NO. 20-297

In the
Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

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

JOINT APPENDIX
Volume II of III

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

Order Denying TransUnion's Motion to Decertify Class (N.D. Cal. Oct. 17, 2016)

This lawsuit arises out of Defendant Trans Union, LLC's identification of Plaintiff Sergio Ramirez as potentially being a person on the United States government's list of terrorists, drug traffickers, and others with whom Americans are prohibited from doing business. The Court previously certified a class action alleging three causes of action under the Fair Credit Reporting Act, and three under its state counterpart, the California Consumer Credit Reporting Agencies Act. *See Ramirez v. Trans Union, LLC*, 301 F.R.D. 408 (N.D. Cal. 2014). Following the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Defendant filed the now pending motion to decertify the class. (Dkt. No. 198.) Upon consideration of the parties' submissions and oral argument on October 6, 2016, the motion is DENIED. Plaintiff suffered a concrete injury and therefore has standing to pursue all of his claims. Under binding Ninth Circuit precedent his standing is adequate for purposes of the class, and, in any event, in light of the specific circumstances alleged here the absent class members also suffered a concrete injury.

BACKGROUND

The Court discussed the factual background of this action at length in its class certification order and only briefly summarizes the relevant facts here. (Dkt. No. 140.)

The United States Treasury Department's Office of Foreign Assets Control ("OFAC") publishes a list of individuals, such as terrorists and narcotics

traffickers, who people in the United States are generally prohibited from doing business with, including the extension of credit ("the OFAC List"). (Dkt. No. 140 at 2.) Trans Union, a consumer credit reporting agency, offers a product known as "OFAC Advisor," "OFAC Alert," or "OFAC Name Screen" as an add-on to traditional credit reports. (*Id.*)

In February 2011, Plaintiff Sergio Ramirez and his wife visited a Nissan dealership to purchase a car on credit. They completed a credit application with each's name, address, social security number, and date of birth, among other identifying information. (Dkt. No. 140 at 3.) The dealer used the information to obtain a Trans Union consumer credit report for Plaintiff and his wife. Plaintiff's report advised the dealer: "OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE." (Dkt. No. 110-10.) As a result of this OFAC alert, Plaintiff was unable to obtain credit to purchase the car jointly with his wife; instead, his wife obtained the loan and purchased the car solely in her name. (Dkt. No. 128-14 at 22:13-24.) When Plaintiff telephoned Trans Union the next day about the OFAC Alert, an employee told Plaintiff that he did not have an OFAC Alert on his credit report.[1] At Plaintiff's request, Trans Union mailed Plaintiff a copy of his consumer file. The file, however, did not include any OFAC information. (Dkt. No. 110-23.) Trans Union mailed Plaintiff a

[1] The deposition transcript portion cited by Plaintiff in support of this fact is not included in the record. *See* Dkt. No. 122 at 13:20 (citing Plaintiff's Dep. at 36:22-37:6.) This fact is not disputed, however, and, in any event, is not material to the Court's class certification ruling.

separate letter "as a courtesy" regarding how his name served as a "potential match" to the OFAC database. (Dkt. No. 110-24.)

At that time, Trans Union's OFAC Alert service used only the consumer's first and last name to search the OFAC List data, even if Trans Union possessed additional identifying information, such as birth date or address. (Dkt. No. 140 at 2.) When the computerized search logic returns a name match, Trans Union automatically places an OFAC Alert on the consumer report provided to the customer without any further investigation or confirmation. (*Id.* at 3.)

Nearly a year after he learned of the OFAC Alert, Plaintiff filed this class action against Trans Union, bringing claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., and its state counterpart, the California Consumer Credit Reporting Agencies Act ("CCRAA"), Cal. Civ. Code § 1785.1 et seq. (Dkt. No. 1.) These claims are divisible into two categories. The first are Plaintiff's "disclosure claims," which are brought pursuant to the FCRA, 15 U.S.C. § 1681g(a) & (c) and the CCRAA, § 1785.10. Section 1681g(a) requires a credit reporting agency to "clearly and accurately" disclose to a consumer "[a]ll information in the consumer's file" upon a consumer's request, and 1681g(c) requires a summary of consumer rights to be provided with each consumer file disclosure. CCRAA § 1785.10 and § 1785.15(f) are analogous state statutes. The second category involves Plaintiff's "reasonable procedures" claims under the FCRA, 15 U.S.C. § 1681e(b) and CCRAA § 1785.14(b). Section 1681e(b) requires a consumer reporting agency to "follow reasonable procedures to assure

maximum possible accuracy of the information concerning the individual about whom the report relates," while its California counterpart, section 1785.14(b), includes similar language.

In July 2014, the Court certified Plaintiff's FCRA claims for a class of "all natural persons in the United States and its Territories to whom Trans Union sent a letter similar in form to the March 1, 2011 letter Trans Union sent to Plaintiff regarding 'OFAC (Office of Foreign Assets Control) Database' from January 1, 2011 - July 26, 2011." (Dkt. No. 140.) The Court also certified a California sub-class on Plaintiff's CCRAA reasonable procedure claim for injunctive relief, but declined to certify a CCRAA subclass for damages.

A year later, the Court granted Defendant's motion to stay the case, pending the outcome of the Supreme Court's review of the Ninth Circuit's decision in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014) upon which this Court relied in granting class certification of the FCRA class. (Dkt. No. 184.) The Supreme Court decided *Spokeo* on May 16, 2016. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In light of that decision, this Court lifted the stay and issued an amended scheduling order. (Dkt. Nos. 195, 196.) Defendant then filed the now pending motion to decertify the class contending primarily that Plaintiff lacks Article III standing. (Dkt. No. 198.)

LEGAL STANDARD

An order certifying a class "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1). "In considering the appropriateness of decertification, the standard of review is the same as a motion for class certification: whether the Rule 23

requirements are met." *Ridgeway v. Wal-Mart Stores, Inc.*, 2016 WL 4529430, at *12 (N.D. Cal. Aug. 30, 2016). Parties should be able to rely on a certification order and "in the normal course of events it will not be altered except for good cause," such as "discovery of new facts or changes in the parties or in the substantive or procedural law." *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 409-10 (C.D. Cal. 2000). "The party seeking decertification bears the burden of demonstrating that the elements of Rule 23 have not been established." *In re: Autozone, Inc.*, No. 3:10-MD-02159-CRB, 2016 WL 4208200, at *9 (N.D. Cal. Aug. 10, 2016) (internal citation omitted).

DISCUSSION

Defendant argues for decertification on two related grounds. First, in light of the Supreme Court's *Spokeo* decision, Plaintiff did not suffer a concrete injury and thus does not have standing; therefore the action must be dismissed for lack of subject matter jurisdiction. Second, and again in light of *Spokeo*, Defendant insists that each class member must have suffered a "concrete injury" and that such inquiry is an individual question that renders certification is improper for a variety of reasons.

I. Plaintiff's Standing

Article III standing consists of three "irreducible constitutional minimum" requirements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally

protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

In *Spokeo*, the plaintiff filed a class action complaint against a consumer reporting agency for alleged violations of Section 1681 of the FCRA. *Spokeo*, 136 S. Ct. at 1545-46. Specifically, the plaintiff alleged that Spokeo violated the FCRA by providing inaccurate information about him in a generated credit report, including that he is married, has children, has a job, is in his 50s, and is relatively affluent with a graduate degree. *Id*. at 1546. The district court dismissed the complaint for lack of standing, but the Ninth Circuit reversed, finding that the plaintiff had adequately alleged an injury in fact for the statutory violation. *Id*. On review, the Supreme Court vacated the decision because the Ninth Circuit's "standing analysis was incomplete"; although the Ninth Circuit found that the plaintiff had adequately alleged a "particularized" injury—i.e., violation of his statutory rights under the FCRA—the Ninth Circuit failed to consider whether that injury satisfied the "concreteness" requirement for an injury in fact. *Id*. at 1548 ("We have made it clear time and time again that an injury in fact must be both concrete and particularized."). To be "particularized," an injury "must affect the plaintiff in a personal and individual way," while "concreteness" requires an injury to be "'de facto'; that is, it must actually exist." *Id*. at 1548 (citation omitted). The Supreme Court noted, however, that "concrete" is "not . . . necessarily synonymous with 'tangible,'" and "intangible injuries can . . . be concrete." *Id*. at 1549. The Court remanded

the case to the Ninth Circuit to consider "whether the particular procedural violations alleged in [the] case entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1550.

A. Plaintiff's Standing Under the Disclosure Claims

Under FCRA Section 1681g(a) a credit reporting agency must "clearly and accurately" disclose to a consumer "[a]ll information in the consumer's file" upon a consumer's request, and provide a summary of consumer rights to be provided with each consumer file disclosure. *See* § 1681g(c). Plaintiff contends that Trans Union violated Section 1681g of the FCRA by not identifying the OFAC Alert in his disclosed consumer file, but instead notifying him of the OFAC Alert in a separate letter, and again by not explicitly stating in that separate letter how a consumer could dispute any inaccurate information. Defendant urges that Plaintiff does not have standing to make these claims. Given that Plaintiff was alerted to the OFAC information in the separate letter, that he in fact contacted Defendant to dispute the information, and that the OFAC Alert was removed from his file, he did not suffer a concrete injury. Defendant thus labels the disclosure claims as purely procedural violations akin to the incorrect zip code violation discussed in *Spokeo*. *See Spokeo*, 136 S. Ct. at 1550 (noting that "not all inaccuracies cause harm or present any material risk of harm" as with "an incorrect zip code."). The Court disagrees.

Plaintiff did not receive any OFAC information when he requested a complete copy of his file; he thus was inaccurately notified that Defendant had not

identified him as matching a name on the OFAC list. The omission was material: the OFAC Alert—being identified as a potential terrorist or drug trafficker—is not even close to the innocuous zip code mentioned in *Spokeo*. And when Plaintiff did receive the OFAC information in a separate letter, it stated it was being provided "as a courtesy" and not that it was an amendment to the incomplete disclosure of his consumer file. Finally, the "courtesy" letter also did not include a disclosure as to how to dispute inaccurate information. These alleged violations created a risk that Plaintiff would be harmed in precisely the way Congress was attempting to prevent when it mandated what disclosures consumer credit reporting agencies must make to consumers: a risk that the consumer is not made aware of material inaccurate information in the consumer's file, nor aware of how to dispute the inclusion of the harmful information. Thus, these omissions entailed a degree of risk sufficient to satisfy Article III's concrete injury requirement. *See Spokeo*, 136 S. Ct. at 1550.

Defendant insists that because Plaintiff contacted Trans Union about the OFAC Alert notwithstanding the alleged disclosure violations he could not have suffered a concrete injury. What Defendant means, then, is that an FCRA case can never even get through the front door—that is, get past standing—unless and until a plaintiff suffers some tangible injury from nondisclosure of required information. Of course, at some point the plaintiff has to become aware of the omitted information, otherwise the plaintiff will never know that he has a claim. But, according to Defendant, if the consumer is able to avert the risk created by the nondisclosure once made aware of the consumer

reporting agency's error such that the consumer does not suffer a tangible injury, the consumer reporting agency is insulated from suit. *Spokeo* suggests no such thing. *See Spokeo*, 136 S. Ct. at 1549 (holding that "concrete" is not synonymous with tangible).

The recent post-*Spokeo* decision in *Larson v. Trans Union LLC*, No. 12-cv-05726-WHO, 2016 WL 4367253 (N.D. Cal. Aug. 11, 2016), is instructive. There the court considered whether a plaintiff had standing to bring a Section 1681g disclosure claim very similar to the claims brought here. The plaintiff argued that an OFAC disclosure indicating that the plaintiff was a "possible OFAC match" made in a separate letter from the credit report left the plaintiff uncertain and confused as to whether he had a right to dispute the OFAC match. *Id.* at *2. The court concluded that the plaintiff had standing to pursue an "informational injury" such as this under section 1681g(a). *Id.* at *3. In so concluding, the court noted that *Spokeo* implicitly recognized "informational injury" as sufficient to establish concrete injury. *Id.* (holding that the plaintiff's "claim is based on the sort of 'informational' injury that the *Spokeo* Court implicitly recognized . . . and that a number of other cases, from both before *Spokeo* and after, have found sufficient to support Article III standing.") (internal citations omitted). The court thus reasoned that the plaintiff's Section 1681g claim was based on "something more than a 'bare procedural violation'—such as the 'dissemination of an incorrect zip code'—that cannot 'cause harm or present any material risk of harm.'" *Id.* (citing *Spokeo*, 136 S. Ct. at 1549-50). The same reasoning applies here.

"[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549. The circumstances of the nondisclosure violations alleged here created a material risk of real harm and thus constitute an injury sufficient for constitutional standing purposes. Plaintiff therefore has standing to pursue his disclosure claims.

