.1. Thus, at a bare minimum, there was no clearly established authority that would have required Experian to adopt procedures to test the accuracy of Alliance's facially valid certification in connection with its semi-annual account review program.

The only argument Levine has offered as to why Experian was purportedly required to go beyond Alliance's certifications is that Alliance's stated purpose of "account review" was "implausible" with respect to his account because Experian's "own data" showed that his Structure account had been closed. (Ex. F ¶ 12.) But this puts the cart before the horse. An agency can find that a facially valid certification is suspicious based on the contents of its "own records" only if it has some preexisting duty to test *every* certification by searching those records.

(continued…)

reporting agency must take steps to insure compliance, such as requiring a separate, advance certification for each report it furnishes … or auditing that user") (emphasis added).

Levine cannot point to any authority, let alone clearly established authority, imposing such a duty—which, again, is dispositive under *Safeco*.[10]

Although Levine has identified no other reason for Experian to have suspected the accuracy of Alliance's certifications, it is worth noting that discovery has confirmed beyond question that there was no reasonable ground for Experian to have questioned Alliance's certification. As an initial matter, nothing about the nature of Alliance's business or its request gave Experian any reasonable basis for doubting Alliance's certifications—including Alliance's representations that it sought credit information only in connection with its "current customers" and "individuals with whom it has a credit relationship." (Exs. I, J.; Ex. C ¶ 3.) Experian knew Alliance was in the business of extending consumer credit to tens of millions of individuals and that, on a semi-annual basis, it requested consumer

[10] There is good reason for the absence of any authority imposing such a duty. Discovery has shown that it is simply infeasible for an agency like Experian to routinely identify which of the more than 30 million accounts in an account review program like Alliance's had been voluntarily closed. Experian's Rule 30(b)(6) witness testified that Experian's systems would have had to separately examine 450 million items more than 30 million times—*i.e.*, 13.5 *billion* separate inquiries—to verify that Alliance had sought information only in connection with its current accounts. (Ex. D at 246-49.) As this witness explained, it would be a "nightmare" for Experian to do this for each of its subscribers and "would probably put us out of business." (Ex. D at 132, 227.) Levine has not designated any expert who would or could rebut this showing. And, in any event, even if he had *Safeco* would still compel summary judgment here because there was no clearly established duty for Experian to undertake to verify Alliance's representations.

reports for the permissible purpose of reviewing their accounts. (Ex. H at 29; Ex. B at 96-98; Exs. I, J.) As an issuer of credit cards, Alliance is not an entity that, by its very nature, is likely to have an impermissible purpose for seeking credit information and there was, thus, no reason for Experian to doubt the accuracy of Alliance's certification.[11]

In addition, in the time that Experian had been furnishing consumer reports to Alliance as part of its Semi-Annual Account Review Program, not once had Experian ever been put on notice or given any reason to believe that Alliance had used consumer reports for an impermissible purpose. (Ex. H at 117-18.) *See Wilson*, 1998 U.S. Dist. LEXIS 8154, at *7 (granting summary judgment where there was "no evidence that Credit Bureau or Equifax had ever received any complaints, nor that Credit Bureau or Equifax had any reason to believe, that Street & Co. [the requester] had accessed a consumer report for an impermissible purpose until Plaintiff's complaint").

Further, before Levine commenced this lawsuit, neither Levine nor any other consumer had ever complained to Experian that Alliance had requested credit

---

[11] *Compare, e.g., Centuori v. Experian Info. Solutions, Inc.*, 431 F. Supp. 2d 1002, 1009 n.9 (D. Ariz. 2006) (stating that, where requests "came from a criminal investigator working for a criminal attorney," Experian was on notice that the requester might be seeking information for impermissible purposes).

information in connection with closed accounts. (Ex. L ¶¶ 10-11; Ex. A at 37; Ex. H at 117-18.) Only when an unidentified consumer complained to *Alliance* did Alliance change its procedures, in July 2003, to no longer request consumer reports from Experian in connection with closed accounts. (Ex. K at 73-75; Ex. B at 43-44.) But Alliance never communicated to Experian that it had previously requested information in connection with closed, zero-balance accounts, nor that it had ceased requesting such information as of July 2003. (Ex. K at 75-76.)

In short, Levine cannot identify any clearly established authority imposing a duty on Experian to test the accuracy of Alliance's certifications against Experian's "own records," and he has identified no other reason—and the discovery record establishes there is no reason—why Experian should have suspected the accuracy of those certifications. *Safeco* requires summary judgment on this ground, too.

## CONCLUSION

The Court should therefore grant Experian's motion for summary judgment and enter judgment for Experian on all of Levine's claims in his First Amended Complaint.

Dated: October 10, 2007

Respectfully submitted,

/ s / Gregory R. Hanthorn

Gregory R. Hanthorn
(Ga. Bar No. 323937)
Michael Wolak, III
(Ga. Bar No. 773197)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053
(404) 521-3939/Telephone
(404) 581-8330/Facsimile

*Attorneys for Defendant*
*Experian Information Solutions, Inc.*

Of counsel:

Meir Feder
Todd R. Geremia
Kate Bushman
JONES DAY
222 East 41st Street
New York, New York 10017-6702
(212) 326-3939/Telephone
(212) 755-7306/Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that on October 10, 2007, I electronically filed the foregoing DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the Court's CM/ECF system, which will automatically send an e-mail notification of such filing to the following counsel of record:

A. Thomas Stubbs
755 Commerce Drive, Suite 720
Decatur, Georgia 30030

Terry A. Smiljanich
James Hoyer Newcomer & Smiljanich, P.A.
One Urban Centre, Suite 550
4830 West Kennedy Boulevard
Tampa, Florida 33609-2517

*Attorneys for Plaintiff Stephen G. Levine*

/ s / Michael Wolak, III
Michael Wolak, III
(Ga. Bar No. 773197)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053

*Attorneys for Defendant*
*Experian Information Solutions, Inc.*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1D, I hereby certify that the foregoing DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT has been prepared with one of the font and point selections (Times New Roman / 14 point) approved by this Court in Local Rule 5.1B.

Dated: October 10, 2007

/ s / Michael Wolak, III
Michael Wolak, III
(Ga. Bar No. 773197)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053

*Attorneys for Defendant*
*Experian Information Solutions, Inc.*