NO. 20-297

In the
Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX
Volume III of III

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Memorandum of Points and Authorities in Support of Renewed Motion for Judgment as a Matter of Law (N.D. Cal. July 19, 2017)

I. INTRODUCTION

Defendant TransUnion LLC ("TransUnion") requests that the Court set aside or amend the judgment in favor of plaintiff Sergio Ramirez ("Plaintiff") and the class, which awards an unprecedented sum to a class that sustained no measurable harm from the practices at issue here. The evidence supports neither the massive verdict nor the liability findings underlying it.

First, the evidence does not support a finding that TransUnion willfully violated the Fair Credit Reporting Act ("FCRA"). TransUnion's witnesses testified in detail and without contradiction that prior to the class period they made objectively reasonable efforts to comply with the FCRA, in response to the appellate ruling in *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010). Plaintiff argued that TransUnion did not do enough to comply with *Cortez*, but the evidence showed no willful violation of the FCRA or any particular mandate of *Cortez*. To the contrary, the evidence showed that TransUnion was mindful of *Cortez* and employed "reasonable procedures for meeting the needs of commerce for consumer credit." *See* 15 U.S.C. § 1681(b). No substantial evidence showed that TransUnion willfully violated any clear legal guidance, harmed the class or even exposed the class to any material risk of harm.

Second, the damages awarded—both statutory and punitive—were grossly excessive and so

disproportionate to the lack of actual impact on the class as to shock the conscience. Plaintiff made no attempt to prove that 8,184 of 8,185 class members suffered any injury ***at all***. Moreover, because TransUnion changed its practices years ago, no allegedly violative conduct remains to be deterred. The jury's $8.1 million statutory damages award vastly exceeds any appropriate measure of punishment and deterrence for conduct that was not proved to cause any actual harm.

Yet the jury did not stop with its outsized statutory damages award; it then piled on more than *$50 million* in punitive damages—again, for practices that Plaintiff never even tried to prove caused any class member any concrete injury. The total award of more than $60 million is grossly disproportionate not only to the (complete lack of) evidence of harm, but also to TransUnion's economic activity during the class period, hugely exceeding TransUnion's gross revenue from Name Screen sales for all of 2011, the relevant year, by a factor of nearly thirty to one, and greatly exceeding TransUnion's profits for ***all*** of its economic activity in 2011.

Both the statutory and the punitive damages awards are unduly punishing and cannot be justified on either compensatory or deterrence grounds, but the punitive damages award is particularly egregious and unconstitutionally excessive, constituting impermissibly duplicative punishment. Statutory damages are intended, at least in part, to serve the same punishment and deterrence ends as punitive damages. Thus, when statutory damages are awarded to every member of the class of individuals potentially

injured by the relevant conduct, no punishment or deterrence is left to achieve. That is particularly true here, where the plaintiff made no attempt to prove that the class suffered any concrete injury, thus leaving the statutory damages award explained only in terms of punishment and deterrence, rather than compensation. Imposing ***any*** punitive damages on top of class-wide statutory damages thus created a grave risk of impermissible overlap, and the punitive damages verdict ***six-and-a-half times*** larger than the statutory damages award shows that this "risk" became a certainty. Such a massive award cannot be understood as anything other than the product of a jury inflamed by passion, prejudice, and rampant improper arguments by Plaintiff's counsel. At a minimum, TransUnion is entitled to a remittitur or a new trial on damages.

Third, the evidence did not support the class certification theory here, and thus the judgment does not comply with Rule 23. The evidence shows that Plaintiff's claim was highly atypical of the class. Moreover, no evidence was presented to show that class members sustained any concrete injury. Many class members also were never given notice of these proceedings.

The evidence and the law do not support the judgment as entered, and it should be set aside.

II. FACTS

A. TransUnion's Name Screen Product

TransUnion launched the initial version of its Name Screen product in 2002, which was intended to help lenders conduct preliminary data screens of the U.S. Treasury's Office of Foreign Assets Control

("OFAC") Specially Designated Nationals ("SDN") list to ease their USA PATRIOT Act compliance burden. (Trial Tr. (O'Connell) 459:24-460:10.)

Critically, the evidence at trial, including the testimony of both parties' experts, established that "interdiction software" products like Name Screen are simply not used to make credit decisions or to determine conclusively that an individual is on the SDN list. (Trial Tr. (Sadie) 622:5-623:6, (Ferrari) 430:9-25.) Rather, as even Plaintiff's expert, Erich Ferrari, confirmed, because of the length and complexity of the SDN list, lenders understand that such products are to be used only as a "first line of defense" in identifying "possible" matches to list data, which then must be confirmed with further human analysis. (Trial Tr. (Ferrari) 430:9-25.) Because it was intended to be only the first step in a compliance review process, using a name-only screening technology was appropriate and did not risk material harm to consumers. (Trial Tr. (Sadie) 625:23, 626:18, 636:6-637:11; *see also id.* at 620:1-624:12.)

TransUnion did not develop the Name Screen product itself, but instead contracted with a third-party vendor, Accuity. (Trial Tr. (Gill) 306:15-17.) As explained by TransUnion Vice President of Product Development Michael O'Connell, TransUnion chose Accuity because "Accuity was the most widely-used software by financial institutions at the time" and it was "the best that was out there." (Trial Tr. (O'Connell) 500:1-20.) Colleen Gill, TransUnion's former Director of Product Development and Management, also noted Accuity's "very high level clearance and endorsement by the American Bankers

Association" and that "they ha[d] been doing all types of financial services compliance for a very long time." (Trial Tr. (Gill) 341:24-342:10.)

The Accuity software used name-only matching technology. (Trial Tr. (O'Connell) 463:1-8.) Long before the class period, TransUnion renamed the product "Name Screen" to indicate that it screened only by name. (Trial Tr. (Gill) 341:6-10.) The evidence showed, without contradiction, that the limited nature of interdiction software, and its appropriate use, was communicated repeatedly to end-users. (Trial Tr. (Gill) 353:5-11, (Sadie) 627:16-628:16, 640:19-641:19.) Indeed, TransUnion's expert, Jaco Sadie, testified that during the January to July 2011 class period, financial institutions regularly used interdiction software only in the limited manner expressly directed by TransUnion. (Trial Tr. (Sadie) 623:7-624:12.) And the documentary evidence confirmed this expert testimony. With respect to Dublin Nissan in particular, the dealer's contract for OFAC screening expressly stated that an OFAC name "match" was "merely a message that the consumer may be listed" and did not indicate that the consumer was actually on the OFAC list:

> Client acknowledges that such an indicator is merely a message that the consumer may be listed on one or more U.S. government-maintained lists of persons subject to economic sanctions, and Client further certifies that in the event that a consumer's ***name*** matches a ***name*** contained in the information, it will contact the appropriate government agency for confirmation and

> instructions. Client understands that a "match" ***may or may not apply*** to the consumer whose eligibility is being considered by Client, and that in the event of a match, Client should not take any immediate adverse action in whole or in part until Client has made such further investigations as may be necessary (i.e., required by law) or appropriate (including consulting with its legal or other advisors regarding Client's legal obligations).

(Trial Tr. (Coito) 279:20-282:8 & Ex. 42 § G.1 at 042-007 (emphasis added).)

B. TransUnion's Response to the *Cortez* Decision

In October 2005, Sandra Cortez sued TransUnion for alleged violations of the FCRA arising from TransUnion's reporting to a third party that Cortez's name was a "match" to a similar name ("Sandra Cortes") on the OFAC list, and for not disclosing this to her when she requested a copy of her credit file. In April 2007, a jury found in favor of Cortez, and the decision was affirmed by the Third Circuit in 2010. *See Cortez v. Trans Union, LLC*, No. CIV.A.05-CV-05684JF, 2007 WL 2702945, at *2 (E.D. Pa. Sept. 13, 2007), *aff'd*, 617 F.3d 688 (3d Cir. 2010).[1]

[1] The Third Circuit affirmed jury findings that TransUnion negligently failed to maintain reasonable procedures to assure maximum possible accuracy in reporting the "match" and willfully failed to disclose information about the reported "match" to Cortez. *See Cortez*, 617 F.3d at 705.

After the *Cortez* jury verdict, and while the appeal was pending, TransUnion used a "rules feature" within Accuity's product to reduce the hit rate from the approximately 5% delivered in its "off-the-rack" state, to a rate of 1%, which was lower than what others delivered. (Trial Tr. (O'Connell) 493:15-494:1, 494:18-21.) It was significantly lower than the 20% hit rate described by Plaintiff's witness, Ferrari, as concerning. (Trial Tr. (Ferrari) 429:14-25.)

In 2010, before the class period here began, TransUnion changed OFAC header language on reports that it sold from "input name matches" to "input name is potential match." (Trial Tr. (Gill) 350:25-352:23; ECF No. 303-1 at 3-6 (Acharya), Ex. 62.)[2] The change was announced widely to Name Screen resellers and users. (Trial Tr. (Gill) 352:20-353:10, Ex. 70.) TransUnion also developed a disclosure letter for consumers whose names were considered to be a potential match to an OFAC-listed name. (Trial Tr. (Katz) 585:19-585:25, Ex. 3.) In addition, TransUnion expanded upon and refined its procedure whereby consumers could dispute the delivery of an OFAC result and block future results. (Trial Tr. (O'Connell) 501:1-5, (Briddell) 771:14-772:20.)

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[2] Ruling on post-trial motions, the *Cortez* trial court noted, "It may well be that the defendant could have escaped liability if it merely reported that the plaintiff's name was (arguably) similar to a name on the OFAC list" rather than reporting plaintiff's name as a "match." *Cortez*, 2007 WL 2702945, at *1. The Third Circuit similarly observed, "The alert on Cortez's credit report does not state that the names are 'similar' to someone on the SDN List or that a match is 'possible.' It reported a 'match' with someone on the SDN List." *Cortez*, 617 F.3d at 708-09.

Steven Katz, TransUnion's Vice President of Consumer Affairs and Operations at the time, contributed to drafting the OFAC letter and testified that TransUnion "wanted to inform the consumer as much as possible about why they were receiving the letter and we felt that this explained as much as possible about how the information might be used by a potential lender in the process that they might be asked to go through once the lender or creditor had received that information." (Trial Tr. (Katz) 590:17-590:22.) In response to the OFAC letter, more consumers contacted TransUnion and were able to successfully block OFAC results from appearing on their TransUnion reports. (Trial Tr. (Briddell) 785:5-10, 810:4-8.) No evidence showed that ***any*** class members failed to understand the information provided.

TransUnion also improved its accuracy rate by demanding that Accuity cease use of a "Synonyms" file, which returned "matches" between names with different spellings (such as the Cortez/Cortes match in *Cortez*). (Trial Tr. (O'Connell) 474:7-9; ECF No. 303-1 at 15-17 (Newman).) Ceasing use of the "Synonyms" file reduced the hit rate to one-half of one percent. (Trial Tr. (O'Connell) 494:18-21.) Mr. O'Connell testified that, to the best of his knowledge, the post-*Cortez* Name Screen product had the lowest false positive rate of any OFAC software on the market. (Trial Tr. (O'Connell) 505:4-6.) It also produced a lower hit rate than is achieved today with OFAC's website search tool, which recommends "fuzzy logic" match techniques. (Trial Tr. (Sadie) 649:4-650:15, Ex. 79.) No evidence showed that any other interdiction software achieved a lower hit rate on a statistical basis

or would not have delivered data as to this class. To the contrary, although Plaintiff ***argued*** that TransUnion could have used date-of-birth filtering technology during the class period (Trial Tr. (O'Connell) 487:18-23, 839:6-840:2), argument is not evidence, and no evidence showed that this was reasonable or even feasible in 2011, let alone that it would have led to different reporting as to every member of the class. Rather, TransUnion's expert witness testified that in 2011 it was not standard financial industry practice to use date-of-birth filtering to reduce the amount of data receiving human review. (*See* Trial Tr. (Sadie) 621:8-13.) Nor does OFAC's website search tool permit date-of-birth filtering. (*See* Ex. 79.)

C. The Dublin Nissan Credit Report

In February 2011, Plaintiff and his wife visited Dublin Nissan to purchase a car. (Trial Tr. (Ramirez) 141:2-4.) Plaintiff's wife was intended to be the primary driver of the vehicle. (Trial Tr. (Ramirez) 160:7-8.) Plaintiff's wife filled in Plaintiff's name on a joint credit application, which both she and Plaintiff signed, providing Plaintiff's name as simply "Sergio Ramirez," leaving a blank space on the part of the form requesting a middle name. (Trial Tr. (Ramirez) 162:6-13, Ex. 43.) The dealer used Plaintiff's information to obtain data about him through a third-party data aggregator. (Trial Tr. (Ramirez) 142:21-143:6.) A report provided to the dealer by the aggregator via a reseller of TransUnion data included a "SPECIAL MESSAGES" section that included several lines reading: "***OFAC ADVISOR ALERT—INPUT NAME MATCHES NAME ON THE OFAC

DATABASE," followed by two names and the information from the OFAC list to allow the user to complete its PATRIOT Act compliance process and clear the applicant. (Ex. 1.) Each of the OFAC names delivered contained "Sergio" as one of the subject's two given names and "Ramirez" as one of the subject's two surnames. (Trial Tr. (Ramirez) 146:9-14, Ex. 1, (O'Connell) 469:1-18.) When the salesperson informed Plaintiff of the results, Plaintiff "asked him to double check and he just wouldn't." (Trial Tr. (Ramirez) 147:16-18.) This was contrary to the dealership's policy, to training the salesperson had received, to contractual limitations on the use of Name Screen data and to instructions set forth on OFAC's website. (Trial Tr. (Coito) 251:22- 252:2, 263:9-25, 276:9-18, 281:21-282:8, (O'Connell) 518:20-519:15, 520:25-521:16, Exs. 42, 74.) Instead, rather than follow a formal process of clearing Plaintiff, the salesperson took the informal shortcut of resubmitting the transaction with Plaintiff's wife as the sole purchaser. (Trial Tr. (Ramirez) 147:24-148:8.) Plaintiff believed that the salesperson "just wanted to sell the car" and "obviously knew" that he was not on the list. (Trial Tr. (Ramirez) 147:18-23.)

Although the Dublin Nissan credit report was often referred to at trial by Plaintiff's counsel as a "TransUnion credit report," the Dublin Nissan report was not prepared by TransUnion. TransUnion Senior Vice President Peter Turek explained that Dublin Nissan obtained Plaintiff's credit report via a reseller, Open Dealer Exchange ("ODE"). (Trial Tr. (Turek) 747:23-748:20.) The Dublin Nissan report differed significantly from the authorized TransUnion report format in use at the time, including (among several

other variations) the lack of the new "potential match" language. (ECF No. 303-1 at 55-56 (Lytle), Ex. 93.) Mr. Turek also confirmed that, beginning in 2010, resellers like ODE were required to describe Name Screen results as "potential matches" rather than "matches," and that he was unaware of any other resellers that failed to include the mandatory "potential match" language added in 2010. (Trial Tr. (Turek) 747:13-747:22.) No evidence was presented at trial establishing that anyone other than Dublin Nissan received a report that lacked the post-*Cortez* "potential match" language, or that any report other than Plaintiff's report failed to include this change.[3]

At trial, the parties stipulated to the following facts:

> The class certified by the Court contains 8,185 consumers. Out of 8,185 consumers in the class, Name Screen data was delivered to a potential credit grantor with respect to 1,853 consumers during the class period of January 1, 2011 through July 26, 2011.

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[3] The witness from the company that provided Dublin Nissan's dealer management systems, DealerTrack, corroborated that to retrieve credit data, its system merely passes along the "credit bureau codes" provided to it by the dealer. (Trial Tr. (Vale) 213:17-214:5.) This witness had no knowledge of the actual codes that were input, and no documentary evidence was presented to show what codes were input. (Trial Tr. (Vale) 235:10-12.) No evidence contradicted TransUnion's evidence that the Dublin Nissan report (although based on data obtained from TransUnion by ODE) was prepared and delivered by ODE, not TransUnion. TransUnion objected to the document repeatedly on foundational grounds and under Federal Rule of Evidence 403.

> Out of the 1,853 consumers for whom Name Screen data was delivered to a potential credit grantor, 40—that's four zero—were delivered via the reseller ODE or one of its affiliates during the class period of January 1, 2011 through July 26, 2011.

(ECF No. 289; *see* Trial Tr. 402:3-8.)

D. Disclosure of OFAC Information to Plaintiff

After his experience at Dublin Nissan, Plaintiff telephoned TransUnion. (Trial Tr. (Ramirez) 150:20-24.) In response to that telephone call, TransUnion mailed to Plaintiff his traditional credit information in the format of a personal credit report, and a separate letter disclosing to him that his name was considered to be a potential match to the OFAC list. (Trial Tr. (Ramirez) 150:20-151:8.)[4] After receiving both items, Plaintiff sent a handwritten note to TransUnion to dispute that he was a potential match, and TransUnion responded by blocking future results from being delivered on all future TransUnion reports. (Trial Tr. (Ramirez) 156:23-157:9.) Plaintiff knew that he had the right to dispute information on his credit file because he had done so in the past. (*See* Trial Tr. (Ramirez) 164:21-165:2.) Plaintiff's dispute was resolved in his favor within the timeframes set forth

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[4] Although Plaintiff's counsel argued that it was wrongful for TransUnion's telephone operators not to disclose OFAC information to Plaintiff immediately when he called (Trial Tr. (Ramirez) 150:20-151:3, 859:23-860:7), this is not a requirement of the FCRA. The FCRA does not mandate disclosure on-demand over the telephone. 15 U.S.C. §§ 1681h(a)(2), 1681h(b)(2)(B) (telephonic disclosure must be preceded by written request for telephonic disclosure).

in 15 U.S.C. § 1681i. (*See* Trial Tr. (Ramirez) 156:23-158:9.) There was no evidence that, due to the manner of disclosure, or due to any particular language in the disclosure (such as its use of the term "courtesy"), any class member did not understand his rights. Nor was there any evidence that any class member had any difficulty disputing OFAC data.

E. Damages

With respect to damages, the ***only*** evidence introduced related to Plaintiff's own unique experience. It was not disputed that Plaintiff's vehicle purchase was completed on the same financial terms and with the same time of vehicle delivery as otherwise would have occurred. (*See* Trial Tr. (Ramirez) 148:6-8, 155:5-9.) The only difference in the transaction was that Plaintiff's wife was on the title alone. (Trial Tr. (Ramirez) 147:24-148:1.) Plaintiff also testified that due to concern about the Name Screen result, he canceled a trip to Mexico, in spite of his knowledge of the correction of his TransUnion file. (Trial Tr. (Ramirez) 155:5-9.)

No evidence was presented that any other class member was denied credit, had a transaction delayed or canceled travel as a result of TransUnion's sales of Name Screen to third parties or as a result of how it was disclosed to consumers. Nor was any evidence presented to suggest that class members were confused or were discouraged from exercising their FCRA rights. To the contrary, data presented by Denise Briddell suggested that the format encouraged contact with TransUnion. (Trial Tr. (Briddell) 785:5-10, 810:4-8, Ex. 69.) Plaintiff presented the class case on the theory that no evidence of class-wide damages

need be proffered. (*See* Trial Tr. 110:17-112:5.) No evidence quantified the "potential risk" allegedly resulting from TransUnion's practices.

F. The Verdict and Its Relationship to TransUnion's Economic Activity

The jury here awarded of $984.22 in statutory damages per class member and $6,353.08 in punitive damages per class member. (ECF No. 309.) Based on a class size of 8,185, this calculates to $8,055,840.70 in statutory damages and $51,999,959.80 in punitive damages, or a total of $60,055,800.50. The total reflects approximately four percent of TransUnion's 2016 net worth. It also exceeds TransUnion's ***entire*** economic activity during the class period, and it dwarfs TransUnion's revenue from the Name Screen product by a factor of nearly thirty. As shown in the concurrently filed Declaration of David Gilbert, TransUnion's gross revenue (*i.e.*, not taking costs into account) from sales of Name Screen in 2011 was approximately $2,100,000. (*See* Declaration of David Gilbert ("Gilbert Decl.") ¶ 2.) TransUnion's net income (profit) in 2011 from ***all*** business operations, *i.e.*, not limited to Name Screen sales, was approximately $41,000,000. (*See id.* ¶ 3).[5]

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[5] Rule 59(c) permits submission of affidavits with a new trial motion. Unlike a Rule 60 motion for relief from judgment, Rule 59(c) does not require a showing that the moving party could not have obtained material earlier through the exercise of reasonable diligence. *See Benton v. United States*, 188 F.2d 625 (D.C. Cir. 1951) (allowing affidavit that contradicted trial testimony). Moreover, because 15 U.S.C. § 1681n(a)(2) states that punitive damages are to be "as the court may allow," the Court should

III. ARGUMENT

A. Legal Standards

1. Standard on a Motion for Judgment as a Matter of Law

A party is entitled to judgment as a matter of law if no reasonable jury would have had a legally sufficient evidentiary basis to find against the party. Fed. R. Civ. P. 50(a)(1). "A jury's verdict must be upheld if it is supported by 'substantial evidence.'" *S.E.C. v. Todd*, 642 F.3d 1207, 1215 (9th Cir. 2011) (citing *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994)). "Substantial evidence is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion from the same evidence." *Id.* (citing *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007) (citation and internal quotation marks omitted)). TransUnion filed a written motion under Rule 50(a) and argued it orally at trial, and accordingly TransUnion may renew that motion now "and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b).

2. Standard on a Motion for New Trial or to Alter or Amend a Judgment

Under Rule 59(a), "[t]he trial court may grant a new trial, even though the verdict is supported by substantial evidence, if 'the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.'" *Roy v.*

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consider this information even though it was not presented to the jury.

Volkswagen of Am., Inc., 896 F.2d 1174, 1176 (9th Cir. 1990) (quoting *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976)); *see also Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 540 (1958) (federal judge has "discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence.").

Rule 59(a) also permits the granting of a new trial to address a "grossly excessive" award of damages, or to order damages remitted. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir. 1996). A new trial also may be granted to address instructional error. *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir. 1996). "[T]he existence of substantial evidence does not prevent the court from granting a new trial if the verdict is against the clear weight of the evidence. 'The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party.' Therefore, the standard for evaluating the sufficiency of the evidence is less stringent than that governing the Rule 50(b) motions for judgment as a matter of law after the verdict." *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 420 F. Supp. 2d 1070, 1075-76 (N.D. Cal. 2006) (quoting *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987)).

Rule 59(e) permits amendment of a judgment "if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law." *O2 Micro*, 420 F. Supp. 2d

at 1075 (quoting *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)).

B. Plaintiff Failed to Present Sufficient Evidence That TransUnion Willfully Violated the Requirement of § 1681e(b) to Employ Reasonable Procedures to Assure Maximum Possible Accuracy of the Information in Class Members' Credit Reports.

TransUnion is entitled to judgment as a matter of law, or to a new trial, because the evidence did not support a finding that TransUnion willfully violated 15 U.S.C. § 1681e(b).

The FCRA requires consumer reporting agencies, in creating credit reports, to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). A "willful" violation of the FCRA occurs only if the defendant either knew that it was violating clearly established law or that it took such an "obvious" risk of violating the law that its culpability was substantially greater than ordinary negligence. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68-69 (2007); *see also Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604, 611 (6th Cir. 2016) (holding that plaintiff must prove that the defendant disregarded "a high risk of harm of which it should have known").

Here, Plaintiff failed to present substantial evidence either: (1) that TransUnion failed to follow reasonable procedures to assure maximum possible accuracy of the information it reported; or (2) that any violation of § 1681e(b) in this regard was willful.

First, the evidence showed that TransUnion's Name Screen product met the "maximum possible accuracy" standard because it accurately conveyed precisely the information that it was designed to convey: whether an individual's ***name*** was a possible match to the OFAC list, such that the user of the information could perform its own due diligence in reaching a final determination of whether the ***individual*** was on the list. (Trial Tr. (Sadie) 621:8-622:4, (Ferrari) 430:13-25.) The testimony of both parties' experts established that "interdiction software" products like TransUnion's Name Screen are simply not used, without further human review, to determine that an ***individual*** is on the OFAC list; rather, they are understood to provide only first-level checks to be buttressed by human review. (Trial Tr. (Ferrari) 430:9-25, (Sadie) 625:23-626:18, 636:6-637:11; *see also id.* at 620:1-624:12.) The evidence also showed that the proper—and limited—use of interdiction software results was communicated to the end-users. (Trial Tr. (Gill) 353:5-11, (Sadie) 627:16-628:16, 640:19-641:19.) For instance, Dublin Nissan's contract for OFAC screening corroborated that an OFAC name "match" was "merely a message that the consumer may be listed" and that "a 'match' may or may not apply to the consumer whose eligibility is being considered." (Trial Tr. (Coito) 279:20-282:8, Ex. 42 § G.1 at 042-007 (emphasis added).) No evidence showed that, except with respect to Plaintiff, any end-user misused any OFAC Name Screen sold with respect to any member of the class.

In short, the evidence at trial showed that TransUnion was asked by its customers during the class period to report only whether the ***name*** of an

individual matched a name on the OFAC list. (Trial Tr. (Gill) 340:3-341:10, (O'Connell) 491:2-5.) TransUnion was not asked to cross-check the individual's name with other information such as date of birth, address, nationality or any other information that might be included within the OFAC database. (*Id.*) Nor did TransUnion ever lead end-users to believe that TransUnion might cross-check these factors. These were things that the end-users themselves would check, and in fact were in a better position to check because of their direct access to the consumer and the consumer's identity verification documents (such as a driver's license). (Trial Tr. (Sadie) 620:10-621:7.) Because TransUnion accurately reported only what it was asked to report, and accurately described the limited nature of what it was reporting, it did not violate § 1681e(b) by including name-only matches in the credit reports it provided to its customers. In other words, because users understood the limited purpose for which a Name Screen would be employed, and because TransUnion expressly and repeatedly explained to users that limited purpose and because TransUnion (post-*Cortez*) changed the result delivery format to describe results as merely ***potentially*** matching the input name provided by the user, no substantial evidence shows that TransUnion willfully provided information that was either "patently incorrect" or "misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009); *see also* FTC, Report to Congress Under Sections 318 and 319 Under the Fair and

Accurate Credit Transactions Act of 2003 at 46 (Dec. 2004) (refusing to recommend a rule that would mandate perfect data matching: "The CRAs often identify matches that are close, but not perfect. Accepting an imperfect match risks inaccuracy. . . . On the other hand, rejecting the match risks incompleteness. The CRAs attempt to minimize both inaccuracy and incompleteness, but the limitations of the identifying information mean that they cannot eliminate both. If the CRA adopts a 'stricter' matching algorithm that reduces inaccuracy, the necessary result is that incompleteness will increase."). Here, when used as intended, Name Screen results would not be expected to adversely affect credit decisions. (Trial Tr. (Sadie) 622:5-623:6, (Ferrari) 430:9-25.)

Toliver v. Experian Info. Solutions, Inc., 973 F. Supp. 2d 707 (S.D. Tex. 2013), is instructive. The *Toliver* plaintiff alleged that certain codes used by a consumer reporting agency were inaccurate or misleading because they might be read by third parties as implying something other than what the agency intended. *See id.* at 714 (alleging that it was misleading to label an account as "open" as opposed to being "charged off"). However, because the plaintiff provided no evidence that the agency ever characterized the codes as meaning anything other than their defined meanings, the court determined that the reporting was "undeniably accurate," in spite of plaintiff's claim that the codes were misused; the agency had a right to expect that its reporting would be used as intended. *See id.* at 717-19; *see also Dickens v. Trans Union Corp.*, 18 F. App'x 315, 318 (6th Cir. 2001) (credit report was not inaccurate because user

understood how the information was supposed to be used). Further, in *Shaw v. Experian Info. Sols., Inc.*, No. 13-CV-1295 JLS (BLM), 2016 WL 5464543, at *10 (S.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56587 (9th Cir. Oct. 25, 2016), summary judgment was entered against a class on the grounds that a consumer reporting agency is not responsible for a user's misreading of data that was transmitted. Here, as in *Tolliver* and *Shaw*, the uncontroverted evidence showed that TransUnion made substantial efforts to ensure that users read and applied Name Screen data properly. (Trial Tr. (Gill) 344:9:19, 345:11-348:15, (Turek) 747:13-747:22.) TransUnion's expert also confirmed that, as a common practice, lenders understand how to properly use results received from interdiction software like Name Screen. (Trial Tr. (Sadie) 615:3-616:23.)

Plaintiff offered no substantial evidence to the contrary. Indeed, Plaintiff failed to present evidence of the existence of any ***possible*** technology that in 2011 could have achieved a greater accuracy rate, or at least any such technology that TransUnion actually knew of then. Likewise, the only evidence of an end-user failing to properly verify a possible OFAC match was Plaintiff's own transaction at Dublin Nissan. (Trial Tr. (Ramirez) (146:2-14.) Although Plaintiff's expert, Mr. Ferrari, testified (over TransUnion's objection) that he had seen creditors decline to do business with individuals based solely on interdiction software results, he did not state when this occurred (*i.e.*, during or after the class period), whether it had happened to any class members, how many times he had seen this, or whether the unnamed creditors he referred to relied upon name-only matching

technology or instead, had reached a conclusion to decline business based on interdiction software that also used other criteria. (Trial Tr. (Ferrari) 425:2-426:12, 432:15-17.) Moreover, Dublin Nissan's General Manager testified that, in the only other instance in her experience where interdiction software delivered a "hit," the dealer completed the transaction promptly after confirming that the customer was not on the OFAC list. (Trial Tr. (Coito) 268:25-270:16.) A single aberrant anecdote describing a report not even prepared by TransUnion is simply not sufficient evidence of a class-wide violation of § 1681e(b).

Second, even if Plaintiff introduced sufficient evidence that TransUnion violated § 1681e(b), any violation in this regard was not willful. As a result of the *Cortez* appellate ruling, TransUnion changed the OFAC header language from "input name matches" to "input name is potential match," to make it more certain that users would not misuse the information. (Trial Tr. (Gill) 304:24-305:5, 350:25-352:23, Ex. 62.)[6] That TransUnion changed this language prior to commencement of the class period here demonstrates that it was attempting to comply with *Cortez* and thus did not ***willfully*** violate § 1681e(b). Again, Plaintiff offered no substantial evidence to the contrary. In particular, the fact that the revised "potential match" language did not appear in Plaintiff's own credit report does not support a finding of willfulness. As discussed above on pages 6 and 7, the evidence at trial confirmed that the Dublin Nissan report was not

[6] As addressed above in footnote 2, both the trial and appellate courts in *Cortez* recognized that addition of language like this might have led to a defense outcome in the *Cortez* case itself.

prepared by TransUnion, and that resellers were required to include the "potential match" language and to forbid end-users from denying credit solely because of a Name Screen result.

Additional evidence, including the testimony of TransUnion employee Michael O'Connell, also demonstrates that TransUnion sought to comply with *Cortez* and that TransUnion's response to *Cortez* was reasonable. TransUnion made nationwide changes to its Name Screen product, including by refusing Accuity's Synonyms file to reduce the number of "false positives" and to avoid the exact issue (Cortez/Cortes) that gave rise to the *Cortez* litigation itself. (Trial Tr. (O'Connell) 501:15-502:1; ECF No. 303-1 at 15-17 (Newman).) Mr. O'Connell testified that if TransUnion had used the Accuity product without making any modifications via the rules feature, the hit rate would have been about five percent. (Trial Tr. (O'Connell) 493:15-19.) By employing the rules feature (after the *Cortez* verdict but before the appeal was decided) and refusing the Synonyms file (in response to the *Cortez* appellate ruling), TransUnion lowered the hit rate to less than 0.5 percent, substantially lower than the "high" hit rate of twenty percent described by Plaintiff's expert witness, Mr. Ferrari. (Trial Tr. (Ferrari) 429:14-25, (O'Connell) 494:18-21, 506:6-10.) Mr. O'Connell testified at trial that, to the best of his knowledge, the Name Screen product had the lowest false positive rate of any OFAC software on the market. (Trial Tr. (O'Connell) 505:4-6.) No evidence suggested that any other interdiction software provider had a lower hit rate, on a statistical basis. By contrast, uncontradicted evidence showed that others, including Accuity and OFAC itself, offer

interdiction tools that, by permitting "fuzzy logic" matching, deliver higher hit rates. (Trial Tr. (O'Connell) 494:18-21, (Sadie) 649:4-20.)