B. Plaintiff's Standing Under the Accuracy Claims

Defendant's standing argument with respect to the accuracy claims is meritless. The evidence supports a finding that Defendant's OFAC Alert on Plaintiff's credit file prevented him from receiving credit to purchase a car. Further, he testified that upon discovering that he had an OFAC alert on his file he was "concerned" and "scared" because he "was on the terrorist list." (Dkt. No. 128-14 at 21:24-22:2; 25:1-3.) If these facts do not constitute concrete injury the Court does not know what does. Further, an inaccurate OFAC Alert creates a material risk of real harm, such as the emotional distress a consumer may suffer upon learning that he or she has been identified as a potential match, or harm to employment or credit prospects. *See Larson*, 2016 WL 4367253 at *3. The concrete injury requirement is easily satisfied for the accuracy claims.

II. Class Member Standing

Defendant next argues that each class member must have suffered a concrete injury and that such an inquiry presents individual questions which render

certification inappropriate. The premise of Defendant's argument—that each class member must have suffered a concrete injury—is wrong. "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *see also Lewis v. Casey*, 518 U.S. 343, 395 (1996) ("[Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.") (internal quotation marks and citation omitted); *Larson*, 2016 WL 4367253, at *4 ("Larson's showing of standing for himself is sufficient to establish standing for the class as a whole."). Remarkably, Defendant's briefs do not cite the Ninth Circuit's en banc *Bates* decision; instead, it argues that Plaintiff's standing is inadequate because under *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012), "[n]o class may be certified that contains members lacking Article III standing." (Dkt. Nos. 198 at 24; 202 at 14.) At oral argument Defendant suggested that because *Mazza* post-dates *Bates*, it overruled *Bates*. Not so.

"Only the en banc court can overturn a prior panel precedent." *United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011), *abrogated on other grounds by United States v. Apel*, 134 S. Ct. 1144 (2014). While a three judge panel "may reexamine normally controlling circuit precedent" where "the reasoning or theory of prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," *Miller v. Gammie*, 335

F.3d 889, 892-93 (9th Cir. 2003), *Mazza* does not identify any "clearly irreconcilable" intervening higher authority; indeed, *Mazza* does not even cite *Bates*, let alone provide analysis as to why *Bates* had been overruled. Moreover, even after *Mazza* the Ninth Circuit has continued to cite *Bates*' holding as good law. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014); *see also Torres v. Mercer Canyons Inc.*, No. 15-35615, 2016 WL 4537378, at *8 n.6 (9th Cir. Aug. 31, 2016) (commenting that *Mazza* only signifies "that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase" and citing to *Bates*).

Spokeo did not alter the well-settled legal principle set forth in *Bates*; it nowhere addresses the question. Nor did the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). *Tyson* did not involve Article III standing requirements in class actions. Indeed, the *Tyson* Court expressly stated that it was not considering "whether a class may be certified if it contains members who were not injured and have no legal right to any damages." *Tyson*, 136 S. Ct. at 1049 (internal quotation marks omitted). The Court did not consider it because the petitioner conceded that the class could be certified even if class members were not injured. *Id.*

Finally, even if each class member was required to show concrete injury, it is satisfied here. Each class member was incorrectly identified as a potential OFAC match and each received the same allegedly inaccurate disclosures as did Plaintiff. Thus, regardless of whether the inaccurate credit report was

disseminated to a third party, the procedural violations alleged as to each class member "entail a degree of risk sufficient to meet the concreteness requirement." *Spokeo*, 136 S. Ct. at 1550.

CONCLUSION

Plaintiff has suffered a concrete and particularized injury with respect to his disclosure and accuracy claims and therefore has constitutional standing. Because under long-standing and binding Ninth Circuit precedent class action standing is satisfied if at least one named plaintiff meets standing requirements, the motion to decertify the class on the grounds that the standing inquiry creates individual questions as to each class member fails. Further, under the particular circumstances of the alleged violations here, each class member has suffered a concrete injury and thus has standing. The Court therefore DENIES Defendant's Motion to Decertify the Class.

This Order disposes of Docket Number 198.

IT IS SO ORDERED.

Dated: October 17, 2016

[handwritten: signature]
JACQUELINE SCOTT CORLEY
United States Magistrate Judge

Screenshot of OFAC Search Tool (Jan. 13, 2017)

(See foldout next page)

Sanctions List Search

This Sanctions List Search application ("Sanctions List Search") is designed to facilitate the use of the Specially Designated Nationals and Blocked Persons list ("SDN List") and all other sanctions lists administered by OFAC, including the Foreign Sanctions Evaders List, the List of Persons Identified as Blocked Solely Pursuant to E.O. 13599, the Non-SDN Iran Sanctions Act List, the Part 561 list, the Sectoral Sanctions Identifications List and the Non-SDN Palestinian Legislative Council List. Given the number of lists that now reside in the Sanctions List Search tool, it is strongly recommended that users pay close attention to the program codes associated with each returned record. These program codes indicate how a true hit on a returned value should be treated. The Sanctions List Search tool uses approximate string matching to identify possible matches between word or character strings as entered into Sanctions List Search, and any name or name component as it appears on the SDN List and/or the various other sanctions lists. Sanctions List Search has a slider-bar that may be used to set a threshold (i.e., a confidence rating) for the closeness of any potential match returned as a result of a user's search. Sanctions List Search will detect certain misspellings or other incorrectly entered text, and will return near, or proximate, matches, based on the confidence rating set by the user via the slider-bar. OFAC does not provide recommendations with regard to the appropriateness of any specific confidence rating. Sanctions List Search is one tool offered to assist users in utilizing the SDN List and/or the various other sanctions lists; use of Sanctions List Search is not a substitute for undertaking appropriate due diligence. The use of Sanctions List Search does not limit any criminal or civil liability for any act undertaken as a result of, or in reliance on, such use.

Download the SDN List

Visit The OFAC Website

Download the Consolidated Non-SDN List

Program Code Key

Lookup

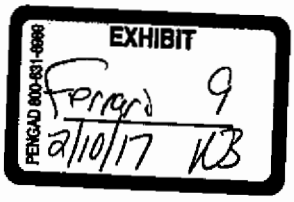
Type:	All	**Address:**	
Name:	Donald Trump	**City:**	
ID #:		**State/Province:***	NY
Program:	All 561List BALKANS BELARUS	**Country:**	All
		List:	All
Minimum Name Score:	50		Search Reset

Lookup Results: 3 Found

Name	Address	Type	Program(s)	List	Score ▼
SUDAN AIR	P.O. Box 253	Entity	SUDAN	SDN	54
GAZPROM PERERABOTKA	d.16 ul.Ostrovskogo	Entity	UKRAINE-EO13662	Non-SDN	51
Hamzat	Akharkho Street,11	Individual	SDGT	SDN	51

* U.S. states are abbreviated on the SDN and Non-SDN lists. To search for a specific U.S. state, please use the two letter U.S. Postal Service abbreviation.

SDN List last updated on: 1/12/2017 10:07:55 AM
Non-SDN List last updated on: 12/20/2016 12:33:02 PM



JA 312A

Order Denying TransUnion's Motion for Summary Judgment (N.D. Cal. Mar. 27, 2017)

Plaintiff contends that between January and July 2011 Trans Union violated three Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq., requirements: (1) that credit reporting agencies establish "reasonable procedures" to ensure the "maximum possible accuracy" of information provided about consumers under 15 U.S.C. §1681e(b); (2) that credit reporting agencies "clearly and accurately" disclose "all information in the consumers file at the time of [a] request" under § 1681g(a), and (3) that credit reporting agencies provide a statement of consumer rights with each such disclosure under § 1681g(c). Trans Union argues that summary judgment is appropriate on all of Plaintiff's claims because Plaintiff cannot establish that Trans Union willfully violated the FCRA. Because a reasonable jury could find otherwise, summary judgment is inappropriate. The Court declines to reconsider Trans Union's Article III standing arguments as the Court has considered—and rejected—these arguments in multiple previous orders.

A. Willful Violations under the FCRA

Plaintiff's FCRA claims are all premised on a "willful" violation. A willful violation entitles a consumer to statutory damages ranging from $100 to $1,000, as well as punitive damages, and attorney's fees and costs. See 15 U.S.C. § 1681n. A violation of the FCRA is willful if it is either knowing or reckless. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). "[A] company subject to FCRA does not act in reckless disregard of it unless the action is not only a

violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. "That is, the defendant must have taken action involving 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Bateman v. American Multi–Cinema*, 623 F.3d 708, 711 n.1 (9th Cir. 2010) (quoting *Safeco*, 551 U.S. at 68). Trans Union contends that its conduct was not willful as a matter of law and therefore it is entitled to summary judgment.

1. Clearly Established Law is not Required

Trans Union first insists that the FCRA willfulness analysis mirrors qualified immunity; that is, to get to a jury a plaintiff must show that the defendant's conduct violated "clearly established" law—provided by "controlling authority within the Circuit, or an overwhelming body of authority outside the Circuit." (Dkt. No. 218-5 at 28:10-13.) Not so.

First, in *Syed v. M-I, LLC*, 846 F.3d 1034 (9th Cir. 2017), opinion amended and superseded on denial of reh'g, No. 14-17186, ___ F.3d ___, 2017 WL 1050586 (9th Cir. Mar. 20, 2017), the Ninth Circuit considered a question of first impression under the FCRA. In ruling that the defendant's FCRA violation was willful as a matter of law, the court squarely rejected defendant's argument that its "interpretation of the statute [wa]s objectively reasonable in light of the dearth of guidance from federal appellate courts and administrative agencies. *Id.* at *8. Instead, the court held that "[a] lack of guidance [] does not itself render [defendant's] interpretation reasonable." *Id.*

"Notwithstanding that we are the first federal appellate court to construe Section 1681b(b)(2)(A), this is not a 'borderline case. An employer 'whose conduct is first examined under [a] section of the act should not receive a pass because the issue has never been decided." *Id.* at *9 (quoting *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010)). It follows, then, that a plaintiff need not show that a defendant's conduct violated clearly established law to prove a willful violation of the FCRA.

Second, even apart from *Syed's* controlling holding, no court has held that a defendant can be found to have willfully violated the FCRA only when its conduct violates clearly established law. *Safeco* did not so hold; instead, after reviewing the FCRA statutory language at issue, the Supreme Court held that given the lack of prior authority interpreting the statute contrary to defendant Safeco's interpretation, and given the statute's ambiguity, Safeco's interpretation of the statute was not reckless as a matter of law. 551 U.S. at 70-71. In other words, an FCRA defendant's conduct cannot be willful if it involves an objectively reasonable interpretation of the statute *and* there is no prior authority to the contrary. Such a conclusion is a far cry from holding that the law must first be clearly established that the defendant's conduct violates the FCRA before it can be found willful. *See Heaton v. Soc. Fin., Inc.*, No. 14-CV-05191-TEH, 2015 WL 6744525, at *6 (N.D. Cal. Nov. 4, 2015) (rejecting defendants' contention "that if a statute is unclear and there is no precedential guidance as to what a valid interpretation may be, a violation may not be considered willful" as an overstatement of *Safeco's* holding). The cases Trans

Union relies on are similar to *Safeco*. For example, in *Redman v. RadioShack Corp*., 768 F.3d 622 (7th Cir. 2014), the court described the violation there as not "willful because it consisted of a permissible interpretation of an ambiguous statute" and there were no previous cases to alert the company of its erroneous interpretation. *Id*. at 639 (*citing Safeco*, 551 U.S. at 68).

2. The Section 1681g Disclosure Claims

Plaintiff makes two 1681g claims. First, that when Plaintiff requested his consumer file, that is, his credit report, Trans Union unlawfully failed to disclose that Plaintiff was identified as a potential OFAC match, even though that information was communicated to customers who asked for Plaintiff's credit report. (Dkt. No. 221-25.) Second, that when Trans Union did disclose to Plaintiff that he is identified as a potential match, Trans Union did not provide Plaintiff with a summary of rights as required by section 1681g(c). (Dkt. No 221-24.) Trans Union contends that no reasonable trier of fact could find that it willfully violated either FCRA provision.

a. 1681g(a) Claim

The FCRA, 15 U.S.C. § 1681g(a), provides in part that "[e]very consumer reporting agency shall, upon request, ... clearly and accurately disclose to the consumer: (1) *All* information in the consumer's file at the time of the request." (emphasis added). Trans Union argues that its conduct was not willful as a matter of law because the FCRA did not require Trans Union to disclose the OFAC Alert to a consumer and, even if it did apply, Trans Union did disclose the

information in compliance, or arguable compliance, with the FCRA.

i. The FCRA Applies to the OFAC Alert

Trans Union advances two arguments in support of its theory that the FCRA does not apply to OFAC information or its OFAC Alert product. Neither is availing.

First, Trans Union's interpretation of "consumer file" as not including information about a consumer having an OFAC Alert is not objectively reasonable for the reasons explained by the Third Circuit in *Cortez*. The FCRA defines "consumer file" as "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." 15 U.S.C. § 1681a(g). Trans Union argues that because the OFAC Alert information was not part of its own database, and was instead maintained by Accuity, it was not part of Plaintiff's "consumer file," or at least its interpretation of consumer file as not including information so maintained was not unreasonable. As the *Cortez* court explained, however, Trans Union's interpretation ignores that the FCRA expressly provides that a credit reporting agency has a duty of disclosure to a consumer of all "information on [a] consumer . . . regardless of how the information is stored." 617 F.3d at 711 (quoting 15 U.S.C. § 1681a(g)). Congress did not "intend[] to allow credit reporting companies to escape the disclosure requirement in § 1681a(g) by simply contracting with a third party to store and maintain information that would otherwise clearly be part of the consumer's file and is included in a consumer report."

