Docket No. ____

United States Supreme Court

——o——

SHERRI COHEN

Petitioner,

-against-

EQUIFAX INFORMATION SERVICES LLC and TRANSUNION LLC

Respondents.

——o——

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, No. 19-3063

APPENDIX FOR PETITION

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15 U.S.C. §1681e(b) - Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(c) Disclosure of consumer reports by users allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information

(1) Notice requirement. A consumer reporting agency shall provide to any person—

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

(2) Content of notice

The Bureau shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Bureau prescription under this paragraph.

(e) Procurement of consumer report for resale

(1) Disclosure. A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report—

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale. A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall—

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person—

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a Federal agency or department. Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if—

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) [1] of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

(Pub. L. 90–321, title VI, § 607, as added Pub. L. 91–508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1130; amended Pub. L. 104–208, div. A, title II, § 2407, Sept. 30, 1996, 110 Stat. 3009–435; Pub. L. 105–107, title III, § 311(b), Nov. 20, 1997, 111 Stat. 2256; Pub. L. 111–203, title X, § 1088(a)(2)(A), July 21, 2010, 124 Stat. 2087.)

15 U.S.C. §1681i(a) – Procedure in case of disputed accuracy

(a) Reinvestigations of disputed information

(1) Reinvestigation required
(A) In general

Subject to subsection (f) and except as provided in subsection (g), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

(B) Extension of period to reinvestigate

Except as provided in subparagraph (C), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.

(C) Limitations on extension of period to reinvestigate

Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt notice of dispute to furnisher of information
(A) In general

Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.

(B) Provision of other information

The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(3) Determination that dispute is frivolous or irrelevant

(A) In general

Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

(B) Notice of determination

Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency.

(C) Contents of notice. A notice under subparagraph (B) shall include—

(i) the reasons for the determination under subparagraph (A); and

(ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(4) Consideration of consumer information

In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.

(5) Treatment of inaccurate or unverifiable information

(A) In general. If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall—

(i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and

(ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.

(B) Requirements relating to reinsertion of previously deleted material
(i) Certification of accuracy of information

If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.

(ii) Notice to consumer

If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

(iii) Additional information. As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion—
(I) a statement that the disputed information has been reinserted;
(II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and
(III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

(C) Procedures to prevent reappearance

A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).

(D) Automated reinvestigation system

Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

(6) Notice of results of reinvestigation

(A) In general

A consumer reporting agency shall provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.

(B) Contents. As part of, or in addition to, the notice under subparagraph (A), a consumer reporting agency shall provide to a consumer in writing before the expiration of the 5-day period referred to in subparagraph (A)—

(i) a statement that the reinvestigation is completed;

(ii) a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;

(iii) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the agency, including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;

(iv) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and

(v) a notice that the consumer has the right to request under subsection (d) that the consumer reporting agency furnish notifications under that subsection.

(7) Description of reinvestigation procedure

A consumer reporting agency shall provide to a consumer a description referred to in paragraph (6)(B)(iii) by not later than 15 days after receiving a request from the consumer for that description.

(8) Expedited dispute resolution. If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved in accordance with paragraph (5)(A) by the deletion of the disputed information by not later than 3 business days after the date on which the agency receives notice of the dispute from the consumer in accordance with paragraph (1)(A), then the agency shall not be required to comply with paragraphs (2), (6), and (7) with respect to that dispute if the agency—

(A) provides prompt notice of the deletion to the consumer by telephone;

(B) includes in that notice, or in a written notice that accompanies a confirmation and consumer report provided in accordance with subparagraph (C), a statement of the consumer's right to request under subsection (d) that the agency furnish notifications under that subsection; and

(C) provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 business days after making the deletion.

(b) Statement of dispute

If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Notification of consumer dispute in subsequent consumer reports

Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Notification of deletion of disputed information

Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information.

(e) Treatment of complaints and report to Congress

(1) In general. The Commission [1] shall—

(A) compile all complaints that it receives that a file of a consumer that is maintained by a consumer reporting agency described in section 1681a(p) of this title contains incomplete or inaccurate information, with respect to which, the consumer appears to have disputed the completeness or accuracy with the consumer reporting agency or otherwise utilized the procedures provided by subsection (a); and

(B) transmit each such complaint to each consumer reporting agency involved.

(2) Exclusion

Complaints received or obtained by the Bureau pursuant to its investigative authority under the Consumer Financial Protection Act of 2010 shall not be subject to paragraph (1).

(3) Agency responsibilities. Each consumer reporting agency described in section 1681a(p) of this title that receives a complaint transmitted by the Bureau pursuant to paragraph (1) shall—

(A) review each such complaint to determine whether all legal obligations imposed on the consumer reporting agency under this subchapter (including any obligation imposed by an applicable court or administrative order) have been met with respect to the subject matter of the complaint;
(B) provide reports on a regular basis to the Bureau regarding the determinations of and actions taken by the consumer reporting agency, if any, in connection with its review of such complaints; and
(C) maintain, for a reasonable time period, records regarding the disposition of each such complaint that is sufficient to demonstrate compliance with this subsection.

(4) Rulemaking authority

The Commission 1 may prescribe regulations, as appropriate to implement this subsection.

(5) Annual report

The Commission 1 shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives an annual report regarding information gathered by the Bureau under this subsection.

(f) Reinvestigation requirement applicable to resellers

(1) Exemption from general reinvestigation requirement

Except as provided in paragraph (2), a reseller shall be exempt from the requirements of this section.

(2) Action required upon receiving notice of a dispute. If a reseller receives a notice from a consumer of a dispute concerning the completeness or accuracy of any item of information contained in a consumer report on such consumer produced by the reseller, the reseller shall, within 5 business days of receiving the notice, and free of charge—

(A) determine whether the item of information is incomplete or inaccurate as a result of an act or omission of the reseller; and
(B) if—
(i) the reseller determines that the item of information is incomplete or inaccurate as a result of an act or omission of the reseller, not later than 20 days after receiving the notice, correct the information in the consumer report or delete it; or
(ii) if the reseller determines that the item of information is not incomplete or inaccurate as a result of an act or omission of the reseller,

convey the notice of the dispute, together with all relevant information provided by the consumer, to each consumer reporting agency that provided the reseller with the information that is the subject of the dispute, using an address or a notification mechanism specified by the consumer reporting agency for such notices.

(3) Responsibility of consumer reporting agency to notify consumer through reseller. Upon the completion of a reinvestigation under this section of a dispute concerning the completeness or accuracy of any information in the file of a consumer by a consumer reporting agency that received notice of the dispute from a reseller under paragraph (2)—

(A) the notice by the consumer reporting agency under paragraph (6), (7), or (8) of subsection (a) shall be provided to the reseller in lieu of the consumer; and
(B) the reseller shall immediately reconvey such notice to the consumer, including any notice of a deletion by telephone in the manner required under paragraph (8)(A).

(4) Reseller reinvestigations

No provision of this subsection shall be construed as prohibiting a reseller from conducting a reinvestigation of a consumer dispute directly.

(g) Dispute process for veteran's medical debt

(1) In general

With respect to a veteran's medical debt, the veteran may submit a notice described in paragraph (2), proof of liability of the Department of Veterans Affairs for payment of that debt, or documentation that the Department of Veterans Affairs is in the process of making payment for authorized hospital care, medical services, or extended care services rendered to a consumer reporting agency or a reseller to dispute the inclusion of that debt on a consumer report of the veteran.

(2) Notification to veteran

The Department of Veterans Affairs shall submit to a veteran a notice that the Department of Veterans Affairs has assumed liability for part or all of a veteran's medical debt.

(3) Deletion of information from file

If a consumer reporting agency receives notice, proof of liability, or documentation under paragraph (1), the consumer reporting agency shall delete all information relating to the veteran's medical debt from the file of the veteran and notify the furnisher and the veteran of that deletion.

(Pub. L. 90–321, title VI, § 611, as added Pub. L. 91–508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1132; amended Pub. L. 104–208, div. A, title II, § 2409, Sept. 30, 1996, 110 Stat. 3009–439; Pub. L. 105–347, § 6(5), Nov. 2, 1998, 112 Stat. 3211; Pub. L. 108–159, title III, §§ 313(a), 314(a), 316, 317, Dec. 4, 2003, 117 Stat. 1994–1996, 1998; Pub. L. 111–203, title X, § 1088(a)(2)(C), (6), July 21, 2010, 124 Stat. 2087; Pub. L. 115–174, title III, § 302(b)(3), May 24, 2018, 132 Stat. 1333.)

15 U.S.C. §1681n(a) – Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

(Pub. L. 90–321, title VI, § 616, as added Pub. L. 91–508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134; amended Pub. L. 104–208, div. A, title II, § 2412(a)–(c), (e)(1), Sept. 30, 1996, 110 Stat. 3009–446; Pub. L. 110–241, § 3(a), June 3, 2008, 122 Stat. 1566.)