At trial, Plaintiff focused on TransUnion's alleged failure to use a date-of-birth filter during the class period. (Trial Tr. (O'Connell) 487:18-23, 839:6-840:2.) The evidence does not support a finding that this constituted a ***willful*** failure to employ a reasonable procedure to assure maximum possible accuracy. As discussed above, Name Screen (at the time) was intended by TransUnion (and understood by users) to be used only to match potential names, and thus users understood that the results indicated only a potential name match. (Trial Tr. (Sadie) 622:5-623:6, (Ferrari) 430:9-25.) The product achieved the "maximum possible accuracy" for the information it actually conveyed, with respect to the class here. Moreover, as explained by Mr. O'Connell, there was, in fact, no date-of-birth filtering technology available to TransUnion during the class period, and Plaintiff presented no contrary evidence in this regard. (Trial Tr. (O'Connell) 487:18-489:3.) The legal standard involves consideration of the maximum ***possible*** accuracy, but Plaintiff's witnesses at trial, including Mr. Ferrari, failed to present evidence of the existence of any ***possible*** technology that in 2011 could have achieved a greater accuracy rate, or at least any such technology that TransUnion both actually knew of, at the time, and ***willfully*** refused to implement. *See Halo Elecs., Inc. v. Pulse Elecs.*, 136 S. Ct. 1923, 1933 (2016) ("Nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted.").

Accordingly, TransUnion was and is entitled to judgment as a matter of law or, in the alternative, a new trial on Plaintiff's claim for a willful violation of § 1681e(b).

C. Plaintiff Failed to Present Sufficient Evidence That TransUnion Willfully Violated the Requirement of § 1681g(a) and (c)(2) to Provide All Information in Class Members' Credit Files and a Statement of Their FCRA Rights.

TransUnion is entitled to judgment as a matter of law, or to a new trial, because the evidence did not support a finding that TransUnion willfully violated the disclosure requirements of 15 U.S.C. §§ 1681g(a) or 1681g(c)(2). *See Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 727 (7th Cir. 2008) (no FCRA statutory damages liability for violation of § 1681m disclosure rules because no specific guidance had issued at the time of the violation); *Henderson v. Trans Union, LLC*, No. 3:14-CV-00679-JAG, 2017 WL 1734036, at *3 (E.D. Va. May 2, 2017) (summary judgment granted against class on FCRA statutory damages claim challenging timing of § 1681k disclosure, because of the lack of "clear guidance" as to the "mechanics" of disclosure).

Section 1681g(a) requires that a consumer reporting agency "clearly and accurately disclose to the consumer … [a]ll information in the consumer's file at the time of the request," and § 1681g(c)(2) states that the agency shall "provide to [the] consumer" a summary of the consumer's rights under the FCRA "with each written disclosure by the agency to the consumer under this section." In 2011, no

authoritative legal guidance put TransUnion on specific notice that disclosing OFAC information in a separate letter would violate these provisions.

It is beyond dispute that TransUnion adopted this manner of disclosure out of a desire to comply with the appellate ruling in *Cortez*, which was the first precedential statement that Name Screen was subject to the FCRA. The evidence here showed that TransUnion made a good-faith attempt to comply with its disclosure obligation by sending the consumers' personal credit reports with a letter identifying the OFAC records that were considered a potential match to the name on the consumers' files. (ECF No. 303-1 at 45 (Lytle).) This material was sent via an automated process, such that the OFAC letter was always sent contemporaneously with the other material, including the statement of rights. (*See* Trial Tr. (Walker) 677:9-16.) It is undisputed that the information in the credit report, together with the information in the letter, constituted "[a]ll information in the consumer's file at the time of the request." 15 U.S.C. § 1681g(a). Undisputed testimony also established that TransUnion provided the summary of rights to all class members in the envelope containing each class member's personal credit report. (Trial Tr. (Walker) 687:9-14.)

Nothing in § 1681g(a) or (c)(2) requires file information to be delivered in a single document or envelope. Section 1681g(a) states only that all information in the file at the time of the request must be disclosed. Likewise, Section 1681g(c)(2) states only that the summary of rights must be provided "with each written disclosure … under this section." Neither

the *Cortez* trial nor the appellate decision addressed the details of compliance, because the case focused on whether OFAC data was subject to the FCRA at all. TransUnion was under no clear mandate to include a separate summary of rights in ***each*** envelope when information was disclosed in multiple mailings in response to a single disclosure request. Neither the FTC nor the CFPB has ever stated how the summary of rights must be conveyed, only that all information must be "clearly and prominently displayed." *See* CFPB Examination Procedures: Consumer Reporting Larger Participants, Sept. 2012, http://files.consumerfinance.gov/f/201209_cfpb_Consumer_Reporting_Examination_Procedures.pdf.

No regulatory or judicial guidance required delivery of this summary of rights more than once per disclosure ***request***. Neither the FCRA itself nor the FTC's commentary on the FCRA requires that an individual's information all be sent in a single document or in a single mailpiece. Instead, the FCRA and the FTC Staff Interpretations state only that disclosures must be made "in writing"; the statute and regulatory guidance nowhere require that all disclosures be made in a ***single*** writing. *See* 15 U.S.C. § 1681h(a)(2) ("Conditions and form of disclosure to consumers"); 40 Years of Experience with the Fair Credit Reporting Act, FTC Staff Summary of Interpretations of the Fair Credit Reporting Act 70-72 (July 2011). When Congress intends to impose a singledocument requirement, it does so clearly, but nothing in the FCRA suggests that such a requirement exists under § 1681g(a) or (c)(2). *Cf.* FTC Issues Final Rule Amendments Related to the E-Warranty Act, https://www.ftc.gov/news-events/press-

releases/2016/09/ftc-issues-final-ruleamendments-related-e-warranty-act (clearly defining the parameters of what constitutes a warranty disclosure, under the "Disclosure Rule": "Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose ***in a single document*** in simple and readily understood language . . .") (emphasis added); FTC Franchise Rule Compliance Guide, https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-complianceguide.pdf (defining a "single document" as "be[ing] printable as a single document—***it cannot be presented in multiple, discrete parts***") (emphasis added); *see also Henderson*, 2017 WL 1734036, at *2-*3 (no willful violation of § 1681k requirement to make a disclosure to an applicant for employment "at the time" a report is provided, even though the applicant was not sent the disclosure ***simultaneously*** with the employer's receipt of the report; mailing the disclosure to the applicant within one business day of sending it to the employer did not willfully violate the FCRA).

Cortez also provided no guidance as to the mechanics of disclosure or the language that should be used in the disclosure. In *Cortez*, the Third Circuit concluded that OFAC information must be disclosed under § 1681g(a), but it did not state what form the disclosure must take. At trial, both Steven Katz and Denise Briddell testified that TransUnion's goal was consistent with *Cortez*—to present information about OFAC results to consumers in a manner that was complete and easy to understand. (Trial Tr. (Katz) 585:19-25, 589:5-10, (Briddell) 780:3-781:5, 807:9-17.)

Ms. Briddell also explained that the consumer relations contact data demonstrated the effectiveness of this manner of communication. (Trial Tr. (Briddell) 785:5-10, 810:4-8, Ex. 69.) Plaintiff presented no evidence that the information was ***not*** easy to understand, that anyone failed to understand it or that use of the term "courtesy" distracted from anyone's understanding of the information. Plaintiff understood it well enough to successfully contact TransUnion and block future deliveries of OFAC data with TransUnion reports. (Trial Tr. (Ramirez) 156:11-157:9, 157:23-158:10, 166:3-5.) Thus, TransUnion is entitled to judgment as a matter of law, or to a new trial, because no substantial evidence showed that TransUnion's disclosure procedures "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 50; *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 248 (3d Cir. 2012).

Finally, mailing the personal credit report and letter separately did not evidence any intent to violate the requirements of the FCRA as set forth by the court in *Cortez*. As noted above, *Cortez* did not address this detail. Sean Walker, a senior manager in consumer relations, testified that, at the time of the *Cortez* decision and during the class period, TransUnion did not have the technology to provide the information in the OFAC letter and the credit report in a single mailing. (Trial Tr. (Walker) 686:6-687:14.) Mr. Walker also explained that the summary of rights was not included a second time in the OFAC letter "[b]ecause it was provided as part of the credit file disclosure ... that we had sent to the consumer that same day, or within hours of each other." (Trial Tr. (Walker) 687:12-

14.) No one ever told him that it violated the FCRA to send OFAC information in a separate letter or without an additional summary of rights, and he confirmed that TransUnion's desire was to comply with the law. (Trial Tr. (Walker) 687:23-688:8.)

Accordingly, TransUnion was and is entitled to judgment as a matter of law or, in the alternative, a new trial on Plaintiff's claims for willful violations of §§ 1681g(a) and (c)(2).

D. A New Trial Should Be Ordered Because of Counsel's Improper Arguments.

TransUnion also is entitled to a new trial because Plaintiff's counsel both repeatedly misstated the evidence and stipulated facts, and improperly attempted to put excluded material before the jury in violation of pretrial rulings. As a result of Plaintiff's counsel's improper arguments, the jury was left with the false impression that TransUnion was attempting to conceal information from them, thus leading to the enormously punishing verdict here.

"[N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931). Accordingly, counsel's improper reference in closing argument to excluded material is grounds for new trial. *See Anheuser-Busch, Inc. v. Nat'l Beverage Distribs.*, 69 F.3d 337, 346-47 (9th Cir. 1995) (reference to excluded material merits new trial); *see also Leathers v. Gen. Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976) ("Counsel for defendant was placed in an unnecessarily difficult and embarrassing position. To interrupt argument by plaintiffs' counsel

might antagonize the jury, and would certainly emphasize the point."); *Globefill, Inc. v. Elements Spirits, Inc.*, 640 F. App'x 682, 684 (9th Cir. 2016) (district court should have granted new trial based on counsel's mischaracterization of evidence during summation). The huge aggregate amount of statutory and punitive damages here, in a case with no proof of actual impact on the class, *see Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984), shows convincingly that counsel's improper argument led the jury to be "influenced by passion and prejudice in reaching its verdict," *Standard Oil Co. v. Perkins*, 347 F.2d 379, 388 (9th Cir. 1965).

For example, Plaintiff's counsel improperly referred to unnamed "executives in tall buildings in Chicago just waiting to hear what you're going to say about this." (Trial Tr. 948:25- 949:2.) He also claimed that the persons with bad intent were not any of the witnesses who testified at trial, but rather the never-identified "people they answer to," "bosses" and "business managers—made decisions that are in willful non-compliance." (Trial Tr. 901:20-902:6.) None of these people were named, and no evidence about them was presented. The only person identified in counsel's closing argument was Lynn Prindes: "You remember Ms. Prindes? [Mr. Newman] said she was going to come here and explain the technology. Where was she?" (Trial Tr. 906:23- 24.) However, Ms. Prindes was mentioned nowhere in TransUnion's opening, and Plaintiff ***stipulated*** that she need not be produced at trial because her testimony about the class data was agreed to be presented by stipulation. (*See* ECF No. 289.) Nor did the pretrial order indicate that Ms. Prindes would be offered to "explain the technology."

(ECF No. 250 at 18 ["Expected to testify regarding data and the authenticity or lack of authenticity of particular documents."].)

Plaintiff's counsel similarly argued, with no evidentiary basis, and contrary to stipulation, that TransUnion concealed evidence of impact to class members after the class period:

> And Mr. Newman, very careful with his language, he tells you: Well, only about a quarter of these people, 1,800, even applied for credit to have their reputations harmed. Not so, all right? The evidence of the records through our stipulation is during a six-month period, from June—sorry, January 2011 to July 2011 about 25 percent of the class population applied for credit. That's because people don't apply for credit every day. Not everybody needs a car loan or a credit card all the time.
>
> We don't know the data for the next six months and the six months after that and the year after that. But we know the name only procedure was the same. We know that it attacked every single one of these people.

(Trial Tr. 903:18-904:5.)

What was read to the jury about the data was a stipulation of facts, agreed to by both sides. (ECF No. 289.) No evidence was presented that any of the vast majority of class members about whom no OFAC data was sold were "attacked" or injured in any way.

Collectively, these arguments, calling to mind a shadowy network of unseen executives secretly

attacking members of the public, improperly inflamed the jury to passion and prejudice, inviting them to ignore the actual evidence presented at trial. This was prejudicial. "[I]rreparable prejudice was caused because the statement[s] before the jury encouraged speculation upon what was purposely being kept from them." *Maricopa Cty. v. Maberry*, 555 F.2d 207, 217 (9th Cir. 1977) (reversing denial of motion for new trial); *Hern v. Intermedics, Inc.*, 210 F.3d 383, 2000 WL 127123, at *4 (9th Cir. 2000) (reversing denial of motion for new trial, based on counsel's improper reference in closing argument to material outside the record, which "left the jury with a final impression that serious information had been kept from it at trial").

Regarding use of the *Cortez* appellate opinion, the Court ruled before trial to exclude the opinion pursuant to Federal Rule of Evidence 403. (Further Pre-Trial Conf. Tr. 5:16-21 ["So the *Cortez* Third Circuit opinion I'm not inclined to let in. That's just going to really confuse the jury. There's a lot of stuff in there. I mean, the fact that the Third Circuit ruled and affirmed, of course, is a fact that needs to come in, but that will come in, but not with the opinion."].) Throughout the course of the trial, and over TransUnion's repeated objections and requests for curative instructions, Plaintiff's counsel aggressively worked to put this excluded material before the jury, reading exact quotations from it and at one point even displaying it on the exhibit screen visible to the entire jury. (*See* Trial Tr. (O'Connell) 531: 8-533:19, 763:6-22.) This was a clear violation of Federal Rule of Evidence 103(d), which states, "To the extent practicable, the court must conduct a jury trial so that

inadmissible evidence is not suggested to the jury by any means." Similarly, Plaintiff's counsel's closing argument differed substantially from the parties' stipulation as to how *Cortez* would be put into evidence, as the Court already noted in response to TransUnion's objection. (*See* Trial Tr. 918:17-25, 919:3-7 ["In your closing argument you said the *Cortez* jury found a willful violation on the disclosure. And while that's, in fact, true, it is not in evidence. The stipulation does not include that distinction as to the negligence or the willful finding."].) This too was highly prejudicial. In *Cortez*, TransUnion was found to have willfully violated the FCRA for not disclosing OFAC data at all, and for refusing to respond to the *Cortez* plaintiff's request to dispute the data. This case, by contrast, involves a claim that TransUnion's efforts to comply were insufficient, not that TransUnion never attempted to comply.

Plaintiff's improper arguments in violation of prior stipulations and the Court's *Cortez* order should be corrected by ordering a new trial.

E. The Jury's Awards of Statutory and Punitive Damages Are Excessive and Should Be Reduced Significantly, or a New Trial Should Be Ordered.

Despite the lack of substantial evidence that TransUnion violated the FCRA—let alone did so willfully, or in a way that actually caused the class any harm—the jury here awarded $984.22 in statutory damages per class member and $6,353.08 in punitive damages per class member. Based on a class size of 8,185, this calculates to $8,055,840.70 in statutory damages and $51,999,959.80 in punitive damages, for

a total of $60,055,800.50. These are staggering awards, particularly since so much of the case focused on highly technical disclosure provisions. The damages are all the more shocking given that no effort was made to prove that the class suffered ***any*** actual damages as a result of any of the challenged practices. Nor did Plaintiff even attempt to quantify any potential harm. In light of the reality that the challenged practices had no measurable impact on the class, both the statutory and punitive damages awards are so excessive as to shock the conscience. They should be substantially reduced, or a new trial should be ordered.

1. Statutory Damages Are Excessive in Light of the Lack of Evidence of Harm to the Class and the Lack of Evidence That the Legal Requirements for Post-*Cortez* Compliance Were Abundantly Clear.

A statutory damages award should be reduced if it "would be unconstitutionally excessive." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006); *accord In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal. 2014); *see also Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (Due Process Clause can justify reducing an aggregate statutory damages award); *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (statutory penalty violates due process if it "is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable") (quoting *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)); *Pinner v. Schmidt*, 805 F.2d 1258, 1265-66 (5th Cir.

1986) (court may remit award of compensatory damages where there is no proof of financial damages); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309-10 (9th Cir. 1990) ("When the class size is large, the individual award will be reduced so that the total award is not disproportionate."); *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2014 WL 2758598, at *23 (N.D. Cal. June 17, 2014) (a court may reduce statutory damages post-verdict because "aggregation of statutory damages claims potentially distorts the purpose of both statutory damages and class actions"); *In re Farmers Ins. Co., Inc., FCRA Litig.*, 738 F. Supp. 2d 1180, 1224-26 (W.D. Okla. 2010) (discussing post-verdict reduction of statutory damages); *Ashby v. Farmers Ins. Co.*, 592 F. Supp. 2d 1307, 1316 (D. Or. 2008) (stating that review of statutory damages award for excessiveness will occur post-verdict). The award of statutory damages here is grossly excessive and unduly punitive. It should not be upheld.

Because the jury did not differentiate among the three claims when awarding damages, the statutory damages award can be sustained in its current form only if the evidence is sufficient to support a finding not only that each purported violation was willful, but that each purported violation caused the class concrete harm. As already explained, however, Plaintiff did not prove that any of the alleged statutory violations was willful, let alone that all three were. Nor did Plaintiff prove that each violation caused the class concrete harm. The proof was particularly weak as to the two disclosure claims, with no evidence showing that ***even Plaintiff*** suffered harm specific to the alleged disclosure violations. Nor did Plaintiff even try to prove that any other class member was

harmed by receiving the OFAC letter separately from the personal credit report and its enclosed statement of rights. That alone requires a new trial on damages or a remittitur.

But even setting aside that problem, the statutory damages verdict of nearly $8.1 million—for the seven-month class period of January through July 2011—is nearly four times TransUnion's gross revenue of $2.1 million from Name Screen sales for all of 2011. (*See* Gilbert Decl. ¶ 2.) The statutory damages award is excessively punitive because it bears no reasonable relationship either to the actual impact on the class (for which there was no evidence) or to TransUnion's financial gain. It is also excessive because the conduct complained of was corrected. TransUnion no longer discloses OFAC information in a separate letter, and TransUnion now uses date-of-birth information to screen results. (Trial Tr. (O'Connell) 512:20-513:4.) There is no past harm to remedy and no future harm to deter. With respect to a remittitur, TransUnion submits that statutory damages should be reduced to an amount no greater than TransUnion's OFAC-related revenue for the year 2011, of $2.1 million, or $256.56 per class member (based on 8,185 class members). Because this is a revenue figure, not a profits figure, and because it is for the full calendar year, and not just for the class period, an award of this size deprives TransUnion of substantially ***more*** than any financial gain associated with its OFAC sales during the period of alleged non-compliance. This figure also is well within the $100 to $1,000 range established by Congress, and therefore would amply compensate class members for what the evidence showed was at most only a ***potential*** risk of harm. It

would also deprive TransUnion of more than what it obtained from selling Name Screen during the seven-month class period.

As entered, the statutory damages award is excessive and a violation of due process principles. *See Six Mexican Workers*, 904 F.2d at 1310 (reducing class statutory damage award averaging $1,369 per class member to between $150 and $600 per class member, in part because "the district court's damage assessment did not involve fact specific calculations of actual injury" and to balance "the need for deterrence with the inequity of disproportionate punishment"). A new trial should be ordered, or the total statutory damages should be remitted to not more than the $2.1 million revenue figure described above.

2. The Jury's Award of Punitive Damages Is Excessive and Should Be Eliminated or Reduced Significantly, or a New Trial Should Be Ordered.

a. Any Award of Punitive Damages Here Would Be Excessive.

Trial courts have a duty to prevent excessive awards of punitive damages and should order a new trial or remit damages when a jury renders an excessive award. *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008). Similarly, when substantial compensatory damages are awarded, punitive damages that exceed the compensatory award should only rarely be awarded. *See id.*; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit

of the due process guarantee."); *see also, e.g.*, *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007) (reducing punitive damage award in FCRA case to equal the compensatory damages in light of "general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances … [A] ratio of 1:1 or something near to it is an appropriate result"); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009) (vacating punitive damages in a discrimination case where the compensatory award was $6 million and instructing lower court not to exceed 1:1 punitive damages ratio); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing punitive damages to a 1:1 ratio where compensatory award was over $4 million).

Excessive punitive damages awards are even more problematic where, as here, substantial statutory damages have been awarded. *See Parker*, 331 F.3d at 26 (noting the "pseudo-punitive intention" of statutory damages) (Newman, J., concurring). Indeed, the large statutory damages award here should preclude the imposition of ***any*** punitive damages. The purpose of punitive damages is to punish and deter egregious conduct. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996). While punishment and deterrence are not the only aim of statutory damages, statutory damages undoubtedly serve similar (if not the same) punishment and deterrence ends, especially in a case like this where there is no evidence of actual harm for statutory damages to compensate. *See, e.g.*, *Bateman v. Am. MultiCinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010)

(FCRA's "statutory damages provision[] … effectuate[s] the Act's deterrent purpose"); *Vanderbilt Mortg. & Fin., Inc. v. Flores*, 692 F.3d 358, 373 (5th Cir. 2012) (purpose of statutory damages is to "deter[] the public harm associated with the activity proscribed, rather than seeking to compensate each private injury caused by a violation" (quoting *DirecTV, Inc. v. Cantu*, No. SA-04-CV-136- RF, 2004 WL 2623932, at *4 (W.D. Tex. Sept. 29, 2004))); *cf. Educ. Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1243 (D.N.J. 1987) ("[S]tatutory damages have all the trappings of punitive damages and, indeed, the tests are virtually the same, *i.e.*, the more willful the infringement—the more outrageous the conduct—the higher the award.").[7]

Given that potential overlap, courts in cases under the Copyright Act—which, like the FCRA, authorizes victims of "willful" conduct to receive statutory damages and punitive damages—have often rejected attempts to impose punitive damages on top of statutory damages, out of concern that doing so could impose double punishment in violation of the Due Process Clause. *See, e.g.*, *TVT Records & TVT Music, Inc. v. The Island Def Jam Music Grp.*, 262 F. Supp. 2d 185, 186 (S.D.N.Y. 2003) (rejecting attempt to impose punitive damages because statutory damages already punished); *see also On Davis v. The*

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[7] *See also Phillips v. Netblue, Inc.*, No. C05-4401 SC, 2006 WL 3647116 (N.D. Cal. Dec. 12, 2006) ("Statutory damages may either take the form of penalties, which impose damages in an arbitrary sum, regardless of actual damages suffered, or, ... may provide for the doubling or trebling of actual damages as determined by the jury." (quoting *Beeman v. Burling*, 216 Cal. App. 3d 1586, 1589 (Cal. App. Ct. 1990))).

Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001) ("The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement."); *Silberman v. Innovation Luggage, Inc.*, No. 01 CIV. 7109 (GEL), 2003 WL 1787123, at *10 (S.D.N.Y. Apr. 3, 2003) ("the purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved by statutory damages").

The potential for impermissible overlap between statutory and punitive damages is particularly acute in the class action context. When a defendant engages in conduct that injures many individuals, but suit is brought on behalf of only one of them, the statutory damages award alone might not be considered sufficient to deter egregious conduct if the limit on statutory damages is relatively low. An additional punitive damages award in an individual case thus could at least theoretically be designed to punish and deter the defendant from injuring other individuals in the same way that it injured the plaintiff. But when a class action suit has already brought the relevant universe of potentially affected individuals before the court, and when every class member has been awarded statutory damages, then imposing a punitive damages award on top of the classwide statutory damages award is all but certain to result in excessively punishing damages.

Here, that risk of excessive and unconstitutional double punishment was ever further exacerbated by the problem that Plaintiff submitted literally ***no***

additional evidence to support his plea for punitive damages, except for TransUnion's wealth. *See, e.g.*, *Ashby*, 592 F. Supp. 2d at 1315 (noting that it would be impermissible to permit punitive damages "for the same conduct that gives rise to statutory damages" under FCRA). There simply is no evidence—let alone sufficient evidence—to support the imposition of any punitive damages on top of an award of substantial statutory damages to each and every class member.

b. A New Trial on Punitive Damages Should Be Ordered Because the Jury Was Not Properly Instructed on the Proper Legal Standard.

In an effort to guard against precisely that risk of impermissible duplicative punishment, TransUnion repeatedly requested jury instructions that would have required the jury to find a higher level of culpable conduct for punitive damages than for statutory damages. The Court repeatedly refused these instructions, on the grounds that under the statute and *Safeco*, the same standard applied. Over TransUnion's objection, the Court expressly permitted the jury to award punitive damages "if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law." (Trial Tr. 939:18-20.) Based on this instruction, Plaintiff's counsel argued, to TransUnion's prejudice, that the legal standard for statutory damages and punitive damages was exactly the same:

> You've already made the liability determination in your verdict. There is no further liability determination. The standard is the same. It is showing reckless disregard

> of consumer rights. You have already found that. The only issue is one of damages. What punitive damages, and in what amount would you award. The perceived risk of harm that you just heard Judge Corley speak about is the same as we talked about yesterday. So liability is done. So therefore, you're completely within your rights to award punitive damages if you see fit, and in whatever amount you see fit.

(Trial Tr. 943:3-11.)

This was error, further justifying setting aside the punitive damages award, as that instruction invited the jury to impose impermissible double punishment for the same conduct. *See Masson*, 85 F.3d at 1397 (new trial may be granted to address claim of instructional error).

Safeco addressed the standard of recklessness that must be proven for statutory damages, but it did not address punitive damages specifically. Pre-*Safeco* authority consistently recognized that punitive damages may only be awarded upon proof of a high level of culpability: "knowing and intentional commission of an act the defendant knows to violate the law." *Gohman v. Equifax Info. Servs., LLC*, 395 F. Supp. 2d 822, 828 (D. Minn. 2005) (quoting *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002)); *see also Pinner*, 805 F.2d at 1263 (plaintiff must prove that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others"); *Riley v. Equifax Credit Info. Servs.*, 194 F. Supp. 2d 1239, 1245 (S.D. Ala. 2002) (same). A defendant's belief it is in compliance with the law, even if

erroneous, bars a punitive damages claim under the FCRA. *See Grendahl*, 312 F.3d at 370; *see also Acton v. Bank One Corp.*, 293 F. Supp. 2d 1092, 1102 (D. Ariz. 2003) (no FCRA punitive damages without proof that the defendant "knowingly or intentionally acted in conscious disregard of the Plaintiff's rights").

Post-*Safeco* cases also state that to obtain punitive damages, the plaintiff must prove a higher degree of culpable conduct than recklessness. *See Davenport v. Sallie Mae, Inc.*, 124 F. Supp. 3d 574, 584 (D. Md. 2015) ("knowing and intelligent commission of acts in conscious disregard for the rights of its customers"); *Edeh v. Equifax Info. Servs., LLC*, 974 F. Supp. 2d 1220 (D. Minn. 2013) ("knowingly and intentionally committed an act in conscious disregard for the rights of others") (quoting *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998)), *aff'd*, 564 F. App'x 878 (8th Cir. 2014). That requirement is essential to ensure that imposing punitive damages on top of statutory damages does not violate due process. *See supra* Section E.2.a. Because the Court's instruction was not just improper, but also invited a constitutional violation, TransUnion is entitled to a new trial with respect to punitive damages.

c. The Punitive Damages Should At Least Be Reduced Substantially, Or a New Trial on Punitive Damages Should Be Ordered.

At a minimum, the considerable risk of impermissible overlap between the awards weighs heavily in favor of a remittitur or a new trial on damages. It is hard to see how the evidence demonstrated ***any*** need for deterrence or punishment

here given TransUnion's undisputed evidence that the particular practices challenged were corrected years ago: OFAC information is now disclosed in a single document, and TransUnion now employs date-of-birth screening technology to reduce the hit rate well below the already-low level it achieved during the seven-month class period. (Trial Tr. (O'Connell) 512:15-513:20.) But even assuming some minimal level of punishment and deterrence were still permissible, surely it was fully achieved (and then some) by the jury's $8.1 million statutory damages award. As noted, that award alone is nearly ***four times*** higher than TransUnion's entire gross revenue from the sales of OFAC Name Screen during ***calendar year*** 2011 (approximately $2.1 million). (Gilbert Decl. ¶ 2.) The $50 million punitive damages award is a shocking ***25 times*** greater than those revenues. Indeed, the punitive damages award is excessive even in relation to the company's entire economic activity in 2011. TransUnion's net income for all of calendar year 2011 was $41 million. (Gilbert Decl. ¶ 3.) The $50 million punitive damages award, which is based on only seven months of activity and only one of TransUnion's products, would more than wipe out its entire profitability for that entire year, for all of its economic conduct, even though the case involves only a small portion of the company's activity, and only for a little more than half of the year.

Such an astounding award is not only excessive, but unconstitutionally so. Under *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), courts consider three factors when determining whether a punitive damages award exceeds the bounds of constitutional due process:

(1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to harm or potential harm to the plaintiff; and (3) the disparities between the punitive damages award and the civil penalties authorized or imposed in comparable cases. Every one of those factors confirms that the jury's punitive damages award is unconstitutionally excessive.

First, there is no evidence of reprehensibility here. Reprehensibility is measured by "considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at 419. Even taken as a given the jury's unsupported willfulness finding, none of the factors is present here. There is no claim of physical harm—indeed, there is not even any evidence of economic harm. Nor did the technical FCRA violations pose any risk to the health or safety of anyone or target the vulnerable. *See Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1207 (10th Cir. 2012) (punitive damages of $2 million reduced to equal the compensatory damages of approximately $630,000, because the impact of the defendant's conduct was economic and did not threaten health or safety). Plaintiff introduced no evidence that TransUnion made any deliberate false statements or engaged in any form of deceit. To the contrary, the evidence demonstrated that TransUnion was actively attempting to address the issues in *Cortez* after the Third Circuit ruled in that

case. (Trial Tr. (O'Connell) 500:21-502:1.) Moreover, the omission of the "potential match" language from the Dublin Nissan report was not intentional and was outside of TransUnion's control (*see* ECF No. 303-1 at 56), and there was no evidence that any other class member was similarly affected. This is not a case where a defendant was flouting the law; indeed, Plaintiff's theory of the case was that TransUnion did not act rapidly enough in attaining compliance. Thus, even accepting Plaintiff's theory of liability, this factor supports reduction of the punitive damages award to something that does not exceed the statutory damages award.

As to the second factor, the ratio of punitive damages to actual or potential harm is, by definition, excessive because Plaintiff did not even ***try*** to prove any actual or even potential harm as to 8,184 members of the 8,185-member class. Instead, he attempted to prove harm only as to himself—and even there he came up woefully short. He identified ***zero*** harm as a result of the disclosure violations, which plainly did not impede his ability to contact TransUnion and exercise his FCRA rights. And as TransUnion's evidence showed, Plaintiff was not unique in that respect: Consumers have repeatedly demonstrated that they had no problem understanding or exercising their rights under the FCRA when they received notice in the manner that Plaintiff did. (Trial Tr. (Briddell) 785:5-10, 810:4-8, Ex. 69.) As for the reasonable procedures claim, Plaintiff offered no evidence that positive Name Screen results had any adverse credit impact on any class members. Users, when employing properly-trained reviewers, rapidly clear positive Name Screen

results with no denial of credit or inconvenience to consumers. (Trial Tr. (Sadie) 637:12-638:6.) TransUnion presented unrebutted evidence that, in the wake of the *Cortez* decision, it specifically instructed Name Screen users that they may not deny credit solely on the basis of a Name Screen result, and that the Treasury Department provides similar guidance as well. (Trial Tr. (O'Connell) 523:5-18, (Sadie) 645:9-23, Exs. 74, 82.) The jury's staggering $50 million punitive damages award thus does not correspond to any actual or potential harm to Plaintiff or the class ***at all***.