Id. "Congress clearly intended the protections of the FCRA to apply to all information furnished or that might be furnished in a consumer report." *Id.* Thus, not only is Trans Union's interpretation of "consumer file" as not including OFAC information unreasonable, it was emphatically rejected by the Third Circuit in *Cortez* before the violation at issue in this lawsuit. *Id.* at 712 ("We hold that information relating to the OFAC alert is part of the consumer's 'file' as defined in the FCRA.").

Likewise, Trans Union's second argument that the OFAC information was not required to be disclosed because the OFAC Alert provided to its customers in a consumer report was somehow not part a consumer report is equally unreasonable. Congress unambiguously defined "consumer report" to include a "communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used in whole or in part for the purpose in establishing the consumer's eligibility for—(A) credit . . . to be used primarily for personal, family or household purposes." 15 U.S.C. § 1681a(d)(1). Trans Union insists that its OFAC Alert service is just part of "a routine PATRIOT Act identification verification" and should not be used for credit eligibility determinations. (Dkt. No. 218-5 at 30:24.) This interpretation of "consumer report" is objectively unreasonable and was squarely rejected by the *Cortez* court. "It is difficult to imagine an inquiry more central to a consumer's 'eligibility' for credit than whether federal law prohibits extending credit to that consumer in the first instance. The applicability of the

FCRA is not negated merely because the creditor/dealership could have used the OFAC Screen to comply with the USA PATRIOT Act, as well as deciding whether it was legal to extend credit to the consumer." *Cortez*, 617 F.3d at 707–08. Further, long before the alleged violation at issue here, OFAC regulations and the Treasury Department's website provided that OFAC information in a credit report is governed by the FCRA. *Cortez*, 617 F.3d at 722; "What Is This OFAC Information On My Credit Report," https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic," Questions 70, 71, (last visited March 27, 2017).

Trans Union's interpretation of "consumer file" and "consumer report" contradicts the plain language of the FCRA and at the time of the violation at issue here a federal court had told Trans Union that its interpretation was wrong.

ii. A Jury Could Find Trans Union Failed to Comply with the FCRA

Next, Trans Union contends that even if it was required to disclose the OFAC information to consumers upon their request for their consumer report, its disclosure of the OFAC information in a separate letter to the class members was an objectively reasonable interpretation of the FCRA disclosure requirements and thus not willful. Indeed, beginning in January 2011, if an individual contacted Trans Union to request a credit report and the individual's name had an OFAC Alert, Trans Union would mail the individual a copy of his credit report, and separately mail him a letter stating that his name was a potential match to the OFAC database. Trans

Union argues that this was all that was legally required was all that was technologically feasible during the class period as well.

Trans Union's interpretation of the disclosure requirement is not objectively reasonable. The FCRA is unambiguous: if a consumer requests, the credit reporting agency must "clearly and accurately" disclose to the consumer *all* information in the consumer file. *See* 15 U.S.C. § 1681g(a). Trans Union's second letter, however, did not "clearly" disclose that it was providing the consumer with information from the consumer's file; to the contrary, it disclaimed that it was doing so by prefacing its letter by stating that the information was being provided "as a courtesy to you" and not, rather, as required by law. (Dkt. No 221-24.) It thus created, at best, an ambiguity as to whether the information was in the consumer's file, and thus included on the consumer's credit report, even though Trans Union presented the information to its customers as part of a consumer's credit report. While *Cortez* did not address this issue, the lack of caselaw does not mean that Trans Union's violation cannot be willful. *See Syed*, 2017 WL 1050586, at *9 (finding that the plaintiff stated a claim for a willful violation of the FCRA even though the relevant legal issue presented an issue of first impression). A reasonable jury could find the violation willful.

b. 1681g(c) Claim

The record also supports a finding that Trans Union violated the FCRA's directive that a consumer reporting agency provide "with each written disclosure by the agency to the consumer" a summary of consumer rights. 15 U.S.C. § 1681g(c)(2). Assuming,

as Trans Union contends, that the second letter is such a disclosure, it did not contain the summary of consumer rights. Trans Union's argument that it was reasonable to interpret the statute as being satisfied with the summary being provided with the first disclosure (which did not include any OFAC information) is unreasonable, especially since the second letter did not in any way reference the first letter. Trans Union's insistence that it was not technological feasible to do anything more than it did is a question for the jury. The Court cannot conclude that no reasonable trier of fact could find that Trans Union willfully violated section 1681g(c).

3. Section 1681e(b) Reasonable Procedures Claim

The FCRA, Section 1681e(b), provides:

> 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.

15 U.S.C. § 1682e(b). "Liability under § 1681e(b) is predicated on the reasonableness of the credit reporting agency's procedures in obtaining credit information." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Plaintiff argues that Trans Union violated this section by using name-only matching to place on OFAC Alert in a consumer's file.

a. Maximum Possible Accuracy of Trans Union's OFAC Alert

Trans Union contends that no jury could find its use of name-only matching violates section 1681e(b) because it advised its customers that they must engage in human review to verify that the OFAC Alert was actually for someone on the OFAC list. The *Cortez* court, however, rejected a related version of this argument: "We are not persuaded that Trans Union's private contractual arrangements with its clients can alter the application of federal law, absent a statutory provision allowing that rather unique result." *Cortez*, 617 F.3d at 708 (rejecting Trans Union's reliance on language in its contractual agreements wherein "the creditor or subscriber agrees to be 'solely responsible for taking any action that may be required by federal law as a result of a match to the OFAC File, and shall not deny or otherwise take any adverse action against any consumer based solely on TransUnion's OFAC Advisor services.'").

Trans Union also contends that it cannot be found to have acted willfully because following *Cortez* it modified its OFAC Alert to state that an individual's name was a "potential match" rather than just a "match." Plaintiff counters that the addition of the word "potential" was not a procedure designed to "assure maximum possible accuracy" because three different Trans Union witnesses testified that there was no evidence that *any* Trans Union customer whose file contained an OFAC Alert was in fact an individual on the OFAC list. (Dkt. No. 221-8 at 62:25-63:6; Dkt. No. 221-15 at 67:6-15; Dkt. No. 221-19 at 37:9-13.) Under the FCRA, a credit report is

inaccurate or misleading if it is patently incorrect or "misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010) (internal citation omitted). A reasonable trier of fact could find that Trans Union's OFAC Alert was misleading given that the evidence supports a finding that none of the consumers flagged as a potential match were in fact a match; in other words, a jury could find that if Trans Union had used more information than just a matching name to flag a consumer—such as a matching birth date—none of the class members would be even a potential match. In addition, that Plaintiff's consumer report did not included the "potential" language supports an inference that Trans Union's procedure did not ensure maximum possible accuracy. (Dkt. No. 221-11.)

Trans Union's insistence that *Cortez* suggested that inclusion of the word "potential" could have defeated liability is not persuasive. *See Cortez*, 617 F.3d at 708-09. That is not how this Court reads *Cortez*. In response to Trans Union's argument that it merely identified Ms. Cortez as a "possible" match, the Third Circuit observed that, in fact, Trans Union identified her as a "match," not someone with a name similar to one on the OFAC list or as a possible match. *Id*. The Third Circuit did not suggest that identifying Ms. Cortez as a possible match would have been sufficient under the FCRA; to the contrary, in the following paragraph the court states that 1681e(b)'s "maximum possible accuracy" standard "requires more than merely allowing for the possibility of accuracy." *Id*. at 709.

Trans Union also insists that there was nothing more that it could have done to ensure the maximum possible accuracy of its OFAC Alert due to technological limitations. There is a material dispute of fact on this issue. Among other evidence, an Experian credit report for Mr. Ramirez during the class period states "NAME DOES NOT MATCH OFAC/PLC LIST." (Dkt. No. 221-22 at ¶ 5 and Ex. B.[1]) Further, that Trans Union removed the OFAC Alert of each class member who contacted Trans Union following receipt of the OFAC letter creates a dispute as to Trans Union's infeasibility argument. It is for the jury, not the Court, to weigh the reasonableness of Trans Union's procedures. *See Guimond*, 45 F.3d at 1333.

B. Trans Union's Other Arguments

The Court declines to consider Trans Union's other arguments in favor of summary judgment as these are a rehash of the same Article III standing arguments which the Court previously rejected.

CONCLUSION

For the reasons stated above, and at oral argument on March 22, 2017, Trans Union's motion for summary judgment is DENIED.

Trans Union's objections to Plaintiff's evidence are denied as moot. The Court did not rely on any of the objected to evidence in reaching its decision here. Likewise, Plaintiff's motion for leave to file a sur-reply is DENIED as moot as the Court did not rely on any

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[1] Although Trans Union objects to the Bhatia Affidavit, its objections relate to other portions of his declaration and not those cited here. (Dkt. No. 227-4 at 21.)

expert testimony in reaching its decision here. (Dkt. No. 230.)

This Order disposes of Docket Nos. 218, 221, and 227. The parties' related administrative motions to seal are DENIED WITHOUT PREJUDICE to Trans Union's submission of a narrowly tailored request for sealing that comports with Local Rule 79-5 and the requirements for sealing in the dispositive motion context. Trans Union shall file its renewed motion to seal by April 5, 2017.

IT IS SO ORDERED.

Dated: March 27, 2017

[handwritten: signature]
JACQUELINE SCOTT CORLEY
United States Magistrate Judge

Excerpts from Trial Transcript (June 12, 2017)

* * *

[115] Fortunately, the sale of the vehicle did go through and the Ramirez family got its car at the exact same time it would have, but for the inconvenience caused when the OFAC information appeared. But keep in mind, as Mr. Soumilas mentioned to you, that this is a class action.

Ladies and gentlemen, you need to see the entire scope here. You must see your way to a single answer for the entire class. And you have heard no discussion of any evidence, and you will see no evidence at this trial, that any other class member had a similar experience to Mr. Ramirez. Nor will you see any evidence at this trial that any transaction was denied because of the delivery of OFAC data. You will see no evidence of hardship to this class.

Yes, Mr. Ramirez's experience was unfortunate, but, nonetheless, fortunately unique. We are confident that you will conclude when all of the evidence is in that Mr. Ramirez's one experience does not prove that any of the people at TransUnion willfully violated the rights of the class as a whole. And you have just heard Mr. Soumilas agree that this is a question of whether there was a willful desire to disobey the law.

As will be explained to you later, the purpose of the Fair Credit Reporting Act is to require consumer reporting agencies, like TransUnion, to adopt reasonable procedures for meeting the needs of commerce. The evidence will show you, ladies and

* * *

[117] only contact with TransUnion was that when they asked for their own credit file, TransUnion let them know that they had a name like someone on the OFAC list and gave them the information that they needed to make sure that in the future they would not be flagged in future screening.

Think about how all of our email works. Many of us have email spam filters. If an email from someone you know gets temporary held or flagged because the computer is not sure what to do with that email, the system is not saying anything bad about it. It's simply saying more information might be needed. And it is possible for that email to be white listed to prevent future issues. One of many systems in modern life that functions like this.

And TransUnion has a system where, if a person does have a name that is similar to someone on the OFAC list, that person can contact TransUnion -- and the letter explains this -- and say: Hey, I'm not that person on the list. Here is a copy of my driver's license. Here is a copy of my Social. White list me. Just -- just make sure you notate my file so that there is not going to be a problem in the future.

And this system worked for Mr. Ramirez. He had one event on one day, one transaction. He got the car at the same time. And then with a simple handwritten note, he was able to get himself white listed against future flags. It worked very, very well.

* * *

[138] that verdict of no. But for now, our only request of you is that you listen carefully to all the evidence and that you accept our thanks and gratitude for sitting in judgment on this matter.

THE COURT: Thank you, Mr. Newman.

Ladies and gentlemen, I think what well do is take a brief 10-minute break and then we will resume with the first witness. Thank you.

As always, please do not discuss the case.

THE CLERK: All rise for the jury, please.

(Jury exits the courtroom at 1:35 p.m.)

THE COURT: Okay. 1:45 we'll resume.

(Whereupon there was a recess in the proceedings from 1:35 p.m. until 1:50 p.m.)

THE COURT: All right. Thank you, ladies and gentlemen.

Mr. Soumilas, you may call your first witness.

MR. SOUMILAS: We will call the class representative, Mr. Ramirez.

SERGIO RAMIREZ,

called as a witness for the Plaintiff herein, having been duly sworn, testified as follows:

THE WITNESS: Yes.

THE CLERK: Can you please state your name and then spell your last name for the record.

[139] **THE WITNESS:** Sergio Ramirez, R-A-M-I-R-E-Z.

THE CLERK: Thank you. You may be seated.

THE COURT: Ms. Brewer, may proceed.