15 U.S.C. §1681o(a) – Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and
(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(Pub. L. 90–321, title VI, § 617, as added Pub. L. 91–508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134; amended Pub. L. 104–208, div. A, title II, § 2412(d), (e)(2), Sept. 30, 1996, 110 Stat. 3009–446, 3009–447; Pub. L. 108–159, title VIII, § 811(e), Dec. 4, 2003, 117 Stat. 2012.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
SHERRI COHEN,

Plaintiff,

-against-

EQUIFAX INFORMATION SERVICES, LLC,
and TRANSUNION LLC,

Defendants.
----------X

OPINION, REPORT & RECOMENDATIONS

1:18-CV-6210 (JSR) (KHP)

TO: THE HON. JED S. RAKOFF, UNITED STATES DISTRICT JUDGE
FROM: KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

Plaintiff Sherri Cohen brings this action *pro se* pursuant to the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, and New York's Fair Credit Reporting Act ("New York FCRA"), N.Y. GBL §§ 380 *et seq.*[1] Plaintiff contends that Defendants violated their statutory obligation to report her consumer credit information accurately, causing her to be denied credit cards and loans. She contends that Defendants have failed to implement and follow reasonable procedures to assure maximum possible accuracy of the information in consumer reports and to comply with reinvestigation requirements when inaccuracies are brought to their attention by a consumer. She seeks actual and statutory damages, punitive damages, attorneys' fees, and costs.

Plaintiff has moved to amend her complaint to add a claim challenging what she describes as a "litigation lock." [ECF No. 61.] She submitted a form Second Amended Complaint ("SAC"), incorporating by reference allegations in her original complaint and First

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[1] New York's Fair Credit Reporting Act substantially mirrors the federal Fair Credit Reporting Act.

Amended Complaint. The SAC asserts the following claims: (1) willful violations of the FCRA and New York's FCRA by failing to follow reasonable procedures to assure the maximum possible accuracy of the information in her consumer report and failing to comply with reinvestigation requirements upon being notified of inaccuracies in the same; (2) negligent violations of the FCRA and New York's FCRA by failing to follow reasonable procedures to assure maximum possible accuracy of the information in her consumer report and failing to comply with reinvestigation requirements upon being notified of inaccuracies in her consumer report; (3) willful violation of the FCRA by placing a "litigation lock" on her credit information or taking "off line" the same after she commenced litigation; (4) retaliation under the FCRA by placing a "litigation lock" on her credit information or taking "off line" the same after she commenced litigation; and (5) intentional infliction of emotional distress. After submitting the proposed SAC, Plaintiff submitted a proposed Third Amended Complaint which she prepared with the assistance of the New York Legal Assistance Group, a clinic for *pro se* litigants in this District.[2] [ECF No. 68, Exh. C] The TAC is laid out in a more conventional way than the SAC but essentially reiterates the same claims under the FCRA asserted in the SAC; however, the TAC omits the claims under the New York FCRA and the claim for intentional infliction of emotional

[2] It includes the following alleged violations of the FCRA: (1) willful failure to conduct an investigation with respect to disputed information in Plaintiff's credit report; (2) negligent failure to conduct an investigation with respect to disputed information in Plaintiff's credit report; (3) willful failure to follow reasonable procedures to assure maximum possible accuracy of Plaintiff's credit report; (4) negligent failure to follow reasonable procedures to assure maximum possible accuracy of Plaintiff's credit report; (5) willful failure to conduct a reasonable investigation and remove inaccurate information after receive actual notice of inaccurate information; and (6) negligent failure to conduct a reasonable investigation and remove inaccurate information after receive actual notice of inaccurate information. The TAC includes allegations that Defendants harassed Plaintiff by "freezing" or "locking" her credit report after initiating litigation, preventing her from accessing her credit report, which constituted a further violation of the law.

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distress. For this reason this Court directed Defendants to respond to the SAC because it contained more comprehensive claims.

DISCUSSION

1. Legal Standard Applicable to Motion

Under Rule 15(a) of the Federal Rules of Civil Procedure, "a party may amend its pleading once as a matter of course within . . . 21 days after serving it, or . . . if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Second Circuit has stated that "[t]his permissive standard is consistent with our strong preference for resolving disputes on the merits." *Williams v. Citigroup Inc.*, 659 F.3d 208, 212-13 (2d Cir. 2011) (internal quotations and citation omitted). Leave to amend should be given "absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000). Proposed amendments are futile when they would fail to "state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 389 (2d Cir. 2015) (quoting *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012)). As such, the determination of futility is subject to the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* Thus, "[f]utility is generally adjudicated without resort to any outside evidence," and the Court

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accepts the factual allegations pled as true. *Wingate v. Gives*, No. 05-cv-1872 (LAK) (DF), 2009 WL 424359, at *5 (S.D.N.Y. Feb. 13, 2009) (citing *Nettis v. Levitt*, 241 F.3d 186, 194, n.4 (2d Cir. 2001)).

Defendant Equifax Information Services LLC ("Equifax") argues that Plaintiff failed to follow prior court orders concerning her proposed amendment and therefore Rule 16(b), rather than Rule 15(a), should be the governing standard here. Under Rule 16(b) of the Federal Rules of Civil Procedure, if a Court has set a deadline for amendments, a motion to amend filed after the deadline may only be granted upon a showing of "good cause" for the delay. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). The determination of whether "good cause" exists under Rule 16(b) largely turns on the diligence of the moving party. *Id.*; *Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009); *see also Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453, 457 (S.D.N.Y. 2012) (to show good cause, moving party must demonstrate that "despite its having exercised diligence, the applicable deadline could not have been reasonably met") (citation omitted).

While it is true that Plaintiff missed deadlines, she has been in constant communication with the Court and Defendants about her claims. Further, Plaintiff alerted both the Court and Defendants of her complaint about what she calls a "litigation lock" on her credit report since early on in the case. [*See, e.g.*, ECF No. 30.] This Court finds that any delays and mistakes in filing have been due to Plaintiff's *pro se* status and failure to understand the procedural rules of the Court. Accordingly, the Court will apply the standard under Rule 15(a).

2. Intentional Infliction of Emotional Distress

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Plaintiff purports to assert a new claim for intentional infliction of emotional distress. Defendants oppose the addition of this claim based on futility. Under New York law, to maintain a claim for intentional infliction of emotional distress, a plaintiff must show: "(1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Conboy v. AT&T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001) (quoting *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir.1999)). This is a very high standard and difficult to meet. *Howell v. New York Post*, 81 N.Y.2d 115, 122 (1993). Indeed, the conduct must be so outrageous in nature as to go beyond all possible bounds of decency and utterly intolerable in a civilized society. *Id.*; *see also Crawford v. Recovery Partners*, 12-cv-8520, 2014 WL 1695239, at *5 (S.D.N.Y. Apr. 28, 2014). Other judges in this Circuit have dismissed allegations of worse conduct than here. *Grimes v. Fremont Gen. Corp.*, 933 F. Supp. 2d 584, 612 (S.D.N.Y. 2013) (noting that allegations of threats of foreclosure, reporting to credit reporting agencies, and "reprehensible" attempts to collect a debt were insufficient to establish an intentional infliction of emotional distress claim); *Calizaire v. Mortg. Elec. Registration Sys., Inc.*, No. 14-cv-1542, 2017 WL 895741, at *8 (E.D.N.Y. Mar. 6, 2017) (finding allegations "that Deutsch Bank has knowingly initiated foreclosure proceedings without the right to do so. . . . does not constitute the 'outrageous conduct' necessary to support an [international infliction of emotional distress] claim.").

In her reply, Plaintiff states that she had previously erroneously plead a cause of action for intentional infliction of emotion distress when she meant to plead negligent infliction of emotional distress. [ECF No. 82.] Under New York law, to maintain a claim for negligent

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infliction of emotional harm, the plaintiff must proceed under either (1) the "bystander theory" or (2) the "direct duty theory." *Werner v. Selene Fin., LLC, No. 17-CV-06514* (NSR), 2019 WL 1316465, at *11 (S.D.N.Y. Mar. 22, 2019) (citing *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996)). The "bystander theory" requires a plaintiff to observe the serious injury or death of a member of their family due to the defendant's conduct. *Id.* Under the "direct duty theory," a plaintiff must suffer an emotional injury due to a breach of duty which unreasonably endangered their physical safety. *Id.* Both are inapplicable here. New York courts have also recognized the cause of action in special circumstances where there is "an especial likelihood of genuine and serious mental distress." *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000) (citation omitted); *see, e.g., Carney v. Bos. Mkt.*, No. 18 CIV. 713 (LGS), 2018 WL 6698444, at *3 (S.D.N.Y. Dec. 20, 2018) ("These special circumstances include, for example, being negligently misinformed by a hospital of the death of a parent, . . . a negligent positive result on an HIV test, . . . or mishandling the remains of a loved one resulting in the need for cremation due to the passage of time.") (internal citations omitted). Such special circumstances also do not apply in the instant case.

None of the facts pled in any of Plaintiff's pleadings or proposed pleadings remotely approach meeting the standard for stating a claim of intentional or negligent infliction of emotional distress. Accordingly, I respectfully recommend that Plaintiff's motion be denied insofar as it seeks to add a claim of intentional or negligent infliction of emotional distress as such a claim would be futile.

3. Retaliation Under the Fair Credit Reporting Act

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The "new" claim under the FCRA and New York FCRA concern Defendants' alleged retaliation against Plaintiff in response to her threatening and filing suit. Plaintiff has identified the retaliation as Defendants placing a "litigation lock" on her credit report after she filed suit. In prior communications with the Court, she has pointed to the case of *Spector v. Equifax Info. Servs.*, 338 F. Supp. 2d 373, 389 (D. Conn. 2004) as supporting such a theory. Defendant Equifax argues that permitting Plaintiff to file a retaliation claim under the FCRA would be futile because no such cause of action exists. [ECF No.73 at 6-8.]