When compared to the statutory damages award, which is not an appropriate measure of either actual or potential harm, the ratio is a grossly excessive 6½ to 1. Ratios above 2:1 are typically reserved for extreme misconduct resulting in bodily harm or severe emotional distress, yet no such evidence was presented here. The jury's verdict here is grossly excessive because it is at a ratio that greatly exceeds those imposed on defendants who imposed massive abuse on their victims. *Cf. Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 146 (2d Cir. 2014) (ratio of 2:1 in case involving "racial insults, intimidation, and degradation over a period of more than three years"); *Lee ex rel. Lee v. Borders*, 764 F.3d 966, 976 (8th Cir. 2014) (ratio of 3:1 approved in case involving rape of a patient at a facility for the developmentally disabled); *Ondrisek v. Hoffman*, 698 F.3d 1020, 1029 (8th Cir. 2012) (punitive damages reduced to 4:1 ratio in case involving a cult leader's repeated instances of child abuse); *Leavey v. Unum Provident Corp.*, 295 F. App'x 255, 258-59 (9th Cir. Oct. 6, 2008) (insurance bad faith claim where jury found defendant acted with an "evil

mind"; $15,000,000 punitive damages award reduced to $3 million; original ratio was 7½:1, and the reduced ratio was 1½:1). This factor supports reduction of the punitive damages award to no more than the amount of the statutory damages award, a 1:1 ratio as in *Exxon*.

Finally, as to the third factor, comparison to a comparable civil penalty, the jury's award of more than $50 million in punitive damages, or $6353.08 per class member, far outpaces the maximum civil penalty of $2500 the FTC could obtain only upon a ***greater*** showing of culpability than the jury was instructed on here: proof of "a knowing violation, which constitutes a pattern or practice of violations." 15 U.S.C. § 1681s(a)(2)(A). The award also greatly exceeds the maximum statutory damages of $1,000 authorized under § 1681n(a)(1)(A)—the same maximum that applies when a person violates consumer privacy by obtaining credit data "under false pretenses or knowingly without a permissible purpose," § 1681n(b), a more serious violation than at issue here. Under any measure, there is simply no justification for the massive over-deterrence reflected in the jury's award of punitive damages. The award should be remitted or a new trial ordered.

F. The Judgment Should Be Altered or Amended to Conform to Rule 23.

TransUnion also requests, in the alternative, that the judgment be altered or amended pursuant to Fed. R. Civ. P. 59(e).

a. The Evidence Does Not Support Entry of Any Class Judgment.

TransUnion renews its prior challenges to class certification, and submits that because the evidence at trial did not establish the elements of Rule 23, it is improper for any class-wide judgment to be entered. Critically, with respect to the element of typicality under Rule 23(a)(3), the evidence showed that Plaintiff's experience was so far removed from the experiences of other class members that it deprived TransUnion of a fundamentally fair trial. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 598 (3d Cir. 2012) (purpose of the typicality requirement is "to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class") (internal quotation marks and citation omitted); *Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 265 (4th Cir. 2012) (reversing certification order because the representative's claims were "typical" only on an "unacceptably general level"); *Cox v. TeleTech@Home, Inc.*, No. 1:14-CV-00993, 2015 WL 500593, at *7 (N.D. Ohio Feb. 5, 2015) (denying certification on typicality grounds because of "the unique factual circumstances" of plaintiff's case); *Davis v. Chase Bank U.S.A., N.A.*, No. CV 06-04804 DDP PJWX, 2013 WL 169868, at *6 (C.D. Cal. Jan. 16, 2013) (denying motion for class certification because "[t]he factual circumstances surrounding Plaintiff's purchases are so atypical as to fall below the normally permissive standard of Rule 23(a)'s typicality requirement"). There was no evidence that the post-*Cortez* "potential match" language was dropped from any Name Screen sold as to any other class member. There was no evidence that

any other class member was denied credit because a lender failed to follow TransUnion's and OFAC's instructions with respect to the handling of interdiction results. There was no evidence that any class member was confused or misled by any communications with TransUnion, either in writing or over the telephone. Most importantly, with respect to more than three-quarters of the class, no Name Screen data was sold at all. Plaintiff unfairly leveraged his unique experience into a massive statutory and punitive damages award in favor of a group of highly atypical and dissimilar people.

A class judgment also is improper because no evidence of actual harm to any class members, or to the class as a whole, was proffered. Plaintiff maintains that such evidence is not necessary. (*See* Trial Tr. 842:20-23, 851:10-12, 863:20-22, 864:15.) With respect to the Court's prior rulings on this issue, TransUnion notes recent Supreme Court authority calling into doubt whether a class case may proceed without proof of concrete injury to class members other than the representative plaintiff. On June 5, 2017, in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), the Supreme Court examined what a proposed intervenor-of-right under Rule 24(a)(2) must show to comply with the standing requirements of the Constitution's Article III. The Supreme Court confirmed that "standing is not dispensed in gross," that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought" and that the "same principle applies when there are multiple plaintiffs." *Id.* at 1650-51 (internal citations and quotation marks omitted). "[A]n intervenor of right must demonstrate Article III

standing when it seeks additional relief beyond that which the plaintiff requests." *Id.* at 1651.

This same principle should also apply in class cases under Rule 23(b)(3), as class litigation is merely a species of intervention. Because here Plaintiff asks the Court to award each class member his or her own separate money damages, the standing limitations of Article III must be considered in light of each class member, and not simply the class representative. *See* 137 S. Ct. at 1651 ("In sum, an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names."). There was no evidence of concrete harm to the class as a whole here, or even to any particular individual. *See Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002-03 (11th Cir. 2016) (intangible harm caused by delay in recording a mortgage satisfaction did not cause injury in fact, barring claim for statutory damages), *pet. for reh'g en banc denied*, 855 F.3d 1265 (2017). To the contrary, the evidence showed that more than three-quarters of the class had no OFAC data sold about them at all (Trial Tr. 577:1-13), and further, that even when data was sold, financial institutions' general practice was to rapidly clear consumers without incident or inconvenience. (Trial Tr. (Sadie) 637:12-638:6.)

With respect to the disclosure claims under 15 U.S.C. § 1681g, and as argued previously in regard to *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017), *pet. for reh'g en banc denied* (June 26, 2017), "informational injury" alone does not

satisfy Article III's standing requirements. *See also Medellin v. IKEA U.S.A. West, Inc.*, 672 F. App'x 782, 783 (9th Cir. 2017) (vacating lower-court judgment where plaintiff "alleged only a bare procedural violation of the statute"); *Smith v. Bank of Am., N.A.*, No. 15-55674, 2017 WL 631696, at *1 (9th Cir. Feb. 16, 2017) ("[m]ere receipt" of a document that does not adhere to the standards of a federal statute, "without more, is insufficient to establish injury-in-fact"); *Holmes v. Contract Callers, Inc.*, No. 3:17CV148-HWH, 2017 WL 2703685 (E.D. Va. June 22, 2017) (dismissing claim under Fair Debt Collection Practices Act for lack of standing where plaintiff failed to show how he was injured by the lender's alleged failure to report to credit bureaus that plaintiff disputed the debt); *Gathers v. CAB Collection Agency, Inc.*, No. 3:17CV261-HEH, 2017 WL 2703686 (E.D. Va. June 22, 2017) (same). Accordingly, the class should be decertified for lack of proof that each class member—or even a specifically ascertainable subset of class members—sustained concrete, individualized injury in fact as a result of each FCRA violation alleged. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) ("special, individualized damage" must be shown to recover under the FCRA for violation of a public right) (Thomas, J., concurring).

b. Persons Known With Certainty Never to Have Received Notice Should Be Omitted From the Class, and the Judgment Should be Corrected to Reflect the Proper Number of Class Members.

As raised before trial, the number of class members needs to be corrected to reflect only those persons whom the notice might have reached. (*See* ECF No. 280.) The evidence was undisputed that neither actual nor constructive notice was given to approximately 15 percent of the class, and that ***at maximum*** only 6,894 persons (taking the seven opt-outs into account) could have even seen the class notice. (*See* Declaration of Jason S. Yoo Ex. A.)[8]

It is fundamental that each class member is entitled to the best notice practicable under the circumstances. Fed. R. Civ. P. 23(c)(2); *see, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 157 (1974) ("The express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be sent to all class members who can be identified through reasonable effort … [I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case but an unambiguous requirement of Rule 23"). It is also fundamental that a court has the discretion to "adjust the class, informed by the proceedings as they unfold." *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620

[8] Further, publication notice was never provided to class members who could not be reached by mail, so there is not even any constructive notice basis to keep in the class the 1,291 persons for whom mailed notice is known to have failed.

(1997) (citing Fed. R. Civ. P. 23(c), (d)). As these class members were never even given an opportunity to request exclusion, they cannot be included in the final judgment. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Any defect in notice is the class representative's and counsel's responsibility. *See Lambert v. Nutraceutical Corp.*, No. ED CV 13-05942-AB (SPx), 2015 WL 12655392, at *8 (C.D. Cal. June 24, 2015). Their failure to address this issue requires amendment of the judgment. TransUnion faces risk of severe prejudice if the wholly unnoticed class members are included in the judgment, as TransUnion cannot be certain that the judgment will even bind them to preclude subsequent litigation. *See, e.g.*, *In re Del-Val Fin. Corp. Sec. Litig.*, 154 F.R.D. 95 (S.D.N.Y. 1994) (permitting extension of time to opt out where class member did not receive notice until after opt-out deadline); *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. MDL 888, 1995 WL 263879, at *6 (E.D. La. May 4, 1995) (permitting extension of time to opt out where notice sent to wrong address). Persons for whom the notice program failed should be removed from the class.

c. The Judgment Does Not Comply With Rule 23(c)(3)(B).

The judgment also does not comply with the formalities of Rule 23(c)(3)(B), which mandates that the judgment expressly "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." As entered, the judgment does not set forth what the rule requires,

and at a minimum should be amended to comply with the rule.

The judgment should be amended to decertify the class, or at a minimum to limit its scope to eliminate persons known with certainty never to have received any notice of these proceedings, and further to comply with the requirements of Rule 23.

IV. CONCLUSION

For the foregoing reasons, TransUnion respectfully requests that this Court enter an order granting judgment to TransUnion as a matter of law or, in the alternative, granting a new trial or, in the alternative, ordering a remittitur or, in the alternative, altering or amending the judgment, as requested herein, and for such other and further relief as may be just and proper.

Dated: July 19, 2017

STROOCK & STROOCK & LAVAN LLP

* * *

By: */s/Stephen J. Newman*
Stephen J. Newman

Attorneys for Defendant TRANS UNION LLC

Final Verdict Form
(N.D. Cal. Jun. 20, 2017)

We, the jury in the above-entitled action, find as follows:

Question No. 1 (First Claim): Did Defendant Trans Union, LLC willfully fail to follow reasonable procedures to assure the maximum possible accuracy of the OFAC information it associated with members of the class?

Yes ____x_____ No _____

Proceed to Question No. 2

Question No. 2 (Second Claim): Did Defendant Trans Union, LLC willfully fail to clearly and accurately disclose OFAC information in the written disclosures it sent to members of the class?

Yes ____x_____ No _____

Proceed to Question No. 3

Question No. 3 (Third Claim): Did Defendant Trans Union, LLC willfully fail to provide class members a summary of their FCRA rights with each written disclosure made to them?

Yes ____x_____ No _____

If your answer is "Yes" to Question Nos. 1, 2, or 3 (or any combination of these), proceed to Question No. 4. However, if you do not answer "Yes" to any of Questions Nos. 1, 2, or 3, then your deliberations are concluded. Your Presiding Juror should sign this verdict and inform Court staff.

Question No. 4: What amount of statutory damages (of not less than $100 and not more than $1000) do you award to each class member?

$[handwritten: 984.22]

Your deliberations are now concluded. Your Presiding Juror should sign this verdict and inform Court staff.

[handwritten: signature]
Presiding Juror

Opposition to Renewed Motion for Judgment as a Matter of Law (N.D. Cal. Aug. 8, 2017)

Plaintiff Sergio L. Ramirez ("Plaintiff" or "Ramirez") and the certified Class hereby oppose Defendant Trans Union, LLC's ("Defendant" or "Trans Union") Motion for Judgment as a Matter of Law or, in the alternative, Motion for a New Trial or, in the alternative, Motion for Remittitur or, in the alternative, Motion to Alter or Amend the Judgment in this class action brought under the Fair Credit Reporting Act (FCRA).

I. INTRODUCTION

Few defendants would take a class action case to trial faced with three separate FCRA claims, *each of which* could result in statutory damages in excess of $8 million, *and each of which* allowed for the recovery of unlimited punitive damages. Defendant Trans Union not only welcomed a trial here, but it also unapologetically attacked Plaintiff and the class, and called itself the victim. It tried this case by contending that it actually "benefited" Ramirez and the 8,184 other innocent Americans that it falsely and unfairly associated with a terrorist watch list.

The jury heard the testimony of 14 witness and considered 44 properly admitted exhibits and several stipulations. This was more than sufficient evidence to support its verdict, which is in line with FCRA standards and constitutional principles. Defendant now seeks a different result. But that is not possible.

The very nature of jury trials is that either side could win, and that verdicts could vary in size. But the losing party does not get a do-over because it does not like the result. There was no error at the trial of this

matter that warrants the extraordinary relief that Defendant now seeks. The jury acted within its province, and the verdict in this matter was proper. It must therefore be upheld.

II. FACTS

A. The OFAC List And The Inception Of Trans Union's OFAC Product

The evidence at trial included background on the credit reporting industry, the Office of Foreign Assets Control (OFAC) list and Trans Union's OFAC alert product. The jury learned that Trans Union is one of the Big Three Consumer Reporting Agencies (CRAs) in the United States, with a net worth of nearly $1.5 billion. Tr.[1] Vol. 2 (Gill) 291:7-10; Dkt. No. 285. Trans Union compiles and sells reports about consumers to banks, car dealerships, and other lenders. Tr. Vol. 2 (Gill) 291:16-18, 293:7-21; Ex. 93 at 093-002. Those reports typically include data about existing credit accounts as well as public records such as bankruptcies, judgments, and tax liens. Tr. Vol. 2 (Gill) 296:23-298:16; Ex. 93 at 093-007, 093-008.

In 2002, Trans Union saw an opportunity to sell additional information to its existing customers—information from the U.S. Department of Treasury's OFAC Specially Designated Nationals (SDN) list. Tr. Vol. 2 (Gill) 302:8-10, 307:11-17, 310:11-14; Tr. Vol. 3 (Ferrari) 410:16-411:10. As part of the USA PATRIOT Act, the U.S. government sought to prevent terrorists, drug traffickers, and others from using the U.S.

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[1] Unless otherwise specified, all citations to "Tr." herein refer to the official transcript of the trial in this matter, and citations to "Ex." refer to the exhibits admitted at trial.

financial system. Tr. Vol. 3 (Ferrari) 413:10-17, 445:11-13. It accomplished this goal in part by establishing a list of individuals who may not engage in financial transactions, including access to credit, in the United States. *Id.* at 410:19-411:8. Individuals on the OFAC list include Osama bin Laden, Mexican drug kingpin El Chapo, and Russian arms dealer Viktor Bout, known as "The Merchant of Death." *Id.* at 411:21- 413:8. The OFAC list includes a wide variety of information about SDNs, including name, address, date of birth, social security number, and passport number. *Id.* at 414:8-13. Approximately 80% percent of entries on the OFAC list include a date of birth. Tr. Vol. 3 (O'Connell) 487:14-17. No entries are made on name alone. Tr. Vol. 3 (Ferrari) 414:16-19.

Lenders and other business are subject to severe penalties for doing business with SDNs, which could include monetary fines of up to $10 million and up to 30 years in prison. *Id.* at 416:12-417:13. In order to reduce or avoid these penalties, lenders use "interdiction software" to identify SDNs before engaging in transactions with them. *Id.* at 419:19-420:7. Trans Union informed its customers that already wanted to review an applicant's credit worthiness that Trans Union's OFAC alerts would also help them avoid doing business with terrorists and other OFAC list criminals. Ex. 89 at 089-002. The product was first known as OFAC Advisor Alerts. Ex. 4; Tr. Vol. 2 (Gill) 340:23-25.

Large lenders, such as national banks and broker-dealers that handle a small number of high-value transactions, typically developed their own internal interdiction procedures, as confirmed by Trans

Union's trial witnesses. Tr. Vol. 2 (Gill) 340:10-22; Tr. Vol. 4 (Sadie) 636:8-637:23, 641:8-16. But Trans Union saw a business opportunity to sell its OFAC alerts to smaller businesses such as car dealerships. Tr. Vol. 2 (Gill) 340:10-22.

Trans Union obtained the OFAC data and matching logic from a third party seller, Accuity, Inc. Tr. Vol. 2 (Gill) 306:13-17, 307:18-308:4; Tr. Vol. 3 (O'Connell) 463:1-4, 482:21- 24; Dkt. No. 303-1 at p. 24 (Newman) 15:10-18. Trans Union elected to configure the matching logic software to use only the consumer's first and last name to associate the consumer to OFAC data. Tr. Vol. 2 (Gill) 315:8-12; Tr. Vol. 3 (O'Connell) 462:23-463:19. Like any buyer, Trans Union had the control over how to configure and use Accuity's software, and over what filters to use. Dkt. No. 303-1 at pp. 26-27 (Newman) 53:21-54:3, 56:8-15, 67:9-16. Pursuant to Defendant's desired "name-only" matching, different spellings and name variations such as nicknames, or even using only a first initial (such as "S" for "Sergio") would still be returned as "matches." *Id.* at pp. 30-31 (Newman) 87:8-89:16, 93:9-94:1. Names would furthermore be matched in any order, so a record for "Sergio Ramirez" would also match to "Ramirez Sergio." Tr. Vol. 3 (O'Connell) 464:3-11.

When this name-only search logic returned a "hit," Trans Union placed an OFAC alert on the first page of a consumer's credit report without any further measures or process to assure that the OFAC alert related to the consumer about whom the report was prepared. Tr. Vol. 3 (O'Connell) 474:21-25; Tr. Vol. 2 (Gill) 310:11-311:10; Ex. 4. The evidence showed that

Trans Union has substantial personal identifying information, including middle names, dates of birth, social security numbers, and addresses in its database. Tr. Vol. 2 (Gill) 294:1-14; Ex. 4. Trans Union did not use this personal information to eliminate false positives, even when that information was available to it and could be compared to the information on the face of the OFAC list. Tr. Vol. 2 (Gill) 315:8-316:7; Tr. Vol. 3 (O'Connell) 469:15-24.

The jury also heard evidence that this name-only matching process was in stark contrast to Trans Union's procedures for matching consumers to tradelines and public record information, which minimally required the match of additional identifying information, such as address, date of birth, and social security number. Tr. Vol. 2 (Gill) 308:16-310:10; Tr. Vol. 3 (O'Connell) 465:13-15. Trans Union testified that it does not use name-only matching for *any other product* it sells or item of information it places on credit reports. Tr. Vol. 3 (O'Connell) 465:16-18.

Before rolling out the OFAC product, Trans Union's lawyers and compliance personnel made a deliberate decision that Trans Union would not attempt to comply with the FCRA with respect to OFAC information. Tr. Vol. 2 (Gill) 302:11-16, 316:10-22. As a result of this decision Trans Union intentionally omitted OFAC information from disclosures sent to consumers. *Id.* at 318:3-14; Tr. Vol. 4 (Walker) 706:7-13.

B. Trans Union's Notice of Problems With Its Treatment of OFAC Information

The trial record included evidence that Trans Union was aware of problems with its practices with respect to its handling of OFAC information for years. Trans Union received numerous consumer inquiries regarding OFAC during 2006 and 2007. Ex. 29.

The evidence furthermore showed that Trans Union had specific notice from a consumer who sued Trans Union in October 2005 for FCRA violations that are a strikingly similar to Plaintiff's claims here. Dkt. No. 287 (Stipulation of the Parties regarding *Cortez* litigation). Sandra Cortez claimed that Trans Union inaccurately included an OFAC alert on a consumer report about her to a car dealership and that it failed to properly disclose OFAC information to her upon her request. *Id.*; Ex. 4. The district court ruled that OFAC data is covered by the FCRA and the jury found that Trans Union violated the FCRA by failing to follow reasonable procedures to assure the maximum possible accuracy of OFAC information on consumer reports, and by failing to properly disclose OFAC information in her file. *Id.*

The record demonstrates that although the *Cortez* jury and trial court found against Trans Union in 2007, Trans Union continued with business as usual with respect to OFAC data until late 2010. Specifically, it continued to use the name-only matching logic to associate consumers with the OFAC list. Tr. Vol. 3 (O'Connell) 485:24-486:6. Similarly, Trans Union continued to omit OFAC data from disclosures it sent to consumers during this period. Tr. Vol. 2 (Gill) 322:12-323:24; Tr. Vol. 4 (Walker) 706:7-

13. Instead of complying with the FCRA, Trans Union made no changes to its practices while it appealed the jury's verdict in *Cortez*. Dkt. No. 287. In August of 2010, the Third Circuit affirmed *Cortez*. *Cortez v. Trans Union, LLC*, 617 F.3d. 688, 721 (3d Cir. 2010).

Even with the benefit of this guidance, Trans Union made no substantive changes to its procedures for associating consumers with SDNs on the OFAC list, continuing to use only nameonly matching logic. Tr. Vol. 3 (O'Connell) 470:7-21, 485:24-486:6. Instead, Trans Union waited for two years for its vendor Accuity to release new matching software. Tr. Vol. 3 (O'Connell) 536:15-537:7. Trans Union did not push Accuity for a faster delivery of this new product. *Id.* at 537:8-11. Trans Union never considered using a different vendor to obtain OFAC information. *Id.* at 482:21-24. And Trans Union never even considered stopping sales of OFAC data. *Id.* at 482:25-483:4.

The only relevant change Trans Union made with respect to its reporting of OFAC information following the *Cortez* appellate decision was to add the word "potential" in front of the word "match" on credit reports delivered to Trans Union's customers, a computer programming change that took a single day to implement. Tr. Vol. 2 (Gill) 358:6-359:9; Dkt. No. 303-1 at pp. 8-9 (Acharya) 27:5-16, 28:22-29:19.[2]

The trial record shows that Trans Union also made no changes to its disclosure practices for OFAC

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[2] Defendant also abandoned the use of Accuity's "synonyms table." Tr. Vol. 3 (O'Connell) 485:3-15. But that change is irrelevant to this case since none of the class members here were considered a "hit" because of any synonym.

information until January 2011. Tr. Vol. 4 (Walker) 706:7-13, 706:22-707:2; Dkt. No. 303-1 at pp. 69-70 (Lytle) 283:11-284:22. At that point, the consumer file disclosure or "personal credit report" sent to consumers continued to omit reference to OFAC information entirely. Tr. Vol. 2 (Walker) 708:6-709:1.

In January 2011, Trans Union began sending consumers it associated with the OFAC list who requested a file disclosure a separate form letter with a subject line "Regarding: OFAC (Office of Foreign Assets Control) Database." Ex. 3; Tr. Vol. 4 (Walker) 684:18-22. The letter had none of the normal indicia of a consumer file disclosure. Ex. 3. To the contrary, the letter said that in response to the consumer's request for their personal credit report, "*That report* has been sent to you *separately*." *Id.* (emphasis added). Trans Union's form letter then said in the passive voice that the recipient's name was "considered a potential match to information listed" on the OFAC database. *Id.* Even the Trans Union employee who drafted the letter admitted that it was unclear, stating that the letter does not clearly state who considered the consumer to be a potential match to an SDN. Tr. Vol. 4 (Katz) 604:6-16.

The letter also set forth the information Trans Union considered a match, including the additional identifying information such as date of birth, place of birth, social security number, and place of birth, despite continuing to fail to use this information in its matching logic. Ex. 3. The form letter indicated that it was being provided as a "courtesy," and was not identified as including information contained within the recipient's consumer file. *Id.* The letter did not

provide required information regarding a toll-free telephone number for disputes, or list the federal agencies responsible for enforcing the FCRA. *Id*. Most importantly, the letter failed to inform consumers of their rights, including their right to know that OFAC information is part of their "file" and that such information may be disputed and must be promptly corrected when inaccurate. *Id.*

C. The Department of Treasury's Concerns And Trans Union's Misrepresentations In Response

The U.S. Department of Treasury ("Treasury"), the government agency responsible for maintaining the OFAC list, contacted Trans Union on October 27, 2010 with continuing concerns regarding its reporting and disclosure of OFAC information. Ex. 34 (referencing prior meetings and correspondence in 2007 and 2008). Treasury specifically expressed concerns with placing OFAC records on credit reports using name-only matching alongside traditional credit data subject to more complex matching:

> We remain concerned that **name-matching services** ("Interdiction Products") used by credit bureaus to inform clients about potential dealings with persons on the SDN List **may be creating unnecessary confusion**. An Interdiction Product that does not include rudimentary checks to avoid false positive reporting can create more confusion than clarity and cause harm to innocent consumers. This is particularly worrisome when Interdiction Products are disseminated

> broadly **in conjunction with credit reports**.

Ex. 34 (emphasis added). Treasury further stated that it was "particularly interested in procedures or policies you have established to mitigate the impact of false positives on credit applicants." *Id.*

Trans Union's legal department took over three months to respond, during which time it created the form letter to send to consumers it was associating with the OFAC list. Ex. 35; Tr. Vol. 4 (Katz) 585:1-7. Trans Union's response misrepresented its actual procedures and communications with consumers. Ex. 35. Trans Union's General Counsel Denise Norgle assured Treasury that its communication to consumers provided "instructions on how the consumer can request Trans Union block the return of a potential match message on future transactions." *Id.* at 035-003. The actual letter, however, contained no such instructions. Ex. 3; Tr. Vol. 3 (O'Connell) 535:16-536:12.

D. The Experience Of Representative Plaintiff Sergio L. Ramirez

1. Trans Union Falsely Associated Ramirez with the OFAC List

The jury heard evidence regarding the experience of Plaintiff Ramirez, beginning when he tried to purchase a car from a Nissan dealership in Dublin, California on February 27, 2011. Tr. Vol. 1 (Ramirez) 140:25-141:14. After negotiating for several hours, Ramirez and his wife submitted a credit application which contained his name, address, social security number and date of birth. Tr. Vol. 1 (Ramirez) 142:8-143:6; Ex. 43 at 043-001. The dealer used the

identifying information on the application to pull a Trans Union credit report about Ramirez. Tr. Vol. 2 (Coito) 252:3-253:16.[3]

Trans Union's name-only matching logic returned the following OFAC alert for Ramirez:

> (013561) UST 03 RAMIREZ AGUIRRE, SERGIO HUMBERTO C/O ADMINISTRADORA DE INMUEBLES VIDA, S.A. DE C.V. TIJUANA MEXICO AFF:SDNTK DOB: 11/22/1951 OriginalSource: OFAC OriginalID: 7176
>
> (013562) UST 03 RAMIREZ AGUIRRE, SERGIO HUMBERTO C/O FARMACIA VIDA SUPREMA, S.A. DE C.V. TIJUANA, MEXICO AFF: SDNTK DOB: 11/22/1951 OriginalSource: OFAC OriginalID: 7176 P_ID: 13561
>
> (013563) UST 03 RAMIREZ AGUIRRE, SERGIO HUMERTO C/O DISTRIBUIDORA IMPERIAL DE BAJA CALIFORNIA, S.A. DE C.V. TIJUANA, MEXICO AFF: SDNTK DOB: 11/22/1951 OriginalID: 7176 P_ID 13561

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[3] The report appeared under the header "Trans Union," and multiple Trans Union witnesses conceded that it was a Trans Union credit report. Ex. 1; Tr. Vol. 5 (Turek) 754:13-21, 756:14-17; Dkt. No. 303-1 at p. 64 (Lytle) 98:1-9. In February of 2011, Dublin Nissan pulled credit reports through a third party software, DealerTrack, which provides a secure channel of communication between the credit bureaus and car dealerships. Tr. Vol. 2 (Vale) 212:20-214:4. DealerTrack made no changes to the substance of the report, which came from Trans Union. Tr. Vol. 2 (Vale) 218:20-219:11.

> (174125) UST 03 RAMIREZ RIVERA, SERGIO ALBERTO CEDULA NO: 16694220 (COLOMBIA) POB: CALI, COLOMBIA CALI, COLOMBIA Passport no. AF771317 AFF: SDNT DOB: 01/14/1964 OriginalSource: OFAC OriginalID: 10438 POB: CALI, COLOMBIA Passportissuedcountry: COLOMBIA CEDULA NO: 16694220 (COLOMBIA)

Ex. 1. The report falsely stated that Ramirez's name was a "match" to two separate SDNs on the OFAC list. *Id.*

Due to its name-only matching criteria, Defendant associated Ramirez with an unrelated Mexican national, "Sergio Humberto Ramirez Aguirre" who had a birth date of 11/22/1951, and also to an unrelated Colombian national, "Sergio Alberto Ramirez Rivera" who was reported with a birth date of 01/14/196*. *Id.* It was clear from the other information contained in Trans Union's report that Ramirez had no association with either of those individuals on the OFAC list. Ex. 1. Trans Union's own file showed that Plaintiff was born in April of 1976, and his middle initial is "L" (for "Luna") not "Alberto," or "Humberto," and he uses only "Ramirez" as his last name, not "Rivera" or "Aguirre." Tr. Vol. 1 (Ramirez) 146:2-14; 161:25-162:13; Ex. 1; Ex. 75.

In addition to obtaining Plaintiff's Trans Union report, the car dealership also obtained information about him from Experian Information Solutions, Inc. (Experian), another of the "Big Three" nationwide consumer reporting agencies. Ex. 20. Experian operates its own OFAC interdiction software available

to businesses, and in this instance, it did not return a match for Plaintiff. *Id.* Dublin Nissan also ran Ramirez's name through the OFAC interdiction software offered by another business, DealerTrack, which resells credit data and is thus a CRA. Ex. 21; Tr. Vol. 2 (Vale) 227:20-228:3. DealerTrack's analysis also found no match to the OFAC list. *Id.*

Ramirez testified that he was shocked and confused by the appearance of the OFAC alert on his consumer report. Tr. Vol. 1 (Ramirez) 146:15-20. He also testified that he was embarrassed, scared, and did not know what to do next. *Id.* at 147:6-11. The dealership refused to sell Ramirez the car because of the appearance of the OFAC alert on his credit report. *Id.* at 146:24-147:23.

This is consistent with the other evidence at trial, which showed that the smaller lenders who are the intended users of Trans Union's OFAC product typically deal in a high volume of transactions, and when confronted with a "hit" are likely to simply move on to the next transaction rather than run the risk of punishments associated with noncompliance. Tr. Vol. 3 (Ferrari) 425:24-426:12. Some smaller entities adopt a blanket policy of declining to do business with anyone identified even as a potential match to the OFAC list. *Id.* ("Well, really, they freak out once they hear that they have a possible match.").

2. Trans Union Failed to Disclose OFAC Information to Ramirez and Did Not Inform Him of His FCRA Rights

The evidence at trial demonstrated Ramirez's efforts to resolve the problem, beginning with a call to Treasury the day after the incident at the car

dealership. Tr. Vol. 1 (Ramirez) 149:3-150:19.[4] He spoke to a representative of Treasury, who told him he would need to contact Trans Union. *Id.* Ramirez called Trans Union on February 28, 2011, and was told there was no OFAC alert on his file. Tr. Vol.1 (Ramirez) 150:20-151:3. Trans Union's representative told him that Trans Union would mail him a copy of his credit report stating that he was not on the OFAC list. *Id.* at 150:25-151:8. Trans Union then sent Ramirez a copy his "personal credit report," also known as a file disclosure. 152:4-17; Ex. 75. The personal credit report did not mention anything about OFAC, which was Trans Union's standard practice at the time. Ex. 75; Tr. Vol. 4 (Walker) 708:6-709:1.

A day later and in a separate envelope, Ramirez received the separate OFAC letter described above. Tr. Vol. 1 (Ramirez) 153:10-154:24; Ex. 3. He was again shocked and confused, because Trans Union had told him that he was not on the OFAC list, and this had been confirmed by the absence of OFAC information on his Trans Union file. Tr. Vol. 1 (Ramirez) 154:19-24. He did not know what to do to fix the problem, because the letter did not give any instructions. *Id.*

At his wife's urging, Ramirez looked for a lawyer who could advise him about the problem. *Id.* 155:2-15. Ramirez testified that he did not learn about his FCRA rights, or submit a dispute to Trans Union, until after he consulted with a lawyer. *Id.* at 156:9-157:20; Ex. 54 (dated March 16, 2011). He also testified that he was

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[4] Ramirez also learned about the similar experience of Sandra Cortez through his research. Tr. Vol. 1 (Ramirez) 149:17-23.

concerned that this damaging information would be associated with him again, and as a result canceled plans to travel to Mexico on a family vacation. *Id.* at 155:2-9.