DIRECT EXAMINATION

BY MS. BREWER

Q. Mr. Ramirez, I'm Carol Brewer. I'm one of the attorneys for the class. And I would like you to introduce yourself to the jury.

A. My name is Sergio Ramirez.

Q. And where do you live?

A. I live in --

THE COURT: Mr. Ramirez, can you please speak into the microphone? You can move the microphone.

A. I live in Redwood City, California.

BY MS. BREWER

Q. Is that a house or an apartment?

A. It's a house.

Q. A single-family house?

A. Yes, it is.

Q. Do you own your house or do you rent?

A. I own my house.

Q. Do you have a mortgage?

A. Yes, I do.

Q. Who lives there with you?

A. My wife and I, my three kids.

[140] **Q.** How old are your children and what are their names?

A. Juliana, she's 18 years old. Emily is 16 and a half. And I have a three-year old daughter Natalia.

Q. Does your wife work outside the home?

A. Yes, she does.

Q. What does she do?

A. She works for a start-up company called Machine Zone. She is an executive assistant.

Q. She's a sales assistant?

A. Yes.

Q. Is that -- is Machine Zone a high tech company?

A. It's a high tech company that makes, like, app for cell phones. Like, Game of War and stuff like that.

Q. And what do you do for work?

A. I'm a construction worker.

Q. What, in particular, do you do in construction?

A. I'm a painter, commercial painter.

Q. Where are you working now?

A. At the Apple campus in Cupertino, the spaceship building.

Q. Are you taking off work this week to be here at trial?

A. Yes, yes.

Q. Are you being paid while you're taking off to represent the class?

A. No.

Q. I want to turn your attention, Mr. Ramirez, to [141] February 27, 2011. That was a little more than six years ago. It was a Sunday. You and your wife had gone to Dublin Nissan to buy a car. Do you remember that?

A. Yes, I do.

Q. Do you remember what time of day you got to Dublin Nissan?

A. Like, 5:00 p.m. or so.

Q. Who was with you that day?

A. It was my wife and my father-in-law.

Q. Did you know what you were looking for when you got to the dealership?

A. Yeah. We had an idea what kind of car we wanted to purchase.

Q. What kind of car did you want to purchase?

A. It was a Nissan Maxima.

Q. Had you done any research or any negotiation before you got to the dealership?

A. Yes. My wife was doing some research online, so we kind of had an idea what we wanted. So when we show up to the dealership, we kind of know what we just want.

Q. Did you have any communications with anyone at the dealership before you got there?

A. Yes.

Q. What was that?

A. His name -- my wife was emailing back and forth the salesman, which his name is Clint Burns.

[142] **Q.** Was he a salesman at Nissan -- at Dublin Nissan?

A. Yes.

Q. Who did you meet with when you got to the dealership?

A. Clint Burns.

Q. This is the same guy that your wife had been emailing with?

A. Correct.

Q. What did you talk about when you got to the dealership?

A. Well, we just talked about -- my wife and him were talking about -- going back and forth about the prices and what kind of -- what color we wanted to get, as far as the color wise on the car, and negotiating prices still.

Q. How long did that take?

A. Oh, it took a couple hours. Like, maybe two or three hours or so.

Q. To get to a point where you had agreed on a color and a price --

A. Correct.

Q. -- and the model?

Did you get to a point where you did agree?

A. Yes, we did. We got to a point where we agreed on the price, the monthly payment, and the only next step was to check the credit.

Q. Were you still talking to Clint Burns by then?

A. Yes.

[143] **Q.** What happened next?

A. He went in, got the credit application.

Q. Is that a credit application for you and your wife both?

A. Correct, for me and my wife.

Q. You both filled out a credit application?

A. Yes, we did.

Q. Then what happened?

A. He went back. Because he was going back and forth to this other room. I don't know --

Q. This is Clint Burns?

A. Correct.

Q. The salesperson is going back and forth?

A. Yes.

Q. Okay.

A. He comes back stating that he couldn't sell me a car because I was on the OFAC list, which is a -- from what his words were a terrorist list.

Q. He told you you were on a terrorist list?

A. Correct.

Q. Did he show you a copy of your credit report?

A. Yes, he did.

Q. I would like you to turn your attention, please -- you've got binders in front of you, and if you would look at Tab No. 1. And look at the exhibit that's shined h behind Tab No. 1?

[144] **A.** Are these two the same?

Q. There is one that, I think, is 1 through 50 and the other is 51 through something else.

A. You want me to look at Tab No. 1?

Q. Tab No. 1.

A. Okay.

Q. Do you see a document under Tab No. 1?

A. Correct.

Q. And can you tell me what that is?

A. It's my credit report.

Q. Is this the credit report that you were shown at Dublin Nissan on February 27, 2011?

A. Correct.

MS. BREWER: Your Honor, we'd like to admit Exhibit 1 into evidence as the Class's Exhibit 1.

THE COURT: Any objection?

MR. NEWMAN: Object to the foundation of the admission, your Honor.

THE COURT: Mr. Ramirez, this is the report that you were shown that day some?

THE WITNESS: Correct.

THE COURT: All right. Objection overruled. Exhibit 1 admitted.

(Trial Exhibit 1 received in evidence)

[145] **BY MS. BREWER**

Q. Do you see your name on the credit report --

MS. BREWER: Oh, can we bring it up? Thank you. Mr. Reeser, could you crop the top section?

(Document displayed)

MS. BREWER: Okay. Thank you.

BY MS. BREWER

Q. Do you see your name on this credit report, Mr. Ramirez?

A. Yes, I do.

Q. Is that your address?

A. It was my previous address, but, yes, that's where I used to live before at that time.

Q. Do you see where it says SSN and there are some asterisks and it ends in 4070?

A. Yes.

Q. Is that the last four digits of your Social Security number?

A. Yes.

Q. Is that your employer -- was that your employer at the time?

A. Correct.

MS. BREWER: Mr. Reeser, could you focus on the next section down, please?

(Document displayed)

[146] **BY MS. BREWER**

Q. Mr. Ramirez, what do you see in that portion of credit report that the dealer showed you on February 27?

A. From what he told me, that my name matched the OFAC list, which is the names that are on that list. But none of those names actually match what my name is, my date of birth and last name and stuff like that. So none of those names are me, in other words.

Q. Do you see where it says "Input name matches name on the OFAC database"?

A. Yes.

Q. And so your testimony is those names are similar to yours, but none of them are you?

A. Correct.

Q. What happened next after the dealer showed you your credit report?

A. I asked if I can -- I just -- I was shocked. I didn't know what to do. I mean, this never happened to me

before. I asked if I can fix it. I asked if I can get a copy of this credit report.

He wouldn't give me a copy of it because he said he wasn't allowed to give me a copy of it. He wanted me to call TransUnion, see if I can try to fix it that way.

Q. Did he let you buy a car?

A. Eventually he said he can't sell me the car because --

[147] **Q.** He could not sell you the car?

A. Correct. He can't.

Q. Why?

A. Because they can't do business if I was on this OFAC list. They can't sell me a car.

Q. What was your reaction to hearing that you had your name on a terrorist watch list?

A. I was embarrassed. I was shocked. I was kind of scared at the time because I didn't know what's going to happen. I mean, if somebody tells you you're on a terrorist list, what are you going to do?

Q. Did you know what that meant?

A. I didn't know -- I didn't know what the list was all about until I went to the dealership and found out. All that was new to me.

Q. Did you -- did you ask the salesman to do anything about double checking or --

A. Yes. I asked him to double check and he just wouldn't. I mean, he just wanted to sell the car, so he obviously he knew that -- that was my right Social Security number, but he wouldn't double check. So

then he offered to put the name under my wife's -- put the car under my wife's name at the time.

Q. He offered to put the car under your wife's name instead of yours?

[148] **A.** Instead of mine, correct.

Q. Did your wife submit a credit application on her own behalf?

A. Yes, she did.

Q. And what happened then?

A. So they did another credit application. Took another hour. He went back in and obviously they agreed with selling her the car instead of me, putting it in her name.

Q. Was that an agreeable outcome for you?

A. Nope, it wasn't.

Q. Why not?

A. Because we usually -- me and my wife usually put everything together. We have been married for so many years, so everything we have, we have a joint account. We have our house together. Everything we have is under both of our names. So this is -- it's kind of a bummer. I couldn't put my name on it. I felt embarrassed. Felt dumb.

Q. Okay. So did you leave the dealership at that point?

A. Yes, we did.

Q. Did you have a car to drive home?

A. No, we didn't.

Q. Why not?

A. They didn't have the color my wife wanted to get, so we had to go back a couple days after.

Q. Oh, to get the --

[149] **A.** To -- they were supposed to deliver a car from another dealership.

Q. What did you do when you got home? Well, let's put it this way. That's Sunday night. The next day was Monday. Did you do anything else that night?

A. Sunday night I got home. I was just talking to my wife about it. I was, like, kind of -- didn't know what to do. I got home kind of late, so I couldn't research it at night when I got home. Had to work the next day. So when I got home from work, that's when I decided to do my research.

Q. What did you find?

MR. NEWMAN: Objection. Calls for hearsay.

THE COURT: Overruled.

BY MS. BREWER

Q. You can answer the question.

A. Can you repeat it again?

Q. What did you find when you did some research?

A. I found that the *Cortez* case, I did some research about it.

Q. What was the *Cortez* case?

A. Same thing happened to the lady that happened to me. She went to a dealership and got denied for credit because she was on the OFAC list.

MR. NEWMAN: Objection. Move to strike.

THE COURT: Well, I'm going to admit it.

[150] Ladies and gentlemen, this is being admitted as to what Mr. Ramirez understood and his state of mind at the time, not as to the truth of what was being asserted.

Go ahead.

BY MS. BREWER

Q. Did you do any other research?

A. Yes. I found the Treasury Department online.

Q. You found the telephone number for the Treasury Department?

A. Telephone number for the Treasury Department, so I called.

Q. You called the Treasury Department?

A. I called the Treasury Department. I left a message. The next day they gave me a call.

Q. What did the person at the Treasury Department tell you?

A. That they couldn't do anything about it; that I would need to call TransUnion to get me off the list.

Q. Did the person at the Treasury Department tell you that you were on the OFAC list?

A. No.

Q. Did you call TransUnion?

A. Yes, I did.

Q. Was that the next day, February 28th, as far as you remember?

A. Yes.

Q. What happened then?

[151] **A.** I spoke to this man and I told them that -- what happened to me; that I was considered to be on the OFAC list and to get me off. He told me that I was not on the OFAC list.

Q. Did you think everything was taken care of at that point?

A. In a way I had a sense of relief that I wasn't on the OFAC list. He said he was going to mail me my credit report stating that I was not on the list. So I got the letter in the mail, when -- a couple days after.

Q. Okay. I first want to ask you, was this just one phone call or was it more than one phone call?

A. It was more than one phone call.

Q. To TransUnion?

A. That I remember, yes.

Q. And why was it more than one phone call?

A. Because I was getting the runaround from them. They kept telling me I was not on the list, and I knew that I was, and I just kept -- there was this lady who was -- I forgot who it was. I don't know if it was a male or female. I couldn't understand her, her accent. She had a real strong Indian accent. So I was just getting the runaround from her. I remember once hanging up because I was so mad because I wasn't getting anywhere.

Q. So you felt you were getting the runaround because you -- the dealer had told you you were on the OFAC list, but the person at TransUnion was telling you you weren't --

[152] **A.** Correct.

Q. -- is that right?

A. Correct.

Q. Okay. So did you ever receive anything in the mail from TransUnion?

A. Yes. I got my copy of my credit report.

Q. In the mail?

A. Correct.

Q. I'd like you to look, Mr. Ramirez, at Exhibit 75 in the binders in front of you and see if you can identify that, please?

(Witness complied)

Q. Can you tell me what that is?

A. It is a copy of my credit report.

Q. Is this the copy of your credit report that TransUnion sent you in the mail and is dated February 28, 2011?

A. Yes, it is.

MS. BREWER: Your Honor, class counsel would like to introduce Exhibit 75 into evidence.

THE COURT: Any objection?

MR. NEWMAN: No objection.

THE COURT: 75 admitted.

(Trial Exhibit 75 received in evidence)

BY MS. BREWER

Q. Mr. Ramirez, I'd like you to take a moment and look [153] through Exhibit 75, which is your credit report, and tell me if there is any information in that report about OFAC at all?

(Witness complied)

A. No.

Q. Did you -- did you think the problem was solved then when you got your credit report?

A. Kind of. In a way I did, but in a way I wasn't because it didn't say that I was not -- I was off the OFAC list. So I was kind of confused whether I was on or not.

Q. Did TransUnion send you anything else?

A. Yes, they did. A couple days -- I think a day later.

Q. What did they send you?

A. Another letter.

Q. Another -- and this is a separate letter from the credit report?

A. Correct.

Q. Mr. Ramirez, I would like you to look at Exhibit 3, please, and see if you can tell me what that is.

(Witness complied)

A. It's a letter that I got from TransUnion.

Q. Is that a letter dated March 1st, 2011 from TransUnion?

A. Correct.

Q. And this is the letter that you got in the mail?

A. Yes.

MS. BREWER: Your Honor, the Class would like to

[154] introduce Exhibit 3 into evidence.