The FCRA contains two provisions relating to civil liability. Section 1681(n) sets forth the standard and relief available for willful violations of the law. Section 1681(o) sets forth the standard and relief available for negligent violations of the law. Nothing in the statute provides a claim for retaliation. Nor has Plaintiff provided the Court with any legal authority for finding that such a claim exists under the FCRA.

The gravamen of Plaintiff's claims have consistently concerned Defendants alleged failure to follow reasonable procedure to assure maximum possible accuracy of information in her credit report as required by Section 1681e(b) of the FCRA and alleged failure to comply with the rules concerning reinvestigations of disputed information set forth in Section 1681i of the FCRA. This Court construes Section 1681i as sufficiently broad to include Plaintiff's allegations concerning a "litigation lock" insofar as such a procedure could be argued to be an unreasonable procedure in the conduct of a reinvestigation. Indeed, when assisted by NYLAG, NYLAG fashioned the claim as falling under Section 1681i. *See* TAC.

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For the reasons set forth above, I respectfully recommend that Plaintiff's motion be denied insofar as it seeks to add an independent claim for retaliation under the FCRA as such a claim would be futile.

4. Remaining Claims Under the Fair Credit Reporting Act and New York Law

Both Defendants argue that Plaintiff's remaining claims for willful and negligent violations of Sections 1681e(b) and 1681i of the FCRA and the equivalent provisions of the New York FCRA are without merit and that amendment should not be permitted based on futility. However, Defendants' arguments go to the merits of these claims. Therefore, it is inappropriate to consider them at this stage of the litigation. These claims are not new—they have been asserted since the beginning of this litigation. Thus, they remain in the litigation and will be addressed when Defendants file their motion for summary judgment.

CONCLUSION

For the reasons set forth above, I respectfully recommend that Plaintiff's motion to amend be DENIED insofar as she seeks to add an independent claim of retaliation under the FCRA and a claim of intentional or negligent infliction of emotional distress. Plaintiff's motion is GRANTED insofar as the SAC will serve as the operative pleading except insofar as the claims of retaliation and intentional or negligent infliction of emotion distress are excised therefrom.

No further amendments to the pleadings shall be permitted. The parties are reminded that all discovery must be completed by May 31, 2019 and that summary judgment motions are due June 14, 2019.

The Plaintiff shall have seventeen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three

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additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)). Defendants shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure.

If Defendants file written objections to this Report and Recommendation, the Plaintiff may respond to Defendants' objections within seventeen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Alternatively, if Plaintiff files written objections, Defendants may respond to such objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(a), (d). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Jed S. Rakoff at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Rakoff. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).

Respectfully submitted,

Dated: April 17, 2019
New York, New York

Katharine H Parker

Katharine H. Parker
U.S. Magistrate Judge, S.D.N.Y.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHERRI COHEN,

Plaintiff,

-against-

EQUIFAX INFORMATION SERVICES LLC and TRANSUNION LLC,

Defendants.

18-cv-6210 (JSR) (KHP)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

In this action, plaintiff Sherri Cohen, pro se, alleges that defendants Equifax Information Services LLC and Transunion LLC are in violation of the federal Fair Credit Reporting Act ("FCRA") and its New York analogue. On March 18, 2019, plaintiff moved to file a Second Amended Complaint. See ECF No. 61. As relevant here, the Second Amended Complaint sought to add claims for intentional infliction of emotional distress and retaliation. Magistrate Judge Parker, to whom this action has been referred for pretrial matters, issued a Report and Recommendation recommending that the motion be denied insofar as the Second Amended Complaint sought to add these causes of action. See Opinion, Report and Recommendation 8, ECF No. 84. Judge Parker concluded that the amendment would be futile insofar as the proposed causes of action failed to state claims for relief. Plaintiff timely filed objections. See Plaintiff's Objection, ECF Nos. 97, 104.

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Having reviewed the underlying papers de novo, and applying a liberal reading to plaintiff's papers in light of her pro se status, the Court is in complete agreement with Judge Parker's thorough and well-reasoned analysis. The Court therefore adopts the reasoning of her Report and Recommendation by reference.

In objecting to Judge Parker's rejection of her claim for intentional infliction of emotional distress, plaintiff cites to cases where courts have upheld awards of damages for emotional distress as a result of FRCA violations. Plaintiff has conflated the availability of damages for emotional distress with the independent tort of intentional infliction of emotional distress - although, in fairness, the nomenclature is extremely confusing. In brief, when a defendant is found liable, the plaintiff may recover actual damages, which may, in an appropriate case, include damages for emotional distress. "Intentional infliction of emotional distress," on the other hand, is an independent tort that renders a defendant liable for especially outrageous conduct. As Judge Parker explained, plaintiff's allegations do not make out a cause of action for intentional (or negligent) infliction of emotional distress. However, nothing in Judge Parker's ruling prevents plaintiff from seeking to prove and recover damages for emotional distress at trial, if she establishes that defendants are liable for one or more of her claims under the FCRA.

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As for the claim of retaliation, plaintiff agrees with Judge Parker's ruling that the FCRA does not provide for such a cause of action. However, plaintiff now seeks leave to amend her complaint to add six new claims related to defendants' imposition of a "litigation lock" on plaintiff's credit score in response to this litigation. Specifically, plaintiff wishes to add (1) a claim under the Racketeer Influenced and Corrupt Organization Act; (2) a claim for a violation of New York's General Business Law § 349; (3) a claim for conversion; (4) a claim for breach of fiduciary duty; (5) a claim for civil conspiracy; and (6) a claim for tortious interference.

This request, raised for the first time in plaintiff's objection to Judge Parker's Report and Recommendation, is not procedurally proper. Normally, "it is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not." Hubbard v. Kelley, 752 F. Supp. 2d 311, 313 (W.D.N.Y. 2009) (quoting Illis v. Artus, No. 06-CV-3077, 2009 WL 2730870, at *1 (E.D.N.Y. Aug. 28, 2009)). However, requiring plaintiff to first present these arguments to Judge Parker would, under the circumstances, result in a needless duplication of effort. In the interest of judicial economy, therefore, the Court has considered plaintiff's motion to amend to add these claims de novo.

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The Federal Rules of Civil Procedure direct that a court "should freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). This "permissive standard" reflects this Circuit's "strong preference for resolving disputes on the merits." Williams v. Citigroup Inc., 659 F.3d 208, 212-13 (2d Cir. 2011) (quoting New York v Green, 420 F.3d 99, 104 (2d Cir. 2005)). Leave to amend should be granted "absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility." Monahan v. New York City Dept. of Corrections, 214 F.3d 275, 283 (2d Cir. 2000).

Here, plaintiff's motion must be denied on the ground of undue delay. This case is on the verge of summary judgment, and discovery is scheduled to close later this month. Plaintiff's only explanation for why it took her so long to propose these amendments is that, when she initiated her lawsuit, she did not know how the defendants would use the litigation lock. Plaintiff's Objection 6. But this lawsuit was removed to federal court in July of 2018, and plaintiff first expressed a desire to amend her complaint to add claims relating to the litigation lock no later than November 15, 2018. See Order dated November 15, 2018 at 2, ECF No. 28. Additionally, Judge Parker set a deadline of November 21, 2018 - nearly six months before plaintiff proposed the amendments now at issue - for the complaint to be amended to encompass this claim. Id. The Court has due regard for the difficulties plaintiff may

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have in finding the proper legal theory to encompass her claims. But plaintiff has not been idle during this time; she has been an active, indeed vigorous, participant in this litigation. The Court can see no reason why plaintiff could not assert these claims earlier. Even making all reasonable allowances for plaintiff's pro se status, this extraordinary delay is unacceptable.

Moreover, permitting these belated amendments is not necessary to resolve this issue on the merits. Plaintiff's Second Amended Complaint includes a claim for willful violation of the FCRA based on the litigation lock procedures, and Judge Parker recommended permitting that amendment (which recommendation the Court is adopting). See Report and Recommendation 2, 8. Thus, plaintiff will have a full opportunity to litigate whether defendants' use of the litigation lock gave rise to liability and, if so, to prove the extent of her resulting damages.

Indeed, not only is plaintiff's latest amendment unnecessary to the resolution of her claims, it would likely cause great confusion and delay. Plaintiff has asserted a veritable buckshot of claims all aimed at proving the same thing: that defendants use the litigation lock to pressure litigants, rather than for any legitimate purpose. Offering the jury seven different legal theories aimed at proving the same misconduct would be, to put it

mildly, excessive.[1] Accordingly, plaintiff's motion to amend her complaint to include the six claims raised for the first time in her objections to Judge Parker's Report and Recommendation is denied.