E. The Consumers Affected By Trans Union's Practices, Including The Certified Class of Consumers

In addition to hearing Ramirez's story, the jury was presented with evidence regarding other consumers affected by Trans Union's practices regarding OFAC data. Between January and July of 2011, Trans Union sent the same confusing and misleading letter regarding OFAC that it sent Ramirez to 8,184 other consumers. Dkt. No. 289; Tr. Vol. 4 (Walker) 677:13-16, 684:18-22. Trans Union associated each of these consumers with the OFAC list using the same name-only matching logic it used with respect to Ramirez. Tr. Vol. 3 (O'Connell) 468:21-470:21; Tr. Vol. 4 (Walker) 685:2-4; Dkt. No. 303-1 at p. 68 (Lytle) 240:17-242:17. Each of these consumers requested his or her file disclosure by mail,[5] and each

[5] Trans Union's statistics, summarized in its internal analysis of OFAC hits, demonstrate that Trans Union was not disclosing OFAC information to consumers who requested a disclosure online during the class period. In February of 2011, there were 1,723 "OFAC Names Found (hits)" among mailed disclosures. Ex. 10 at 010-005. These are class members who also received the separate OFAC letter, and this number is consistent with the total of 8,185 class members over the six month class period. In the same month, there were 3,599 OFAC Names Found for the disclosure web service. *Id.* OFAC information was not incorporated into web disclosures until September 2011. Dkt. No. 303-1 at p. 45 (Lytle) 70:15-21. If these consumers received the OFAC disclosure letter and are part of the class, then the class size would have to be much larger than 8,185. Thus, either Trans

was sent a file that contained no reference to OFAC. Tr. Vol. 4 (Walker) 708:6-709:1. The evidence regarding the class demonstrated the indiscriminate nature of the name-only matching logic: for example, nearly 100 class members are named "Maria Hernandez," and were all linked to the same individual on the OFAC list, regardless of their vastly differing middle names, addresses, and dates of birth. Tr. Vol. 3 (O'Connell) 472:2-19; Ex. 8 at 008-081 to 008-083.

The evidence also showed that a substantial number of individuals outside of the class were affected by Trans Union's practices. Trans Union's OFAC product was on the market for over a decade, using name-only matching logic to associate consumers with criminals on the OFAC list. Tr. Vol. 3 (O'Connell) 462:20-463:19, 468:21-470:21. The evidence further showed that in a single year, Trans Union used this name-only matching procedure to place OFAC alerts more than 200,000 consumers' credit reports and delivered them to creditors. Ex. 10 at 010-005 (17,557 in July 2012 alone). And during the first eight years Trans Union sold OFAC data, it disclosed *no information at all* about OFAC to consumers who requested their files, leaving thousands of consumers in the dark each year. *Id.*; Tr. Vol. 2 (Gill) 318:9-319:2; Tr. Vol. 4 (Walker) 706:7-13.

Union was not disclosing OFAC information following online disclosure requests in the January to July 2011 time frame, or the class is substantially larger than previously known.

F. Evidence of Trans Union's Disregard for Alternative Procedures To Protect Consumers' Rights

The trial record contains evidence that Trans Union had numerous alternative methods to its chosen procedures. From the beginning, Trans Union's chosen vendor Accuity offered customizable match logic options, which could search OFAC data using different items of personal identifying information, including date of birth. Dkt. No. 303-1 at pp. 26-29 (Newman) 50:7-52:8, 53:21-54:3, 54:23-55:4, 56:8-15, 67:9-16, 70:21-71:21, 72:5-75:20.[6]

The record also demonstrates that Trans Union had access to a variety of other interdiction software options. Tr. Vol. 3 (Ferrari) 420:23-421:4 (naming three providers of screening software other than Accuity). Furthermore, the jury heard evidence that the recommended best practices for OFAC interdiction software is to conduct searches with name plus at least one additional item of personal information. *Id.* at 423:2-25.

The evidence showed that more accurate alternative methods were available in 2011. Two other CRAs screened Ramirez against the OFAC list on the very same day, and accurately found that he was not associated with any SDNs. Ex. 20; Ex. 21. Trans Union's direct competitor Experian conduct its own OFAC search and found no match. Ex. 20. DealerTrack ran a separate screen and independently

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[6] During the January-July 2011 time frame, Trans Union paid Accuity as little as 1/10 of one cent per search. Dkt. No. 303-1 at p. 25 (Newman) 42:8-43:9.

found no match. Ex. 21. Plaintiff's expert testified that he has consulted with financial institutions concerning proper filters for detecting possible OFAC matches, and that in his ten years of legal practice specializing in OFAC compliance, the minimum number of identifiers he has ever recommended to properly identify SDNs is two. Tr. Vol. 3 (Ferrari) at 404:4-405:5, 423:22-25.

The testimony and documents admitted at trial also showed that Trans Union chose not to implement several more accurate matching procedures. Trans Union's own internal research showed that it could have entirely eliminated false positive results by disqualifying potential matches where the date of birth on the OFAC file was more than ten years different from the consumer's date of birth. Tr. Vol. 3 (O'Connell) 486:16-487:9; Ex. 10 at 010-011 (two different rule options which included "DOB>10 Yrs" reduced false positives to 0%). But Trans Union did not implement any of these additional rules or use date of birth in its matching logic until 2013. Tr. Vol. 3 (O'Connell) 489:19-22, 533:20-534:2. The evidence also showed that a human review of OFAC records was feasible, because Trans Union in fact established an in-person review system of consumer disputes of OFAC information in late 2010 after the *Cortez* appellate decision. Tr. Vol. 2 (Gill) 325:10-326:21. A Trans Union employee would review the consumer's identifying information and compare it to the information Treasury made available regarding the SDN. *Id.* When the information did not match, Trans Union would block the alert from reappearing on the consumer's credit report. *Id.* at 327:7-328:2. This human review process demonstrated the inaccuracy of

the name-only matching system: Trans Union conceded that *every one* of the OFAC alerts reviewed in this process was inaccurate, and thus blocked each one. *Id.* at 331:15-21.

Trans Union testified at trial that it cannot identify a single instance since 2002 in which its OFAC alert procedure identified a person actually on the OFAC SDN list. Tr. Vol. 3 (O'Connell) 491:7-17. Yet, Trans Union continues to this day to argue that its procedures in fact *benefitted* class members:

> Q Mr. O'Connell, I will represent to you that the stack that I just placed in front of you - (Document displayed)
>
> Q -- represents the class of over 8,000 people in this case. Is it your testimony that TransUnion's enhancements and products benefited those 8,000 people?
>
> A Absolutely.
>
> Q Absolutely.
>
> A Absolutely.

Tr. Vol. 3 (O'Connell) 545:8-16.

G. The Jury's Verdict

After hearing all of the evidence and argument in this matter, the jury found that Trans Union willfully violated the FCRA by (1) failing to maintain reasonable procedures to assure the maximum possible accuracy of OFAC information it associated with class members, (2) failing to clearly and accurately disclose OFAC information upon request, and (3) failing to provide a summary of FCRA rights with each file disclosure. Dkt. No. 305 (verdict form).

The jury awarded $984.22 in statutory damages to each class member. *Id*. The jury awarded an additional $6,353.08 in punitive damages to each class member. Dkt. No. 306 (punitive damages verdict form).

III. ARGUMENT

Trans Union challenges each of the jury's liability determinations, requests a new trial, and seeks a reduction of both the statutory and punitive damages awards. Trans Union must satisfy an exacting standard in order to invalidate the jury's determination. Trans Union fails to meet the burden extraordinary burden for each of its requests.

A. The Jury's Verdict Was Supported By The Evidence And There Is No Basis For Judgment As A Matter Of Law

1. Legal Standard

A party seeking to overturn a jury's verdict after trial faces a "very high" hurdle. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 859 (9th Cir. 2002). Judgment as a matter of law is appropriate only where "a reasonable jury would not have a legally sufficient evidentiary basis" to find in favor of the moving party. Fed. R. Civ. P. 50. The moving party has the burden of demonstrating that its opponent failed to support its claims with "substantial evidence." *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987); *see also Weaving*, 763 F.3d at 1111.

The court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876, 881 (9th Cir. 2003). The court may not weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. *Landes Constr.*, 833 F.2d at 1371; *Costa*, 299 F.3d at 859. Granting a motion for judgment as a matter of law is proper if "the evidence permits only one reasonable conclusion, and the conclusion is contrary to that reached by the jury." *Ostad*, 327 F.3d at 881.

2. The Jury Had Sufficient Evidence to Conclude That Trans Union Willfully Failed to Follow Reasonable Procedures to Assure the Maximum Possible Accuracy of Class Member OFAC Alerts

The FCRA requires CRAs such as Trans Union to follow "reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates" when creating consumer reports. 15 U.S.C. § 1681e(b).

An inquiry into the reasonableness of procedures under FCRA section 1681e(b) centers on whether the CRA's procedures included reasonable procedures to prevent inaccuracies in preparing the report at issue. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333-34 (9th Cir. 1995). "The reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases." *Id.* at 1333; *Dalton v. Capital Associated Indus.*, 257 F.3d 409, 416 (4th Cir. 2001).

Multiple circuit courts, including the Ninth Circuit, have found a report to be inaccurate when

information in it is "patently incorrect" or when it is "misleading in such a way and to such an extent that it can be expected to [have an] adverse" effect. *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890-91 (9th Cir. 2010) (citing and quoting *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009).

Willful violations of the FCRA include "action taken in 'reckless disregard of statutory duty,' in addition to actions 'known to violate the Act.'" *Syed v. M-I, LLC*, 853 F.3d 492, 503 (9th Cir. 2017) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-57 (2007)). A CRA can willfully violate the FCRA even in the absence of prior authoritative guidance. *Id.* at 504. Indeed, "in the FCRA context, a 'lack of definitive authority does not, as a matter of law, immunize [a party] from potential liability' for statutory damages." *Id.* (quoting *Cortez*, 617 F.3d. at 721). Where the FCRA is clear, a defendant's subjective belief that its actions are proper is immaterial. *Id.* at 505.

Blanket policies that result from corporate decision-making regarding treatment of data about consumers can underpin a willfulness finding under the FCRA even in the absence of guidance. *Seamans v. Temple Univ.*, 744 F.3d 853, 868 (3d Cir. 2014). *See also See Soutter v. Equifax Info. Servs., Inc.,* 307 F.R.D. 183, 206-07 (E.D. Va. 2015) (a CRA's "conscious decision to categorically subject" different types of information to different collection standards was a sufficient basis for a reasonable jury to find a willful violation of FCRA section 1681e(b)).

The jury here found that Trans Union willfully violated the FCRA by failing to follow reasonable

procedures to assure the maximum possible accuracy of the OFAC information it associated with class members. Dkt. No. 305 (verdict form). This determination is supported by the substantial evidence Plaintiff presented at trial:

- Trans Union used identical name-only matching logic, disregarding middle names, dates of birth, social security numbers, places of birth, and all other available identifying information, to associate Ramirez and all other class members with the OFAC list, even when additional information was provided to it and available from its credit database and/or the face of the OFAC list. Tr. Vol. 3 (O'Connell) 468:21-470:21; Tr. Vol. 4 (Walker) 685:2-4; Dkt. No. 303-1 at p. 68 (Lytle) 240:17-242:17; Tr. Vol. 2 (Gill) 294:1-14, 315:8-316:7.
- Trans Union's name-only matching procedure for OFAC information was in stark contrast to its procedures for all other items of information included on credit reports, which required additional identifying information, such as address, date of birth, or social security number, to match in order for Trans Union to associate such information with a consumer. Tr. Vol. 2 (Gill) 308:16-310:10; Tr. Vol. 3 (O'Connell) 465:13-18.
- The recommended best practice for OFAC interdiction software is to use at least one item of personal identifying information *in addition* to name. Tr. Vol. 3 (Ferrari) 423:2-25.
- The smaller lenders to which Trans Union's OFAC product was marketed were unlikely to run the risk of doing business with a person associated with the OFAC list and would prefer to move on to the next

transaction, regardless of Trans Union's contractual language, as shown by Plaintiff's experience. Tr. Vol. 2 (Gill) 340:10-22; Tr. Vol. 3 (Ferrari) 425:24-426:12; Tr. Vol. 1 (Ramirez) 146:2-147:5

- Trans Union's vendor Accuity had filtering options which included searching the OFAC database by date of birth, and allowed the buyers of its software, such as Trans Union, to control the filters they wished to use of OFAC "hits." Dkt. No. 303-1 at pp. 26-29 (Newman) 50:7-52:8, 53:21-54:3, 54:23-55:4, 56:8-15, 67:9- 16, 70:21-71:21, 72:5-75:20.
- The two other CRAs (Experian and DealerTrack) that screened Mr. Ramirez against the OFAC list in February 2011 were able to accurately determine that he is not a match to the OFAC SDN List. Ex. 20; Ex. 21.
- Trans Union had repeated notice of problems with its procedures regarding OFAC between 2005 and 2011, including the *Cortez* complaint in 2005, the jury's verdict in 2007, frequent consumer inquiries in 2006 and 2007, and communications from Treasury in 2010, which referenced earlier communications from 2007 and 2008. Dkt. No. 287; Ex. 29, Ex. 34.
- Trans Union's internal statistics for the relevant time period show that over 75% of OFAC records matched to consumers using only first and last name had a date of birth *more than ten years different* than that of the allegedly matching consumer. Ex. 10 at 010-003.

- Trans Union continued to use name-only matching logic for OFAC information until 2013. Tr. Vol. 3 (O'Connell) 489:19-22, 533:20-534:2.
- After Trans Union began accepting disputes of OFAC information, it employed a manual review process to determine accuracy of OFAC hits, and as a result conceded the inaccuracy of *each one* by always blocking it. Tr. Vol. 2 (Gill) 325:10-326:21, 327:7-328:2, 331:15-21.
- Trans Union did not consider using a different vendor other than Accuity, or stopping the sale of OFAC information. Tr. Vol. 3 (O'Connell) 482:21-483:4.
- Trans Union is unable to identify a single instance since 2002 in which its OFAC alert procedure identified an SDN actually on the OFAC list. Tr. Vol. 3 (O'Connell) 491:7-17.
- Trans Union nonetheless argues that its OFAC procedures "absolutely" benefitted consumers. Tr. Vol. 3 (O'Connell) 545:8-16.
- Trans Union conceded no mistakes, and admitted that its reporting in this case was done in accordance with its policies in 2011. Tr. Vol. 3 (O'Connell) 468:21- 470:21.

Viewing this evidence, and all inferences therefrom, in the light most favorable to Plaintiff and the class, a reasonable jury could conclude that Trans Union willfully violated conclusion, and that conclusion is contrary to that reached by the jury." Ostad, 327 F.3d at 881. Defendant has thus failed to meet its burden under Rule 50 and its motion for judgment as a matter of law on the accuracy claim should be denied. FCRA section 1681e(b). This is not a case where "the evidence permits only one

reasonable conclusion, and that conclusion is contrary to that reached by the jury." Ostad, 327 F.3d at 881. Defendant has thus failed to meet its burden under Rule 50 and its motion for judgment as a matter of law on the accuracy claim should be denied.

None of Trans Union's arguments to the contrary have merit. First, Trans Union relies upon the disclaimers in its contracts and the addition of the word "potential" in front of the word "match" to argue that it was neither inaccurate nor misleading to associate innocent consumer with the OFAC list. Trans Union asserts it was the end user's responsibility to determine whether the subject of a report was actually a match to the OFAC list. Defendant's Renewed Motion for Judgment As A Matter Of Law (herein, "Def. Mem.") Dkt. No. 321 at p. 11.

This attempt to shift the burden of assuring accuracy to its customers fails both factually and legally. Ramirez's experience, which was the only evidence presented to the jury about how small lenders who purchase Trans Union's OFAC product actually react in the face of an OFAC alert, demonstrates how a car dealership did nothing other than review the Trans Union report, and refused to extend credit to Ramirez based upon the report. Tr. Vol. 1 (Ramirez) 146:15- 147:23. This corroborates the testimony of Plaintiff's expert Mr. Ferrari, who stated that small lenders will "freak out" in the face of an OFAC alert, and end the transaction rather than run the risk of violating OFAC sanctions. Tr. Vol. 3 (Ferrari) 425:24-426:12. And Trans Union knows that it has never been able to confirm the actual accuracy

of a single OFAC hit, and conceded the inaccuracy of every disputed OFAC alert. Tr. Vol. 3 (O'Connell) 491:7-17; Tr. Vol. 2 (Gill) 325:10-326:21, 327:7-328:2, 331:15-21.

Further, multiple courts have found that disclaimers and qualifications on credit reports about the accuracy of the data on those reports does not provide a FCRA defense, and surely does not transform inaccurate information into accurate information. *Cortez*, 617 F.3d at 708 ("We are not persuaded that [defendant's] private contractual arrangements with its clients can alter the application of federal law, absent a statutory provision allowing this rather unique result."); *Smith v. E-Backgroundchecks.com, Inc.*, 81 F. Supp. 3d 1342, 1348-49 (N.D. Ga. 2015) ("Ultimately, regardless of whether Defendant had presented this argument to the Magistrate Judge, the Court finds the 'disclaimer' used by Defendant does not negate liability" under the FCRA); *Henderson v. Corelogic Nat'l Background Data, LLC*, 178 F. Supp. 3d 320, 336 (E.D. Va. 2016) (disclaimers or other contractual delegations of responsibility do not prevent application of FCRA's requirements). If Trans Union's argument is accepted, CRAs could place completely false information about credit card accounts, bank accounts, judgments, or tax liens on credit reports, and escape liability for inaccuracy, simply by adding disclaimers requiring the purchasers of reports to confirm the information before using it. FCRA section 1681e(b) requirement of

maximum possible accuracy cannot countenance such a result.[7]

Trans Union also argues that its later addition of the word "potential" in front of "match" demonstrates that any violation of FCRA section 1681e(b) could not be willful because it was attempting to comply with *Cortez*. Trans Union again misstates the ruling of the *Cortez* court by arguing that the addition of this single word is sufficient—as this Court has noted, the Third Circuit was dismissing Trans Union's argument that OFAC alerts are only "possible" matches to be screened by the end user, an argument Trans Union repeats here. *Ramirez v. Trans Union, LLC*, 2017 WL 1133161, at *5 (N.D. Cal. Mar. 27, 2017) (denying motion for summary judgment). Even a cursory review of *Cortez* makes clear "that 1681e(b)'s 'maximum possible accuracy' standard 'requires more than merely allowing for the possibility of accuracy.'" *Id.* (quoting *Cortez*, 617 F.3d at 708-09).

Trans Union also points to its sole other change to its OFAC product after the *Cortez* appellate decision, an email sent to its vendor asking it to remove the synonym matching function. Def. Mem., Dkt. No. 321

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[7] The *Toliver* and *Shaw* cases that Trans Union cites for the proposition that CRAs may expect data to be used as intended are simply inapplicable here. Def. Mem., Dkt. No. 321 at p. 13 (citing *Toliver v. Experian Info. Solutions, Inc.*, 973 F. Supp. 2d 707 (S.D. Tex. 2013) and *Shaw v. Experian Info. Sols., Inc.*, 2016 WL 5464543 (S.D. Cal. Sept. 28, 2016)). Both of those cases dealt with interpretation of internal codes related to tradelines which undisputedly pertained to the consumer about whom the credit reports related, and provide no support for the proposition that a CRA may avoid liability when it attributes data to the wrong consumer.

at p. 5. This minor adjustment did nothing to affect the fundamental problem with Trans Union's name-only matching procedures, which the Third Circuit clearly identified and labeled as "reprehensible": the name-only matching logic which disregarded additional data when present, including date of birth. Tr. Vol. 3 (O'Connell) 468:21- 470:21; *Cortez*, 617 F.3d at 723. Indeed, Cortez's date of birth was more than ten years different from the OFAC criminal Trans Union associated with her, just like Ramirez and 75% of other consumers Trans Union associated with OFAC alerts. Ex. 4 (Trans Union report on Sandra Cortez, showing a May 1944 date of birth for Cortez, and a June 1971 date of birth in the OFAC record); Ex. 1 (Trans Union report showing April 1976 date of birth for Ramirez and November 1951 date of birth in OFAC records); Ex. 10 at 010-003. The problem was the name-only matching logic, which Trans Union continued to use until 2013. Tr. Vol. 3 (O'Connell) 489:19- 22, 533:20-534:2.

The evidence also contradicted Trans Union's claim that better technology was not available in 2011. Two other CRAs screened Ramirez against the OFAC list on the very same day Trans Union did so, and correctly found that he was not a match, or even a potential match. Ex. 20, Ex. 21.

Although Trans Union would like to focus on its actions following the appellate decision in *Cortez* in 2010, the jury here was presented with a broad range of evidence that Trans Union had notice of problems with its OFAC procedures far earlier. Cortez brought her lawsuit in 2005, and the trial court found in 2007 that OFAC information is covered by the FCRA and

thus subject to the maximum possible accuracy standard. Dkt. No. 287. The *Cortez* jury sent a message to Trans Union that it was violating the FCRA in 2007. *Id.* During the *Cortez* litigation, in 2006 and 2007, Trans Union was receiving frequent inquiries from consumers about OFAC. Ex. 29. OFAC itself contacted Trans Union in 2010, referencing prior communications in 2007 and 2008, with concerns about the sale of OFAC alerts on consumer credit reports. Ex. 34. In the face of all of this, Trans Union never even considered pausing sales of OFAC alerts. Tr. Vol. 3 (O'Connell) 482:25-483:4. Furthermore, Trans Union's disregard for consumer rights was continuing—even after *Cortez*, Trans Union did not begin using any data other than name to match consumers to the OFAC list until 2013. Tr. Vol. 3 (O'Connell) 489:19-22, 533:20-534:2.

Finally, the jury was entitled to consider the unapologetic and implausible stances Trans Union took at trial, which support a finding of willfulness. Trans Union asserted that it was the victim, claiming that the case was about Trans Union's reputation, not the reputations of consumers. Tr. Vol. 5. 898:11-899:11. Trans Union took the position that Ramirez's experience at the Dublin Nissan dealership was his fault for having a prior repossession, or his wife's for not writing his middle initial on the credit application. Tr. Vol. 1 (Ramirez) 161:25-164:13, 163:7-164:11.[8] Trans Union also sought to blame Dublin Nissan for

[8] Other evidence presented at trial demonstrated that Trans Union had Mr. Ramirez's middle initial, "L" in its database (Ex. 1, Ex. 75), and that the repossession referenced had no impact on the transaction. Tr. Vol. 2 (Coito) 255:3-13.

taking action based on the report (Tr. Vol. 5 (Turek) 750:2-752:23), and the company that provided the secure channel between Trans Union and Dublin Nissan for omitting the word "potential." *Id.* at 757:3-25. Defendant even asserted that the credit report delivered to Dublin Nissan on February 27, 2011 wasn't a genuine Trans Union report at all. *Id.* at 764:7-10.[9] Trans Union claimed a market-best rate of false positives, but did not even know the false positive rates of any of its competitors. Tr. Vol. 3 O'Connell 527:8-12, 528:6-529:22. Perhaps most tellingly, Trans Union asserted that class members have been benefitted by its use of name-only matching logic that falsely associates them with terrorists, drug traffickers, and other criminals. Tr. Vol. 3 (O'Connell) 545:8-16.

The jury's conclusion that Trans Union was in willful violation of the FCRA's accuracy requirements is supported by the evidence and must stand.

3. The Jury Had Sufficient Evidence to Conclude That Trans Union Willfully Failed to Clearly and Accurately Disclose OFAC Information

Whenever a consumer requests a copy of their file, the FCRA requires CRAs to "clearly and accurately disclose to the consumer all information in the consumer's file" at the time of the request. 15 U.S.C. § 1681g(a). The FCRA defines a consumer's file to

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[9] Mr. Turek later contradicted his testimony by stating that Exhibit 1 was a genuine Trans Union report, and confirmed that the source of the OFAC data was Trans Union. Tr. Vol. 5 (Turek) 754:18-21, 756:14-17, 764:14-766:3.

include "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). Unambiguous statutory language like this, which is "not subject to a range of plausible interpretations," renders a defendant's subjective interpretation of the law irrelevant and supports a finding of willfulness. *Syed*, 853 F.3d at 505. As the Third Circuit found in upholding the jury's willfulness finding on the disclosure claim in *Cortez*, the broad reach of FCRA section 1681g(a) is "obvious." 617 F.3d at 711.

The jury found that Trans Union willfully failed to clearly and accurately disclose OFAC information to class members upon request. Dkt. No. 305 (verdict form). This determination was fully supported by the substantial evidence presented at trial:

- Ramirez requested a copy of his Trans Union file, and received his file or "personal credit report" which identified itself as the response to his request, and contained no reference whatsoever to OFAC. Ex. 75.
- The form of the "personal credit report" was the same for all class members in 2011, and was the same form sent to Ms. Cortez in 2005 in that it omitted OFAC information. Tr. Vol. 4 (Walker) 708:6-709:1; Dkt. No. 303-1 at pp. 62-63 (Lytle) 81:1-82:7; Ex. 75; Ex. 5.
- Trans Union sent Ramirez and all other class members a separate letter regarding the OFAC record that "is considered a potential match" to the consumer's name. The author of the letter admitted that it is unclear who or what considers

the consumer's name to be a match. Tr. Vol. 4 (Walker) 684:18-22; Ex. 3; Tr. Vol. 4 (Katz) 604:6-16.

- The separate letter is not identified as a file disclosure, and says that the requested personal credit report "has been mailed to you *separately*." The letter also states that it is being provided as a "courtesy," and does not inform the consumer that the OFAC information can be disputed if inaccurate. Ex. 3.
- Ramirez did not know that he could dispute the OFAC information associated with him, or how to do dispute it, until after he consulted with a lawyer. Tr. Vol. 1 (Ramirez) 156:9-157:20; Ex. 54.
- Since it introduced the product in 2002, Trans Union had the capability to incorporate OFAC information on the credit reports sold to customers. Tr. Vol. 2 (Gill) 310:11-311:10; Ex. 4.
- Trans Union had notice that OFAC information should be disclosed in the form of the plain language of the FCRA, the Cortez complaint in 2005, the Cortez jury verdict in 2007, and numerous consumer inquiries regarding OFAC in 2006 and 2007. Dkt. No. 287; Ex. 29.
- Trans Union did not begin to disclose OFAC information to consumers in any manner until 2011, and never considered stopping sales of OFAC alerts to third parties. Tr. Vol. 4 (Walker) 706:7-13, 706:22-707:2; Dkt. No. 303-1 at pp. 69-70 (Lytle) 283:11-284:22; Tr. Vol. 2 (Gill) 318:9-319:2; Tr. Vol. 3 (O'Connell) 482:25-483:4.
- Trans Union misrepresented the content of the separate OFAC letter in a communication to Treasury, falsely claiming that it instructed

consumers about their right to dispute OFAC information. Ex. 3; Ex. 35.

This evidence and the inferences drawn from it, viewed in the light most favorable to Plaintiff and the class, was more than sufficient for the jury to conclude that Trans Union willfully failed to clearly and accurately disclose OFAC information upon request.

Trans Union argues that its use of a separate letter constituted a proper disclosure under the FCRA because the letter should be read together with the personal credit report. Def Mem., Dkt. No. 321 at p. 16. Nothing about the two documents indicates that they should be read together: the "personal credit report" does not say that it is incomplete and will be supplemented, and the separate letter defines itself in opposition to a file disclosure, saying that the consumer's file has been sent "separately." Ex. 3. Even the author of the separate letter conceded that it is unclear. Tr. Vol. 4 (Katz) 604:6-16. Thus, even taken together, the two documents do not clearly and accurately disclose all of the information in a consumer's file, as required by FCRA section 1681g.[10]

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[10] Furthermore, the jury could infer from the content of the separate OFAC letter that Trans Union did not want consumers to know that OFAC information was part of their file or that they could dispute it. The letter said that Trans Union was providing the information as a "courtesy" and not as required by law, suggesting that the information is not part of the file. Ex. 3. The inference that Trans Union misled class members is bolstered by the evidence that shortly after drafting the OFAC letter, Trans Union's general counsel falsely represented to Treasury that the letter contained instructions on how to block future return of potential match messages. Ex. 35 at 035-003.

Trans Union asserts that a willful violation is not possible allegedly because there was no "authoritative legal guidance [that] put Trans Union on specific notice that disclosing OFAC information in a separate letter would violate" FCRA section 1681g. Def. Mem, Dkt. No. 321 at p. 15. As this Court has already recognized, this incorrect legal standard is made up of whole cloth: "no court has held that a defendant can be found to have willfully violated the FCRA only when its conduct violates clearly established law." *Ramirez v. Trans Union, LLC*, 2017 WL 1133161, at *2 (denying Trans Union's motion for summary judgment). Indeed, Trans Union's approach is entirely foreclosed by the binding precedent of *Syed*, which makes clear that when a statute is unambiguous, no prior guidance is necessary to find a willful violation. *Syed*, 853 F.3d at 504-05.[11] No such lack of clarity exists here—FCRA section 1681g(a) is pellucidly clear that *all* information in the consumer's file must be disclosed.

Trans Union claims that it "made a good faith attempt to comply with its disclosure obligation," (Def. Mem., Dkt. No. 321 at p. 16) but this assertion is also undermined by the evidence at trial, which demonstrates that Trans Union made no effort whatsoever to disclose OFAC information to consumers until well after the appellate decision in

[11] The cases Trans Union cites are both nonbinding and not to the contrary. In *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 727 (7th Cir. 2008), the court found that the provision at issue was unclear. Likewise, although obscured by Trans Union's selective quotation, the "lack of guidance" at issue in *Henderson v. Trans Union, LLC* was a lack of clarity in the *statutory terms*. 2017 WL 1734036, at *3 (E.D. Va. May 2, 2017).

Cortez in 2010. Tr. Vol. 4 (Walker) 706:7-13; Dkt. No. 303-1 at pp. 69-70 (Lytle) 283:11-284:22. In addition to disregarding the clear mandate of FCRA section 1681g(a), Trans Union had notice in the form of the *Cortez* lawsuit and jury verdict in 2007, as well as numerous consumer inquiries in 2006 and 2007. Dkt. No. 287; Ex. 29. Even after the *Cortez* appellate decision, Trans Union continued to sell OFAC information to its customers through 2010 and until 2011 without any way of clearly disclosing information to consumers. Tr. Vol. 4 (Walker) 706:7-13, 706:22-707:2. It could have avoided thousands of willful violations of FCRA section 1681g(a) by pausing sales until it had a proper disclosure method in place, but never even considered it. Tr. Vol. 3 (O'Connell) 482:25-483:4.

Trans Union argues that FCRA section 1681g does not require disclosures to arrive in a single envelope, but this misses the point. This provision requires clear and accurate disclosure of all information in a consumer's file, and Trans Union's method of disclosure was not clear or accurate, and did not include all information.

Trans Union also repeats its claim that it simply "did not have the technology" to make OFAC disclosures in a single document. Def. Mem., Dkt. No. 321 at pp. 18-19. As an initial matter, the only evidence supporting this claim is Trans Union's self-interested testimony, which the jury is entitled to disregard and this court need not consider. *Harper v. City of L.A.*, 533 F.3d 1010, 1021 (9th Cir. 2008); *Charyulu v. Cal. Cas. Indem. Exch.*, 523 Fed. App'x 478, 481 (9th Cir. 2013). Furthermore, this testimony

is contradicted by evidence that Trans Union had the technology to incorporate OFAC information on consumer reports it sold to third parties for money, and had that technology for years. *See* Ex. 4 (Cortez report, incorporating OFAC alert in 2005). And certainly nothing was stopping Trans Union from making a clear statement that OFAC information is part of a consumer's file and was being sent as part of a file disclosure.