THE COURT: Any objection?

MR. NEWMAN: No objection, your Honor.

THE COURT: Exhibit 3 admitted.

(Trial Exhibit 3 received in evidence).

MS. BREWER: Ken, if you would pull that up, please?

If you could crop and highlight the top part?

(Document displayed)

BY MS. BREWER

Q. Mr. Ramirez, do you see the top part of this letter that says:

> "As a courtesy to you, we also want to make you aware that the name that appears on your TransUnion credit file 'Sergio L. Ramirez' is considered a potential match to information listed on the United States Department of Treasury's Office of Foreign Asset Control database."

Do you see that?

A. Yes, I do.

Q. What was your reaction to seeing that information?

A. I was shocked because from the first letter, maybe I thought it was -- they had already taken it off. But I didn't know what to do. It doesn't say whether -- how to fix it, where to call or -- it doesn't say anything how to dispute. The letter doesn't say anything about that.

Q. So you didn't know what to do?

[155] **A.** I didn't know what to do.

Q. Did you discuss this with your wife, about what you should do?

A. Yes, I did. I discussed it with her and she was -- she was also worried. We were planning -- we were planning a family trip to go to Mexico, the whole family, but we decided to cancel because of what happened here, because I was on the OFAC list. So we were -- in a way my daughters were all kind of bummed because we were not going to go to Mexico.

So then my wife said: You know what? Maybe you should look for a lawyer.

Q. Did you look for a lawyer?

A. Yes, I did.

Q. Did you contact a lawyer at that point?

A. Yes, I did.

Q. Mr. Ramirez, would you please look at Exhibit 54 in the binder in front of you?

(Witness complied.)

Q. Do you see it?

A. Yes.

Q. Can you tell me what that is?

A. It's another letter from TransUnion. 54, you said?

Q. 54?

A. Yes. Five four.

Q. Is that your personal -- is that the letter that you [156] wrote?

A. No.

Q. Okay. You would look at Exhibit 53?

(Brief pause.)

THE COURT: Ms. Brewer, if you want to step forward and look at the...

(Whereupon document was shown to the witness.)

BY MS. BREWER

Q. Okay. Would you look at Exhibit 54, please, and tell me what that is?

A. It's a letter I wrote to TransUnion.

Q. Does it have a date on it?

A. Yes. March 16th.

Q. March 16th --

A. -- 2011.

Q. 2011.

MS. BREWER: Your Honor, the Class would like to introduce Exhibit 54 into evidence.

MR. NEWMAN: No objection.

THE COURT: 54 admitted.

(Trial Exhibit 54 received in evidence).

BY MS. BREWER

Q. What does your letter say?

A. (As read)

"Please get me off the OFAC list. I tried to buy a [157] car and got denied because they said I was on the OFAC list."

And then it says a file number and my signature.

Q. Okay. Could you speak into the microphone a little more?

A. It says:

"Please get me off the OFAC list. I tried to buy a car, but got denied because they said I was in the OFAC list."

And it has a file number and my signature.

Q. How did you figure out how to send a dispute?

A. After I talked to the lawyer.

Q. You talked to a lawyer.

Mr. Newman said that the letter that TransUnion sent you explained how to fix the problem, but you said that it didn't tell you how to fix the problem, is that right?

A. Yes. That's the only reason why I called the lawyer in the first place, because I didn't know what to do.

Q. Would you have known how to dispute with TransUnion without contacting a lawyer?

A. No.

Q. Did you ever hear back from TransUnion after you disputed?

A. I think, yeah, I got a letter back from them.

Q. Okay. I'm going to ask you to look at Exhibit 53, please.

(Witness complied)

Q. Can you tell me what that is?

[158] A. It's a letter from TransUnion.

Q. What does it say?

A. It's supposed to say that the...

(Brief pause.)

A. That they took me off the OFAC list.

MS. BREWER: Your Honor, counsel would like to move for admission into evidence of Exhibit 53.

MR. NEWMAN: No objection.

THE COURT: 53 admitted.

(Trial Exhibit 53 received in evidence).

BY MS. BREWER

Q. Mr. Ramirez, how long have you lived in California?

A. All my life.

Q. How old were you when you came into this country?

A. Maybe, like, five months.

Q. Five months old? And you've lived in California since then?

A. Correct.

Q. You understand that this case is not just about you. You're here representing a certified class?

A. Correct.

Q. What does that mean to you?

A. Well, it means it's not just me. It's all the representatives that are -- that happened the same thing what happened to me.

[159] **Q.** Why did you want to represent a class in this case?

MR. NEWMAN: Objection. Relevance.

THE COURT: Overruled.

BY MS. BREWER

Q. You can answer.

A. Because I just don't want that to happen to anybody. I mean, it's embarrassing. I don't think it's right what they are doing. And I just don't -- I wouldn't -- I don't feel it's right, period.

Q. What do you think TransUnion did wrong here?

MR. NEWMAN: Objection.

THE COURT: Overruled.

A. Putting people on the OFAC list that shouldn't be on the OFAC list. And then, like, instead of you trying to fix it, you get the runaround. You don't know what to do. Just like what happened to me. They sent me letters, but didn't say how to fix it. And I just think it's wrong.

MS. BREWER: Thank you. I have no more questions.

THE COURT: All right. Any cross examination?

CROSS EXAMINATION

BY MR. NEWMAN

Q. Hello, Mr. Ramirez.

A. How is it going?

Q. Could we begin by speaking a little bit about the vehicle purchase? Your wife was the one who negotiated the purchase of

* * *

[166] **A** In time, I built up my credit, and I was able to purchase the house, correct.

Q Since the time we have been discussing, March of 2011, you haven't had any other issues with an OFAC flag, have you?

A No.

MR. NEWMAN: No further questions, Your Honor.

THE COURT: Ms. Brewer?

MS. BREWER: Just a very brief redirect.

Mr. Reeser, could you pull up exhibit 1 again, please? And the identifying part at the top.

(Document displayed.)

REDIRECT EXAMINATION

BY MS. BREWER

Q Mr. Ramirez, I'm looking at the credit report that the dealer showed you on February 27.

And do you see your name, that says "Sergio L. Ramirez" at the top?

A Correct.

Q Middle initial L.?

A Yes.

Q And, it didn't match any of the Sergio Ramirezes that were shown in the middle of the report, did it?

A No.

Q When you and your wife filled out the credit report at the dealership, your wife actually filled out all the information.

* * *

Excerpts from Trial Transcript (June 13, 2017)

* * *

[209] that was going to happen.

MR. LUCKMAN: Yes. If you could just --

THE COURT: I'll tell them she's one of those witnesses.

MR. LUCKMAN: -- indulge me in a reminder.

THE COURT: Absolutely.

MR. SOUMILAS: We agree.

MR. NEWMAN: Very good, your Honor.

THE COURT: If I forget to do any of these things, feel free to remind me.

(Whereupon there was a recess in the proceedings from 8:59 p.m. until 9:06 p.m.)

THE COURT: Good morning, ladies and gentlemen. Why while we had the delay we were able to use that time and so I expect that the evidence should come in quite smoothly today. So, Mr. Soumilas, would the plaintiff like to call your next witness.

MR. SOUMILAS: Thank you, your Honor. Yes. We are prepared now to call Hector Vale.

HECTOR VALE,

called as a witness for the Plaintiff herein, having been duly sworn, testified as follows:

THE WITNESS: Yes.

THE CLERK: Can you please state your name and spell [210] your last name for the record?

THE WITNESS: Hector Vale. Last name is Vale, V, as in Victor, A-L-E.

THE CLERK: Thank you. You may be seated.

THE COURT: Good morning, Mr. Vale.

THE WITNESS: Good morning.

DIRECT EXAMINATION

BY MR. SOUMILAS

Q. Good morning, Mr. Vale. Who do you work for, sir?

A. I work official Cox Automotive.

Q. Where is your office?

A. It's at 1111 Marcus Avenue, Lake Success, New York.

Q. Did you say New York?

A. Yes.

Q. What is Cox Automotive?

A. Cox Automotive is quite a few number of companies. One of them is the Cox Automotive industry, but they also own Cox Media, Cox Cable.

Q. What do you do for Cox Automotive?

A. I work for a company -- well, I actually work for Cox Automotive that was actually acquired by Dealertrack awhile back and I am Security Operations Manager.

Q. And what do you do in that capacity?

A. We do abnormal activity monitoring on our website for applications, credit applications that are being submitted on [211] behalf of consumers. We

monitor dealerships. We address subpoenas that we receive from our legal counsel.

Q. And when you say you "address subpoenas," would you please explain what that means?

A. So our counsel would receive a subpoena for a dealership that may have had fraudulent activity done within our website and we would, in essence, have to investigate that activity and provide evidence.

Q. And do subpoenas sometimes ask you to retrieve records that your company has?

A. Yeah. Credit applications, as well as financial submissions to lending institutions.

Q. Okay. Now, earlier, just a moment ago, you mentioned the Dealertrack acquisition, I think you called it; is that right?

A. That's correct.

Q. So what is Dealertrack?

A. Dealertrack is a web-based company that offers automotive software for on demand credit inquires, as well as applications. It provides a secure channel for communications with other parties.

Q. And would you just explain to the jury what the relationship is between Dealertrack and Cox Automotive, please?

A. So the relationship, meaning that they purchased Dealertrack.

Q. Got it. So before Cox Automotive purchased Dealertrack, [212] did you used to work for Dealertrack?

A. Yes.

Q. And were you working for Dealertrack in the 2011 time frame?

A. Yes.

Q. And what type of work were you doing for Dealertrack in that time frame?

A. Security Operations Manager.

Q. And the responsibility concerning subpoenas, did you also have that responsibility back then?

A. Yes. I was considered the custodian of records, and I worked alongside Piyush Bhatia.

Q. When you say "custodian of records," would you please explain what that means?

A. Sure. So the custodian of records would mean all the transactions that were processed through our website, storing that information.

Q. Okay. And you said you worked with someone, Mr. Bhatia.

A. That's correct.

Q. Okay. Do you understand -- well, let me ask you this. Did Dealertrack in that time frame of 2011 have any role in assisting car dealerships obtaining credit reports?

A. Yes. We provided a secure channel for the communications.

Q. All right. And was Dublin Nissan, here in California, one of the clients for whom you provided that type of a channel?

[213] **A.** Yes.

Q. And did the channel include information that came from the TransUnion credit bureau?

A. Yes.

Q. Would I be correct in saying that you -- well, let me not even put it that way. How did the channel work to communicate data from TransUnion to Dublin Nissan?

A. Sure. So a dealer internally gets on --

MS. ELLICE: Objection, your Honor. I'm going to make a foundational objection to this testimony.

THE COURT: Overruled.

BY MR. SOUMILAS

Q. That means you can answer it.

A. I'm sorry. Can you repeat the question again?

Q. Yes. Would you please explain what you said was the channel of communication, how it worked?

A. Okay. So the dealer would, in essence, provide credit bureau codes to us. We would upload them onto our website, which would allow them a secure channel to communicate with TransUnion.

Q. All right. So in layman's terms if a dealer like Dublin Nissan wanted a TransUnion credit report, would Dealertrack help them get it?

A. Dealertrack just provided the services. They would, in essence, provide us with the credit bureau codes and we would [214] load it on their Dealertrack I.D., which is unique per dealership.

So they would -- Dublin Nissan would have provided us those credentials in order to provide that secure channel of communication between TransUnion and the dealership.

Q. And then what happened once those credentials were properly input into your system?

A. The dealer would pull credit on a consumer and then the -- the transaction would then fetch the data from TransUnion and they would display it on the screen.

Q. Got it. Now, did Dealertrack also provide data to dealerships from other credit bureaus, such as Experian?

A. Yes.

Q. And was it through the same channel?

A. Yes.

Q. Are you aware with what OFAC screening is?

(Cell phone interruption.)

THE COURT: She's never done that before.

MR. SOUMILAS: Happens to all of us. Don't worry about it.

A. Yes, I am aware of what OFAC is.

BY MR. SOUMILAS

Q. And what is your understanding of what OFAC is?

MS. ELLICE: Objection, your Honor. Foundation, and relevance from this witness.

[215] **THE COURT:** I sustain that.

BY MR. SOUMILAS

Q. Okay. Did Dealertrack itself provide any reports through this channel to car dealerships, like Dublin Nissan?

A. Can you clarify?

Q. Yes. Does Dealertrack have its own OFAC screening service?

A. No.

Q. Does Dealertrack provide any type -- let me stop and ask you to look at some documents. You said you were the custodian of records at the time?

A. That's correct.

Q. And are you aware whether a subpoena for this case, the *Ramirez versus TransUnion* case, was served upon Dealertrack?

A. Yes.

Q. And are you aware whether records were retrieved from Dealertrack to provide to us in response to that subpoena?

A. Yes.

Q. And are you familiar with those records?

A. Yes.

Q. Were those records pulled in the regular course in which you would pull records to respond to subpoenas?

A. That's correct, yes.

Q. And does Dealertrack maintain these records in the regular course of its business?

[216] **A.** Yes.