Finally, plaintiff has also filed a letter asking the Court to "personally review" the validity of her FCRA and RICO claims. Motion for Judge Rakoff's Personal Review and Ruling 1, ECF No. 115. This Court reviews de novo any potentially dispositive motions. See 28 U.S.C. § 636(b)(1)(B). As to any non-dispositive matters, plaintiff is free to appeal any rulings she feels are "clearly erroneous or contrary to law," 28 U.S.C. § 636(b)(1)(A) - as indeed plaintiff has already done once, see ECF No. 94. Plaintiff should rest assured that this case will receive the Court's full and undiluted attention.[2]

For the reasons given above, plaintiff's undue delay in proposing the RICO amendment justifies denial of her motion to amend. However, because it is obviously important to plaintiff

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[1] Additionally, while the Court's present ruling is not premised on a finding of futility, the Court is extremely doubtful that most, if any, of plaintiff's belatedly-asserted theories of liability state a viable claim for relief.

[2] The Court would be remiss, however, if it did not note that Magistrate Judge Parker is an exceptionally thoughtful and scrutinizing jurist. To the extent plaintiff's motion reflects a concern that Judge Parker's rulings are anything less than the product of careful legal reasoning, therefore, that concern is totally misplaced. As the Court has already noted, plaintiff should consider herself fortunate that such a capable judge is handling the pretrial matters in this case. See Order dated December 21, 2018, ECF No. 50.

that the Court address the viability of her claim, the Court has also undertaken a de novo review of whether amendment to add this claim would be futile. The Court concludes that it would, as plaintiff has not stated a claim for relief under RICO.

"To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." DeFalco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001) (internal quotation marks omitted) (quoting Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp., 101 F.3d 900, 904 (2d Cir. 1996)). "To establish a violation of 18 U.S.C. § 1962(c)" - the only substantive subsection that might apply to plaintiff's claims - "a plaintiff must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Id. at 306 (internal quotation marks omitted) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)). "Racketeering activity" is defined by 18 U.S.C. § 1961(1) to include a broad array of illegal conduct, of which the only example relevant here is extortion.

Plaintiff's only asserted basis for RICO liability is that defendants put a "litigation lock" on her credit score after she commenced these proceedings which prevents her from freely accessing her credit score. Plaintiff's Objection 3-5. Plaintiff claims that defendants use these litigation locks to coerce

plaintiffs to settle their lawsuits. There are several problems with formulating this as a RICO violation. First, "[u]nder section 1962(c), a defendant and the enterprise must be distinct." DeFalco, 244 F.3d at 307. Plaintiff has not identified any "enterprise" that is distinct from Transunion LLC and Equifax Information Services, LLC, the only defendants.

Second, plaintiff has not alleged any facts in support of her claim that the litigation lock is imposed to bully consumers into settling. A bare allegation of improper intent is not sufficient to survive a motion to dismiss. And plaintiff's allegation of a "tacit" conspiracy between defendants, Plaintiff's Objection 5, is entirely speculative.

Third, even if plaintiff had sufficiently pleaded that defendants had a wrongful motivation, the litigation lock is not extortion. Extortion usually requires obtaining of property from another by threats of violence. E.g., 18 U.S.C. § 1951(b)(2). Even assuming without deciding that, by inducing plaintiff to settle or drop her case, defendants thereby attempted to obtain property from her, a litigation lock is not a threat of force or violence against person or property. Plaintiff characterizes the practice as "unfair and unreasonable," Plaintiff's Objection 4, and it may well be, but not every unfair or unreasonable business practice is racketeering. Indeed, plaintiff compares the litigation lock to "a grocery chain refusing to sell food to someone who has sued the

chain." Plaintiff's Objection 4. But such a course of action would be perfectly legal.

In addition to being untimely, then, plaintiff's proposed RICO claim does not state a claim for relief. For that additional reason, plaintiff's amendment would be futile and her motion to amend is denied.

In summary: The Court adopts Judge Parker's Report and Recommendation in full. Plaintiff's motion to amend her complaint is denied insofar as she seeks to add an independent claim of retaliation under the FCRA, a claim of intentional or negligent infliction of emotional distress, a claim under RICO, or any of the six New York state law claims asserted for the first time in plaintiff's Objection to the Report and Recommendation. Plaintiff's motion is granted insofar as remainder of the Second Amended Complaint will serve as the operative pleading. Plaintiff will be permitted to litigate the issue of the "litigation lock" insofar as it is relevant to establishing the defendants' liability for a willful violation of the FCRA. No further amendments to the pleadings will be permitted.

The Clerk of the Court is directed to close docket entries 61 and 115.

SO ORDERED.

Dated: New York, NY
May 17, 2019

JED S. RAKOFF, U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHERRI COHEN,

Plaintiff,

-against-

EQUIFAX INFORMATION SERVICES, LLC, and TRANS UNION, LLC,

Defendants.

18-cv-6210 (JSR)

MEMORANDUM AND ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiff Sherri Cohen, pro se, filed this suit against defendants Equifax Information Services, LLC and Trans Union, LLC for allegedly maintaining inaccurate information in her credit reports and failing to adequately investigate when she brought the inaccuracies to defendants' attention. Plaintiff and defendants have each moved for summary judgment.

In light of plaintiff's pro se status, the Court has viewed her submissions with a liberal eye. Nonetheless, in opposing defendants' motions for summary judgment, it is plaintiff's burden, even pro se, to point to admissible evidence in the record that, were the case to proceed to trial, could reasonably result in a jury verdict in her favor. Plaintiff has not done so. Accordingly, defendants' motions for summary judgment are granted and plaintiff's complaint is dismissed.

I. Undisputed Facts

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Defendants Equifax Information Services, LLC ("Equifax") and Trans Union, LLC ("Trans Union") are credit reporting agencies as defined by the Fair Credit Reporting Act ("FCRA"). As such, they gather information about consumers from various sources which they then use to generate consumer credit files and consumer reports. Between January 2016 and October 2017, Equifax received seventeen disputes submitted on plaintiff's behalf by a credit repair organization, CreditRepair.com. Equifax SMF[1] ¶ 42; Pl. Resp. SMF re: Equifax ¶ 42.[2] Plaintiff admitted at her deposition that she was not aware of the content of the disputes that CreditRepair.com submitted on her behalf and that, once she signed up for the service, the company simply generated disputes without consulting or notifying her. See Equifax SMF Exh. B at 219-21, ECF No. 153-2.

Similarly, between May 20, 2016 and March 17, 2017, Trans Union received some seven disputes made on behalf of plaintiff by CreditRepair.com. Trans Union SMF ¶¶ 1-60; Pl. Resp. SMF re: Trans

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[1] "SMF" refers to a party's Statement of Material Facts submitted in support of that party's motion for summary judgment. A responsive or supplemental Statement of Material Facts submitted in opposition to another party's motion is designated "Resp. SMF" or "Supp. SMF."

[2] Plaintiff claims for the first time in a reply brief to have also personally filed a dispute with Equifax on August 16, 2016. Pl. Reply to Equifax Resp. 5-6, ECF No. 192. However, plaintiff supports this proposition only with a dispute letter she filed with a different credit reporting agency on this date. Id. Exh. D. She thus proffers no relevant evidence of this dispute.

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Union ¶¶ 1-60. In response to each, Trans Union initiated a reinvestigation. Id. During her deposition, plaintiff admitted that she could not remember what purported inaccuracies prompted any of these disputes, nor could she recall whether CreditRepair.com consulted her or otherwise involved her in the process. E.g., Poling Decl. Exh. A at 73-74, 76, 88-92, ECF No. 160-1; see also id. at 95 ("[T]his is not m[y] doing. I guess this is a computerized program that did that.").[3]

On November of 2017, Trans Union and Equifax each received identical letters from an attorney, Kristin White, Esq., who was writing on plaintiff's behalf. Equifax SMF ¶ 46; Pl. Resp. SMF re: Equifax ¶ 46; Trans Union SMF ¶ 61; Pl. Resp. SMF re: Trans Union ¶ 61. In each letter, White claimed that Trans Union's credit report for plaintiff Cohen erroneously reported a "charge off" in the amount of $2,599, as well as showing an inaccurate utilization rate and credit inquiries more than one year old. See Pl. Resp. re: Equifax Exh. C, ECF No. 188; Pl. Resp. re: Trans Union Exh. D ("White Letter"), ECF No. 186. Subsequently, in February of 2018, Equifax and Trans Union each received identical dispute letters from plaintiff herself claiming that

[3] Trans Union also received, on November 16, 2016, a request from the Consumer Financial Protection Bureau that plaintiff's credit score be recalculated. Trans Union SMF ¶ 30; Pl. Resp. SMF re: Trans Union ¶ 30. Because that request did not claim that any item of information in plaintiff's file was inaccurate, it is not relevant to the instant suit.

the utilization rate for unspecified accounts on her credit report was still inaccurately high. Trans Union SMF ¶ 66; Pl. Resp. SMF re: Trans Union ¶ 66; Pl. Resp. re: Equifax Exh. D, ECF No. 188; Pl. Resp. re: Trans Union Exh. N, ECF No. 186.

On July 9, 2018, plaintiff initiated this suit against Trans Union, Equifax, and a third such company, Experian Information Solutions, Inc.[4] Following motion practice and amendment, the operative pleading (the Second Amended Complaint) asserts three causes of action under the Fair Credit Reporting Act against both Trans Union and Equifax: negligent failure to follow reasonable procedures to ensure accuracy of consumer reports, in violation of 15 U.S.C. § 1681e(b); negligent failure to conduct a reasonable reinvestigation, in violation of 15 U.S.C. § 1681i(a)(1)(A); and willful violation of the foregoing subsections. See Second Am. Compl., ECF No. 61-1; Opinion, Report & Recommendation 8, ECF No. 84, adopted, ECF No. 124.[5]

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[4] Experian settled with plaintiff on September 25, 2018. See Notice of Settlement, ECF No. 20.