The jury verdict regarding FCRA section 1681g(a) was fully supported by the evidence, and Trans Union's motion must be denied.

4. The Jury Had Sufficient Evidence to Conclude That Trans Union Willfully Failed to Include a Statement of Rights with Its Disclosure of OFAC Information

In addition to providing clear and accurate disclosures upon request, the FCRA also unambiguously requires CRAs to "provide to a consumer *with each written disclosure*…the [FTC's] summary of rights…." 15 U.S.C. § 1681g(c) (emphasis added). As with the disclosure requirement, this mandate is not subject to multiple plausible interpretations, rendering any alternate reading unreasonable and actions taken based on such an alternate reading willful violations. *Syed*, 853 F.3d at 505.

The jury found that Trans Union willfully failed to provide the FCRA summary of rights with each written disclosure made to consumers. Dkt. No. 305 (verdict form). This finding was likewise fully supported by the evidence, listed in section III.A.3 above.

Trans Union claims that it fulfilled its obligations under FCRA section 1681g(c) with respect to OFAC information by including the summary of rights with the personal credit report it sent to class members. Def. Mem., Dkt. No. 321 at pp. 16-17. But it is undisputed that the personal credit report did not contain any reference to OFAC whatsoever. Ex. 75; Tr. Vol. 4 (Walker) 708:6-709:1. It is further undisputed that the separate letter, which did contain OFAC information, did not contain a summary of rights. Ex. 3. The OFAC letter did not include any reference to the summary of rights contained in the personal credit report, or indicate that those rights applied to OFAC information. Ex. 3.

Trans Union cannot have it both ways—since Trans Union asserts that the separate letter is a written disclosure, then it was required to provide the summary of rights *with that mailing*. Trans Union protests that no authority existed requiring a single envelope, or providing the summary of rights more than once per request (Def. Mem., Dkt. No. 321 at pp. 16-17), but these arguments ring hollow in light of the unambiguous language of FCRA section 1681g(c) requiring the inclusion of the summary of rights with "*each written disclosure*." 15 U.S.C. § 1681g(c) (emphasis added). There is no plausible interpretation of this language that permits sending the summary of rights with a separate piece of mail, and thus no additional authority is needed. *Syed*, 853 F.3d at 505.

As described above, Trans Union's argument that it was just not possible for it to deliver a single integrated file in 2011 does not hold water, and the jury had sufficient evidence to conclude otherwise.

Trans Union was able to deliver a single integrated report with OFAC and all other data on it to lender clients since the early 2000s. Ex. 4. The jury was entitled to infer that Trans Union could have delivered the exact same thing to consumers including class members.

Trans Union's separate OFAC letter provides no defense. Rather than include a summary of rights with the letter, or reference the summary of rights contained in the personal credit report, or even simply state that the OFAC information could be disputed if incorrect, the letter is silent regarding consumers' rights. Ex. 3. Worse still, when Treasury contacted Trans Union with concerns regarding its OFAC procedures, Trans Union responded by misrepresenting the contents of the OFAC letter. Ex. 34; Ex. 35. Trans Union claimed that the letter "is accompanied by instructions on … how to request TransUnion block the return of a potential match message on future transactions." Ex. 35 at 035-003. The letter contains no such instructions, much less a full statement of rights. Ex. 3.

Finally, Trans Union's assertion that Ramirez "understood [the letter] well enough to successfully contact TransUnion and block future deliveries of OFAC data" is contradicted by the evidence of record. Def. Mem., Dkt. No. 321 at p. 18. Ramirez testified that he was confused after receiving the letter and did not contact Trans Union to dispute the OFAC information until after he consulted with a lawyer. Tr. Vol. 1 (Ramirez) 154:19-24, 156:9-157:20; Ex. 54. A disclosure that requires legal advice to decipher

cannot possibly be clear, accurate, or properly inform consumers of their rights.

The jury was presented with substantial evidence that Trans Union was aware of its obligations under the FCRA with respect to disclosure of OFAC information and inclusion of consumers' right to dispute with each disclosure, as well as evidence that Trans Union did not comply with these obligations. Judgment as a matter of law for Defendant is thus inappropriate, and Trans Union's motion should be denied.

B. Counsel's Arguments Do Not Warrant A New Trial

As with its request for judgment as a matter of law, Trans Union fails to meet its high burden in seeking a new trial. A new trial is appropriate under Rule 59 "only if the jury verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)).

"The federal courts erect a 'high threshold' to claims of improper closing arguments in civil cases raised for the first time after trial." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193-94 (quoting *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.*, 785 F.2d 656, 658 (9th Cir. 1986)). In the absence of a contemporaneous objection, a new trial is only appropriate where "the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Bird v. Glacier Electric Coop.*

Inc., 255 F.3d 1136, 1148 (9th Cir. 2001).[12] The burden is on the moving party to demonstrate concrete prejudice, in light of the totality of the circumstances. *Hemmings*, 285 F.3d at 1193. Even in the presence of clearly proven prejudice, the remedy of a new trial is reserved for "extraordinary cases," such as those involving inflammatory terms or appeal to racial prejudice. *Bird*, 255 F.3d at 148, 1152.

This is plainly not such an extraordinary case. Trans Union made no objection to Plaintiff's closing argument and did not move for a mistrial following argument, but instead chose to "sit silent" and wait for the jury to return. *Hemmings*, 285 F.3d at 1193, 1195 ("The fact that counsel did not object before the jury was instructed strongly suggests that counsel made a strategic decision to gamble on the verdict and suspected that the comments would not sway the jury."). None of the statements to which Trans Union objects were excluded after *in limine* motions, and none was incendiary. Importantly, each was a true statement fairly inferred from the evidence. For example, Plaintiff's reference to corporate decisionmaking by executives was supported by the

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[12] Trans Union's citation to *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337 (9th Cir. 1995) is inapposite. Far from allowing a new trial anytime excluded material is referenced, *Anheuser-Busch* makes clear that a new trial is warranted on the ground of attorney misconduct only where the misconduct was pervasive and "the jury was influenced by passion and prejudice in reaching its verdict." 69 F.3d at 346 (internal quotations and citations omitted). The misconduct at issue in *Anheuser-Busch* was repeated reference to hearsay which had been explicitly excluded from trial, and was demonstrably false. *Id.* at 346-47.

fact that multiple Trans Union witnesses testified that their actions regarding OFAC were taken on the direction of their superiors. Tr. Vol. 3 (O'Connell) 461:21- 462:13; Tr. Vol. 2 (Gill) 351:1-8; Tr. Vol. 4 (Walker) 683:17-684:2, 706:22-707:2; Tr. Vol. 4 (Katz) 585:1-12. The fact that Chicago has tall buildings is common knowledge. Likewise, counsel's statement that "[w]e don't know the data" on class members' applications for credit outside the class period was an entirely accurate description of the state of the evidence, and counsel at no point suggested that Trans Union was concealing this data. *See* Dkt. No. 289 (providing data only regarding January 2011 through July 2011). Counsel has "wide latitude" on closing, is not limited to the exact wording of the evidence presented, and may argue based upon inferences. *Fleming v. City of Los Angeles*, 187 F.3d 646, 648 (9th Cir. 1999). None of the statements by Plaintiff's counsel identified by Trans Union go beyond this wide latitude.

Counsel's references to *Cortez* were similarly appropriate. Although the full text of the Third Circuit's appellate opinion was excluded from evidence, nothing in either the Court's ruling or the parties' stipulation prevented Plaintiff from referencing the opinion, quoting it, or questioning witnesses about the opinion or the *Cortez* case in general. Dkt. No. 287 ("Nothing in this stipulation shall preclude either party from examining any witness about the *Cortez* litigation or about Ms. Cortez."); Tr. Vol. 4 (The Court) 562:23-563:1 ("But what the stipulation said and what I believe is appropriate is the plaintiff can question any particular witness about what's in [the *Cortez* appellate opinion].

And the words that are in it."). Plaintiff properly sought to explore witnesses' knowledge regarding the *Cortez* litigation, and demonstrate when their testimony departed from the facts of the case. It was particularly appropriate for Plaintiff's counsel to question Trans Union's witness Mr. O'Connell about *Cortez*, including through reference to an excerpt of the opinion, after *Trans Union's counsel* asked him to testify about the meaning of the case. Tr. Vol. 3 (O'Connell) 500:21-501:14.

Most importantly, Trans Union has made absolutely no showing of prejudice here. The statements made in closing were supported by evidence and reasonable inferences and were within the wide latitude permissible during closing argument. It is undisputed that the *Cortez* litigation is of fundamental relevance to this case; indeed, Trans Union's arguments both at trial and in the present motion focus almost entirely on its reaction to the *Cortez* appellate opinion. And, significantly, each of Plaintiff's counsel's quotations and references to the *Cortez* appellate opinion, including reference in closing to a willful violation on the disclosure claim, was *completely accurate* and fairly inferred from admitted evidence. Trans Union cannot both proclaim its knowledge of and reaction to *Cortez* as a defense to this case, but claim prejudice at accurate references to that case. This is no case founded upon "false or perjurious evidence" and there was no "miscarriage of justice" here. *Molski*, 481 F.3d at 729. Trans Union therefore does not have a right to a new trial.

C. The Jury's Award of Statutory and Punitive Damages Must Stand

A post-trial motion for a new trial pursuant to Fed. R. Civ. P. 59(a) "may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States … " As the U.S. Supreme Court has warned, however, a court can only grant a new trial in order to correct a "wrong" and when it "clearly appears that the jury ha[s] committed a gross error, or ha[s] acted from improper motives, or ha[s] given damages excessive in relation to the person or the injury …." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996). No such gross error or miscarriage of justice occurred here.

1. A Request For A Constitutional Reduction Is Not A Remittitur

As a threshold matter, it is important to distinguish between a request for a constitutional reduction of a damages verdict (which is only available for punitive damages, does not lead to a new trial, and which both sides can appeal) and a request for a remittitur (which can lead to a new trial upon condition of remittitur, or can be conditional upon the non-acceptance of a new trial). Trans Union here confuses the two, arguing that the jury's verdict is a "violation of due process principles," and citing to cases regarding constitutional reduction, but requesting a new trial or remittitur. Def. Mem., Dkt. No. 321 at p. 24. The concept of "remitting" an award

is unrelated to constitutional concerns.[13] Indeed, no new trial is appropriate under Rule 59 where the alleged error cannot be cured by a new trial, since no jury would pass on the constitutional limitation of damages in a second trial.[14] Trans Union omits the true standard for remittitur or a new trial under Rule 59, perhaps because it wholly fails to satisfy its burden. Indeed, as discussed below, after Trans Union's arguments against the jury's verdict here are

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[13] The Eleventh Circuit put the concept in these terms:

> A constitutionally reduced verdict ... is really not a remittitur at all. A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is unreasonable on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award.

Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331 (11th Cir. 1999); *see also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002) ("Here, while perhaps labeled as such, the action the district court took was not actually a remittitur, but instead was simply a reduction of the excessive punitive damages award in conformity with constitutional limits").

[14] In *Gore*, for example, the U.S. Supreme Court found that the Alabama Supreme Court (from where the case was appealed) could make an "independent determination" as to the appropriate maximum, but did not require a new trial. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 561 (1996). If a new trial was necessary, a reviewing court could still review for constitutional excessiveness. *Id. See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) ("The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts [from where the case was appealed]").

untangled, it becomes clear that there is no valid basis to override the jury's determination.

2. The Statutory Damages Award Is Supported By The Evidence

Courts "'must uphold a jury's damages award unless the amount is 'clearly not supported by the evidence, or only based on speculation or guesswork.'" *Guy v. City of San Diego*, 608 F.3d 582, 585-86 (9th Cir. 2010) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). Juries have substantial discretion in making damages determinations, particularly in light of what the Ninth Circuit recently called the "inherent difficulty in quantifying damages for injury to creditworthiness or reputation" under the FCRA. *Kim v. BMW Fin. Servs. NA, LLC*, ___ Fed. App'x ___, 2017 WL 3225710, at *1 (9th Cir. July 31, 2017) (upholding $250,000 damages award in FCRA claim involving a misattributed car loan).

The jury here awarded $984.22 in statutory damages per class member. This award was within the range set by statute for willful violations. 15 U.S.C. § 1681n(a)(1)(A) (permitting award of "damages of not less than $100 and not more than $1,000"). For all the reasons discussed in section III.A above, this award was fully supported by the evidence presented, and Trans Union has plainly failed to demonstrate the existence of clear error or a miscarriage of justice.

Trans Union's only argument that relates to the Rule 59 standard (which it failed to set forth), is that there was insufficient evidence of harm to support the statutory damages verdict. Def. Mem., Dkt. No. 321 at p. 23. Trans Union first claims, without citation, that the statutory damages award can only be sustained if

the evidence of harm is sufficient for all three counts presented to the jury. *Id.* This is a plain misstatement of the law, which provides for statutory damages upon a willful violation of "*any requirement* imposed" by the FCRA. 15 U.S.C. § 1681n(a) (emphasis added). If the jury had been presented with any one of the three claims in this case as a single count, it would have been entitled to award between $100 and $1,000 after finding liability, and any one of the claims is sufficient to support the statutory damage award here.

In any event, the jury had sufficient evidence to find that Trans Union harmed each class member by exposing them to risk "in precisely the way Congress was attempting to prevent" in enacting the FCRA. *Ramirez v. Trans Union, LLC*, 2016 WL 6070490, at *4 (N.D. Cal. Oct. 17, 2016) (denying motion to decertify the class, because class members suffered concrete harm).[15] As set forth above, the evidence at trial showed that Trans Union associated all class members with terrorists, drug traffickers, and other criminals on the OFAC list, and provided only incomplete and misleading information to them in response to their requests for their files. Trans Union has failed to meet its burden under Rule 59, and no

[15] The Ninth Circuit's recent decision in the *Spokeo v. Robins* case on remand from the U.S. Supreme Court makes clear that the interests protected by the FCRA's requirements are "'real,' rather than purely legal creations," and that the FCRA was specifically intended to protect consumers against the risks associated with inaccurate data, including "the uncertainty and stress" that come with inaccurately attributed information. __ F.3d ___, 2017 WL 3480695, at *4 (9th Cir. Aug. 15, 2017).

reduction in the statutory damages award or new trial should be granted.

3. The Statutory Damages Award Is Not Constitutionally Excessive

Trans Union once again faces an exceedingly high burden in seeking to reduce the jury's statutory damages on constitutional grounds. A statutory damages award only violates constitutional due process protections when it is "'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" *U.S. v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919)); *Perez- Faria v. Global Horizons, Inc*., 499 Fed. App'x 735, 737 (9th Cir. 2012). Statutory damages need not be proportional to plaintiff's own injury in part because "'Congress may choose an amount that reflects the injury to the public as well as to the individual.'" *Coach, Inc. v. Celco Customs Servs. Co*, 2014 WL 12573411, at *24 (C.D. Cal. June 5, 2014) (quoting *Centerline Equip. Corp. v. Banner Personnel Serv., Inc.*, 545 F.Supp.2d 768, 777 (N.D. Ill. 2008)). Where a jury awards damages that are within a range set by statute, such damages are not excessive. *Kim v. BMW Fin Servs. NA, LLC*, 142 F. Supp. 3d 935, 947 (C.D. Cal. 2015) (upholding civil penalty assessed by jury because it was within the statutory limit).

Trans Union once again fails to meet its burden. Notably, Trans Union fails to cite even a single case in

which a court actually reduced a statutory damages award as constitutionally excessive.[16]

The evidence at trial demonstrated that Trans Union harmed all class members by associating them with terrorists, narco-traffickers, international arms dealers, and other criminals prohibited from doing business in the United States, and then failed to adequately inform class members that it associated these harmful records with their credit files. As discussed above, the evidence was sufficient for the jury to conclude that Trans Union's violations of the FCRA showed willful disregard for consumers' rights. In enacting the FCRA, Congress selected a statutory damages range of $100 and $1,000 to reflect the seriousness of a reckless approach to consumer rights. The jury's award of statutory damages is within this range and is thus not excessive.

Furthermore, the Ninth Circuit's decision in *Bateman v. Am. Multi-Cinema, Inc.* firmly rebuts Trans Union's argument here. 623 F.3d 708, (9th Cir. 2010). Although decided at the class certification stage, *Bateman* makes clear that "[t]here is no language in the [FCRA], nor any indication in the legislative history, that Congress provided for judicial discretion to depart from the $100 to $1000 range

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[16] The *Six (6) Mexican Workers v. Arizona Citrus Growers* case does not support Trans Union's argument as it makes no reference to constitutional due process or the relevant standard, instead following an analysis specific to liquidated damages under the (now-repealed) Farm Labor Contractor Registration Act. *Six Mexican Workers*, 904 F.2d 1301, 1309-10 (9th Cir. 1990) (citing *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985)).

where a district judge finds that damages are disproportionate to harm…. the plain text of the statute makes absolutely clear that, in Congress's judgment, the $100 to $1000 range is proportionate and appropriately compensates the consumer." *Id.* at 718- 19.

Trans Union's remaining arguments are simply irrelevant to the analysis here. The fact that Trans Union changed its OFAC procedures in the face of repeated litigation has no bearing on the appropriateness of statutory damages. Trans Union's continued use of name-only match logic through 2013 bolsters the jury's finding of willfulness. Furthermore, no "overlap" between statutory and punitive damages exists in this case—the FCRA makes plain that statutory damages are an alternate form of compensatory damages,[17] and the jury heard an entirely separate set of instructions and argument on punitive damage, making clear that the punitive phase of the trial served a separate purpose from statutory damages. Tr. Vol. 6, 939:5-940:5.

Trans Union's comparison of the jury's statutory damages award to its revenue from the OFAC product during the class period is inappropriate for several reasons.[18] First, as set forth in Plaintiff's Motion to

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[17] 15 U.S.C. § 1681n (offering statutory damages as an alternative to actual damages).

[18] Although it should be disregarded entirely, it is worth noting that Trans Union's representation that its revenue from "OFAC sales during the period of alleged non-compliance" was only $2.1 million is misleading. Def. Mem., Dkt. No. 321 at pp. 23-24. Although the class period in this case covers only January through July of 2011, Plaintiff's contention is that Trans Union

Strike the Gilbert Declaration, this additional evidence is not properly before the Court. Trans Union failed to produce this information in discovery despite Plaintiff's requests, failed to disclose Mr. Gilbert as a witness, and stipulated to a statement regarding its financial condition which excluded this information as well as other evidence Plaintiff sought to introduce. Dkt. No. 327. Furthermore, under the relevant legal standard, Trans Union's revenue or profit for a time from the practice at issue has no bearing whatsoever on the appropriateness of a constitutional reduction in statutory damages. *Citrin*, 972 F.2d at 1051 (considering only amount of damages and interests served by statutory penalty and determining that no reduction was necessary). The Due Process clause does not require Congress to "make illegal behavior affordable, particularly for multiple violations." *Phillips Randolph Enterprises, LLC v. Rice Fields*, 2007 WL 129052, at *3 (N.D. Ill. Jan. 11, 2007); *Bateman*, 623 F.3d at 719 (proportionality of statutory damage to harm does not change as dollar amount of total award goes up—it increases "at exactly the same rate as the class size.").

The jury's award of $984.22 in statutory damages per class member was within the range set by Congress as appropriate to address the harms associated with willful violations of the FCRA, and was appropriate here.

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practices were in violation of the FCRA from the product's inception in 2002 and as late as 2013

4. The Punitive Damages Award Is Appropriate

Upon a finding of a willful violation, the FCRA also permits an award of punitive damages, in addition to statutory damages. 15 U.S.C. § 1681n(a)(2). After hearing additional evidence, argument and instruction, the jury here awarded $6,353.08 in punitive damages to each class member. Dkt. No. 306. Trans Union argues that the Court's instruction to the jury on punitive damages was improper, and that the award should be reduced or eliminated on constitutional grounds. Each of these arguments fails.

i. The Court's Instruction on Punitive Damages Was Proper

District courts have "broad discretion" in formulating jury instructions. *U.S. v. Harris*, 587 Fed. App'x 411, 411 (9th Cir. 2014) (quoting *U.S. v. Hayes,* 794 F.2d 1348, 1351 (9th Cir. 1986)). Post-trial review of the instructions to the jury considers whether the instructions, "as a whole, were inadequate or misleading." *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir. 1996) (quoting *Gizoni v. Southwest Marine Inc.*, 56 F.3d 1138, 1142 n.5 (9th Cir. 1995)). The essential issue is whether the court misstated the elements to be proved. *Id.* Failure to include additional language requested by a party is not error so long as the instruction correctly describes the legal requirements of the FCRA. *Kim v. BMW Fin. Servs. NA, LLC*, ___ Fed. App'x ___, 2017 WL 3225710, at *2.

The Court's punitive damages instruction was in accordance with the Ninth Circuit's Model Civil Jury

Instruction 5.5 (2007), and correctly described the standard for awarding punitive damages under the FCRA. Trial Tr. Vol. 6, pp. 939-40. The Court properly relied upon the authoritative Supreme Court precedent on availability of damages under the FCRA. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). The Court's punitive damage instruction quotes repeatedly from *Safeco*, stating that "[y]ou may award punitive damages only if you find that TransUnion's conduct was in reckless disregard of the rights of plaintiff and the class" and defining reckless disregard in accordance with *Safeco*. 551 U.S. at 57-60, 69 (willfulness includes actions taken "with reckless disregard" of consumer rights, including taking actions "entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'"). The Court furthermore instructed the jury regarding the distinction between compensatory and punitive damages. Trial Tr. Vol. 6, 939:7-9.

Trans Union's assertion that an FCRA plaintiff's burden of proof is higher for punitive damages than for statutory damages is simply incorrect. The Supreme Court acknowledged in *Safeco* that the same finding of willfulness justifies both statutory and punitive damages. 551 U.S. at 53 (upon a finding of willfulness under the FCRA, a consumer is entitled to "statutory damages ranging from $100 to $1,000, and even punitive damages").[19] *See also Saunders v. Equifax Info. Servs. L.L.C.*, 469 F. Supp. 2d 343, 348

[19] *Safeco* overruled many of the cases Trans Union cites. Reliance on these outdated cases, and on post-*Safeco* cases which continued to cite them, lends no support to Trans Union's argument.

(E.D. Va. 2007) (hereinafter, "*Saunders*") ("The jury's $1,000 statutory damages award properly allowed the jury to consider and then render an award of punitive damages for any willful violation of the FCRA.").[20]

The Court's instruction on punitive damages accurately described the relevant legal standard, and was not otherwise misleading, and it was thus proper.

ii. A Reduction in Punitive Damages Is Not Warranted

No constitutional basis exists to reduce the jury's punitive damages award here. There is no mathematical formula or "bright line ratio that a punitive damages award cannot exceed." *State Farm*, 538 U.S. at 425. The U.S. Supreme Court has identified three "guideposts" for assessing punitive damages: (1) the reasonableness of the punitive damages in relation to the reprehensibility of defendant's actions; (2) the disparity between the punitive damages awarded and the compensatory damages awarded (the "ratio"), and (3) the difference between the punitive damages awarded by the jury and civil penalties authorized in comparative cases. *Id.* at 418 (*citing Gore*, 517 U.S. 559).[21]

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[20] Even if a different, higher standard is required for punitive damages, it was met here. The evidence showed that Trans Union's noncompliance with the FCRA was the result of deliberate corporate decision-making in the face of substantial notice, lasted over a decade, and adversely affected thousands of consumers. Plaintiff submits that the evidence at trial and inferences drawn therefrom was sufficient satisfy the highest imaginable standard for punitive damages.

[21] The High Court has overturned only two punitive damages verdicts because of their size—*Gore* and *State Farm*, *supra*. *See*

a. The Punitive Damages Verdict Here Is Reasonably Related to the Reprehensibility of Defendant's Conduct

As far as fair credit reporting cases are concerned, Trans Union's conduct here was highly reprehensible. Defendant is well aware of its longstanding and unambiguous responsibility under FCRA section 1681e(b) to assure the maximum possible accuracy of records it reports, and under FCRA section 1681g to make clear and complete disclosures to consumers, including information about their rights under the FCRA. *See, e.g. Guimond*, 45 F.3d at 1332- 33; *Cortez*, 617 F.3d at 709-12. Indeed, "notwithstanding the conclusion of Trans Union's lawyers, the breadth and scope of the FCRA is both evident and extraordinary." *Cortez*, 617 F.3d at 721.

And Trans Union was on notice of problems with its practices regarding OFAC data as early as the commencement of the *Cortez* litigation in 2005, and the jury's verdict finding violations of the FCRA's accuracy and disclosure provisions in 2007. The Third Circuit found that Trans Union's treatment of OFAC data was reprehensible because it "ignored 'the overwhelming likelihood of liability' and contorted its policies to avoid its responsibilities under the FCRA." 617 F.3d at 723 (quoting *State Farm*, 538 U.S. at 419). The *Cortez* court further found that Trans Union's

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Saunders, 469 F. Supp. 2d at 349 n.7. Those cases are very different from this case, with punitive damages more than 140 times the compensatory damages awards. Neither the Supreme Court nor Congress has ever limited punitive damages under the FCRA.

failure to use dates of birth when available to match consumers to the OFAC list was reprehensible. *Id.*

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Trans Union's behavior was reprehensible then, and it became only more so when Trans Union ignored the Third Circuit's warning by continuing to use name-only matching logic to associate consumers with the OFAC list, and continuing to fail to provide clear and accurate disclosure of OFAC data along with a statement of rights. The evidence in this case is that Trans Union's policies with respect OFAC information as applied to Ramirez and the class were substantively the same as those found to be reprehensible by the *Cortez* jury in 2007 and the Third Circuit in 2010: Trans Union still used name-only matching logic, disregarding all additional identifiers including dates of birth. Trans Union's disclosures to consumers it associated with the OFAC list continued to make no mention whatsoever of OFAC information. And despite the clear warning of the *Cortez* litigation that its actions were already both willful and

reprehensible, Trans Union never even considered pausing sales of OFAC data in order to improve its practices. The depth of Trans Union's disregard for consumer rights with respect to OFAC was put on stark display at the trial in this matter, where Trans Union's corporate representative insisted that its OFAC procedures in fact *benefitted* class members. Tr. Vol. 3 (O'Connell) 545:8-16.

Trans Union's conduct plainly satisfies this "reprehensibility" standard, and an award of $6,353.08 per class member is more than reasonable.

The circumstances underlying *State Farm*, a bad faith insurance claim matter stemming from a fatal car accident, led the Court to discuss five factors as to "reprehensibility," factors which are not a meaningful match for FCRA consumer cases. *See Saunders*, 469 F. Supp. 2d at 351 (discussing *State Farm* in FCRA punitive damages case, refusing to remit 80:1 ratio of punitive to compensatory damages, and explaining why reprehensibility factors are not a good guide for FCRA cases). Specifically, the first two of the *State Farm* reprehensibility factors should be given less weight in consumer actions since FCRA actions typically will not involve physical injury of the type in *State Farm*. *Id*. *See also Kemp v. American Telephone & Telegraph Co*., 393 F.3d 1354, 1363 (11th Cir. 2004) (upholding district court's finding that first two factors of State Farm reprehensibility analysis did not apply to consumer overcharging case).

Additionally, the final factor can also be discounted since malice is not necessary in FCRA cases to recover punitive damages. *See Saunders*, 469 F. Supp. 2d at 351. *See also Cushman v. Trans Union*

Corp., 115 F.3d 220, 227 (3d Cir. 1997); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 294 (5th Cir. 1993); *Dalton*, 257 F.3d at 418; *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) ("Malice or evil motive need not be established for a punitive damages award [in FCRA cases], but the violation must have been willful") (citation omitted).

Moreover, the Supreme Court stated that the reprehensibility considerations are not a mandatory checklist that must be satisfied in full, but that the absence of all five factors renders a punitive damages award "suspect," although not necessarily unconstitutional. *State Farm*, 538 U.S. at 418. This analysis is bolstered by the Ninth Circuit's conclusion that when punitive damages are awarded pursuant to a statutory regime, as opposed to under state common law, "rigid application of the *Gore* guideposts is less necessary or appropriate." *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1056 (9th Cir. 2014). Nevertheless, the evidence of record satisfies the factors applicable to the case at bar.

First, the harm here was neither purely "economic" nor "physical." A major part of the harm was reputational and emotional in nature—Trans Union associated class members with terrorist and criminals, and deprived class members of the information they needed to correct the problem. Second, this was not a case that involved the "health or safety of others." Third, the evidence demonstrated that the OFAC information associated with class members could result in them being entirely cut off from the U.S. financial system, potentially rendering them "financial vulnerable." Tr. Vol. 3 (Ferrari)

419:10-13, 425:24-426:12. Each class member was substantially outmatched in resources by Trans Union, a billion-dollar corporation. Fourth, Trans Union engaged in repeated conduct. Minimally, it associated the 8,185 class members with the OFAC list during the seven-month class period using name-only matching logic and denied each of them a clear and accurate disclosure and statement of FCRA rights. But the class members in this case were not the only consumers whose rights were violated by Trans Union's noncompliance with the FCRA. It used name-only matching logic from 2002 to 2013. And for almost the same period it failed to disclose OFAC information. Trans Union's own internal statistics suggest that these policies affected tens of thousands of consumers per year. Ex. 10 at 010-005. Trans Union argues that its behavior was not reprehensible because it was trying to comply with the FCRA. Def. Mem., Dkt. No. 321 at p. 30. Not so. The evidence shows that Trans Union deliberately chose not to comply with the FCRA with respect to its OFAC product, from 2002 until mid-2011, in spite of the FCRA's plain language and the *Cortez* jury verdict. Trans Union took the calculated risk of an appeal, while continuing to use the same procedures. And even after losing, it deliberately continued selling the OFAC product knowing its approach was inadequate and *already* reprehensible. The reprehensibility guidepost is fully satisfied here.

b. The Relationship Between Statutory and Punitive Damages Here Was Constitutionally Appropriate

The jury's measured award of $6,353.08 in punitive damages per class member, representing approximately a 6:1 ratio, is entirely appropriate here.

Multiple cases decided after *Gore* have upheld ratios much greater than 4:1. Indeed, the Fourth Circuit upheld a punitive-compensatory damage ratio of 80:1 in a comprehensive and well-reasoned decision on an FCRA case, following defendant's motion for a constitutional reduction, just like Trans Union's motion here. *See Saunders v. Equifax Information Services, LLC*, 526 F.3d 142 (4th Cir. 2008) (finding that $80,000 in punitive damages for a single consumer who was awarded $1,000 in statutory damages was constitutionally appropriate in light of similar FCRA awards and the need to adequately punish and deter a large, wealthy corporation).[22] But that is only one example, out of many:

- 300,000:1 ratio proper. *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1054-56 (9th Cir. 2014) (affirming punitive damages award of $300,000 which accompanied $1 in nominal damages, in part because strict adherence to *Gore* ratio analysis is not appropriate in the case of limited nominal or statutory damages) (citing *Saunders*).

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[22] *See also Daugherty v. Ocwen Loan Servicing, LLC*, ___ Fed. App'x ___, 2017 WL 3172422, at *12 (4th Cir. 2017) (100:1 ratio appropriate in FCRA case) (citing *Saunders*).

- 125,000:1 ratio proper. *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008) (affirming punitive damages award of $125,000 accompanying nominal damages of $1);
- 75:1 ratio proper. *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 233- 37 (3d Cir. 2005) (upholding punitive damage award of $150,000 in insurer's bad faith case involving property damage where compensatory damages were $2,000).
- 1,500:1 ratio proper. *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004) (upholding $6,000,000 arbitration award in FDCPA case of $4,000 in damages).[23]

By contrast, the two cases where the U.S. Supreme Court overturned punitive damage awards *because of their size* are materially different. *Gore* had a verdict of $4,000 in compensatory damages and $2,000,000 in punitive damages, and *State Farm* had a verdict of $2.6 million in compensatory damages and $145 million in punitive damages. Thus the ratios of punitive to compensatory damages in both of those cases, which the U.S. Supreme Court found to be offensive, were 500:1 and 145:1, respectively. *See Saunders* 469 F. Supp. 2d at 349 n. 7. Here, the punitive to compensatory damages ratio is approximately 6:1, well under the singledigit ratio (l0:1 or less) that *State Farm* suggests in appropriate. 538 U.S. at 425.