Q. Okay. I would like to show you what's in the binder in front of you as -- actually, even before I get there, if you saw these records, would you be able to identify them?

A. Yes.

Q. All right. Let's start with what is Exhibit 1 in the binder in front of you, please. There are two binders and they should be labeled 1 through 50. So look at that one.

A. Sure.

Q. Look at Tab 1, please.

A. Tab 1.

Q. All right. So you're looking at the exhibit behind Tab 1 in the first binder?

A. Yes.

Q. And could you identify that document for the record, please?

A. Yes. It's a TransUnion credit report.

MS. ELLICE: Objection, your Honor. Move to strike the response.

THE COURT: Overruled. I will allow the next question.

BY MR. SOUMILAS

Q. And was this one of the documents that Dealertrack provided in response to the subpoena in this matter?

A. It is possible, yes.

[217] **Q.** Okay. And have you worked with someone in connection with this subpoena that was provided?

A. Yes.

Q. Who was that?

A. Piyush Bhatia.

Q. Are you aware whether Mr. Bhatia also assisted in preparing -- producing, excuse me, this document?

A. Am I aware if Piyush Bhatia produced this document?

Q. Yes.

A. I am not aware.

Q. Have you seen an affidavit by Mr. Bhatia that he said he was the person originally producing these documents?

MS. ELLICE: Objection, your Honor. Counsel is testifying as to the contents of the affidavit.

A. Yes.

THE COURT: Overruled.

A. Yes.

BY MR. SOUMILAS

Q. Yes, you have seen it?

A. Yes.

Q. Would it refresh -- do you remember what it says?

A. It was a subpoena related to the TransUnion credit report and the inquiry that was done by Dublin Nissan.

Q. Okay. And was this the TransUnion credit report that was produced in response to the subpoena?

[218] **A.** Yes.

Q. Okay. Now, when you talked about this channel --

MR. SOUMILAS: Actually, Mr. Reeser, would you put up Exhibit 1?

And would you flip to the second page?

Would you mind displaying the second page and then back to the first?

(Document displayed)

BY MR. SOUMILAS

Q. Okay. Is the document in front of you, Mr. Vale, a two-page document like the one just displayed to the jury?

A. Yes, it is.

Q. Okay. And is that the information that would have gone through the channel that you just testified about from Dealertrack to Dublin Nissan?

A. Yes.

Q. Now, when information goes through this channel, I take it it's a -- we're talking about a computer channel, correct?

A. That's correct.

Q. Does Dealertrack do anything to change TransUnion's information?

A. No, we do not.

Q. Does Dealertrack add any words to what TransUnion has on its reports?

A. No.

[219] **MS. ELLICE:** Objection, your Honor. Foundation.

THE COURT: Overruled.

BY MR. SOUMILAS

Q. What was the answer?

A. No.

Q. Does Dealertrack subtract any words from what TransUnion would have in its reports?

A. No.

Q. Does Dealertrack simply convey to the dealership what TransUnion provides?

A. That is correct.

Q. All right. Now, take a look, if you will, please, at Exhibit 20 in the binder in front of you?

A. I'm sorry. Exhibit?

Q. Twenty. Two zero.

(Witness complied)

A. I'm assuming 20 is going to be a little further down this document -- I mean, this binder.

MR. SOUMILAS: So could I help the witness, your Honor?

THE COURT: You may.

BY MR. SOUMILAS

Q. I think if you look for Tab 20...

(Document was shown to the witness.)

A. Tab 20. Okay, perfect.

[220] **Q.** You got it?

A. Yeah.

Q. So, Mr. Vale, let me know, please, when you get to the exhibit behind Tab 20 in the binder in front you.

A. Sure.

(Brief pause.)

A. So I am at Tab 20.

Q. And do you recognize this document?

A. Yes. This is an Experian credit report.

Q. And was this also part of the documentation that

Dealertrack provided in response to the subpoena in this lawsuit?

A. Yes, it is.

Q. And was this, also, documentation that Dealertrack sent to Dublin Nissan in connection with the Ramirez request?

A. Yes, it is.

Q. Okay.

MR. SOUMILAS: At this point we would like to move Exhibit 20 into evidence, your Honor.

MS. ELLICE: Objection, your Honor. Foundation.

THE COURT: Overruled. Overruled. Exhibit 20 admitted.

(Trial Exhibit 20 received in evidence).

MR. SOUMILAS: And let's display that to the jury.

(Document displayed)

[221] **BY MR. SOUMILAS**

Q. Is that a one-page document, Mr. Vale?

A. On the top right-hand side it says 8 of 11.

Q. Okay. So it says 8 of 11 on a document filed on the Pacer docket with this court. So that's a court filing document.

A. Got you. It is one page.

Q. And I want to direct your attention -- actually, I'm going to correct this. That's why I wanted to get my binder.

Would you look at the binder in front of you? Do you have two pages for that document?

A. Yes, I do.

MR. SOUMILAS: I'm sorry. Let's display the second page for the sake of completeness.

(Document displayed)

BY MR. SOUMILAS

Q. Would you agree with me that the end of the second page simply says "End Experian"?

A. That's correct.

Q. Okay. So there is nothing on the second page other than to indicate that's the end of the Experian report, correct?

A. That is correct.

Q. And if we flip back to the first page for a moment, I want to direct your attention to the very bottom of that page. Under "Messages," do you see that?

A. Yes, I do.

[222] **Q.** And do you see the code 1202?

A. Yes, I do.

Q. Would you please read to the jury what it says right after that code?

A. "Name does not match OFAC PLC list."

Q. "Does not match," correct?

A. "Does not match."

Q. And that's according to the Experian report?

A. That's correct.

Q. Now, does Dealertrack do anything to change data that it receives from Experian and conveys to Dublin Nissan?

A. No, it does not.

Q. Does it add any words or subtract any words?

A. No, it does not.

Q. And would you please, sir, take a look at the exhibit Behind Tab 21 in the binder in front of have? It's the very next document.

(Witness complied)

Q. Are you aware whether this document, Exhibit 21, was also provided in this case in response to the subpoena that we served on Dealertrack?

A. Yes, that is correct.

Q. And could you identify this document for the record?

A. This document is an OFAC report from the Dealertrack website.

[223] **MR. SOUMILAS:** Okay. At this point, your Honor, we would like to move Exhibit 21 into evidence.

MS. ELLICE: Your Honor, we just renew our objection as to foundation for these documents.

THE COURT: Okay. Overruled.

(Trial Exhibit 21 received in evidence)

MR. SOUMILAS: Let's please display this document for the jury.

(Document displayed)

BY MR. SOUMILAS

Q. And, Mr. Vale, you said this document is from Dealertrack's own website?

A. Yes.

Q. So this is not information that Dealertrack got from Experian or TransUnion. It's its own information?

A. It would have gotten it from one of the credit bureau providers and it would have been generated as a report on the Dealertrack.com website.

Q. Right. And do you know which of the credit bureau providers provided this third page?

A. No.

Q. Okay. Do you know whether it was the third national credit bureau, Equifax?

A. No, I do not.

Q. All right. And would you agree with me that the bottom of [224] this page also says "OFAC Detail, No Match Found"?

A. Yes, I agree.

Q. All right. I don't think I have anything further. Thank you very much.

CROSS EXAMINATION

BY MS. ELLICE

Q. Good morning, Mr. Vale.

A. Good morning.

Q. My name is Christine Ellice. I'm counsel for TransUnion, defendant in this case.

A. Hi.

Q. Now, Mr. Vale, you just testified on direct that you work at Cox Automotive, correct?

A. That is correct.

Q. And you are currently the Security Operations Manager there, is that right?

A. That is correct.

Q. And that's a position you've held since March, 2013?

A. I have been with the company for 13 years.

Q. But my question was a little bit different. You have been the Security Operations Manager at Cox Automotive since March of 2013, is that right?

A. That is correct.

Q. And prior to being the Security Operations Manager at Cox Automotive, you were an SAP security analyst at Dealertrack?

[225] **A.** That is correct. That -- go ahead. Sorry.

Q. And that was a position you held between March 2010 and March 2013, is that right?

A. That is correct.

Q. So meaning on the day that Dublin Nissan pulled this credit report through the Dealertrack website, you were employed as an SAP security analyst at Dealertrack, right?

A. So I played a number of roles at Dealertrack. And SAP Security Administrator was part of the security operations management portion. And I had a consultant that was reporting to me, as well as an employee on the SAP administration side.

So I was doing -- I was playing both roles, security operations, custodian of records, as well as SAP administrator.

Q. Now, in March -- between March 2010 to March 2013, you weren't responsible for overseeing any business negotiations between Dealertrack and car dealerships, were you?

A. No.

Q. And you weren't responsible for overseeing any negotiations between Dealertrack and credit reporting agencies, were you?

A. No.

Q. And just to be clear, Mr. Vale, when we're talking about security in the context of your job at Dealertrack, we're talking about the security of a company's IT network, is that right?

[226] **A.** Its security -- there's a number of roles within security. It could be a security risk, risk management, vulnerability testing, network security, security operations.

So at that time I was security operations in terms of looking after the security of dealerships within our website.

Q. But just to be clear when we talk about security, you're not talking about security in any kind of counter terrorism sense, right?

A. No.

Q. You're talking about the infrastructure security of a company's software system, operations, that kind of thing?

A. I'm referencing the course of business on our website and the abnormal activities that pertains to dealership activity. Network security was managed by the network team.

Q. Now, I want to talk a little bit about Dealertrack's business model. I think it's fair to say from your testimony on direct Dealertrack is a service provider; is that accurate?

A. Yes.

Q. And Dealertrack services the automotive industry?

A. Yes.

Q. And I understood your testimony to mean that Dealertrack provides on demand software services to car dealerships; is that fair?

A. Yes.

Q. And among the services Dealertrack provides to these car [227] dealerships, it provides a channel for dealers to obtain consumer reports?

A. That's correct.

Q. And was it your testimony that Dealertrack is providing a direct channel between car dealerships and credit reporting agencies?

A. That's correct.

Q. There is no intermediary involved in that chain?

A. No.

Q. So does Dealertrack have a contract with TransUnion?

A. Good question. I'm not sure.

Q. You don't know?

A. No.

Q. You haven't seen that in your capacity as custodian of records?

A. No.

Q. You haven't seen any licensing agreements between TransUnion and Dealertrack?

A. No.

Q. You haven't seen any reseller agreements between Dealertrack and TransUnion?

A. I know we're a credit bureau reseller. We are a credit bureau reseller. I don't know whether or not they have, as a credit bureau reseller, with the three providers a contract. That would be our legal team that would retain that [228] information.

Q. So it's your testimony that Dealertrack is a reseller?

A. Yes, we are.

Q. And from your understanding, there should be a contractual relationship between Dealertrack and the three credit reporting agencies, if they are a reseller?

A. Yes. I would assume so.

Q. But you don't have any of those contracts with you here today, do you?

A. No.

MS. ELLICE: Could we put Exhibit 1 up on the screen, please, Shoma?

(Document displayed)

BY MS. ELLICE

Q. Mr. Vale, you testified on direct about this document, Exhibit 1, which has been identified as Mr. Ramirez's credit report?

A. Correct.

Q. And I think you referred to it as the TransUnion credit report, is that right?

A. That's correct.

Q. When was the first time you saw Trial Exhibit 1?

A. Last week.

Q. You didn't see it at the time it was created?

A. No.

* * *

[286] witness, the class wishes to introduce some evidence by way of stipulation and judicial notice.

And, specifically, this is evidence relating to the *Sandra Cortez versus TransUnion* litigation that started in 2005. And, at this point, we wish to do three things.

First, to enter into evidence Trial Exhibit 4. That is a TransUnion credit report for Sandra Cortez to the Elway Subaru car dealership dated June 3, 2005. It's a three-page document at Trial -- Trial Exhibit 4, Your Honor.

THE COURT: All right. 4 is admitted.

(Trial Exhibit 4 received in evidence.)

MR. SOUMILAS: The next thing we wish to move into evidence is Trial Exhibit 5. It is a file disclosure or personal credit report that TransUnion

sent to Sandra Cortez along with a cover letter that is dated May 10th, 2005. And that's Trial Exhibit 5 here, Your Honor.

THE COURT: All right. That is also admitted.

(Trial Exhibit 5 received in evidence.)

MR. SOUMILAS: And the third item of business, Your Honor, is a stipulation concerning the *Cortez* litigation history that was filed at Docket 287 of this case.

And I believe we have an agreement that the Court could provide this information to the jury that's in Paragraph 1.

THE COURT: All right. So I'm going to read the stipulation. [287]

A stipulation are facts to which the parties have agreed. And so you're to consider them as proved. Again, to streamline the case, the parties have agreed that these facts that I'm going to read to you are true:

In October, 2005, plaintiff Sandra Cortez filed a lawsuit in the Federal Eastern District of Pennsylvania against TransUnion for violations of the Fair Credit Reporting Act, alleging that TransUnion confused Ms. Cortez's identity with the identity of someone with a similar name who was on the OFAC specially-designated nationals list; failed to correct problems with her credit report, and failed to disclose to her any information about OFAC in her file disclosure.