[5] Plaintiff's original complaint also asserted claims under New York's Fair Credit Reporting Act, N.Y.G.B.L. § 380. See Compl. ¶¶ 68, 71. Her Second Amended Complaint incorporated by reference the federal FCRA claims from her original complaint, see Second Amended Complaint ¶¶ 109, 128, but not the New York analogue. Additionally, plaintiff's proposed Third Amended Complaint - which she filed without permission (which likely would have been denied) and which was not used as the operative pleading on these motions - also omitted the New York FCRA. Moreover, no party has referenced the New York causes of action in the summary judgment briefing. From this, it is clear that plaintiff has abandoned her claims arising under the New York FCRA, though, even if that were not the case, such claims would not survive summary judgment. The same is true of the purported Third Amended Complaint.

All parties have now moved for summary judgment. ECF Nos. 150, 153, 157. As discussed in more detail below, the Court concludes that, even taking all evidence in the light most favorable to plaintiff and drawing all reasonable inferences in her favor, plaintiff has not adduced any admissible evidence sufficient to support a reasonable jury's finding that either defendant negligently failed to maintain adequate procedures for ensuring the accuracy of plaintiff's information or that either defendant negligently failed to conduct a reasonable reinvestigation in response to plaintiff's disputes. Defendants' motions for summary judgment are therefore granted. Plaintiff's motion for summary judgment is correspondingly denied.

II. Discussion

A. Legal Standard

"Summary judgment is proper when, after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993); see also Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). "A fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law.'" Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 69 (2d Cir. 2001)

(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Id. "Genuine issues of fact are not created by conclusory allegations." Heublein, 996 F.2d at 1461.

"Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To avoid summary judgment, "[t]here must be more than a 'scintilla of evidence' in the non-movant's favor; there must be evidence upon which a fact-finder could reasonably find for the non-movant. Heublein, 996 F.2d at 1461 (quoting Anderson, 477 U.S. at 252).

"Because [plaintiff] is a pro se litigant," the Court "read[s] [her] supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994).[6] Still, while pro se litigants are entitled to "reasonable allowances," they are not "exempt[ed] . . . from compliance with relevant rules of

[6] The Court rejects defendants' arguments that, because plaintiff received assistance from lawyers in drafting certain documents, her papers should not be construed liberally. The record is unclear about the extent of the assistance received. However, even construed liberally, plaintiff's submissions are not sufficient to defeat summary judgment.

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procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quoting Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981)).

B. Equifax Motion for Summary Judgment

Equifax moves for summary judgment on all claims against it, arguing that plaintiff cannot show that her credit file contained inaccurate information; that she has adduced no competent evidence that Equifax failed to follow reasonable procedures; that she has adduced no competent evidence that Equifax failed to conduct a reasonable reinvestigation in response to her disputes; and that she has adduced no competent evidence of damages. Equifax Mem. 7-8, ECF No. 154. The Court agrees that plaintiff has failed to meet her burden of producing admissible evidence supporting her claim that Equifax failed to follow reasonable procedures or to conduct reasonable reinvestigations, and therefore does not reach the other issues.

1. Failure to Follow Reasonable Procedures

Plaintiff's first claim is that Equifax failed to follow "reasonable procedures" to maintain the accuracy of its information, in violation of 15 U.S.C. § 1681e(b). "[I]n order to succeed on a claim under § 1681e(b), a plaintiff must show that:

> (1) the consumer reporting agency was negligent in that it failed to follow reasonable procedures to ensure the accuracy of its credit report; (2) the

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> consumer reporting agency reported inaccurate information about the plaintiff; (3) the plaintiff was injured; and (4) the consumer reporting agency's negligence proximately caused the plaintiff's injury.

Collins v. Experian Credit Reporting Service, 494 F. Supp. 2d 127, 134-35 (D. Conn. 2007) (quoting Whelan v. Trans Union Credit Reporting Agency, 862 F. Supp. 824, 829 (E.D.N.Y. 1994)).

Equifax claims that plaintiff's account with Applied Bank "is the only account about which Plaintiff is suing Equifax," and that "Plaintiff's allegation of inaccuracy is that the Applied Bank tradeline did not include the date of charge off." Equifax SMF ¶¶ 37-38. This is inaccurate. A review of the deposition testimony cited by Equifax in support of these contentions suggests that plaintiff was providing partial or general answers, not intentionally narrowing her legal theories through deposition testimony. See Equifax Reply Mem. 2-3, ECF No. 197.

Plaintiff identifies the following purported inaccuracies in her credit report: "[w]rong addresses, dates, and telephone number information, and misspellings of her name," "[i]naccurate credit card and loan balance information," and "[i]naccurate payment histories and utilization rates affecting several accounts." Pl. Supp. SMF re: Equifax ¶ 1, ECF No. 188. This does not, however, suffice to create a genuine dispute of fact, because, for the most part, the record documents plaintiff cites

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do not support these contentions. Mere contentions by a party do not create a genuine dispute; rather, "[a]n issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001) (some internal quotation marks omitted) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see also Fed. R. Civ. P. 56(c)(1) (assertion must be supported by admissible evidence).

Plaintiff's assertion that her credit report contained inaccurate information cites to three sources: her complaint, her deposition, and her declaration. Her complaint, however, is not itself evidence; it is simply a collection of allegations. A declaration may be sufficient "to support or oppose a motion," so long as it is "made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Here, plaintiff simply repeats her generalized allegation that her credit report contained inaccuracies, with no details or elaboration. See Cohen Decl. ¶ 4, Pl. Exh. A, ECF No. 188. This kind of conclusory assertion is not sufficient to create a genuine dispute of fact.

However, plaintiff's deposition testimony does suffice to raise a genuine dispute as to at least some facts. In her

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deposition, she specifically identified certain phone numbers and addresses listed on her credit report that belonged to her and claimed that the remainder were not and had never been hers. See Cohen Depo. 52-54, Pl. Exh. C, ECF No. 163. The Court concludes that plaintiff's deposition testimony is adequate to create a genuine dispute about whether her Equifax credit report contained inaccurate addresses.[7]

The remainder of plaintiff's testimony regarding supposed inaccuracies, however, is too vague and conclusory to preclude summary judgment. She testified, for example, that the credit limits associated with two accounts - Comenity Capital Bank and Discover Bank - were incorrect. Id. at 57. But with respect to Comenity, plaintiff did not offer an affirmative statement that the credit limit was inaccurate; rather, she simply insisted that she "would never have a credit limit that low." Id. As for Discover, plaintiff did claim that the listed credit limit was incorrect, but only as of one month prior to the deposition. Id. With respect to utilization rates, plaintiff asserted that she "felt" that her credit score was not accurate, based on "a gut

[7] Equifax represents that its credit reports do not include telephone numbers, Equifax SMF ¶ 73, and plaintiff fails to adduce competent evidence to the contrary.

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feeling." Id. at 86-87. She admitted that she did not have evidence that her score was inaccurate. Id. at 87.[8]

Even drawing all reasonable inferences in favor of plaintiff, gut feelings are not a sufficient basis to conclude that there is a genuine dispute of fact as to the accuracy of information about plaintiff's credit limits or utilization rates. See Collins, 494 F. Supp. 2d at 135 (granting summary judgment where plaintiff in FCRA case failed to "provide[] any documentary evidence to support his claim that there was inaccurate information in his credit report"); Turner v. Experian Information Services, Inc., No. 3:16 CV 630, 2017 WL 2832738, at *3 (N.D. Ohio June 30, 2017) ("Turner offers no evidence suggesting these reports were inaccurate, beyond her testimony that she did not 'recall' or 'believe' that she made any late payments. This is not the type of 'concrete' and 'affirmative' evidence required to survive summary judgment.") (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 256-57 (1986)).

The parties spend much of their time debating the scope and legal relevance of purported errors relating to an Applied Bank account, including errors relating to a "charge off" date, the

[8] Plaintiff additionally testified that her credit report contained accounts that were not hers, but specified that those purported inaccuracies are not at issue in this suit. Cohen Depo. 90-91, 95.

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account's utilization rate, and whether the account should have been removed from plaintiff's credit report based on its age. Equifax Mem. 12, ECF No. 154; Pl. Mem. Opp. Equifax 5-6, ECF No. 186. Most of this is irrelevant because plaintiff has adduced no evidence supporting her assertion that the Applied Bank account had any errors. Plaintiff merely cites to a letter by her own attorney asserting these errors existed, without substantiation. See Pl. Resp. re: Equifax Exh. C, ECF No. 188. Moreover, to the extent that plaintiff disputes Equifax's failure to include the Applied Bank charge-off date in her credit report, "[t]he FCRA does not specifically require a reporting agency to affirmatively add credit data to a report." Davis v. Equifax Info. Servs. LLC, 346 F. Supp. 2d 1164, 1172 (N.D. Ala. 2004).