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[23] *See also Williams v. First Advantage LNS Screening Solutions, Inc.*, ___ F. Supp. 3d ___, 2017 WL 819486, at *17 (N.D. Fla. Mar. 2, 2017) (upholding 13.2:1 ratio of compensatory to punitive damages in FCRA case where a large, wealthy CRA engaged in a "burden-shifting strategy" to assuring accuracy).

Trans Union begins its opposition to punitive damages by claiming that, because the jury awarded statutory damages, any punitive damages at all would offend the constitution because of an "impermissible overlap" between the types of damages. Def. Mem., Dkt. No. 321 at pp. 24- 26. The FCRA, however, specifically provides that statutory damages are an alternate form of compensation to actual damages. 15 U.S.C. § 1681n(a). *See also Bateman*, 623 F.3d at 718-19 (primary purpose of FCRA statutory damages is to compensate individuals without need to prove actual damages).[24] And no such overlap existed here, where the jury heard separate instructions and argument on statutory and punitive damages, deliberately separately, and delivered separate verdicts.

The fact that this is a class action does not change the analysis. *Id.* at 719 ("Despite Congress's awareness of the availability of class actions, it set no cap on the total amount of aggregate damages, no limit on the size of a class, and no limit on the number of individual suits that could be brought" against a single defendant). Trans Union's claims that punitive damages are inappropriate when "class action suit has already brought the relevant universe of potentially affected individuals before the court" and they have been awarded statutory damages. Trans Union cites no supporting authority for this proposition. But even

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[24] The cases under the Copyright Act on which Trans Union relies are irrelevant to the analysis here, in light of the substantial differences between that statute's damages provision and that of the FCRA. Unlike the FCRA's single $100-$1,000 range for willful violations, the Copyright Act provides for multiple levels of statutory damages to account for different levels of culpable conduct. 17 U.S.C. § 504(c).

if it had done so, it is simply untrue that the "relevant universe of affected individuals" is before the court here. The evidence of record is that Trans Union used the same name-only matching logic to associate consumers with the OFAC list from 2002 until 2013, and failed to include OFAC data in disclosures to consumers until July of 2011. Trans Union's records indicate that these practices affected tens of thousands of consumers per year. Thus, the 8,185 class members affected during the sevenmonth class period represent only a small fraction of the "universe of affected individuals."

Trans Union points out that courts have limited punitive damages, including under the FCRA, where substantial compensatory damages have been awarded. Def. Mem., Dkt. No. 321 at pp. 24-25 (citing, *inter alia*, *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007)). But a limited award of $984.22 per class member cannot possibly be considered substantial, and Trans Union provides no authority suggesting that it could. To the contrary, when the Ninth Circuit has upheld reductions in punitive damages because compensatory damages were high, it typically did so when a single consumer was set to receive tens of thousands of dollars. *See, e.g.*, *Bennett v. Am. Medical Response, Inc.*, 226 Fed. App'x 725, 728 (9th Cir. 2007) ($100,000 in compensatory damages was substantial); *Bains LLC v. Arco Prods. Co., Div. of Atlantic Richfield Co.*, 405 F.3d 764, 776 (9th Cir. 2005) ($50,000 to a single plaintiff was substantial).[25]

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[25] Other circuits have defined "substantial" compensatory damages in the range of $300,000 to $4 million. *See Jurinko v.*

Trans Union once again invokes its late-presented and self-serving declaration regarding its alleged revenues to argue that the punitive damages award should be reduced. Def. Mem., Dkt. No. 321 at pp. 28-29 (citing Declaration of David Gilbert). As discussed above and in Plaintiff's Motion to Strike (Dkt. No. 327), the Gilbert Declaration is not properly before the court and should be disregarded. In any event, the best evidence of a defendant's ability to withstand a punitive damages award is exactly what the jury was presented with here: Trans Union's net worth. *Todd v. AT&T Corp.*, 2017 WL 1398271, at *1 (N.D. Cal. Apr. 19, 2017) (in FCRA lawsuit, collecting cases finding that net worth of defendant relevant to punitive damages and holding that only *current* net worth is relevant); *Cortez*, 617 F.3d at 718 n. 37 (relative wealth of defendant in the form of net worth is appropriate evidence of financial condition).

The $984.22 punitive damages award Trans Union's suggests would not be "punitive" at all for a company the size of Trans Union. Given the modest statutory damages award here, the reckless and

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Medical Protective Co., 305 Fed. App'x 13, 28 (3d Cir. 2008) (noting that $1.6 million in compensatory damages is substantial, and collecting cases indicating that compensatory damages of $366,939, $600,000, $1.65 million, $2.3 million, $3.2 million, and over $4 million were sufficiently high to merit reduction in punitive damages); *Boerner v. Brown & Williamson Tobacco Co.* 394 F.3d 594, 603 (8th Cir. 2005) ($4 million compensatory damages award was substantial; contrasting case of $500,000 compensatory damages with another case where compensatory award was "'only $70,000'") (quoting *Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir. 1999)); *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 165-66 (2d Cir. 2014) ($1.32 million in compensatory damages was substantial).

reprehensible nature of Defendant's conduct, the fact that this is a consumer protection case under a remedial statute such as the FCRA, and Defendant's net worth, the approximately 6:1 ratio is appropriate.

c. Civil Penalties Comparison Not Germane

Trans Union also asserts that the difference between the civil penalties available under the FCRA and the jury's punitive damage award suggests that the award is excessive. This argument has no merit. As the *Saunders* court held, "since this limit is not applicable to actions brought under the FCRA by private citizens, it is not particularly helpful in assessing the constitutionality of the punitive damage award. Accordingly, for FCRA cases brought by private citizens, the third guidepost offers little help to this Court's punitive damages analysis." *Saunders*, 469 F. Supp. 2d at 353 (internal quotations and citation omitted). There is, therefore, no truly "comparable" civil penalty that the Court could be guided by.

In determining the size of the punitive damages award here, the jury was certainly within its province to consider the reach of Trans Union's conduct beyond the class members here. Although the jury could not, and did not, compensate non-parties, it could certainly punish Trans Union in a fashion so as to *deter future harm to others* by the same reckless conduct. *See Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007); *Cortez*, 617 F.3d at 723 (punitive damages serve to incentivize Trans Union not to "ignore the requirements of the FCRA each time it creatively

incorporates a new piece of personal consumer information in its reports.").

In sum, the jury's punitive damages verdict was appropriate, and Trans Union offers no valid reason to reduce it.

D. The Class-wide Judgment Is Appropriate

Trans Union once again repeats its argument that this case should not be a class action because Plaintiff is allegedly atypical. The Court should reject this argument again.[26]

The evidence presented at trial was the same evidence before this Court upon class certification, and demonstrated that in all material ways, Plaintiff's experience was typical of all other class member. *Ramirez*, 301 F.R.D. 408, 419-20 (N.D. Cal. 2014). As with Ramirez, Trans Union associated each class member with the OFAC list using name-only matching logic. Tr. Vol. 3 (O'Connell) 468:21-470:21. Trans Union sent Ramirez and all other class members same form of disclosure which did not include OFAC information, and the same unclear separate letter. Tr. Vol. 4 (Walker) 708:6-709:1; Ex. 3. The claims of Ramirez and the class are not based

[26] In citing *Town of Chester v. Laroe Estates, Inc.* 137 S. Ct.1645 (2017), Trans Union simply grasps at straws. *Town of Chester* discusses standing in the context of multiple plaintiffs or litigants, but makes no reference whatsoever to class actions. Further, that opinion makes clear that standing concerns are implicated because an intervenor seeks "relief that is *different* from that which is sought by a party with standing." *Id.* at 1651 (emphasis added). This class action, like all class action, seeks relief that is the *same* for all class members, rendering such analysis inapplicable.

upon a denial of credit. *Ramirez*, 301 F.R.D. at 419 ("Plaintiff would have the same claims even if he had never visited the Nissan Dealer or been denied credit."). Likewise, whether the word "potential" appeared on the credit reports of other class members is irrelevant to the class claims, because as this Court recognized, it is the association with the OFAC list that is misleading, regardless of any qualifying language, and thus "runs afoul of the FCRA." *Id.* The evidence underpinning these conclusions is the same evidence that was presented to the jury here.

This Court should also reject Trans Union's repeated argument that class members were allegedly not harmed. As discussed above, Plaintiff presented sufficient evidence for the jury to conclude that Trans Union incorrectly identified each class member as a potential match to the OFAC list. Incorrect OFAC records put consumers at risk of losing their ability to do business in the United States, as well as emotional and reputation harms that come with being identified as a terrorist or enemy of the state. Tr. Vol. 3 (Ferrari) 413:10-17, 445:11-13; *Ramirez*, 2016 WL 6070490, at *4. Likewise, Plaintiff presented evidence that all class members were denied clear and complete disclosure of the files, and did not receive a statement of FCRA rights. As this Court found, Trans Union's failure to provide this information created "precisely" the risk that "Congress was attempting to prevent when it mandated what disclosures consumer credit reporting agencies must make to consumers: a risk that the consumer is not made aware of material inaccurate information in the consumer's file, nor aware of how to dispute the inclusion of the harmful

information." *Id.* None of Trans Union's cited cases are to the contrary.[27]

Trans Union argues that the fact that it sold a credit report containing an OFAC alert to a third party regarding 25% of class members during the six month class period suggests that other class members were not harmed by its conduct. Def. Mem., Dkt. No. 321 at p. 32. To the contrary, this evidence underscores the risk of harm to class members—if a quarter of the class made an application for credit during only a six month period, this suggests that over the course of two years, *all* of them would have at least one credit application resulting in sale of a report to a third party containing an inaccurate and defamatory OFAC alert.

Finally, Trans Union's request to remove class members whose notices were returned as undeliverable should be denied. Rule 23 does not

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[27] As this Court is aware, *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017) deals with an entirely different provision of the FCRA and does not address the harm inflicted when inaccurate information and a statement of rights is entirely omitted from a consumer disclosure.

Smith v. Bank of Am., N.A. is even less applicable here. 679 Fed. App'x 549 (9th Cir. 2017). In *Smith*, the Ninth Circuit upheld dismissal of a claim relating to inaccurate disclosures on IRS forms. *Id.* Unlike the FCRA claims at issue here, which are widely recognized as designed to protect specific consumer rights, the provision at issue *does not provide for a private right of action*. *Smith v. Bank of Am., N.A.*, 2015 WL 12979198, at *3 (C.D. Cal. Feb. 3, 2015) (citing 26 U.S.C. § 6050H).

Medellin v. IKEA U.S.A. West, Inc. is even further afield, given that the plaintiff there actually *conceded* that she failed to allege cognizable harm, which is plainly not the case here. 672 Fed. App'x 782, 783 (9th Cir. 2017).

require that a notice program be perfect—it need only provide "the best notice that is practicable under the circumstances," sent to class members identified through "reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1260-61 (10th Cir. 2004) (notice which is reasonably calculated to apprise interested parties of pendency of action is sufficient, even when it fails to reach 1,455 of the 6,423 class members) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Furthermore, as Trans Union points out, Rule 23 requires a class judgment to identify those class members to whom notice was *sent*, and does not limit judgment to those who actually received notice. Fed. R. Civ. P. 23(c)(3)(B).[28]

Here, Trans Union stipulated to the form and method of notice to class members, and has thus waived any argument that notice was improper. Dkt. No. 165 (stipulation of the parties setting the form and method of notice). Specifically, the parties agreed that individual notice would be mailed to each of the 8,185 certified class members at identified by Trans Union on the class list. *Id.*; Ex. 8 (class list).

Trans Union cites no authority suggesting that class members whose notices were returned as undeliverable must be excluded from the judgment, and Plaintiff is aware of none. Indeed, the only authority Trans Union cites for this proposition, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 794 (1985),

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[28] Plaintiff does not object to any amendment to the judgment that this Court deems necessary to comply with the formalities of Rule 23(c)(3)(B).

demonstrates that the class notice program followed here was proper. The High Court found that the procedure at issue in *Shutts*, "where a fully descriptive notice *is sent* by first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process." *Id.* at 798 (emphasis added). This is exactly the procedure followed in giving notice to the class here.

While the notice program here clearly complied with Rule 23 and due process requirements, Plaintiff is committed to ensuring that as many class members as possible receive the statutory and punitive damages awarded by the jury, including undertaking additional skiptracing efforts in order to locate the most up-to-date addresses of class members. Furthermore, given that Trans Union itself maintains and regularly updates a credit file on each class member which includes current mailing address, the means to do so is within Trans Union's power. Plaintiff submits that when checks are to be delivered to class members, Trans Union should be required to provide the most up-to-date address data for class members, rather than exclude any class member from recovery.

IV. CONCLUSION

For all the foregoing reasons, Defendant's motion should be denied in full.

Dated: August 18, 2017

s/John Soumilas
s/John Soumilas

Attorney for Plaintiff Sergio L. Ramirez and the Certified Class

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Excerpts from Transcript of Hearing on Motion for Retrial and Motion for Judgment as a Matter of Law (Oct. 5, 2017)

* * *

[3] me to look at and try to give me some pause.

MR. NEWMAN: Well, I think for today, your Honor -- and I appreciate that comment -- I think it's perhaps most productive if we talk about the Ninth Circuit's recent decision in *Robins v. Spokeo*, and also if we talk about *Six Mexican Workers* and review of the statutory damages for excessiveness, and *State Farm* and the cases following *State Farm* involving review of the punitive damages for excessiveness.

THE COURT: Okay.

MR. NEWMAN: So if your Honor's happy with -- or accepting of that presentation --

THE COURT: I appreciate that.

MR. NEWMAN: Okay, thank you, your Honor. And I think -- this a monumental verdict, your Honor, and completely unexpected, and in our view, it's completely untethered to what the evidence showed about impact to the class or even risk of impact, and I think there is where the new guidance we have from the Supreme Court in the *Spokeo* case has come in.

And I know during the course of the case we've had a lot of discussions --

THE COURT: Yes, it was not so new. We talked about it.

MR. NEWMAN: No, no, I understand, but what the Ninth Circuit has done is new, and is post-verdict, and I think [4] what we have out of the Ninth Circuit,

in a fair reading of that opinion, is tremendous skepticism about whether standing exists for violations of the Fair Credit Reporting Act that do not result in publication of a false report, and you have 80 percent of the class here where there is no publication.

So 80 percent of the class that has no harm, and Rule 23 --

THE COURT: Well, I'm going to stop you for a second. So if I -- I'm sitting there and I get my letter, my two letters from Trans Union. I get my credit report and I get -- then I get the courtesy letter. And so then, I call up Trans Union, I've got to get on the phone and I have to spend time and I have to get them to now remove me from the OFAC alert, no standing, no Article III standing.

MR. NEWMAN: Well, there is no publication of a report, and --

THE COURT: Okay, so I just want to make it clear that it's your -- Trans Union's position that even doing something that then requires a consumer to call up Trans Union, to sit on the phone to take those affirmative acts, there's no standing at all. That's not injury, no harm.

MR. NEWMAN: Well, there's -- let's back up and talk about that transaction your Honor has just described. There's no report that's been sold on that consumer that has the OFAC information on it yet. It is --

[5] **THE COURT**: And in part, for many of these, that will be because they called up and got their name removed from Trans Union's OFAC alert before that. So the reason that didn't happen -- for some, not all

class members -- is because the consumer took the step of doing that.

Is it your position -- because you said 80 percent of the class has no harm -- is it your position they have no standing constitutionally, that they suffered no harm?

MR. NEWMAN: Well, remember, we don't know why these people contacted Trans Union to get their credit file, but we do know that the OFAC alert is not always sold. So something else, for whatever reason, people are allowed to get a free copy of their report once a year. So it could be someone has been, you know, going along their life; Trans Union has never sold any OFAC, anything about this person. The only thing that triggers the letter is the hypothetical possibility that you -- at some point in the future, someone might buy a report from Trans Union that has the name screen add-on attached to it.

So you don't know, for this 80 percent of the population, if OFAC information of any kind had ever been sold, or will ever be sold in the future.

THE COURT: Well --

MR. NEWMAN: So --

THE COURT: -- ever be sold -- look, your company makes money because it all sold, because people have to apply [6] for credit. So I don't accept that. You want me to assume that it's never going to be sold?

So by the way, they should have done nothing, and they should have waited until they applied for credit, and then once they applied for credit, then call up

Trans Union and say, get me removed from the OFAC alert?

I guess I'll just stop you there. There is no way that this Supreme Court, even in its current composition, would agree with you that if what you do requires me to have to call you up and get my name removed from something that should never be there in the first place, that that is not injury and standing. So if you have some other subset you want to talk about, we can talk about that.

MR. NEWMAN: Okay, well, again, your Honor, what the Ninth Circuit said is that when you're talking about -- they didn't say anything about the disclosure claim other than to say it wasn't before them, and there was, you know -- there was tremendous concern about finding standing except in the case of publication, and if your Honor -- and we cited this to your Honor before, the *Dreher* case, and I know your Honor's view on the case, also recent authority of the *Groshek* case out of the Seventh Circuit, and there has to be something more. Just perceiving a bad disclosure is not enough. There has to be something else.

And you don't know -- there is no evidence of what [7] happened to this population, and certainly there was evidence that many of these people might not have to do anything at all because of the process of clearing, and by --

THE COURT: Why would they not have to do anything at all?

MR. NEWMAN: Well, again, because many people are cleared, it is possible, because Trans Union doesn't always sell the OFAC alert, right? Even in

cases where a report is sold, the OFAC is an add-on product, not everyone buys it, and even cases where it is sold, there are many people who are just cleared because, okay, the name is -- the first name, last name is the same, but we see it's not the person.

THE COURT: Why are we talking about anyone other than Mr. Ramirez in the first place?

MR. NEWMAN: Well, because, your Honor, Rule 23 obviously is an aggregation of claims --

THE COURT: But we had this issue. I addressed this issue, and isn't there binding Ninth Circuit opinion, based, I think, on Supreme Court opinion, that says you only need to find standing as to the named class rep? Yes or no.

MR. NEWMAN: Well, your Honor has made that ruling before, and your Honor's made that ruling under *Bateman*, but --

THE COURT: Is that what *Bateman* says?

MR. NEWMAN: *Bateman* didn't involve what happens at trial, and you get all the way through trial, and there's no --

* * *

[16] also evidence that Trans Union took steps to reduce the hit rate.

And so in terms of the scale of reprehensibility, it's not as if they did nothing; so they didn't do enough. So that is something to be taken into account, that pushes that number back towards that *Exxon* presumptive one-to-one.

Impact on the class is also a factor to be considered under *State Farm*, and again, there was no

proof of actual impact, and there you had a differential impact that the reports sold population is a much smaller percentage of the class, and again, even within that population, you don't know of anyone who was actually denied credit as a result of this, and again, I think that should push the analysis further down the reprehensibility scale.

And now talking about the actual ratio, what's the denominator in the fraction here? To the extent the statutory damages award already has a punishing component, you're really not just dividing the punitives by the statutory damages. The ratio, really, in terms of the punitive damages to the value of the harm, it's something more than six and-a-half to one, and I would suggest it's --

THE COURT: I don't -- I don't know, and I guess, Mr. Newman, I think what -- you know, those eight people sat there, right? It's not just me. Those eight people sat there and listened and they came to that conclusion, actually [17] relatively quickly, and I think what Trans Union is doing, it's actually undervaluing the harm that when someone gets a letter and says, you know, you may be on this Terrorist Watchlist, that post-9/11, post-2001, that means a lot. That's actually a pretty heavy thing, and serious thing, and maybe what the jury was saying, they didn't think Trans Union took that serious.

And I don't know how you can say that's worth less than 900, or whatever -- I assume you guys have figured -- I mean, I'm sure there was some rationale for that particular number. I don't know what it is, but how could I possibly sit here and say, no, not worth that, not worth that? Especially given Mr. Ramirez's

testimony, which was quite compelling as to what that means to be so identified.

MR. NEWMAN: Okay, but there is -- the people involved, they still have the first name and last name as someone who's on the list. If someone goes to that OFAC website, they may still pop up.

THE COURT: No, they won't, because there's other information that's there.

MR. NEWMAN: No, your Honor saw the evidence that if you just put in the name, you know, Donald Trump, it comes up. You can't strain for date of birth on the OFAC site.

But I understand your Honor's point. You can certainly understand why someone might read the letter and have a concern, as Mr. Ramirez did. That's different from there

* * *

[27] think it was wrong, I can't disagree -- viewed the conduct differently than Trans Union did, obviously. They took it to term.

MR. NEWMAN: As we've mentioned before, it's a difficult case, because we were put into a trial against a population that was significantly -- it was really different from Mr. Ramirez's experience in just about every way. You had the -- even setting aside the issue of reports sold versus not reports sold, the fact that it came through a reseller, that the fact that the person at the dealership didn't follow his training, and we've -- the jury did not have an accurate picture of the class as a whole and was basically instructed, you must assume Mr. Ramirez's experience across the entire class.

THE COURT: Well, I'm going to disagree -- I'm not going to accept your words. You can make that argument. I don't think that's correct at all. I made my rulings as to why you have your rights on appeal as to that.

I think the jury -- again, I just think, to this day, Trans -- I'm sure you're glad you tried the case when you did and not this month -- that Trans Union just didn't really understand, like, what an impact it is, and what it could mean to actually get something in the mail that says you're a potential match to a Terrorist Watchlist. That would be terrifying, terrifying to anyone, whether it had some economic [28] impact on you or not.

MR. NEWMAN: I -- your Honor, I was once pulled over for speeding and, like, held by a police officer because there happened to be, like, a warrant out for murder for a guy named Stephen Newman, okay? That was unsettling. It was not emotionally distressing. I mean, it was -- I mean, like, I'm a person this actually happened to, and I got through it just fine, and this is not to say that everyone would have --

THE COURT: But there were eight people sitting there. It was if it was a bench trial, fine, but there were eight. That's why we have jury trials. And it wasn't even six, it was eight, and they were unanimous, because they were in federal court.

MR. NEWMAN: And this is why -- and because juries can reflect the anger and outrage of the community, this is where judges come in and this is why, in *Six Mexican Workers*, the Ninth Circuit has said, when the class size is large, the individual award

will be reduced so that the total award is not disproportionate.

THE COURT: I get -- okay, I know that --

MR. NEWMAN: And this --

THE COURT: -- and I don't agree that it's disproportionate, I have to tell you. I don't. I see what they did. I don't know why that letter said, "as a courtesy." That was just a farce. It wasn't as a courtesy. They knew, [29] following Cortez, that they were required. Why did it say that, right? I get that.

Why wasn't it in the credit report? It should be. Why didn't they, in 2011, why didn't they go hire some outside vendors? Why did they only say -- there was no one who sat on the stand and said, "We did everything possible, we spent millions of dollars or whatever it would take to do something." Nothing, no evidence. The one guy sat there, said, "Well, I couldn't figure out how to do it, so we didn't do it. We did it in separate letters, but six months later, we were able to do it."

Why? Why was Experian -- Experian -- able to do a credit report or an OFAC alert that cleared Mr. Ramirez and not Trans Union? Why -- why, in fact, did -- when Mr. Ramirez just wrote a note that said, "Take me off," they took him off? Clearly, clearly, what they did was not the most accurate or what's reasonable -- what -- reasonable, most -- whatever, you know, I can't remember now.

If it so easily could be changed, it wasn't very accurate to begin with. No verification of it. You just write the handwritten note.

MR. NEWMAN: So how does all that get to a six and-a-half to one when you have Exxon, which crashes an oil tanker into, you know, into like the shore, and spills oodles and oodles of gallons of sludge, completely messing up the

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Brief of Appellee (9th Cir. May 25, 2018)

I. INTRODUCTION

For 48 years, the Fair Credit Reporting Act (FCRA) has required accuracy in credit reporting and clear disclosure to consumers about the information that may be sold about them. 15 U.S.C. §§ 1681e(b) & 1681g(a). Approximately 8 years ago, the U.S. Court of Appeals for the Third Circuit found that TransUnion's reporting was "reprehensible" when it used only a name to associate an innocent consumer with a drug trafficker on the Department of Treasury's Office of Foreign Assets Control (OFAC) list, despite the fact that the dates of birth and other available personal identifiers of the two individuals were different. *Cortez v. TransUnion, LLC*, 617 F.3d 688, 723 (3d Cir. 2010). The Third Circuit in *Cortez* also found that TransUnion willfully violated the FCRA when it failed to clearly disclose to that consumer the OFAC information it had in her file and thus might sell about her. *Id*.

It is therefore unsurprising that the jury in this case found TransUnion was still willfully violating the FCRA because, even after the warnings of *Cortez*, it essentially did the same thing again—it used a "name-only" procedure to associate Sergio L. Ramirez and more than 8,000 other innocent American consumers with terrorists, drug traffickers and other criminals who are actually on the OFAC list. As in *Cortez*, the jury here also found that TransUnion's continued failures to clearly disclose to those adversely-impacted consumers all information in their files (as well as their FCRA right to dispute inaccurate information,

and have it corrected) were willful violations of the FCRA.

TransUnion now contends that Ramirez and the class here pursued "novel liability theories" and "do not even state viable FCRA violations." Appellant's Br. at 2. To the contrary, these are basic and well-recognized FCRA violations. The accuracy and disclosure requirements TransUnion repeatedly violated are black letter law. The FCRA's statutory language and the Third Circuit's *Cortez* opinion involving this very defendant are precisely on point.

TransUnion's reckless disregard of the law is explained by its profit motive. For approximately 99.5% of its OFAC screening transactions, TransUnion profited from the sale of no data at all, only a "clear" message. For the 0.5% of transactions that resulted in a "hit," the OFAC data TransUnion provided was inaccurate 100% of the time. TransUnion included disclaimers in its contracts and calculated its risk/reward ratio to be acceptable. So it did the minimum and continued with business as usual, even after *Cortez*.

Now, after another loss at trial, TransUnion appeals again, challenging every major ruling made by the District Court: Article III standing, Rule 23 certification, the merits of all three FCRA claims, as well its decision upholding the jury's statutory and punitive damages awards. As will be discussed below, the District Court made no errors. This Court should therefore affirm.

II. STATEMENT OF THE CASE[1]

A. The OFAC List And TransUnion's OFAC Product

TransUnion is one of the largest consumer reporting agencies (CRAs) in the U.S. Supplemental Excerpts of Record (SER)0835. It sells reports about consumers to creditors which include personal identifying information, data about credit accounts, and public records such as civil judgments and bankruptcies. SER0835; SER0837; SER0840-42; SER1580; SER1585-86.

In 2002, TransUnion saw an opportunity to sell additional information to its existing customers from the Department of the Treasury's (Treasury) OFAC list of Specially Designated Nationals (SDN). SER0846; SER0851; SER0854; SER0955- 56. OFAC is responsible for enforcing economic sanctions in order to address threats to national security, foreign policy, and the U.S. economy, including terrorists, international drug traffickers, proliferators of weapons of mass destruction, and other threats. SER0955-56. SNDs on the OFAC list are legally ineligible for credit in the U.S. SER0962-64.

The OFAC list includes a wide variety of information about SDNs, including name, address, date of birth, and social security number. SER0959. Approximately 80% percent of OFAC entries include a

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[1] TransUnion's statement of the case gives the impression of a sparse factual record and a case dominated by legal argument. In reality, the factual record here includes the testimony of 14 trial witnesses and 45 exhibits. Review of the complete record is necessary in order to understand the issues presented on appeal.

date of birth. SER1032. No OFAC list entries consist of only a name. SER0959.

Creditors doing business with SDNs are subject to severe penalties, including fines of up to $10 million and up to 30 years in prison. SER0961-62. In order to avoid these penalties, businesses use "interdiction software" to identify SDNs before engaging in transactions with them. SER0964-65. TransUnion informed its existing customers that TransUnion's OFAC alerts would help them avoid doing business with terrorists and other OFAC list criminals. SER1571.

Large creditors, such as national banks and broker-dealers that handle a small number of high-value transactions, typically develop their own interdiction programs. SER0884; SER1182-83; SER1187. But TransUnion saw a business opportunity to sell its OFAC alerts to smaller businesses such as car dealerships. SER0884.

In the early 2000s, TransUnion began purchasing OFAC information from a third-party data broker (rather than directly from the government), and elected to use only the consumer's first and last name to associate the consumer to an SDN. SER0850-52; SER0859; SER1007-08.[2] TransUnion charged its customers for each OFAC search it conducted, and approximately 99.5% of the time returned no results, just a clear message. SER1547; SER1593.

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[2] TransUnion's vendor for OFAC information is Accuity, Inc. SER0850-51; SER1008; Appellant's Excerpts of Record (ER) 283. TransUnion had control over how to configure the software and what filters to use. ER285-86.

When the name-only matching logic did return a hit, TransUnion placed an OFAC alert on a consumer's credit report without any further process to assure that the OFAC alert related to the consumer about whom the report was prepared. SER1019; SER0854-55; SER1551. TransUnion has substantial personal identifying information, including middle names, dates of birth, social security numbers, and addresses in its database, but failed to use this information to eliminate false positives. ER324; SER0838; SER0859-60; SER1014; SER1551. Since it began selling the OFAC product, TransUnion's automated process has incorporated OFAC alerts directly onto credit reports. SER1551; SER0859-60; SER1019.

This name-only matching process contrasts sharply with TransUnion's procedure for matching traditional credit data and public record information. That procedure requires, at a minimum, the match of additional identifying information, such as address, date of birth, or social security number. SER0852-54; SER1010. TransUnion does not use name-only matching for any other type of information it places on credit reports. SER1010.

Before rolling out its OFAC product, TransUnion's lawyers and compliance personnel decided that TransUnion would not attempt to comply with the FCRA with respect to OFAC information. SER0846; SER0860. As a result, TransUnion intentionally omitted OFAC information from file disclosures sent to consumers. SER0862; SER1252.

B. TransUnion Failed To Change Its Treatment Of OFAC Data Despite The Clear Warning Of *Cortez* And Other Notice

TransUnion continued this policy of noncompliance with the FCRA and nondisclosure to consumers despite receiving numerous inquiries and disputes from consumers about OFAC as early as 2006 and 2007. SER1691.

TransUnion was sued for these practices in October 2005 by Sandra Cortez. SER1580. Cortez claimed that TransUnion inaccurately included an OFAC alert on her credit report sold to a car dealership, and that it failed to properly disclose OFAC information to her upon her request. *Id*.; SER1551. The district court ruled that OFAC data is covered by the FCRA and the case went to trial. SER1604. The jury found that TransUnion violated the FCRA by failing to follow reasonable procedures to assure the maximum possible accuracy of OFAC information on Cortez's report, and by failing to disclose OFAC information when Cortez requested her file. *Id*.

Despite the 2007 findings of the *Cortez* jury and trial court, TransUnion continued to use name-only matching logic to associate consumers with the OFAC list. SER1030-31; SER0866-67. It also continued to omit OFAC data information from the file disclosures it sent to consumers. SER0866-67; SER1252. TransUnion made no changes whatsoever to its practices while it appealed the *Cortez* decision. *Id.*; SER1030-31. In August 2010, the Third Circuit affirmed the trial court's decision in a 90-page opinion. *Cortez*, 617 F.3d 688.

Even after the Third Circuit's decision, TransUnion continued to use nameonly matching logic. SER1015; SER1030-31. TransUnion waited—for two years—for its vendor Accuity to offer it new matching software. SER1081-82. TransUnion never considered using a different vendor to obtain OFAC information or halting its sale of OFAC data. SER1027-28.

TransUnion received even further notice of problems with its OFAC data directly from Treasury, which maintains the OFAC list. Treasury contacted TransUnion on October 27, 2010 in a letter addressing its continuing concerns regarding TransUnion's treatment of OFAC information. SER1575 (referencing prior meetings and correspondence in 2007 and 2008). Treasury specifically expressed concerns with placing OFAC records on credit reports using name-only matching alongside traditional credit data subject to multi-factor matching, stating that "[w]e remain concerned that *name-matching services* … that [do] not include rudimentary checks to avoid false positive reporting can create more confusion than clarity and cause harm to innocent consumers." *Id.* (emphasis added).