TransUnion defended the case on the grounds, among others, that its OFAC product was not governed by the Fair Credit Reporting Act, and, therefore, TransUnion did not include it in its

disclosures to consumers or allow consumers to dispute the OFAC information.

Ms. Cortez argued that the product was of governed by the Fair Credit Reporting Act, and the District Court agreed. The Court's ruling was the first ruling to so hold, that an OFAC product could be governed by the Fair Credit Reporting Act, if sold by a consumer reporting agency.

In April 2007, a jury found in favor of Ms. Cortez and against TransUnion. Based upon the Court's ruling, the jury found TransUnion liable for its failure to treat its OFAC [288] product as governed by the Fair Credit Reporting Act, including maintaining reasonable procedures for achieving maximum possible accuracy in consumer reports, disclosing OFAC information to consumers, and for disputing OFAC information. An Appellate Court upheld the jury's verdict in August 2010.

Ms. Cortez has been fully paid on her claim, and she is not part of the class or any other aspect of this litigation. You are only to consider this information about the *Cortez* case as background for understanding events prior to the January 1 through January 26, 2011 class period here.

All right. Are you ready for your next witness?

MR. SOUMILAS: Thank you, Your Honor. Yes, we are. Our next witness is Colleen Gill.

COLLEEN GILL, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please say your name and then spell your last name for the record.

THE WITNESS: Sure. Colleen Gill, and the last name is spelled G-I-L-L.

THE COURT: Ladies and gentlemen, Ms. Gill is one of those witnesses I told you about just yesterday, one of the witnesses that was on both parties' witness list. So, in order to avoid Ms. Gill having to come back again for the defendants' presentation of their case, both sides are going to use Ms. Gill for their direct and their cross-examination at the same time.

[289] All right. You may proceed.

MR. SOUMILAS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SOUMILAS:

Q Ms. Gill, good morning.

A Good morning.

Q Where is your home, ma'am?

A I live outside of Chicago in a suburb by the name of Park Ridge.

Q Okay. And, do I understand that you were previously employed by TransUnion?

A Yes.

Q You are not --

A I was --

Q I'm sorry. Please answer.

A Yes, I was employed at TransUnion for 26 years.

Q Thank you. But, presently, you are not employed by TransUnion?

A No. Presently, I'm not employed by TransUnion.

Q What do you do now?

A I am a self-employed project consultant. So right now I'm focusing on healthcare consulting.

Q All right. I want to talk a little bit about your time with TransUnion. When did you start there?

A In November of 1984.

[290] **Q** And when did you stop working for TransUnion?

A I left in November of 2010.

Q So if my math is right, 26 years with the company?

A Yes. It was shortly after my 26th anniversary, I left.

Q Could you tell us a little bit about the type of work you did at TransUnion over all those years?

A Sure. When I first started at TransUnion, I was in a data acquisition role. And in that role, our focus was to load data to the TransUnion database.

After a few years, I moved into a product management role, where we were focusing on developing new products to meet our customers' needs.

Q What was the highest title you held at TransUnion?

A The highest title would have been a director, and it was my title when I left in November of 2010.

Q Would you please explain to us, director of what?

A Director of product development and management. It had a different name when I left, but that is basically what it was. Product development and management.

Q And when you say "products," at TransUnion, am I correct that products are information?

A Yes.

Q So it's the selling of information on credit reports, typically, correct?

A Um, well, it is information products or data products. [291] And there are credit reports which would be governed by FCRA. And then there were also a set of solutions that weren't governed by the FCRA.

Q Okay. I want to just start with some basic information about the company, since you worked for them for so long. And we'll get more specific to the products at issue in this case.

But, do you recognize TransUnion as one of the big three credit reporting agencies in this country?

A Yes. I would recognize TransUnion as one of the big three.

Q And, what are the other two?

A Experian and Equifax.

Q Now, I believe the jury has also heard the term "credit bureau." Is that same thing? Is it synonymous?

A Yes. I would say so.

Q And, you said that one of the things that TransUnion sells is credit reports. Correct?

A Correct. One of the things they sell is credit reports.

Q Now, you made a distinction between sales of products that you said were governed by the FCRA and those that are not. Correct?

A That's correct.

Q So, when you say "the FCRA," we're talking about the federal law, the Fair Credit Reporting Act?

A That's correct.

[292] **Q** Okay. So there's a set of informational products that TransUnion considers to be governed by the Fair Credit Reporting Act?

A That's correct.

Q And TransUnion knows that act because it is the primary law that governs that part of its business. Correct?

A That's correct.

Q You have heard of the standard of assuring maximum possible accuracy on the information on credit reports. Correct?

A I'm sorry. Could you repeat that, please?

Q Yes. Of course.

With respect to credit reports, with your years at TransUnion, did you hear of the standard of assuring the maximum possible accuracy of the information on the credit reports?

MR. LUCKMAN: Your Honor, object to the form. This is a partial statement.

THE COURT: I'll allow her to answer that.

THE WITNESS: Yes. TransUnion's goal was to always provide the most accurate information possible to people that were purchasing their products.

BY MR. SOUMILAS:

Q All right. You would agree with me that the people purchasing TransUnion's credit reports have an expectation that [293] they are purchasing accurate information from TransUnion?

A Yes. That would be correct.

Q And is it your understanding also that consumers wish to have accurate information sold to banks or whoever they might be doing business with?

A Yes. That's correct.

Q All right. Now, am I correct that when we are talking about the credit report side of the business, credit reports are furnished by TransUnion to banks. Correct?

A Yes.

Q And what other types of TransUnion customers typically purchase credit reports?

A Insurance companies would be another example.

Q Okay. Any other type of companies that you know?

A Other financial services providers, not just banks.

Q Credit card companies?

A Right.

Q Mortgage companies?

A Right.

Q People who extend credit for car loans?

A Correct.

Q Okay. And am I correct that credit reports at TransUnion have several types of information generally on them?

A Yes. There's a couple of different sections of data included on a credit report.

[294] **Q** So that's what I'd like to discuss next. Just to outline the types of data that you would typically see on a TransUnion credit report.

Would personal information about the consumer be one of those sections?

A Yes. Personal information is included in the credit report.

Q Thank you. And when we say "personal information," what type of information are we talking about?

A Name, address, Social Security number.

Q Date of birth, when it's available?

A Yes.

Q Prior address, when it's available?

A Yes, prior address.

Q And when we talk about names, if TransUnion were furnished, by one of its suppliers, first, middle, and last name of a consumer, it would maintain that, typically?

A. Clarify what you mean by "maintain it."

Q Keep it in its database from where it would sell credit reports.

A I'm a little confused by that question.

Do you mean would we keep a record of the information that was sent to us to request a credit report?

Q Hmm, no. I'm sorry. Let me try to clarify the question.

A Thank you.

[295] **Q** Do I understand that TransUnion gathers information from various sources to keep in its credit reporting database?

A Yes.

Q So --

A We have data contributors that contribute data which makes up the TransUnion database.

Q So we can use me as an example. If one of my banks were a data contributor to TransUnion, would TransUnion get information about me?

A If you had an open account with them, yes.

Q Sure. So let's say I had an open account, and the bank had my street address and my Social Security number and my date of birth.

Would that be the type of information that TransUnion would gather from that contributor?

A I think you are asking me about data contribution guidelines, and that really wasn't my area of expertise.

There's something called the metro format, which all three credit bureaus require when data is contributed. And I don't know, off the top of my head, what data fields would be included. I'm sure it was -- you know, the identifying information and then the information about the trade or the account.

Q Okay. Fine.

MR. LUCKMAN: Your Honor, excuse me. Before -- before [296] he asks another question, our feed died on the --

THE COURT: Oh, your realtime?

MR. LUCKMAN: Yes.

THE COURT: Okay.

MR. LUCKMAN: And because of my hearing, I would like to have that.

THE COURT: All right. Are you having trouble --

MR. LUCKMAN: I'm hearing fine.

(A pause in the proceedings)

BY MR. SOUMILAS:

Q Okay. So I think we were speaking about generally the collection of personal identifying information as one type of information that goes on a credit report. Do you recall that?

A Yes.

Q And you may not know every data field, but you think generally TransUnion would collect name, street address, Social Security number, date of birth?

A Once again, I feel a little uncomfortable with this, because you're really asking about data acquisition formats, and that really wasn't my area of expertise when I left.

Q Okay. Fine. Let's talk about things that you learned through the years working for the company.

Is another area of information that goes in credit reports public records that might be associated with particular consumers?

[297] **A** Yes. Or public records included on credit reports.

(Reporter interruption) **T**

HE WITNESS: There are public records included on credit records, that's correct.

BY MR. SOUMILAS:

Q And when we say "public records," would you explain to the jury what that is?

A A public record, an example would be a bankruptcy.

Q All right. So, also, if a consumer has maybe a tax lien, would that be in that part of the credit report as well?

A I -- I believe if tax liens are collected, they're displayed on a credit report, as well.

Q All right. So when you say "public records," is it, generally speaking, government records that might be filed with some government agency or courthouse?

MR. LUCKMAN: Objection, Your Honor. It is vague, and she's already demonstrated it is not her area. We are going to have another witness who will know this later.

THE COURT: Overruled.

You can answer it if you can.

THE WITNESS: I'm -- I believe they are court records. I'm not really familiar, though, with the process of collecting them.

BY MR. SOUMILAS:

Q Okay. That's fine. Let's go to the next area that would [298] typically be in a TransUnion credit report.

Are you familiar with trade lines?

A Yes, I am.

Q Okay. And would you explain to the jury what trade lines are?

A "Trade lines" is an industry term for an account with a credit granter.

Q So, if I have a credit card with, I don't know, name your bank, Bank of America, and Bank of America supplied that information to TransUnion, it would show up on a credit report about me?

A If the account was open, in all likelihood, it would appear on your credit report.

Q And what other types of accounts might show up as trade lines?

A A mortgage or an installment loan.

Q Okay. So, you were in the courtroom just now, Ms. Gill, when we read the stipulation about the *Cortez* litigation. Correct?

A Yes.

Q I would like to direct your attention to an exhibit that was admitted into evidence right before that stipulation, which is No. 4 in the binder in front of you.

If you could please flip to Tab 4 and look at the document immediately behind it.

[299] (Request complied with by the Witness)

Q Are you there?

A Yes, I'm here.

Q All right.

MR. SOUMILAS: Mr. Reeser, would you mind putting Exhibit 4 up for the jury?

(Document displayed)

BY MR. SOUMILAS:

Q And, focusing on the top section of the report, underneath the name "APPLICANT, SANDRA CORTEZ," do you see what it reads after a long sequence of numbers (Indicating)?

(Witness examines document)

A So, just to make sure I'm following you, are we talking about underneath the section where it says "TRANSUNION CREDIT REPORT"?

Q I'm sorry.

MR. SOMILAS: So what we have up on the screen right now needs to be adjusted. Let's go a little higher, please.

BY MR. SOUMILAS:

Q And I'll help you with a pointer as to what I'm pointing to.

A Okay. Thank you.

(Document displayed)

Q So right there at the top (Indicating), under the name "SANDRA CORTEZ," we have the heading "TRANSUNION CREDIT [300] REPORT." Do you see that?

A Yes, I do.

MR. SOMILAS: And now let's focus on a little further down, where you were before, Mr. Reeser. So, blow up that section, but all the way down to "SPECIAL MESSAGES," if you would.

(Document displayed)

BY MR. SOUMILAS:

Q So right underneath the heading "TRANSUNION CREDIT REPORT," we see things like "SANDRA JEAN CORTEZ," and then there's an address there, in Highland Ranch, Colorado, a date of birth on the right-hand side, where I'm pointing now.

Do you see that?

A Yes.

Q There's a Social Security number, but it is blocked out for privacy purposes in this litigation. My question is: Is this the type of personal identifying information that you testified about just a few moments ago?

A Yes.

This would be the identifying information on a credit report.

Q Got it.

MR. SOUMILAS: And now I want to go underneath the "MODEL PROFILE" section, have that section and the trades blown up for the jury, please.

(Document displayed)

[301] **BY MR. SOUMILAS:**

Q And, Ms. Gill, would you agree with me that, under the model profile, that's typically where we see the credit score?

A Yes, that's correct.

Q So that would be right there where I'm pointing now at "721"?

A Yes.

Q And then immediately underneath that, it says "TRADES." Do you see that?

A Yes, I do.

Q And is that the type of information that you identified just a moment ago as "trade lines"?

A Yes. Or accounts.

Q Okay. So, the first one we see there appears to be some, like, Discover credit card? Is that what it is?

A Yes. That is a revolving card.

Q All right. Thank you for explaining that.

Now, are you aware that, at some point along your years at TransUnion, TransUnion also decided that it was going to communicate or furnish information about OFAC?

MR. LUCKMAN: Objection, Your Honor. It is an incomplete --

THE COURT: Well, he just asked if she was aware. If you can answer.

THE WITNESS: Yes. I was aware that TransUnion was [302] going to offer an OFAC service.