Even as to the information about which there is a genuine dispute, plaintiff has not put forth evidence sufficient to defeat summary judgment. Plaintiff has adduced no evidence to establish that Equifax "failed to follow reasonable procedures to ensure the accuracy of its credit report." Collins, 494 F. Supp. 2d at 134. Instead, plaintiff argues, based on her interpretation of Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995), that, once a plaintiff establishes that her report contained inaccurate information, the burden shifts to the defendant to show that its procedures were reasonable. Pl. Mem. Supp. Mot. SJ re: Equifax 8, ECF No.

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163. The Court disagrees. Although Guimond did refer off-handedly to an agency "establish[ing]" the reasonableness of its procedures, the Court does not understand that passing reference to institute a burden-shifting framework. And, in any event, Guimond is not binding on this Court.

Furthermore, the view elsewhere is to the contrary. According to the D.C. Circuit, for example, "a plaintiff cannot rest on a showing of mere inaccuracy, shifting to the defendant the burden of proof on the reasonableness of procedures for ensuring accuracy." Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51 (D.C. Cir. 1984). Rather, "even if the information [in a credit report] is inaccurate, a credit reporting agency is not held strictly liable under the FCRA merely for reporting it; rather, the consumer must show that the agency failed to follow reasonable procedures in generating the inaccurate report." Whelan, 862 F. Supp. at 829 (emphasis added). Therefore, "[t]o defeat a motion for summary judgment on a § 1681e(b) claim, a plaintiff must minimally present some evidence from which a trier of fact can infer that the consumer reporting agency failed to follow reasonable procedures in preparing a credit report." Id. (emphasis added and internal quotation marks omitted) (quoting Stewart, 734 F.2d at 51). Plaintiff has adduced no such evidence here. Accordingly, the Court grants

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Equifax's motion for summary judgment as to plaintiff's § 1681e(b) claim.

2. Failure to Conduct Reasonable Reinvestigation

Plaintiff's second claim arises under 15 U.S.C. § 1681i(a)(1)(A), which provides that when "the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer," the agency must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate," generally within 30 days. To establish a claim, a plaintiff must show that "(i) the plaintiff's credit report contains inaccurate or incomplete information; (ii) the plaintiff notified the consumer reporting agency directly of the inaccurate or incomplete information; (iii) the plaintiff's dispute is not frivolous or irrelevant; and (iv) the consumer reporting agency failed to respond to the plaintiff's dispute with a reasonable reinvestigation." Saenz v. Trans Union, LLC, 621 F. Supp. 2d 1074, 1082 (D. Or. 2007).

It is undisputed that Equifax received several disputes submitted on plaintiff's behalf. Equifax SMF ¶¶ 41-43, ECF No. 153-1. The great majority of these were submitted by "Creditrepair.com." Id. Plaintiff admitted at her deposition that she was not aware of the content of the disputes they made on her behalf and that, once she signed up for the service, the

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company simply generated disputes without consulting or notifying her. Cohen Depo. 219-21.

The Court concludes that the disputes submitted by Creditrepair.com did not trigger Equifax's duty to reinvestigate because plaintiff did not "directly" inform Equifax of the dispute. At least one federal court has held that a consumer "directly" informs a credit reporting agency only if the consumer does so "without an intervening actor." In re Experian Information Solution, Inc., No. CV-15-01212-PHX-GMS, 2017 WL 3559007, at *3 (D. Ariz. Aug. 17, 2017). The Court hesitates to go that far; it would seem unreasonable to say that a consumer did not notify a credit reporting agency if, for example, they contacted the agency through an attorney. The Court is confident, however, that a consumer has not "directly" contacted a credit reporting agency when, as here, she merely signs up for a credit repair service and then has no further involvement with, or even knowledge of, the disputes submitted putatively on her behalf. See Turner, 2017 WL 2832738, at *8 (concluding that consumer did not directly notify agency of dispute submitted by credit repair organization, where consumer "did not draft the dispute letter, provide documentation supporting its claims, review its accuracy, sign it, or mail it").

An additional dispute was submitted on November 15, 2017, by an attorney retained by plaintiff, Kristin R. White. Equifax

SMF ¶¶ 46-48; see also Pl. Equifax Opp. Exh. C (copy of letter). Because the letter recites that White was retained by plaintiff specifically to dispute certain inaccuracies, the Court concludes that this was a sufficiently "direct" notification to trigger a duty to reinvestigate.

Nonetheless, plaintiff has adduced no admissible evidence that Equifax did not conduct a reasonable reinvestigation in response to the November 15 dispute. Equifax has supplied a declaration from one of its employees generally describing its reinvestigation protocols. In response to a consumer dispute, Equifax transmits an Automated Consumer Dispute Verification form ("ACDV") to the furnisher of the disputed information. Gobin Decl. ¶¶ 26-27, ECF No. 153-2. Data furnishers are contractually required to conduct their own investigation upon receipt of an ACDV. Id. ¶ 29. Equifax then takes action based on the result of the data furnisher's investigation. Id. ¶ 30-31. Equifax claims that it followed this procedure in response to the November 15 dispute, and that the information was verified. Id. ¶¶ 51-52. Plaintiff has adduced no contrary evidence,[9] and so no reasonable jury could conclude that Equifax failed to conduct a reasonable reinvestigation. See Dickens v. Trans Union Corp.,

[9] Although plaintiff argues that Equifax did not investigate some other disputed account balances and utilization rates mentioned in the White Letter, plaintiff fails to adduce any evidence of this claim. Pl. Resp. re: Equifax 13, ECF No. 188. Nor does she offer evidence that this information was inaccurate in the first place. Id.

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18 F. App'x 315, 319 (6th Cir. 2001) (holding that summary judgment was properly granted on § 1681i claim where agency followed ACDV procedure, furnisher verified that information was accurate, and consumer failed to adduce evidence showing that investigation was inadequate).

Plaintiff argues that that a reinvestigation is not "reasonable" when it consists merely of contacting the furnisher to see if they stand by their information. Pl. Opp. re: Equifax 14. But the cases cited by plaintiff do not support this construction. Rather, all they establish is that "the parameters of a reasonable investigation will depend on the circumstances of a particular dispute," and that "a credit reporting agency may be required, in certain circumstances, to verify the accuracy of its initial source of information." Jones v. Experian Info. Solutions, Inc., 982 F. Supp. 2d 268, 273 (S.D.N.Y. 2013) (emphasis added and alteration omitted) (first quoting Cortez v. Trans Union, LLC, 617 F.3d 688, 713 (3d Cir. 2010), then quoting Cushman v. Trans Union Corp., 115 F.3d 220, 225 (3d Cir. 1997)). "Courts have noted that a number of factors will determine the extent of the CRA's reinvestigation," including "whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable," as well as "the cost of verifying the accuracy of

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the source versus the possible harm inaccurately reported information may cause the consumer." Id. (quoting Cushman, 115 F.3d at 225).

Here, plaintiff has adduced no record evidence suggesting that any of the furnishers at issue were unreliable, nor has plaintiff identified what additional steps Equifax should have taken in response to her disputes. Indeed, it bears repeating that, for the vast majority of the alleged inaccuracies plaintiff asserts, she still has not provided evidence that the information was even incorrect. Under these circumstances, a jury could not reasonably conclude that Equifax failed to conduct a reasonable reinvestigation.

Finally, Equifax received a letter dated February 16, 2018 from plaintiff directly, in which plaintiff claimed that Equifax was reporting an inaccurately high utilization rate. Equifax SMF ¶ 55. Plaintiff did not identify the account or accounts for which she claimed the utilization rate was too high. Equifax claims that it sent her a letter asking her to be more specific. Id. ¶ 55. Plaintiff claims that she never received that letter. Cohen Decl. ¶ 12, Pl. Exh. A, ECF No. 188. It does not matter, however, because the duty to reinvestigate is triggered only when the consumer identifies the "item of information" that is purportedly incomplete or inaccurate. 15 U.S.C. § 1681i(a)(1)(A). By failing to identify the accounts for which

her utilization rate was allegedly too high, plaintiff did not draw to Equifax's attention any "item of information" that it could re-investigate.

Plaintiff also argues that Equifax violated § 1681i(a)(5)(A)(i) by failing to delete inaccurate information from her file. However, plaintiff has not adduced any evidence establishing that the disputed information was inaccurate. Notably, neither the November 15 letter nor the February 16 letter disputed any of the information - such as plaintiff's telephone number or address - for which the Court has found there to be record evidence supporting a finding of inaccuracy.

3. Willful FCRA Violation

Plaintiff argues that Equifax willfully violated the FCRA. Where willfulness is established, a plaintiff may recover punitive as well as actual damages. 18 U.S.C. § 1681n(a). The Court has already concluded, however, that summary judgment must be granted in favor of defendants on all of plaintiff's substantive FCRA claims. Plaintiff has not adduced record evidence from which a jury could reasonably conclude that defendants violated the FCRA at all. It follows that plaintiff also cannot establish that defendants violated the FCRA willfully.

Accordingly, even taking the evidence in the light most favorable to plaintiff, there simply is not sufficient record

evidence for a fact-finder to render a verdict in plaintiff's favor on any claim. Equifax's motion for summary judgment is therefore granted, and plaintiff's motion for summary judgment against Equifax is denied.

C. Trans Union Motion for Summary Judgment

Trans Union also moves for summary judgment on all counts, for much the same reasons as Equifax. Trans Union Mem. 1-2, ECF No. 158. As discussed further below, the Court again agrees.