TransUnion took over three months to respond to Treasury's concerns. SER1576. At that time, OFAC information was still not included on the "personal credit reports" TransUnion sent to consumers who requested their files. SER1254- 55; ER322; ER328. Instead, in January 2011, TransUnion began sending consumers it associated with the OFAC list and who requested a file disclosure a separate form letter. SER1518; SER1230; SER1254-55. The letter defined

itself in opposition to TransUnion's response for the consumer's request for a file or "personal credit report," stating "*That* report has been sent to you *separately*." SER1518 (emphasis added). The separate letter furthermore indicated that TransUnion provided the OFAC information as a "courtesy," and did not state that it included information contained within the recipient's file. *Id*. Most importantly, the separate letter failed to inform consumers of their rights, including their right to know that OFAC information is part of their "file" and that such information may be disputed and must be promptly corrected when inaccurate. *Id*.

TransUnion's response to Treasury, sent shortly after the separate letter procedure was adopted, misrepresented its actual procedures and communications with consumers. SER1576-78; SER1131. TransUnion's General Counsel stated that TransUnion provided "instructions on how the consumer can request TransUnion block the return of a potential match message on future transactions." SER1578. This is a plain misrepresentation—the separate letter to consumers contained no such instructions. SER1518; SER1080-81.

C. TransUnion Falsely Associated Ramirez With The OFAC List

On February 27, 2011, Sergio L. Ramirez, with his wife and father-in-law, went to a Nissan dealership in Dublin California to try to purchase a car. SER0683-84. Ramirez submitted a credit application which contained his name, address, social security number and date of birth. SER0685-86; SER1520-21. The dealer used the identifying information on the

application to pull a TransUnion credit report about Ramirez. SER0796-97. Although some TransUnion witnesses attempted to argue at trial that the report was not actually a TransUnion credit report, it appeared under the heading "TransUnion Credit Report," and multiple witnesses, including a third party and other TransUnion witnesses, testified that it was a TransUnion credit report. SER1507; SER1301; SER1303; SER0760; ER323.[3]

Pursuant to its name-only matching logic, TransUnion included the OFAC records of two separate SDNs on the credit report it delivered to Dublin Nissan, falsely stating that Ramirez was a "match." SER1507. TransUnion associated Ramirez with an unrelated Mexican national, "Sergio Humberto Ramirez Aguirre" who had a birth date of 11/22/1951, and also to an unrelated Colombian national, "Sergio Alberto Ramirez Rivera" who was reported with a birth date of 01/14/196*. *Id.* By contrast, TransUnion's own file showed that Ramirez was born in April of 1976, and his middle initial is "L" (for "Luna"). *Id.* He uses only "Ramirez" as his last name, not "Rivera" or "Aguirre." SER0689; SER0704-05; SER1507; SER1511.

In addition to obtaining a TransUnion report about Ramirez, the car dealership also ran his name through the OFAC interdiction software of two other companies: Experian, another of the "Big Three"

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[3] Dublin Nissan pulled the report through DealerTrack, which provides a secure channel of communication between CRAs and car dealerships. SER0755-58. DealerTrack made no changes to the substance of the report, which came from TransUnion. SER0762-63.

nationwide CRAs, and DealerTrack, a credit data reseller. SER1524; SER1526. Experian and DealerTrack each found no potential match between Ramirez and the OFAC list. *Id.*

Ramirez was shocked and confused when the car dealer informed him that he could not buy a car because he was on a "terrorist list." SER0686; SER0689. He was embarrassed, frightened, and did not know how to proceed. SER690. As is typical with the small, high-volume lenders that are the intended users of TransUnion's OFAC product, Dublin Nissan refused to sell Ramirez the car because of the OFAC alert on his credit report. SER0689-90; SER884; SER970-71.

D. TransUnion Failed To Disclose OFAC Information To Ramirez And Did Not Inform Him Of His FCRA Rights

The next day Ramirez called Treasury to try to address the problem of TransUnion's inaccurate attribution of OFAC information to him. SER0692-93. Treasury's representative told Ramirez to contact TransUnion. *Id.* Ramirez next called TransUnion, which told him that there was no OFAC alert on his file. SER0693-94. TransUnion's representative said TransUnion would mail him a copy of his personal credit report that would confirm that he was not on the OFAC list. *Id*. TransUnion then sent Ramirez a copy of his "personal credit report" or file disclosure. SER0695; SER1509-14. The file that TransUnion sent to Ramirez, in fact, did not include anything about OFAC, which was TransUnion's standard practice at the time. SER1509-14; SER1254-55.

A day later, Ramirez received the separate OFAC letter described above. SER0696-97; SER1518. He was again shocked and confused: TransUnion had just told him that he was *not* on the OFAC list, and had confirmed this by sending his personal credit report that had no reference to OFAC. SER0697. Because the separate letter did not give any instructions, Ramirez did not know how to fix the problem, or even if it could be fixed. *Id.*

Ramirez did not learn about his FCRA rights, or submit a dispute to TransUnion, until after he consulted with a lawyer. SER0699-700; SER1519 (dispute dated March 16, 2011). Ramirez had continuing concerns regarding the effect of TransUnion's use of OFAC information—he worried that this damaging information would be associated with him again, and as a result canceled plans to travel to Mexico on a family vacation. SER0698.

E. The Certified Class Consumers Affected By TransUnion's Practices

Between January and July of 2011, TransUnion sent the same confusing and misleading separate letter regarding OFAC that it sent Ramirez to 8,184 other consumers. ER418; SER1223; SER1230. TransUnion associated each of these consumers with the OFAC list using the same name-only matching logic it used with respect to Ramirez. ER327; SER1013-15; SER1231. Each of these consumers requested his or her personal credit report by mail,

and TransUnion sent each a file disclosure that contained no reference to OFAC. SER1254-55.[4]

F. TransUnion Disregarded Available Alternative Procedures

From at least 2010, Accuity had customizable match logic options that could search OFAC data using different items of personal identifying information, including date of birth. ER285-88. TransUnion could also have used a variety of other interdiction software options beyond Accuity. SER0965-66 (naming three other providers of screening software). The recommended best practice for OFAC interdiction software is to search with a name plus at least one additional item of personal information, a practice that TransUnion did not follow. SER0968.

More accurate alternative matching procedures were available in 2011. Two other CRAs, Experian and DealerTrack, screened Ramirez against the OFAC list on the very same day as TransUnion. SER1524; SER1526. They both accurately found that he was not associated with any SDN. *Id.* Ramirez's expert, who has consulted with financial institutions concerning

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[4] The OFAC letter was used to identify the class. Other unidentified consumers were affected as well. TransUnion's OFAC product was on the market for over a decade using name-only matching logic to associate consumers with criminals on the OFAC list. SER1007-08; SER1013-15. In a single year, TransUnion used this name-only matching procedure to place OFAC alerts more than 200,000 consumers' credit reports. SER1593 (17,557 in July 2012 alone). During the first eight years TransUnion sold OFAC data, it disclosed *no information at all* about OFAC to consumers. *Id.*; SER0862-63; SER1252.

proper filters for detecting possible OFAC matches, explained that in ten years of experience with OFAC compliance, the minimum number of identifiers he has ever recommended to properly identify SDNs is two—at least name plus one other identifier, such as date of birth. SER0949-50; SER0968.

TransUnion nonetheless chose not to implement several matching procedures with more demonstrated accuracy. Its own internal research showed that it could have eliminated false positive results *entirely* by disqualifying potential matches where the date of birth on the OFAC file was more than ten years different from the consumer's date of birth. SER1031-32; SER1595-96 (two different rule options which included "DOB>10 Yrs" reduced false positives to 0%). But TransUnion did not implement any of these additional procedures or use date of birth in its matching logic until 2013. SER1034; SER1078-79.

Human review of OFAC records to avoid inaccurate attribution was also feasible—indeed, TransUnion established a human review process, whereby an employee checked the disputing consumer's identifying information against the data on the OFAC list. SER0869-70. TransUnion conceded that *every one* of the OFAC alerts reviewed in this human review process was inaccurate, and thus blocked each one. SER0875.

Indeed, TransUnion has never identified a single instance since 2002 in which its OFAC alert procedure identified a person actually on the OFAC SDN list. SER1036. Yet TransUnion insisted at trial that its procedures regarding OFAC in fact "benefitted" class members. SER1090. TransUnion furthermore claimed

at trial that it was *TransUnion's* reputation at stake, not the reputation of consumers whose data it sells and whose reputations the FCRA is designed to protect. SER1445-46.

III. SUMMARY OF ARGUMENT

Appellant raises four basic arguments, each of which fails. First, TransUnion argues that the District Court erred in finding that Ramirez and the class had Article III standing. This argument is simple denial—Appellant cannot accept the fact that its OFAC practices caused real harm. Harm to reputation, the inability to access credit, distress, the deprivation of information and wasted time correcting an inaccuracy are the types of harms that flowed from TransUnion's OFAC practices. *See Cortez*, 617 F.3d at 720, 723. The evidence at trial showed harm to Ramirez and every class member. It almost goes without saying that being falsely associated with a terrorist watch-list and being deprived of congressionally-mandated information about how to correct such a false association is harmful.

Next, TransUnion changes its tune, and argues that it actually did cause real harm—in fact, such "severe" harm to Ramirez that his claim is atypical. Appellant's Br. at 39. The District Court, however, did not abuse its discretion in finding that Ramirez satisfied the typicality requirement of Rule 23. The evidence showed that Ramirez and every class member were falsely associated by TransUnion with OFAC criminals because of the same "name-only" procedure; they all were legally ineligible to obtain credit; they all ran the risk of being denied credit; they were all deprived of the very same file disclosure

information; and they were all misinformed about their FCRA rights, such as the right to dispute and to have the false OFAC information blocked or deleted from their files.

Third, Appellant contends that the District Court erred in allowing the jury to decide whether TransUnion violated the FCRA *willfully*. Under the facts of this case, however, any reasonable jury could have found a willful violation on any of the class's three FCRA claims, especially given TransUnion's brazen trial strategy. Essentially the same issues went to the jury in *Cortez*, which found willful violations in three of four counts, all of which were upheld by the Third Circuit. No FCRA jurisprudence supports TransUnion's argument that it is entitled to judgment as a matter of law here. As the District Court found, there was overwhelming evidence of liability at trial. ER4.

Finally, TransUnion argues that $7,337 in statutory and punitive damages to Ramirez and each class member is so exceedingly high that it violates the U.S. Constitution. Again, no precedent supports TransUnion's position. Appellant largely ignores both the facts of record and the recalcitrant nature of its defenses.

The jury's punitive damages verdict was completely in line with the evidence of three willful FCRA violations in the face of clear warnings, including from *Cortez*. The reality is that TransUnion chose to keep reaping the benefits of its OFAC reporting, even though the product never resulted in a single true hit. Despite ensnaring thousands of innocent Americans into its web of false hits,

TransUnion's corporate representative testified at trial that the OFAC reporting *benefitted* class members. TransUnion's misleading statements to Treasury, misadvising that its consumer disclosures instructed consumers on how to dispute and block false OFAC alerts, reinforced the need for punitive damages. TransUnion witnesses at trial blamed their failure to comply with the FCRA after *Cortez* on the supposed unavailability of technology, but the jury did not accept this far-fetched defense, especially when TransUnion's competitors had no problems in finding that Ramirez did not match any SDN. Nor did the jury appreciate other far-fetched defenses, including the testimony by some TransUnion witnesses that the "TransUnion Credit Report" sold about Ramirez to Dublin Nissan was not really a TransUnion credit report, and the argument of defense counsel that TransUnion was actually the victim in this case.

In sum, the jury's verdict is supported by detailed evidence of harm, proportional to the scope of TransUnion's widespread violations of the FCRA, and necessary to send a message to a recalcitrant and unapologetic defendant. The verdict should be upheld in full.

IV. STANDARDS OF REVIEW

Appellee agrees that the standard of review for class certification rulings is abuse of discretion, and for constitutional issues and judgment as matter of law rulings the standard is *de novo* review. This Court has also held that "[a] jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary

conclusion." *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (*en banc*). A verdict can be overturned if that evidence permits "only one reasonable conclusion, and that conclusion is contrary to that of the jury…." *Id.* (quoting *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016)).

V. ARGUMENT

A. The District Court Did Not Err In Denying TransUnion's Repeated Article III Standing Challenges

This Court recently discussed Article III standing in the FCRA context following the decision of the U.S. Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo II*"), and found that FCRA statutory violations, alone, establish concrete injury where such violations present a "risk of real harm" to the concrete interests the statute was enacted to protect. *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017) ("*Spokeo III*").[5]

Spokeo II recognized that both tangible and intangible injury can satisfy the requirement of concreteness. *Id.* at 1549. Although often more difficult to recognize, intangible injuries (such as harm to one's reputation) may nevertheless be concrete. *Id.* As the Supreme Court explained, "[i]n determining whether an intangible harm constitutes injury in fact,

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[5] Rather than changing the law, *Spokeo II* confirmed the long-established principle that standing consists of three elements. *Spokeo II*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

both history and the judgment of Congress play important roles." *Id.* Indeed, "because Congress is well-positioned to identify intangible harms that meet minimum Article III requirements, its judgment is … instructive and important." *Id.* "Congress may identify and 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan*, 504 U.S. at 578).

Spokeo II further instructs that the concreteness requirement is satisfied if alleged violations of procedural rights present a "risk of real harm" to the concrete interests Congress sought to protect by enacting the statute. *Spokeo II*, 136 S. Ct. at 1549. In such a case, a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* (emphasis in original).

In *Spokeo III*, this Court confirmed that Congress has the power to "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" 867 F.3d at 1112-13. "In some areas—like libel and slander *per se*—the common law has permitted recovery by victims even where their injuries are 'difficult to prove or measure,' and Congress may likewise enact procedural rights to guard against a 'risk of real harm,' the violation of which may 'be sufficient in some circumstances to constitute injury in fact.'" *Id.* (quoting *Spokeo II*). Thus, "an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents 'a risk of real harm' to that concrete interest."

Spokeo III, 867 F.3d at 1113 (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)).

1. All Class Members Have Standing For The Accuracy Claim

As the High Court recognized in *Spokeo II*, a central purpose of the FCRA is "to ensure 'fair and accurate credit reporting.'" 136 S. Ct. at 1545. Through the FCRA, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* at 1550.

The risk of dissemination of inaccurate information impacting a person's reputation is the exact type of harm Congress sought to prevent through the FCRA's accuracy provisions. 116 Cong. Rec. 36570 (1970) (Representative Sullivan remarking that the "unthinking machine" of modern CRAs "can literally ruin [an individual's] reputation without cause."). The Third Circuit in *Cortez* found that "the gravity of harm that could result" from association with a terrorist watch list "cannot be overstated" in light of "the severe potential consequences of such an association." 617 F.3d at 723.

By continuing to use its grossly inadequate name-only matching procedure to associate innocent consumers with the OFAC list, especially after *Cortez*, TransUnion exposed the class here to the serious risk of defamation and credit denial as Ramirez experienced, regardless of any subsequent, additional consequences.

The trial evidence demonstrated that TransUnion incorrectly identified each class member as a potential match to the OFAC list, putting them all at risk of losing their ability to obtain credit and exposing them

to the reputational harms that come with being identified as a terrorist. SER1013-15; SER1231; ER327; SER0958; SER0990.[6]

TransUnion incorrectly argues that the selling of an inaccurate report to a third party is required in order for a plaintiff to have standing to bring a claim under FCRA section 1681e(b). Appellant's Br. at 31. *Spokeo III* Court specifically declined to address such a situation (867 F.3d at 1116 n.3), and instead focused on the gravity of harm that can be caused "by the very existence of inaccurate information in his credit report and the likelihood that such information will be important to one of the many entities who make use of such reports … especially in light of the difficulty the consumer might have in learning exactly who has accessed (or who will access) his credit report." 867 F.3d at 1114. All class members here experienced this very same risk of harm.[7]

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[6] *Wheeler v. Microbilt Corp.*, 700 Fed. App'x 725 (9th Cir. 2017) has no applicability to this case. There, the Ninth Circuit affirmed the dismissal of a complaint which contained "mere conclusions for which he provided no support." 700 Fed. App'x at 727. The allegations required to survive a Rule 12(b)(6) motion to dismiss have nothing to do with whether a set of facts adduced a trial demonstrate that a practice exposed consumers to harm giving rise to Article III standing.

[7] TransUnion claims that dispute statistics demonstrate that consumers understood their rights regarding OFAC data. To the contrary, it is unsurprising that so few consumers disputed OFAC data as a result of TransUnion's separate letter, since TransUnion failed to tell consumers that such disputes were possible.

Furthermore, the evidence of record, that TransUnion disseminated an OFAC alert to third parties regarding 25% of class members during the six-month class period suggests that over the course of two years, *all* of them would have had a credit application resulting in the sale of an inaccurate and defamatory OFAC alert to a potential creditor. ER418.[8]

2. All Class Members Have Article III Standing For The Disclosure Claims

With respect to the disclosure claims, this Court has found that failure to provide disclosure mandated by the FCRA is itself sufficient to establish standing. *Syed v. M-I, LLC*, 853 F.3d 492, 499-500 (9th Cir. 2017). By creating a private right of action to address failure to provide a clear disclosure of the information in a consumer's file, and the consumer's right to dispute and have it corrected, Congress recognized the harm caused by these actions and giving rise to standing. *Id.*; *see also Spokeo III*, 867 F.3d at 1114.

The disclosure requirements of FCRA sections 1681g(a) and 1681g(c) advance consumers' concrete interest in accurate credit report by providing a mechanism for consumer oversight, empowering consumers to monitor their files for inaccurate data. *Patel v. TransUnion, LLC*, No. 14-cv-00522-LB, 2016

[8] Although the class period here was defined by the 6-month window when TransUnion used the separate OFAC letter, TransUnion was selling these same false OFAC records in the years before and after the class period about class members using the same name-only match logic, and the period to recover damages under the FCRA is minimally two years. SER1034; SER1078-79; 15 U.S.C. § 1681p.

WL 6143191, at *4 (N.D. Cal. Oct. 21, 2016). Thwarting a consumer's ability to monitor her file and correct inaccurate data "can itself satisfy the requirement of concreteness" because doing so "presents a 'real risk of harm' of exactly the type that [the] FCRA seeks to prevent …." *Id.* Put another way, it is not a bare procedural violation; it is the hindering of a consumer's ability to monitor her file and correct inaccurate data about herself that results in concrete injury. *Id.* at *4-5.

The evidence here demonstrates that all class members requested and were sent a "personal credit report" that did not contain reference to OFAC information although TransUnion in fact associated an OFAC record with them; and that TransUnion sent each class member a separate letter identifying the OFAC record associated with them, but failed to include any information about how to dispute or block the record. SER1518. The separate OFAC letter made no indication that the OFAC information was part of the consumer's file, and in fact indicated the opposite by stating that "[t]hat report has been sent to you separately." *Id.* Even the author of the separate letter conceded that it is unclear. SER1152. The separate letter did not make any reference to the summary of rights contained in the personal credit report, or state that those rights applied to the information in the letter. SER1518.[9] Indeed, the separate letter stated

[9] TransUnion's assertion that Ramirez understood the separate letter sufficiently to dispute the OFAC information is contradicted by the evidence of record. Ramirez testified that he was confused after receiving the separate letter and did not contact TransUnion to dispute the OFAC information until after he consulted with a lawyer. SER0697; SER0699-700; SER1519.

that the information was being provided as a "courtesy," not as required by law. *Id.*

TransUnion's suggestion that Ramirez must prove that class members were "confused by the disclosure[s]" misstates the requirements of FCRA section 1681g, which contains no element or requirement of actual confusion or reliance. Rather, a violation of section 1681g "is predicated on the character of the allegedly misleading information the credit reports disseminated to [the plaintiff] and absent class members, not on [the plaintiff] or absent class members' subjective interpretation of that information. *Larson v. TransUnion, LLC*, 201 F. Supp. 3d 1103, 1109 (N.D. Cal. 2016) (rejecting "consumer confusion" argument and finding that class has standing for 1681g claim for failure to properly disclose OFAC information). *Spokeo II* also recognized that this type of "informational" injury supports Article III standing. 135 S. Ct. at 1553 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982)). All class members were deprived of the information required by FCRA section 1681g(a) and 1681g(c), and that deprivation of information is their concrete injury regardless of any additional consequence.

3. Ramirez's Article III Standing Is Sufficient To Confer Standing On All Absent Class Members

For the reasons set forth above, the District Court properly concluded that Ramirez and all class members independently have Article III standing

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A disclosure that requires legal advice to decipher cannot possibly be what the FCRA contemplates.

here. However, class members' ability to recover statutory and punitive damages is underscored by the reality that under Ninth Circuit precedent the fact that a class representative has Article III standing is sufficient by itself to invoke federal court jurisdiction. "In a class action, standing is satisfied if at least one named plaintiff meets the requirements …. Thus, we consider only whether at least one named plaintiff satisfies the standing requirements[.]" *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (*en banc*). For the reasons set forth above and proven at trial, Ramirez has standing to bring his claims in federal court, and under Ninth Circuit precedent this is sufficient for him to pursue these claims on behalf of the class.[10]

TransUnion's attempt to limit the holding of *Bates* to injunctive relief is unpersuasive. *Bates* discusses the requirements of standing in connection with

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[10] *Town of Chester v. Laroe Estates, Inc.,* 137 S. Ct. 1645 (2017), has no relevance here. It makes no mention of class actions, and makes clear that standing concerns are implicated where an intervenor sough "relief that is *different* from that which is sought by a party with standing." *Id.* at 1651 (emphasis added).

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016), a wage-and-hour collective action seeking unpaid overtime, has even less to say about standing here. The Supreme Court approved the use of statistical techniques to determine an average amount of overtime pay based upon a sample of employee record, but explicitly declined to reach any decision regarding the appropriateness of certification of a class containing members who admitted they were not owed any overtime pay and thus had no right to recovery. *Id.* at 1048-50.

These two cases have no binding or persuasive impact in this class action in which class members were awarded identical relief by a jury.

equitable relief simply because that was the only type of relief sought in that litigation. 511 F.3d at 985. The *Bates* discussion of standing, however, plainly states that only named plaintiffs need established standing in a class action without any limitation on the relief sought. *Id.* This rule has been repeatedly echoed by the Ninth Circuit in cases seeking damages. *In re Zappos.com, Inc.*, ___ F.3d ___, 2018 WL 1883212, at *6 n.11 (9th Cir. Apr. 20, 2018) (where plaintiffs sought damages "only one Plaintiff needs to have standing for a class action to proceed"); *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 865 (9th Cir. 2014); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 728 (9th Cir. 2012).

TransUnion's citation to *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012), does nothing to overcome this long-established precedent. In *Mazza*, the court in fact *rejected* the argument that class members who did not provide individualized proof of injury lacked standing. 666 F.3d at 596. The court gave no indication of an intent to overrule *Bates*. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016) (commenting that *Mazza* only signifies "that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase" and citing *Bates*).[11] The District Court properly found,

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[11] *In re Hyundai and Kia Fuel Economy Litig.*, 881 F.3d 679 (9th Cir. 2018) has even less to do with standing considerations here. The court in *In re Hyundai* rejected a settlement which it considered overbroad because it dealt, with a class of consumers that included individuals who had not been exposed to the allegedly improper practice. *Id.* at 703-05. Despite TransUnion's

based upon a wealth of Ninth Circuit precedent on point, that Article III standing is satisfied here.

B. Ramirez's Claims Were Typical Of The Class's Claims

TransUnion next contends that Rule 23 certification of the class here was inappropriate, allegedly because Ramirez's claims were "fatally atypical." Appellant's Br. at 38. Although at several stages of this case (*see* ER375, ER440- 46, Dkt. No. 128 at p. 4), TransUnion argued that Ramirez was not really injured at all, now TransUnion asserts that "his injuries are atypically *severe*." Appellant's Br. at 39. (emphasis added).

Contrary to TransUnion's new severity of injury argument, the District Court did not abuse its discretion in finding that Ramirez satisfied the typicality element of Rule 23, which requires only that *claims* be typical, not that class members suffer identical injuries.[12]

Typicality is fulfilled if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality test is "whether other members have the

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citation, the case does not so much as mention Article III standing. *Id.*

[12] TransUnion has made multiple attempts to reverse the District Court's class certification decision, including a "Motion for Clarification" (Dkt. No. 163), a petition to appeal pursuant to Fed. R. Civ. P. 23(f), which this Court denied (No. 14- 80109 (9th Cir.) at Dkt. Nos. 1-1, 8), and its motion for decertification following *Spokeo II. Ramirez v. TransUnion, LLC*, 2016 WL 6070490 (N.D. Cal. Oct. 17, 2016). Each of its attempts have failed, and this one fails as well.

same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted).

TransUnion's only argument with respect to the Rule 23 element of typicality is that Ramirez allegedly had a "unique experience." Appellant's Br. at 38. Yet the evidence established that this action *was not* based on conduct unique to the named plaintiff. *Hanon,* 976 F.2d at 508.

With respect to the FCRA section 1681e(b) claim, the evidence shows that Ramirez was falsely associated with the OFAC list because of corporate-wide practices at TransUnion and its "name only" matching procedure. This was the case for every class member. All class members were thus put at risk for the same harm by that false association—the risk of being defamed and declined credit.

Whether Ramirez or any class member sought a Nissan for a spouse or a Toyota for one's self is of no moment. The claim here was for statutory damages of $100- $1,000 permitted by FRCA section 1681n, not for a specific monetary loss or for denial of a specific type of credit. Thus the class-wide risk of harm and relief sought for such harm is the "the same or similar" for Ramirez and each class members. *Hanon,* 976 F.2d at 508. To argue otherwise is to argue that no FCRA statutory damages class action should ever be certified because people have different shopping habits.

TransUnion insists that only 25% of class members applied for new credit during a 6-month

window, but the jury could have reasonably concluded from this that every class member would have used their credit in the 2010-2013 timeframe when TransUnion associated class members with the OFAC list. Nowhere did Ramirez claim a 6-month damages or publication window. At any rate, FCRA allows the recovery of statutory damages dating back at least two years from the date of the violation, even without a credit denial.[13] So TransUnion's insistence on a uniform-type credit denial is irrelevant both for Rule 23 purposes and for purposes of establishing an FCRA section 1681e(b) claim.

Ramirez's FCRA section 1681g(a) and 1681g(c) disclosure claims are even more cohesive with those of the class. All class members requested their TransUnion files; all were provided a TransUnion "personal credit report" (the file) that disclosed nothing about OFAC even though TransUnion had them all associated with some OFAC list entry; all were deprived of data about the most harmful item information in their files, or how they could dispute it and have it blocked; all were sent the separate OFAC letter that compounded the problem by being unclear and by not including any statement of FCRA rights.

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[13] *See* 15 U.S.C. §1681p (FCRA statute of limitations). Further, and contrary to Appellant's assumption, under Ninth Circuit case law, transmission of a consumer report to a third party is not a prerequisite to establishing liability under section 1681e(b). *Guimond v. TransUnion Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Ottiano v. Credit Data Sw., Inc.*, 54 F. App'x 640 (9th Cir. 2003) ("neither the transmission of the report to third parties, nor a denial of credit, is a prerequisite to recovery under the FCRA").

Failure to provide a congressionally-mandated FCRA disclosure naturally results in the deprivation of the very information that the disclosure was supposed to provide; no additional harm or consequence is required. The harm to Ramirez is thus the same for every class member and stems from the violation—a deprivation of information resulting from uniform corporate practices.

Ramirez's reaction to TransUnion's disclosure is relevant to provide context and to show the risk of harm and other relevant matters, such as to establish liability. Moreover, TransUnion did not object to that transaction-specific evidence that was proffered at trial. Indeed, as a trial witness, Ramirez had to lay a foundation and testify with respect to specific dates, records and transactions of which he had firsthand knowledge. There was nothing inappropriate about his testimony, and TransUnion's appeal does not raise any issues about the trial court's evidentiary rulings.

The fact that class counsel mentioned Ramirez's reaction, based upon properly admitted and relevant evidence, for a few seconds during a one-hour closing argument does not make Ramirez's claims "fatally atypical." Nor is the reference by class counsel to Ramirez's teenage daughter germane, other than to explain to the jury who was sitting next to Ramirez in the back of the courtroom during part of the trial. The full closing argument makes it clear that Ramirez and the class have the same claims and seek the same damages. SER1379-1415.

The District Court here saw that the basic facts and evidence related to all three FCRA claims, including the statutory damages sought by Ramirez

and all class members, were the same or similar, thus satisfying the typicality element of Rule 23. TransUnion has failed to show that Ramirez's experience is "unique," or that the District Court abused its discretion in finding that the relatively low typicality threshold of Rule 23 was satisfied in this case.

C. Given *Cortez* And The Facts Presented At Trial Here, Any Reasonable Jury Could Have Found A Willful Violation

Three distinct FCRA claims were submitted to the jury here. ER 22-23. If the jury had found liability on any one of the three claims, it would have been entitled to award $100-$1,000 in statutory damages to each class member. *Id.*; 15 U.S.C. § 1681n(a) (statutory damages available upon willful violation of "any requirement imposed" by FCRA). Because each of the three violations independently supports the statutory damages award here, Appellant would need to prove that no reasonable jury could find a willful violation on any of the claims. As the District Court properly found, there was substantial evidence supporting the jury's liability findings.

1. Substantial Evidence Supports The Jury's Finding That The Accuracy Violations Were Willful

The FCRA requires TransUnion to follow "reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates" whenever it prepares any consumer report. 15 U.S.C. § 1681e(b). FCRA accuracy claims center on whether the CRA's procedures included reasonable procedures to prevent

inaccuracies in preparing the report(s) at issue. *Guimond*, 45 F.3d at 1333-34. "The reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases." *Id.* at 1333.

A report is inaccurate when information in it is "patently incorrect" or when it is "misleading in such a way and to such an extent that it can be expected to [have an] adverse" effect. *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890-91 (9th Cir. 2010) (citing and quoting *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009)).

Willful violations of the FCRA include "action taken in 'reckless disregard of statutory duty,' in addition to actions 'known to violate the Act.'" *Syed*, 853 F.3d at 503 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-57 (2007)). A CRA can willfully violate the FCRA even in the absence of prior authoritative guidance. *Id.* at 504. Indeed, "in the FCRA context, a 'lack of definitive authority does not, as a matter of law, immunize [a party] from potential liability' for statutory damages." *Id.* (quoting *Cortez*, 617 F.3d. at 721). Where the FCRA is clear, a defendant's subjective belief that its actions are proper is immaterial. *Id.* at 505. Blanket policies can also underpin a willfulness finding under the FCRA even in the absence of guidance. *Seamans v. Temple Univ.*, 744 F.3d 853, 868 (3d Cir. 2014).

The jury's determination that TransUnion willfully failed to follow reasonable procedures to assure the maximum possible accuracy of OFAC alerts is supported by the following substantial evidence presented at trial:

- TransUnion used identical name-only matching logic for all class members, disregarding available middle names, dates of birth, social security numbers, places of birth, and other information. SER1013-15; SER1231; ER327; SER0838; SER0859-60.
- TransUnion's name-only matching logic for OFAC information used lower standards than used for all other items of information included on reports, which required additional identifying information, such as a date of birth or social security number. SER0852-54; SER1010.
- The recommended best practice for OFAC interdiction software is to use at least one item of identifying information *in addition* to name. SER0968.
- The smaller businesses to which TransUnion's OFAC product was marketed were unlikely to run the risk of doing business with a person associated with the OFAC list and would prefer to move on to the next transaction, regardless of TransUnion's contractual language. SER0884; SER0970-71; SER0689-90.
- TransUnion's vendor had filtering options which included searching the OFAC database by date of birth since at least 2010, and TransUnion controlled the filters used for OFAC "hits." ER285-88.
- Experian and DealerTrack screened Ramirez against the OFAC list in February 2011 and were able to accurately determine that he was not a match to any SDN. SER1524; SER1526.
- TransUnion had repeated notice of problems with its procedures regarding OFAC between 2005 and

2011, including the *Cortez* verdict in 2007, frequent consumer inquiries in 2006 and 2007, and communications from Treasury in 2010, which referenced earlier communications from 2007 and 2008. SER1603; SER1601; SER1575.