1. Failure to Follow Reasonable Procedures

As with Equifax, plaintiff's first claim against Trans Union is that Trans Union failed to follow "reasonable procedures" to maintain the accuracy of its information, in violation of 15 U.S.C. § 1681e(b). Plaintiff asserts the existence of "a vast array of inaccuracies in her file, including wrong addresses, dates, and telephone numbers, and misspellings of her name, incorrect balance and utilization rates, and the failure to remove outdated delinquencies." Pl. Opp. re: Trans Union 6-7, ECF No. 186. But, as discussed above relating to Equifax, plaintiff has not produced any competent evidence substantiating these supposed inaccuracies, with the possible exception of the allegedly inaccurate addresses and telephone numbers.

Plaintiff argues that, because Trans Union ultimately removed two of the disputed accounts - Applied Bank and Cortrust - from plaintiff's file, Trans Union has effectively conceded that those

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accounts were inaccurate. Pl. Opp. re: Trans Union 6. But that does not follow. The FCRA permits removal of information that is "inaccurate or incomplete or cannot be verified," 15 U.S.C. § 1681i(a)(5), so removal, standing alone, does not imply a determination that the information was inaccurate.

In any event, "even if the information [in a credit report] is inaccurate, a credit reporting agency is not held strictly liable under the FCRA merely for reporting it; rather, the consumer must show that the agency failed to follow reasonable procedures in generating the inaccurate report." Whelan, 862 F. Supp. at 829. Plaintiff has adduced no admissible evidence suggesting that Trans Union's procedures were unreasonable.

Plaintiff argues that a jury could infer Trans Union's procedures were unreasonable from a variety of factors - including "the sheer number and diversity of the inaccuracies in the Plaintiff's credit file," a 2012 statistic drawn from an unrelated settlement agreement about the prevalence of inaccuracies in consumer reports in general, and the fact that Trans Union is frequently sued. Pl. Opp. re: Trans Union 9-10. The Court finds none of this persuasive. First, while plaintiff asserts that her file contained myriad errors, the Court emphasizes once more that she has not produced evidence to corroborate that assertion. Second, a 2012 statistic about the prevalence of inaccuracies in consumer reports in general, which plaintiff draws from an

unrelated settlement agreement, proves nothing about Trans Union's procedures in this particular case. This is particularly true because Trans Union agreed to improve its procedures for ensuring data accuracy as a part of this 2015 settlement. See Pl. Resp. re: Equifax Exh. H, ECF No. 188. Third, the quantity of lawsuits against a defendant by other plaintiffs is not itself evidence of anything. A jury could not reasonably infer, from this scant proof, that Trans Union's procedures to ensure accuracy were unreasonable.

2. Failure to Conduct Reasonable Reinvestigation

Plaintiff's second claim is that Trans Union failed to conduct a reasonable reinvestigation pursuant to 15 U.S.C. § 1681i(a)(1)(A). The uncontradicted record evidence is that, in response to all but the last of plaintiff's disputes at issue in this case, Trans Union conducted a reinvestigation that consisted of contacting the furnisher and asking it to verify whether the information was accurate.[10] Trans Union SMF ¶¶ 1-65. Plaintiff again argues that these investigations were insufficient as a matter of law. Pl. Opp. re: Trans Union 15-16. The Court again concludes that, for the same reasons given above relating to

[10] As with Equifax, plaintiff argues that Trans Union failed to investigate some account balances and utilization rates disputed in the November 15 White Letter. Pl. Reply to Trans Union Resp. 2-3, ECF No. 191. As with Equifax, however, plaintiff offers no evidence to support this point or the proposition that the disputed information was inaccurate in the first place. Id.

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Equifax, under the circumstances of this case plaintiff has not shown and cannot show that these investigations were unreasonable.

Moreover, as to the disputes initiated by CreditRepair.com, the Court again concludes, for the same reasons given above relating to Equifax, that these disputes were not "directly" initiated by plaintiff so as to trigger any reinvestigation obligation.

Finally, as to the February 2018 dispute, Trans Union does not claim to have initiated a reinvestigation. Trans Union SMF ¶ 67. However, the Court again concludes, for the same reasons given above relating to Equifax, that plaintiff's complaint of too-high "utilization rates," without identifying the accounts at issue, was too vague to trigger any reinvestigation requirement.

3. Willfulness FCRA Violation

Finally, plaintiff claims that Trans Union willfully violated the FCRA. Because the Court concludes that no reasonable factfinder could find that Trans Union violated the FCRA, even taking the evidence in the light most favorable to plaintiff, it follows that no reasonable factfinder could find that Trans Union willfully violated the FCRA.

As with Equifax, even taking the evidence in the light most favorable to plaintiff, there simply is not sufficient record evidence for a fact-finder to render a verdict in plaintiff's favor against Trans Union on any claim. Trans Union's motion for summary

judgment is therefore granted. Plaintiff's motion for summary judgment against Trans Union is denied.

III. Conclusion

In summary, Plaintiff has failed to produce admissible evidence substantiating her assertion that most of the disputed information in either her Equifax credit report or her Trans Union credit report was false. Even as to those few items for which plaintiff's deposition suffices to create a genuine dispute of fact as to falsity, plaintiff has adduced no evidence that the falsity was the result of Equifax's or Trans Union's failure to follow reasonable procedures. Nor has plaintiff produced any evidence that either Equifax or Trans Union ever failed, following notification of a dispute directly from her, to conduct a reasonable reinvestigation. Even taking all evidence in the light most favorable to plaintiff and resolving all credibility disputes in her favor, no reasonable jury could render a verdict in her favor against either defendant. Accordingly, defendants are entitled to summary judgment on all counts, and plaintiff's case must be dismissed with prejudice.

Clerk to enter judgment.

SO ORDERED.

Dated: New York, NY
September 12, 2019

JED S. RAKOFF, U.S.D.J.

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19-3063
Cohen v. Equifax Information Services, LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of September, two thousand twenty.

PRESENT:

JOHN M. WALKER, JR.,
ROBERT A. KATZMANN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

Sherri Cohen,

Plaintiff-Appellant,

v. 19-3063

Equifax Information Services, LLC, Transunion LLC,

Defendants-Appellees,

Experian Information Solutions, Inc.,

Defendant.

FOR PLAINTIFF-APPELLANT: Sherri Cohen, pro se, Middletown, NY.

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FOR DEFENDANT-APPELLEE EQUIFAX INFORMATION SERVICES, LLC:	Esther Slater McDonald, Seyfarth Shaw LLP, Atlanta, GA.
FOR DEFENDANT-APPELLEE TRANSUNION LLC:	Camille R. Nicodemus, Colin C. Poling, Schuckit & Associates, P.C., Zionsville, IN.

Appeal from a judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*; Parker, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Sherri Cohen, proceeding pro se, sued credit reporting companies Equifax Information Services, LLC ("Equifax") and Transunion LLC ("Transunion") under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. The district court denied Cohen leave to amend her complaint to include a civil RICO claim, and it granted summary judgment to the defendants, finding that Cohen had not established a genuine dispute of material fact as to whether the defendants (1) failed to follow reasonable procedures to assure the accuracy of her credit report, in violation of 15 U.S.C. § 1681e(b), (2) failed to reasonably reinvestigate disputed information in her credit file, in violation of 15 U.S.C. § 1681i, or (3) willfully violated the FCRA. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Summary Judgment

We review a grant of summary judgment *de novo*, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126–27 (2d Cir. 2013) (per curiam). "Summary judgment is proper only when, construing

the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

A. Inaccuracies

The parties agree that a plaintiff must demonstrate that her credit report contained inaccurate information in order to prevail on a claim under § 1681e(b) or § 1681i. The district court found that Cohen at most raised a genuine dispute as to whether her Equifax file contained inaccurate addresses and her Transunion file contained inaccurate addresses and telephone numbers, but not as to any other alleged inaccuracy.

The district court correctly noted that Cohen cited only to her complaint, her deposition, and her declaration as evidence that her credit report contained inaccuracies, and that her complaint was not evidence. *See Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) (a complaint is treated as an affidavit for summary judgment purposes only if the plaintiff "verifie[s] his complaint by attesting under penalty of perjury that the statements in the complaint [are] true to the best of his knowledge"). We agree that the declaration and most of Cohen's deposition testimony were "too vague and conclusory" to raise a genuine dispute regarding the existence of other inaccuracies. Even with respect to the Applied Bank balances and utilization rates, about which she gave at least some information about the nature of the inaccuracy, Cohen did not explain what the correct information would have been.

On appeal, Cohen argues that there was other evidence of inaccuracies in the record that the district court overlooked and that the district court applied the wrong legal standard when evaluating her claims. But, contrary to her argument, the district court explicitly considered the

dispute letters written by her attorney. These records of Cohen's disputes (and the fact that the agencies initiated investigations in response to them) are merely evidence that Cohen made *allegations* of inaccuracies. The attachments to the dispute letters written by Cohen's attorney fail to raise a genuine dispute of fact: they included only receipts documenting prior disputes and then-current balance statements for CapitalOne and Merrick Bank accounts. Nothing in the record suggests that CapitalOne and Merrick Bank did not timely report this balance information to the agencies, or that the agencies failed to update Cohen's file to accurately reflect it. Although Cohen argues that the district court drew an improper inference against her when it found that Cortrust's nonresponse to an agency verification request was not evidence that the information previously reported by Cortrust was inaccurate, a reasonable juror could not conclude that information in Cohen's credit file was inaccurate based on this fact. *See Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994) ("When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact . . . ."). Finally, Cohen argues that the district court applied the wrong legal standard by failing to consider evidence of inaccuracies as a whole, analogizing to the standard applied to evidence in a discrimination case to prove discriminatory intent. This analogy is inapposite: considering the evidence as a whole and construing it in the light most favorable to Cohen, the evidence fails to create a genuine dispute of material fact concerning the existence of other inaccuracies.

B. Reasonable Procedures (§ 1681e)

On appeal, Cohen argues that a reasonable factfinder could find that the defendants did not maintain reasonable procedures to assure the accuracy of her consumer report based on (1) the

number of inaccuracies in her credit report, (2) a statistic regarding the prevalence of errors in Transunion credit reports drawn from a 2012 settlement agreement, and (3) the fact that one data furnisher failed to respond to a reinvestigation inquiry from Transunion. We agree with the district court that this evidence did not give rise to a genuine dispute of material fact regarding the reasonableness of the agencies' procedures. As discussed above, Cohen at most raised a genuine dispute regarding the accuracy of contact information in her credit report. But inaccurate contact information cannot give rise to liability under § 1681e(b): this section concerns the accuracy of "consumer reports," which do not encompass contact information because such information does not "bear[] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1); *see id.* § 1681e(b); *Williams-Steele v. TransUnion*, 642 F. App'x 72, 73 (2d Cir. 2016) (summary order) (plaintiff's "claims concern[ing] inaccuracies in her credit reports," including contact information, "had no bearing on her credit-worthiness, and were therefore not actionable under the FCRA"); *see also Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993) (noting that the Court may affirm a judgment on any grounds "for which there is a record sufficient to permit conclusions of law").

C. Reasonable Reinvestigation (§ 1681i)

Cohen identifies seven disputes that, she contends, the agencies failed to reasonably reinvestigate. As discussed above, Cohen conceded that the dispute must concern information that is actually inaccurate to state a claim under § 1681i, and she raised a genuine dispute of fact only as to the inaccuracy of addresses and telephone numbers. Of the seven identified disputes, only one—an alleged October 4, 2016 dispute with Transunion, for which she argues that there is no evidence of any investigation—concerned inaccurate addresses or telephone numbers.

Accordingly, only the October 4, 2016 dispute could give rise to liability.

As a preliminary matter, Cohen did not address this alleged dispute in her opposition to Transunion's motion for summary judgment and we decline to reach it for the first time on appeal. *See Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016) (appellate courts generally will not consider an issue raised for the first time on appeal). Even if we were to consider this allegation, Cohen's October 4, 2016 communication with Transunion did not trigger any obligation under § 1681i because it did not dispute the "completeness or accuracy of an[] item of information" in her file. 15 U.S.C. § 1681i(a)(1)(A). If a consumer is not satisfied with the result of a reinvestigation, the FCRA gives the consumer the right to "file a brief statement setting forth the nature of the dispute." 15 U.S.C. § 1681i(b). Transunion presented evidence that, on October 4, 2016, Cohen submitted a request to add a consumer statement to her credit file listing two addresses and instructing, "[i]f somebody puts another address, please make it fraudulent." This request was not presented to the agency in the form of a dispute, and it is best read to apply prospectively—*i.e.* to instruct that any account information associated with a different address in the future would be fraudulent, not to assert that any account associated with a different address already in her file was then incomplete or fraudulent.

Moreover, Cohen does not challenge the district court's legal conclusion that a dispute generated by a credit repair company without consulting or notifying the consumer does not trigger the reporting agency's reinvestigation obligations under § 1681i, and she has thus abandoned that challenge. *LoSacco v. City of Middletown*, 71 F.3d 88, 92–93 (2d Cir. 1995) (pro se litigant abandons issue by failing to raise it in appellate brief). Cohen does, however, briefly argue that the district court erred in finding that the credit repair company Creditrepair.com generated

disputes without consulting with her or notifying her of their content. However, as the district court found, Cohen repeatedly testified that, after she retained Creditrepair.com's services, it generated disputes without her input or that she had no memory of being involved in initiating the disputes.

In the absence of any dispute that (1) concerned information for which there is a genuine dispute of fact regarding accuracy and (2) triggers the reporting agency's reinvestigation obligations, we do not reach Cohen's argument that the agencies' procedures for reinvestigating disputed information are not "reasonable" under § 1681i.

D. Willful Violations

As the district court found, because Cohen failed to demonstrate a violation of § 1681e or § 1681i, she necessarily failed to show a willful violation of those sections. Cohen also failed to raise a genuine dispute of material fact as to whether the agencies willfully violated the FCRA by imposing a "litigation lock" on her credit file. *See Leon*, 988 F.2d at 308 (noting that the Court may affirm on grounds upon which the district court did not rely). Cohen does not explain how the alleged litigation locks could violate § 1681e or § 1681i. In deference to Cohen's pro se status, we liberally construe her filings to raise and preserve for review a claim that this practice constituted a willful violation of 15 U.S.C. § 1681g(a), which establishes a consumer's right to her credit file "upon request."[1] 15 U.S.C. § 1681g(a).

But the evidence does not establish a genuine dispute as to whether Cohen was denied access to her credit file or that the agencies otherwise violated this provision of the FCRA. Cohen

[1] We liberally construe Cohen's filings despite the fact that both her brief and reply on appeal state that they were "drafted in whole, or substantial part, by an attorney."

points to the following evidence to support her "litigation lock" claim: (1) Equifax's admission that it placed a code in her file to steer her inquiries to a legal response team, (2) Transunion's admission that it placed a "lock" on her file, (3) the fact that she was denied access to Equifax's credit monitoring program, (4) a notice from the company Identity Guard, and (5) a transcript of Cohen's telephone conversations with Equifax customer representatives. Transunion conceded that it imposed a "litigation lock" on Cohen's account on July 19, 2018, pursuant to which all of Cohen's queries were addressed by Transunion's outside litigation counsel rather than its usual customer representatives. But § 1681g(a) would not be violated by routing credit queries through a legal team; nor would it be violated by refusing membership in a credit monitoring service. *See* 15 U.S.C. § 1681g(a). Moreover, Cohen's evidence regarding Identity Guard—a notice from that company—says only that there was insufficient data in her credit file to compile a report, not that the company could not access her file. Finally, the transcripts do not show that Cohen was denied access to her Equifax credit file; they only show that her requests were routed to Equifax's legal team. Cohen does not argue that any request for credit information directed to the agencies' legal teams was denied.

II. Discovery

We review a district court's discovery rulings for abuse of discretion. *See DG Creditor Corp. v. Dabah (In re DG Acquisition Corp.)*, 151 F.3d 75, 79 (2d Cir. 1998). A district court has abused its discretion "if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (internal quotation marks omitted).

On appeal, Cohen argues that the district court erred in denying her request to depose

information technology workers from the agencies. But she does not challenge the district court's rulings that her objection to the magistrate judge's order denying this discovery request was untimely and her objection to the magistrate judge's order denying reconsideration was without merit. These challenges are thus waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Even setting aside timeliness and waiver, the district court did not abuse its discretion in denying Cohen's discovery request because Cohen has not explained how additional information about the capabilities of the agencies' computer systems would support her claim. *See* Fed. R. Civ. P. 26(b)(1).

III. Leave to Amend Complaint

"While generally leave to amend should be freely granted, it may be denied when there is a good reason to do so, such as futility, bad faith, or undue delay." *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) (citation omitted). We generally review the denial of leave to amend for abuse of discretion, although we review *de novo* where the denial is based on the resolution of legal questions. *Thea v. Kleinhandler*, 807 F.3d 492, 496 (2d Cir. 2015). Cohen argues that the district court erred in denying leave to amend her complaint to include a civil RICO claim because such an amendment would not have been futile, but she does not address the district court's alternative dispositive holding that the motion to amend must be denied based on undue delay. Her challenge to that ruling is thus also waived. *See Norton*, 145 F.3d at 117.

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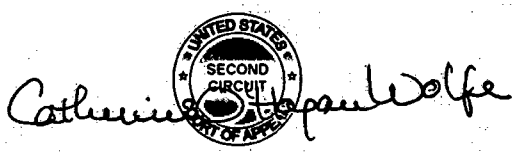
We have considered all of Cohen's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty,

Before: John M. Walker, Jr.,
Robert A. Katzmann,
Raymond J. Lohier, Jr.,

Circuit Judges.

Sherri Cohen,

Plaintiff - Appellant,

v.

Equifax Information Services, LLC, Transunion LLC,

Defendants - Appellees,

Experian Information Solutions, Inc.,

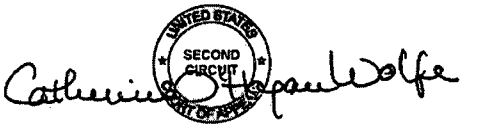
Defendant.

ORDER
Docket No. 19-3063

Appellant Sherri Cohen having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



Additional material from this filing is available in the Clerk's Office.