- TransUnion's internal statistics for the relevant time period show that over 75% of OFAC records matched to consumers using only first and last name had a date of birth *more than ten years different* than that of the allegedly matching consumer. SER1599.
- TransUnion continued to use name-only matching logic for OFAC information until 2013. SER1034; SER1078-79.
- After TransUnion began accepting disputes of OFAC information, it employed a manual review process which found that each one of the disputed OFAC alerts were inaccurate. SER0869-72; SER0875.
- TransUnion did not consider using a different vendor or stopping the sale of OFAC information. SER1027-28.
- TransUnion is unable to identify a single instance since 2002 in which its OFAC alert procedure identified an SDN actually on the OFAC list. SER1036.
- TransUnion conceded no mistakes at trial, and admitted that its reporting in this case was done in accordance with its usual policies and practices in 2011, boldly testifying that such practices benefited the class. SER1013-15.

See also ER3-4. Viewing this evidence, and all inferences therefrom, in the light most favorable to the class, a reasonable jury could conclude that

TransUnion willfully violated FCRA section 1681e(b). This is not a case where the evidence permits "only one reasonable conclusion, and that conclusion is contrary to that of the jury." *Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017).

TransUnion's arguments to the contrary fail. Brazenly, and as it did unsuccessfully at trial, TransUnion asserts that its OFAC alerts were accurate, relying upon the disclaimers in its contracts and the addition of the word "potential" in front of the word "match" to argue that it was neither inaccurate nor misleading to associate innocent consumers with the OFAC list. Appellant's Br. at 45. This assertion is contradicted by TransUnion's own testimony conceding that it has never been able to confirm the actual accuracy of a single OFAC hit. SER1036. Furthermore, each time any consumer disputed the accuracy of an OFAC alert, TransUnion conceded its inaccuracy. SER0869-72; SER0875.

TransUnion was on clear notice that disclaimers and qualifications regarding the accuracy of OFAC alerts were insufficient to provide a defense to FCRA claims, or transform inaccurate information into accurate information. The Third Circuit in *Cortez*, in response to the same argument asserted here, held that "[w]e are not persuaded that [defendant's] private contractual arrangements with its clients can alter the application of federal law, absent a statutory provision allowing this rather unique result." *Cortez*, 617 F.3d at 708.[14] *Cortez* emphasized the importance the

[14] Trial courts are in accord. *Smith v. E-Backgroundchecks.com, Inc.*, 81 F. Supp. 3d 1342, 1348-49 (N.D. Ga. 2015); *Henderson v.*

FCRA's requirement of *maximum possible* accuracy, declaring that this standard "requires more than merely allowing for the possibility of accuracy." *Id.* at 709. *Cortez* furthermore warned TransUnion of the "inherent dangers in including any information in a credit report that a credit reporting agency cannot confirm is related to a particular consumer." *Id.* at 710.[15]

If TransUnion's argument is accepted, CRAs could place any completely false information on credit reports and escape liability for inaccuracy simply by adding disclaimers requiring the purchasers of reports to confirm the information before using it. FCRA section 1681e(b)'s requirement of maximum possible accuracy does not allow such a result. As stated in *Cortez*, "[a]llowing a credit agency to include misleading information as cavalierly as TransUnion did here negates the protections Congress was trying to afford consumers" in enacting the FCRA. *Id.*

TransUnion also seeks to shift the burden of assuring accuracy to its customers by arguing that it was the end user's responsibility to determine

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Corelogic Nat'l Background Data, LLC, 178 F. Supp. 3d 320, 336 (E.D. Va. 2016).

[15] *Cortez* also identified the very information TransUnion could use to confirm that an OFAC alert is related to a particular consumer: the middle names and dates of birth which appear on the face of OFAC records. *Id.* at 710. The Third Circuit called TransUnion's failure to "at the very least" use date of birth where available "reprehensible." *Id.* at 723. Nevertheless, TransUnion continued to ignore dates of birth on the OFAC list until 2013. SER1034; SER1078-79.

whether the subject of a report was actually a match with the OFAC list. Appellant's Br. at 46. This argument fails because, as TransUnion was made aware in *Cortez*, contractual language does not alter the application of the FCRA. This argument also fails to account for the realities of the credit transactions in which TransUnion's OFAC product is involved. The evidence of record demonstrates that the small businesses—TransUnion's target customers for OFAC alerts—are unwilling to run the risk of extending credit to consumers who are associated with the OFAC list. The car dealership that purchased TransUnion's report about Ramirez did nothing more than review the report and refused to extend Ramirez credit because of the OFAC alert. SER0689-90. Lenders who deal in low-dollar, high-volume transactions are more likely to end the transaction rather than running the risk of incurring a multi-million dollar fine. SER0970-71; SER0961-62.[16]

The evidence also contradicted TransUnion's contention that better technology was not available in 2011. Two other CRAs screened Ramirez against the OFAC list on the same day TransUnion did, and both correctly found that he was not a match, or even a

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[16] TransUnion claims that the "uncontradicted" record shows that "most lenders understand what to do when confronted with OFAC alerts," but that is not true. Appellant's Br. at 46. The testimony TransUnion cites provides a snapshot of the behavior of certain large financial institutions, conducting only 15-20 transactions per month, not the small, high-volume lenders who are the target customer for TransUnion's OFAC product. SER1212-14. A reasonable jury could rely on the contrary testimony, that small lenders are unwilling to take the risk of doing business with an SDN. SER0970-71.

potential match. SER1524; SER1526. TransUnion's argument that such technology was not "production-ready" in 2011 falls flat given the evidence that TransUnion made absolutely no effort to make any changes whatsoever to its matching logic in the months and years following *Cortez*. SER1015; SER1030-31. TransUnion's existing vendor already offered match logic options which included date of birth. ER285-88. TransUnion chose not to use these options, or to explore using a different vendor for OFAC data. O'Connell at 482:21- 24. It also never even considered halting sales of OFAC alerts. *Id*. at 482:25-483:4.[17]

TransUnion further claims that the *Cortez* decision suggests that its continued use of name-only matching logic could not be willful because of the addition of the word "potential" in front of the word "match" in connection with OFAC alerts. Appellant's Br. at 48. To the contrary, *Cortez rejected* TransUnion's argument that OFAC alerts are only "possible" matches to be screened by the end user. *Ramirez v. TransUnion, LLC*, No. 12-cv-632-JSC, 2017 WL 1133161, at *5 (N.D. Cal. Mar. 27, 2017). Instead, *Cortez* focused on TransUnion's actual procedures, and identified the very information TransUnion could use to confirm the accuracy of OFAC alerts: available middle names and dates of birth. *Id.* at 710. The Third Circuit called

[17] TransUnion also repeats its typicality argument, addressed above, that transmission of a consumer report to a third party is required in order to state a claim under FCRA section 1681e(b). Ninth Circuit authority, both longstanding and recent, forecloses this position. *See* fn. 13, *supra*.

TransUnion's failure to "at the very least" use date of birth "reprehensible." *Id.* at 723. TransUnion, of course, continued to ignore dates of birth on the OFAC list until 2013, despite its own research showing that using date of birth, or even year of birth, could entirely eliminate false positives. SER1031-32; SER1592; SER1599.[18]

2. Substantial Evidence Supports The Jury's Conclusion That TransUnion Willfully Failed To Clearly And Accurately Disclose OFAC Information

Whenever a consumer requests a copy of his or her file, the FCRA requires CRAs to "clearly and accurately disclose to the consumer all information in the consumer's file" at the time of the request. 15 U.S.C. § 1681g(a). The FCRA defines a consumer's file to include "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). Unambiguous statutory language like this, which is "not subject to a range of plausible interpretations," renders a defendant's subjective interpretation of the law irrelevant and supports a finding of willfulness. *Syed*, 853 F.3d at 505. As the Third Circuit found in upholding the jury's willfulness finding on the disclosure claim in *Cortez*, the broad

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[18] The minor logic change TransUnion references—the elimination of "synonyms" function (which led to TransUnion reporting the OFAC record of "Sandra Cortes Quintero" about Ms. Cortez)—did nothing to affect the fundamental problem with TransUnion's name-only matching procedure, which is the procedure that negatively affected every class member here. SER1013-15; *Cortez*, 617 F.3d at 723.

reach of FCRA section 1681g(a) is "obvious." 617 F.3d at 711.

The jury found that TransUnion willfully failed to clearly and accurately disclose OFAC information to class members upon request. ER22-23. This determination was fully supported by the substantial evidence presented at trial:

- Ramirez requested a copy of his TransUnion file, and received his file or "personal credit report" which identified itself as the response to his request, and contained no reference to OFAC. SER1509-17.
- The form of the "personal credit report" was the same for all class members in 2011, and was the same form sent to Cortez in 2005. SER1254-55; SER1509-17; SER1554-63; ER321-22.
- TransUnion sent Ramirez and all other class members a separate letter regarding the OFAC record that "is considered a potential match" to the consumer's name. The author of the letter admitted that it is unclear. SER1230; SER1518; SER1150.
- The separate letter is not identified as a file, and says that the requested file "has been mailed to you *separately*." The letter also states that it is being provided as a "courtesy," and does not inform the consumer that the OFAC information can be disputed if inaccurate. SER1518.
- Ramirez did not know that he could dispute the OFAC information associated with him, or how to do so, until after he consulted with counsel. SER0699-700; SER1519.

- Since it introduced the product in 2002, TransUnion had the capability to incorporate OFAC information on the credit reports sold to customers. SER0854-55; SER1551; ER324.
- TransUnion was on notice that OFAC information should be disclosed in the form of the plain language of the FCRA, the *Cortez* complaint in 2005, the *Cortez* jury verdict in 2007, and numerous consumer inquiries regarding OFAC in 2006 and 2007. SER1604; SER1601.
- TransUnion did not begin to disclose OFAC information to consumers in any manner until 2011, and never considered stopping sales of OFAC alerts. SER1252-53; ER328-29; SER0862-63; SER1027-28.
- TransUnion misrepresented the content of the separate OFAC letter in correspondence to Treasury, falsely claiming that it instructed consumers about their right to dispute/block OFAC information. SER1518; SER1576-78.

This substantial evidence was sufficient for a reasonable jury to conclude that TransUnion willfully failed to clearly and accurately disclose OFAC information upon request.

TransUnion contends that this claim fails as a matter of law. Appellant's Br. at 42-43. TransUnion argues that it satisfied its disclosure obligations with respect to OFAC information because it sent the file and the separate letter "contemporaneously." *Id.* This argument is foreclosed by the documents themselves. Nothing about TransUnion's "personal credit report" and the separate OFAC letter indicate that they should be read together: the "personal credit report" does not say that it is incomplete and will be

supplemented, and the separate letter defines itself in opposition to a file disclosure, saying that the consumer's file has been sent "separately." SER1518. Thus, even taken together, the two documents do not clearly and accurately disclose all of the information in a consumer's file.

Indeed, the letter's statement that the OFAC data was provided as a "courtesy" and not as required by law supports an inference that TransUnion did not want consumers to know that the information was part of their file and could be disputed. SER1518. This inference is bolstered by TransUnion's misrepresentation to Treasury about the contents of the letter. SER1578.

As *Cortez* held, the fact that the OFAC data was housed separately from TransUnion's traditional credit data has no relevance to TransUnion's obligation to disclose it to consumers. 617 F.3d at 711-12. Furthermore, TransUnion's claim that the OFAC information "had to be sent" separately because it was housed separately (Appellant's Br. at 43) lacks credibility: TransUnion was able to incorporate and send the same OFAC data directly in reports sold to its paying clients as early as 2002. ER324; SER1551. A reasonable jury could infer that TransUnion had the ability to do the exact same thing for disclosures sent to consumers free of charge.

TransUnion asserts that there was no "precedent or authoritative guidance in 2011 even suggesting that TransUnion's two-mailings-instead-of-one practice violated FCRA." Appellant's Br. at 44. But, as the District Court found, this inaccurate legal standard is entirely TransUnion's self-serving

creation: "no court has held that a defendant can be found to have willfully violated the FCRA only when its conduct violates clearly established law." *Ramirez*, 2017 WL 1133161, at *2. Indeed, TransUnion's approach is entirely foreclosed by the binding precedent of *Syed*, which makes clear that when a statute is unambiguous, no prior guidance is necessary to find a willful violation. *Syed*, 853 F.3d at 504-05. FCRA section 1681g(a) is pellucidly clear that *all* information in the consumer's file must be disclosed. The evidence of record was sufficient for any reasonable jury to conclude that TransUnion failed to disclose all information to the class that was in their files.

3. Substantial Evidence Supports The Jury's Verdict That TransUnion Willfully Failed To Include A Statement Of Rights With Its Disclosure Of OFAC Information

In addition to providing clear and accurate file disclosures upon request, the FCRA also unambiguously requires CRAs to "provide to a consumer *with each written disclosure*…the [FTC's] summary of rights…." 15 U.S.C. § 1681g(c) (emphasis added). This mandate is not subject to multiple plausible interpretations, rendering any alternate reading unreasonable. *Syed*, 853 F.3d at 505.

The same evidence listed in section V.C.2 above permits a reasonable jury to conclude, as the jury did here, that TransUnion willfully failed to provide the FCRA summary of rights with each written disclosure made to consumers. ER22-23.

TransUnion asserts that there was "only one written disclosure here," and that the statement of FCRA rights contained in the personal credit report applied equally to the information in the separate OFAC letter. Appellant's Br. at 43. This argument strains credulity given that the OFAC letter contains no reference at all to the summary of rights or to the FCRA at all. SER1518. The letter does not state that the OFAC data is part of the consumer's file, and states that it is provided as a "courtesy." *Id.*

If, as TransUnion asserts, the separate letter is a written file disclosure to consumers, then TransUnion was required to provide the summary of rights with that mailing. The unambiguous language of FCRA section 1681g(c) requires the inclusion of the summary of rights with "each written disclosure." 15 U.S.C. § 1681g(c). There is no plausible interpretation of this language that permits sending the summary of rights with a separate piece of mail. *Syed*, 853 F.3d at 505. A reasonable jury could therefore easily conclude that TransUnion's violation of FCRA section 1681g(c) was willful.

D. The Damages Verdict Was Justified By The Facts, By TransUnion's Brazen Defense At Trial, And Was Completely In Line With Constitutional Standards

Finally, TransUnion seeks to eliminate or reduce the statutory damages award of $984.22 and the punitive damages award of $6,353.08 per class member. Appellant's arguments fail.

1. The Statutory Damages Award Was Proper

Upon a finding of any willful violation, the FCRA permits a statutory damages award of $100-$1,000, and uncapped punitive damages. 15 U.S.C. § 1681n(a)(2). The parties agreed to submit a jury verdict form which asked for damages, if any, to be awarded *per class member*. ER22-23. The jury instruction concerning statutory damages was entirely consistent with the plain language of the FCRA, permitting a recovery $100-$1,000 per consumer. ER351.

The jury found three separate willful violations of the FCRA and assessed statutory damages at $984.22 per class member. ER23. The District Court upheld the award. ER8-12. TransUnion now argues that the statutory damages verdict was allegedly improper.

First, TransUnion contends that class members should not recover any statutory damages because they allegedly lack Article III standing. Appellant's Br. at 49. This argument fails for the same reasons that TransUnion's previous standing argument fails. *See supra* at pp. 17-26.

Next, TransUnion regurgitates its argument that class members have allegedly not established willful violations of the FCRA. Appellant's Br. at 49. Appellant is mistaken about the merits of the class's claims, as discussed above. *See supra* at pp. 31-43.

Further, the FCRA permits statutory damages for *any one* violation, and TransUnion agreed that the jury may award up to $1,000 if it found in favor of the class on any one of the three FCRA claims. ER22-23; SER1609. TransUnion waived it argument that "there

is no way to know what the jury would have awarded" (Appellant's Br. at 49-50) had the jury found for the class on two claims or if one class size was smaller by agreeing to a verdict form which allowed an award of statutory damages for any of the three claims. SER1609.

Further, TransUnion argues that the fact that statutory damages here were 98% of the maximum $1,000 offends due process allegedly because they were "wholly disproportionate to the offense." Appellant's Br. at 50-51. But this Court has held that statutory damages award can only violate constitutional due process protections when they are "'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" *U.S. v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919)).

That is not the case here. Indeed, TransUnion cannot, and does not, even argue that the statutory damages award was either severe or oppressive. Even the aggregate statutory damages award was miniscule for one of the "Big Three" credit reporting agencies in the U.S. SER1607. Moreover, given the verdict of three separate violation for every class member here, the defamatory nature of false OFAC information, and the degree of TransUnion's recklessness, a statutory damages award approaching the $1,000 cap is warranted.

TransUnion also complains that the District Court affirmed the statutory damages award by citing to a recent Ninth Circuit FCRA case, rather than to Appellant's preferred Farm Labor Contractor

Registration Act ("FLCRA") case. *Six Mexican Workers*, 904 F.2d 1301, 1309-10 (9th Cir. 1990). Given that the FLCRA has been repealed, it is questionable whether *Six Mexican Workers* has a proper application in any context. Regardless, that decision is not helpful here since it makes no reference to constitutional due process, instead following an analysis specific to liquidated damages under the FLCRA. *Id.*

The District Court committed no error in citing to *Bateman v. Am. Multi- Cinema, Inc.*, 623 F.3d 708, (9th Cir. 2010). Although decided at the class certification stage, *Bateman* is a recent FCRA decision that makes clear that "[t]here is no language in the [FCRA], nor any indication in the legislative history, that Congress provided for judicial discretion to depart from the $100 to $1000 range where a district judge finds that damages are disproportionate to harm…. the plain text of the statute makes absolutely clear that, in Congress's judgment, the $100 to $1000 range is proportionate and appropriately compensates the consumer." *Id.* at 718-19.

Finally, juries have substantial discretion in making damages determinations, particularly in light of what this Court called the "inherent difficulty in quantifying damages for injury to creditworthiness or reputation" under the FCRA. *Kim v. BMW Fin. Servs. NA, LLC*, 702 Fed. App'x 561, 563 (9th Cir. 2017). That is one of the reasons the FCRA allows for statutory damages in cases like these. Nothing about this verdict is wholly disproportionate or obviously unreasonable in the circumstances of this case.

2. The Punitive Damages Award Was Within Constitutional Limits

TransUnion's final erroneous argument is that the jury's punitive damages award of $6,353.08 to each class member has "constitutional problems." Appellant's Br. at 52.

First, TransUnion argues that the verdict allegedly suffers from a "double punishment" problem, apparently complaining that the jury did not understand the different functions of statutory and punitive damages under the FCRA. *Id.* at 53. TransUnion's position is sheer speculation.

The jury instructions here were proper, and TransUnion does not argue otherwise in this appeal. The punitive damages phase of the trial was entirely separated from the liability phase, with separate and equally proper instructions and a separate verdict form. SER1487-88; ER21. The closing arguments during the liability/statutory damages phase made it clear that statutory damages compensate for intangible harm that is difficult to monetize. SER1410-SER1413; *Bateman*, 623 F.3d at 718-19. Nor did TransUnion object during closing argument or after. To reverse a jury verdict based on *post hoc* speculation is unprecedented.

TransUnion next argues that the jury must have misunderstood that the punitive damages were not only for class members but also for non-parties. Appellant Br. at 54-55. This argument completely ignores the jury instructions and what class counsel actually said at closing.

The jury charge was clear. The District Court's punitive damages instruction was in accordance with

the Ninth Circuit's Model Civil Jury Instruction 5.5 (2007), and correctly described the standard for awarding punitive damages under the FCRA. SER1487-88. Again, TransUnion did not object to the jury charge as causing any confusion about punitive damages or for whom they were intended.

Class counsel's closing argument for punitive damages was also clear, going as far as to tell the jury who punitive damages were intended for: "Mr. Ramirez and other class members. And nobody else." SER1490. When class counsel stated truthfully that there was evidence of much broader misreporting of OFAC alerts by TransUnion,[19] he followed that by accurately stating, "you could consider that evidence, not because anyone besides this class could recover any money in this case, but in order to figure out how frequently the law is being violated, how [a] frequent and a repeat offender TransUnion is." SER1490. Again TransUnion did not object.

Although the jury could not, and did not, compensate non-parties, it could certainly punish TransUnion in a fashion so as to *deter future harm to others* by the same reckless conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007); *Cortez*, 617 F.3d at 723 (punitive damages serve to incentivize

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[19] The evidence of record is that TransUnion used the same name-only matching logic to associate consumers with the OFAC list from 2002 until 2013, and failed to include OFAC data in disclosures to consumers until July of 2011. SER1013-15; SER1231; ER327-29; SER1252-53. TransUnion's records indicate that these practices affected tens of thousands of consumers per year. SER1593. The class that could be ascertained and certified, however, was much smaller.

CRAs not to "ignore the requirements of the FCRA each time it creatively incorporates a new piece of personal consumer information in its reports."). To argue now that the jury must have been awarding punitive damages for non-class-members is too late, as that argument was waived at trial, and clearly incorrect in any event.

TransUnion's contention that the punitive damages were constitutionally excessive, allegedly because they do not satisfy any of the three *State Farm* guideposts, is also mistaken. *See State Farm Mut. Auto Ins. Co. v Campbell*, 538 U.S. 408, 418 (2003).

Under *State Farm*, there is no "bright line ratio that a punitive damages award cannot exceed." 538 U.S. at 425. The U.S. Supreme Court has identified three "guideposts" for assessing punitive damages: (1) the reasonableness of the punitive damages in relation to the reprehensibility of defendant's actions; (2) the disparity between the punitive damages awarded and the compensatory damages awarded (the "ratio"), and (3) the difference between the punitive damages awarded by the jury and civil penalties authorized in comparative cases. *Id.* at 418 (*citing Gore*, 517 U.S. 559).

a. The Punitive Damages Verdict Here Is Reasonably Related To The Reprehensibility Of TransUnion's Conduct

As far as fair credit reporting cases are concerned, TransUnion's conduct here was highly reprehensible. TransUnion was well aware of its longstanding and unambiguous responsibility under FCRA section 1681e(b) to assure the maximum possible accuracy of

records it reports, and under FCRA section 1681g to make clear and complete file disclosures to consumers, including information about their rights under the FCRA. *Guimond*, 45 F.3d at 1332-33; *Cortez*, 617 F.3d at 709-12.

As the jury heard, TransUnion was on notice of problems with its practices regarding OFAC data as early as the commencement of the *Cortez* litigation in 2005, and the jury's verdict finding violations of the FCRA's accuracy and disclosure provisions in 2007. The Third Circuit in *Cortez* found that TransUnion's failure to use dates of birth when available to match consumers to the OFAC list was reprehensible. *Id.*

TransUnion's behavior was reprehensible then, and it became only more so when TransUnion ignored the Third Circuit's warning by continuing to use nameonly matching logic to associate consumers with the OFAC list, and continuing to fail to provide clear file disclosures of OFAC data.

The evidence in this case is that TransUnion's policies with respect OFAC information as applied to the class were substantively the same as those found to be reprehensible by the *Cortez* jury in 2007 and the Third Circuit in 2010: TransUnion still used name-only matching logic, disregarding all additional identifiers including dates of birth. TransUnion's file disclosures to consumers it associated with the OFAC list continued to make no mention whatsoever of OFAC information. And despite the clear warning of *Cortez*, TransUnion never even considered pausing sales of OFAC data in order to reform its practices. Instead, it misled Treasury by falsely stating that it

informed consumers that they could block false OFAC alerts.

The depth of TransUnion's disregard for U.S. federal court rulings against it and also of consumer rights with respect to OFAC was put on stark display at the trial in this matter, where certain TransUnion witnesses would not even admit that they sold a credit report about Ramirez, where a corporate representative insisted that TransUnion's procedures *benefitted* class members, and where TransUnion's counsel claimed that it was *TransUnion's* reputation at stake, not the reputations of consumers. SER1090.

TransUnion's conduct plainly satisfies this "reprehensibility" standard, and an award of $6,353.08 per class member is reasonable.

The circumstances underlying *State Farm*, a bad faith insurance claim matter stemming from a fatal car accident, led the Court to discuss five factors as to "reprehensibility," factors which are not a meaningful match for FCRA consumer cases. *See Saunders v. Equifax Info. Svcs., LLC*, 469 F. Supp. 2d 343, 351 (E.D. Va. 2007) ("*Saunders v. Equifax*"). Specifically, the first two of the *State Farm* reprehensibility factors should be given less weight in consumer actions since FCRA actions typically will not involve physical injury of the type in *State Farm*. *Id*. *See also Kemp v. American Telephone & Telegraph Co*., 393 F.3d 1354, 1363 (11th Cir. 2004) (upholding district court's finding that first two factors of State Farm reprehensibility analysis did not apply to consumer overcharging case).

Additionally, the final factor can also be discounted since malice is not necessary in FCRA

cases to recover punitive damages. *See Saunders v. Equifax*, 469 F. Supp. 2d at 351; *Cousin v. TransUnion Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) ("Malice or evil motive need not be established for a punitive damages award [in FCRA cases]") (citation omitted).

Moreover, the Supreme Court stated that the reprehensibility considerations are not a mandatory checklist that must be satisfied in full, but that the absence of all five factors renders a punitive damages award "suspect," although not necessarily unconstitutional. *State Farm*, 538 U.S. at 418. This analysis is bolstered by the Ninth Circuit's conclusion that when punitive damages are awarded pursuant to a statutory regime, as opposed to under state common law, "rigid application of the [*State Farm*]/*Gore* guideposts is less necessary or appropriate." *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1056 (9th Cir. 2014). Nevertheless, the evidence of record satisfies the factors applicable to the case at bar.

First, the harm here was neither purely "economic" nor "physical." A major part of the harm was reputational and informational in nature—TransUnion associated class members with terrorists and deprived them of the information they needed to correct the problem. Second, this was not a case that involved the "health or safety of others." Third, the evidence demonstrated that the OFAC information associated with class members could result in them being cut off from the U.S. financial system, rendering them "financially vulnerable," particularly in comparison to TransUnion, a billion-dollar corporation. SER0964; SER0970-71; SER1607. Fourth, TransUnion engaged in repeated conduct.

Minimally, it associated the 8,185 class members with the OFAC list during the six-month class period using name-only matching procedure and denied each of them a clear file disclosure and statement of FCRA rights, and the evidences shows that these same practices affected many other unidentifiable consumers. SER1593.

The evidence shows that TransUnion deliberately chose not to comply with the FCRA with respect to its OFAC product in spite of the FCRA's plain language and *Cortez*. TransUnion took the calculated risk of an appeal, while continuing to use the same procedures. And even after losing the *Cortez* appeal, it deliberately continued selling the OFAC product knowing its approach was inadequate and *already* reprehensible. The reprehensibility guidepost is fully satisfied here.

b. The Relationship Between Statutory And Punitive Damages Here Was Constitutionally Appropriate

The jury's measured award of $6,353.08 in punitive damages per class member, representing approximately a 6:1 ratio, is entirely appropriate here. TransUnion calls it a ratio "50,000 times higher" (Appellant Br. at 56), but that simply demonstrates that TransUnion's unwillingness to listen to any court or jury which tells it that its OFAC reporting practices are harmful to consumers.

Multiple cases decided after *Gore* have upheld ratios much greater than 6:1. Indeed, the Fourth Circuit upheld a punitive-compensatory damage ratio of 80:1 in a well-reasoned decision on an FCRA case, following defendant's motion for a constitutional

reduction, just like TransUnion's motion here. *See Saunders v. Branch Banking and Trust Co. of VA, LLC*, 526 F.3d 142 (4th Cir. 2008) ("*Saunders v. BB&T*") (finding that $80,000 in punitive damages for a single consumer who was awarded $1,000 in statutory damages was constitutionally appropriate in light of similar FCRA awards and the need to adequately punish and deter a large, wealthy corporation).[20] But that is only one example, out of many:

- 300,000:1 ratio proper. *Arizona v. ASARCO*, 773 F.3d at 1054-56;
- 125,000:1 ratio proper. *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008);
- 75:1 ratio proper. *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 233-37 (3d Cir. 2005);
- 1,500:1 ratio proper. *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004).[21]

By contrast, the only two cases where the U.S. Supreme Court overturned punitive damage awards *because of their size* are materially different. *Gore* had a verdict of $4,000 in compensatory damages and $2,000,000 in punitive damages, and *State Farm* had a verdict of $2.6 million in compensatory damages and $145 million in punitive damages. Thus the ratios of

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[20] *See also Daugherty v. Ocwen Loan Servicing, LLC*, 701 Fed. App'x 246, 261- 62 (4th Cir. 2017) (100:1 ratio appropriate in FCRA case) (citing *Saunders v. BB&T*).

[21] *See also Williams v. First Advantage LNS Screening Solutions, Inc.*, 231 F. Supp. 3d 1333, 1357 (N.D. Fla. 2017) (upholding 13.2:1 ratio of compensatory to punitive damages in FCRA case where a large, wealthy CRA engaged in a "burdenshifting strategy" to assuring accuracy).

punitive to compensatory damages in both of those cases, which the U.S. Supreme Court found to be offensive, were 500:1 and 145:1, respectively. *See Saunders v. Equifax*, 469 F. Supp. 2d at 349 n. 7.

Here, the punitive to compensatory damages ratio is approximately 6:1, well under the single-digit ratio (10:1 or less) that *State Farm* suggests is appropriate. 538 U.S. at 425.

TransUnion argues that in the aggregate the punitive damages award is "substantial." Appellant's Br. at 56. It provides no analysis at all as to what that means.[22] Moreover, the entire punitive damages verdict is a small fraction (3.3%) of TransUnion's net worth. SER1607. Usually, the best evidence of a defendant's ability to withstand a punitive damages award is exactly what the jury was presented with here: TransUnion's net worth. *Cortez*, 617 F.3d at 718 n. 37 (net worth is appropriate evidence of financial condition).

In the aggregate the punitive damages verdict is $52 million only because TransUnion repeatedly violated the rights of over 8,000 consumers. TransUnion's argument is not under *State Farm*, it is

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[22] A limited award of $984.22 per class member cannot be considered substantial, and TransUnion provides no authority suggesting that it could. To the contrary, when the Ninth Circuit has upheld reductions in punitive damages because compensatory damages were high, it did so when a single consumer was set to receive tens of thousands of dollars. *See, e.g.*, *Bennett v. Am. Medical Response, Inc.*, 226 Fed. App'x 725, 728 (9th Cir. 2007) ($100,000 in compensatory damages was substantial); *Bains LLC v. Arco Prods. Co., Div. of Atlantic Richfield Co.*, 405 F.3d 764, 776 (9th Cir. 2005) ($50,000 to a single plaintiff was substantial).

a regurgitation of its belief that the District Court abused its discretion in certifying this case as a class action. But it did not, as discussed above. Not surprisingly, TransUnion cites to no authority at all for its proposition that the proportionality analysis is different for class actions.

Indeed, the fact that this is a class action does not change the analysis. *Bateman*, 623 F.3d at 719 ("Despite Congress's awareness of the availability of class actions, it set no cap on the total amount of aggregate damages, no limit on the size of a class, and no limit on the number of individual suits that could be brought" against a single defendant). Given the modest statutory damages award here, the reckless and reprehensible nature of Appellant's conduct, the fact that this is a consumer protection case under a remedial statute, and TransUnion's net worth, the approximately 6:1 ratio is appropriate.

c. Civil Penalties Comparison Not Germane

TransUnion also asserts that the difference between the civil penalties available under the FCRA and the jury's punitive damage award make the award is excessive. This argument has no merit. As the *Saunders* court held, "since this limit is not applicable to actions brought under the FCRA by private citizens, it is not particularly helpful in assessing the constitutionality of the punitive damage award. Accordingly, for FCRA cases brought by private citizens, the third guidepost offers little help to this Court's punitive damages analysis." *Saunders v. Equifax*, 469 F. Supp. 2d at 353 (internal quotations and citation omitted). There is, therefore, no truly

"comparable" civil penalty that the Court could be guided by.

In sum, the jury's punitive damages verdict was appropriate, and TransUnion offers no valid reason to reduce it.

VI. CONCLUSION

For all the foregoing reasons, Appellee respectfully submits that the District Court's orders being appealed should be affirmed in all respects.

Respectfully submitted,

Dated: May 25, 2018

/s/ John Soumilas
John Soumilas

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