BY MR. SOUMILAS:

Q Right. And, eventually, you became the OFAC product manager, didn't you?

A Yes. I did.

Q Okay. So let's walk the jury through a little bit of that history.

Do you know when TransUnion first began offering this OFAC alert service?

A It went into production, I believe, in September of 2002.

Q Okay. And when it went into production, did TransUnion have this product in its category of products that were regulated by the Fair Credit Reporting Act? Or did it have it in the other category that you testified about previously?

A TransUnion's Legal and Compliance Department determined it was non-FCRA data.

Q Okay. So, what is the other department that it goes in when it's non-FCRA data?

A Well, I don't know that I would call it a department, but TransUnion has a number of databases. So we have the FCRA-governed databases that credit reports come from. And then there are other databases -- I can't remember their names, they may have had some acronyms -- that aren't governed by FCRA.

Q Okay. So, let me get this right.

[303] Initially, TransUnion's lawyers decided that the OFAC service should go in some other database, not the Fair Credit Reporting Act database.

A Well, they made a determination, you know, based on a lot of research, that we couldn't -- it wasn't FCRA-governed, and it wouldn't be added to the credit database. It would be stored in a separate file that we were getting from a vendor.

Q Okay. You're not a lawyer, right, Ms. Gill?

A No, I'm not.

Q And you're aware of the specific legal research that the lawyers engaged in at that time?

A No. I'm only aware of the decision that they, you know, came to.

Q Right. Because you said it was a lot of legal research. So I'm wondering if you know specifically what it was.

A No, I don't. I don't know. There was a process that was conducted to determine, you know, a lot of the Legal and Compliance questions. But, you know, they had done their research, and they got back to the product development team with, you know, the answer that they determined it wasn't FCRA-regulated data.

Q Who was the head of the Legal Department at the time?

A I -- I don't know if it was John Blenke or not. I don't know if he was around in 2002 when we launched the product.

Q Do you know who Denise Norgle is?

[304] **A** Yes, I do.

Q Who is that?

A She's -- I don't know what her title is, but she is a lawyer on the TransUnion legal team.

Q Are you aware whether she is a high-level lawyer for the corporation?

A I'm not aware of her exact title.

Q Do you know whether she is the general counsel of the corporation?

A No, I don't know.

Q Okay. At any rate, in 2002, you weren't managing this product. You were just assisting with the OFAC service?

A Yes. I wasn't the primary person, but I took over managing it after it was launched because the primary person left the company.

Q Got it. And, when, approximately, did you take over as the primary person managing the OFAC product?

A I really can't remember the exact date.

Q Could you approximate without guessing?

A Sometime after it was launched. That's the only thing I can remember.

Q Would the mid-2000s sound about right?

A I really don't want to guess on that.

Q How long were you the primary manager of the OFAC product at TransUnion?

[305] **A** From sometime after its launch until I left in November of 2010.

Q Were you the product manager of the OFAC product in the time that the *Cortez* litigation occurred?

A Yes, I was.

Q And, in fact, you gave testimony in that litigation. Correct?

A Correct. I was deposed and I gave testimony at trial.

Q And did you hear when we just read the stipulation concerning the *Cortez* litigation to the jury, that that litigation started in October of 2005?

A I -- I didn't remember the exact dates, but once it was read, my memory was refreshed on the timing of the *Cortez* trial.

Q So, would you agree, now that you had your memory refreshed, that in the mid-2000s, you were the product manager for the OFAC product?

A Well, based on everything, it must have been between 2002, when the product was launched, and the *Cortez* trial that I took over managing the product.

Q Okay. And you maintained the management responsibilities through November of 2010 when you left TransUnion. Correct?

A That's correct.

Q All right. So could you please tell us some of the basic duties and responsibilities that you had as the OFAC product [306] manager for the years that you were in charge of that product?

A Sure. In addition to OFAC, I did manage other products as well. But, basically, what a product manager does is it evaluates new concepts that typically come to us from a customer. There's some unmet need out in the marketplace.

And if the concept is approved by Legal and Compliance and we move forward with development,

I would be managing the product after it was launched.

So I would be answering questions primarily from salespeople. I would be updating marketing materials, making any changes that were deemed unnecessary to -- deemed necessary to the product.

Q And, would you know, for example, where information concerning the OFAC product would come from?

A Yes. We -- TransUnion had entered into a relationship with a third-party vendor by the name of Accuity, and they were furnishing us the OFAC information.

Q And, broadly speaking, would you also know how the product was supposed to deliver a match to a potential credit applicant?

A I'm a little confused by the wording, because even though the information was returned with a credit report, the searches were entirely different. And the information for OFAC was returned with a credit report, but as far as OFAC went, it was a name-only-based search. Where a search for a credit report [307] would be all the identifying information that the customer provided to us in the inquiry.

Q So, that's what I was getting at, whether you were aware that the OFAC product was a name-only search, as you put it.

A Yes. I was aware of that.

Q Let's break that down just a little further.

You said a moment ago that TransUnion used Accuity, Inc., as the company from which it retrieved data concerning OFAC? Correct?

A Accuity was our vendor for the OFAC solution.

Q So, are you aware whether the OFAC list is -- do you know what "OFAC" stands for?

A Yes, I do.

Q What is it?

A Office of Foreign Assets Control.

Q And do you know what that is, that office?

A I know it's a division of the U.S. Treasury.

Q And, am I correct that, when TransUnion obtained OFAC information during the years that you were product manager, that it did not go and get that information directly from the U.S. Department of the Treasury?

A That's correct. We were using Accuity to get the OFAC file.

Q And, Accuity was TransUnion's sole source of OFAC file information?

[308] **A** Yes. That's correct.

Q And that was from the very beginning through 2010, when you left the company. Correct?

A That's correct.

Q Got it. And, let's clarify a little bit further this name-only search procedure.

Would I be correct, Ms. Gill, that once a consumer submitted a credit application, and then one of TransUnion's customers wanted a credit report, there

would be some type of an inquiry by that customer for a credit report?

A That's correct.

Q And, typically, that customer would provide to TransUnion information about the consumer who's making the credit application?

A That's correct.

Q So, in the report that we just saw for Sandra Cortez, the Elway Subaru dealership would provide information about the name of the applicant, correct?

A Although I can't see it on this copy, they would have had to send us the name, along with other identifying information.

Q Right. So the other information typically is Social Security number, correct?

A. That's correct.

Q. Typically, a date of birth, when they have it. Correct?

A I don't know in how many cases, but, you know, always at [309] least name and address. That would be the minimum to pull a credit report. And then, hopefully, a Social Security number. And, you know, date of birth was also optional.

Q Certainly, there are data fields that the customer could fill in for date of birth, Social Security number, name and address, correct?

A Yes.

Q So when they want a TransUnion report, they could fill in all that data and give it to TransUnion and say: Give us a report on Sandra Cortez at such and

such an address, such and such Social Security number, such and such date of birth.

Correct?

A That's correct.

Q And then once that request comes to TransUnion, TransUnion uses that information to pull things like the trade lines. Correct?

A Well, it would use that identifying information to pull a credit report, yes.

Q Right. So the credit report would include information like the Discover credit card account that we saw and other things that you called the trade lines. Correct?

A Yes, trade lines or accounts.

Q So, like the car loans, the mortgages, the things that you described as trade lines. Correct?

A That's correct.

[310] **Q** And TransUnion would use all of the information that the customer provided to make a link between the applicant and whatever information was in the credit history that TransUnion had about that applicant.

A Based on the customer's, you know, input, which is identifying information, TransUnion would use their search logic to pull the credit report.

Q And it would use all the information that the customer provided. Correct?

A Yes.

Q Yeah. But, then, when it came time to -- so would I be correct that some customers also wanted

TransUnion to provide an OFAC search for that same applicant?

A Yes, OFAC could be returned with a credit report.

Q All right. So let's go back to that Exhibit 4 for a moment.

(Request complied with by the Witness)

Q And, the first page.

MR. SOUMILAS: Would you put it up, Mr. Reeser?

(Document displayed)

BY MR. SOUMILAS:

Q And, now, Ms. Gill, I would like us to focus in the middle part of the first page underneath "SPECIAL MESSAGES."

Would you take a look at that?

(Witness examines document)

[311] **A** Yes.

Q So this is a situation where a customer is requesting the OFAC product along with all the other credit information for Ms. Cortez. Correct?

A That's correct.

Q And the OFAC hit, if there is one, would show up under the "SPECIAL MESSAGES" field?

A Yes. The OFAC information, whether it was a clear message or a hit message, would be returned in the "SPECIAL MESSAGES" section on the printed credit report.

Q This one that we are looking at here on Exhibit 4 --

MR. SOUMILAS: Would you please blow up "SPECIAL MESSAGES" for the jury to see.

(Document displayed)

BY MR. SOUMILAS:

Q Was this a hit or a clear?

A This was a hit because it says "INPUT NAME MATCHES NAME IN THE OFAC DATABASE," and then underneath it you will find the information that was present in the OFAC Treasury Department database entries that potentially matched.

Q Okay. So, this language that says "INPUT NAME MATCHES NAME ON OFAC DATABASE," this is the language that was used at the time in 2005 to explain a hit?

A Yes, it was.

Q And the information underneath is information that comes [312] from Accuity to TransUnion, correct?

A That's correct.

Q And here it says that there is a hit to a Sandra Cortes Quintero of Cali, Colombia, correct?

A Yes, that's correct.

Q Why are there four separate hits, do you know?

A Most likely there were four entries in the OFAC database.

Q All right. And they're all for the same person?

(Witness examines document)

A A similar -- similar names.

Q It does appear that all four of these entries relate to a person that has a date of birth of June 21, 1971. Correct?

(Witness examines document)

Q Let me help you.

A Okay.

Q It is a lot of data. Do you see it now?

A The first one does, and I don't see it in the second. Oh, there it is.

Q And maybe there's the third (Indicating)?

A Yes.

Q And how about there (Indicating), the fourth?

A Yes.

Q Okay. Now, TransUnion knew, if you look further up on that credit report under the "PERSONAL IDENTIFYING INFORMATION," that Sandra Cortez's date of birth was May 1944.

[313]

Is that correct?

MR. SOUMILAS: Mr. Reeser, would you show the section under "TRANSUNION CREDIT REPORT," the top section?

MR. LUCKMAN: Your Honor, I think we are going pretty far down the road on this document on the *Cortez* case, following the stipulation --

THE COURT: I'll allow the questions.

(Document displayed)

BY MR. SOUMILAS:

Q So, am I right, Ms. Gill, that the date of birth for the applicant, Sandra Cortez, was May, 1944?

A That's the date of birth that was in the TransUnion database.

Q Got it. And it looks like TransUnion had data about Sandra Cortez in its database since the 1980s, right? 1982 (Indicating)?

(Witness examines document)

A Yes. That would be the in-file date.

Q All right. So I just want to go back to this name-only matching that TransUnion was using with Accuity. When we say "name-only," it means that we're not using things like the date of birth to look whether there's a potential hit. Correct?

A That's correct.

Q And we're not using the date of birth at any point, correct?

[314] **A** That's correct. Because the OFAC database, the only consistent element in each one of those records is name. The date of birth was only there in select cases.

Q Do you know what percentage of cases had the date of birth?

A No, I don't. But I know it wasn't in every case.

Q Are you aware whether TransUnion actually researched how frequently the date of birth was available in the OFAC database?

A I believe there was some analysis done.

Q Are you aware that it was over 80 percent?

A No.

Q Okay. You didn't do that analysis, correct?

A No. No, I didn't.

Q We'll discuss that later. But for now what I want to know is -- just establish that the date of birth was one of the fields that was just not used to compare the applicant to the data on the OFAC list. Correct?

A No. Because, once again, this wasn't determined to be an FCRA product. And the date of birth is part of the FCR-regulated database.

Q Okay. So that's a good point.

TransUnion, at this time, believed that the product was not one of the credit report database products. Correct?

A That's correct.

[315] **Q** So it didn't follow the FCRA procedures that it would for information coming from the FCRA database.

A TransUnion's Legal and Compliance Department determined that OFAC wasn't FCRA-governed data.

Q So, for that reason, TransUnion was not following the standards that it would use for FCRA-governed data?

A That's correct.

Q It was not using date of birth or Social Security number or any address information, or anything else, other than name, to match an applicant to a potential hit on the OFAC list.

Isn't that also correct?

A That's correct.

Q Now, even after this information was pulled from Accuity concerning the hit, no one at TransUnion compared any of the data in the "SPECIAL MESSAGES" to the data in the personal information of the applicant. Correct?

A No. When an inquiry came in to us, requesting OFAC, with a credit report, for example, the, you know, full identifying information would search the CRONUS database. And then concurrently, only the name would be used to search the OFAC file. And then the data would be returned, you know, in tandem with each other.

Q That's what I'm trying to get at.

So when the data is returned in tandem with each other, at that point, the report goes out to the customer, correct?

[316] **A** That's correct.

Q So there isn't a part of the process where we stop, before sending the report to the customer, and cross-reference things like dates of birth on the OFAC list, when they're available, to date of births in the CRONUS TransUnion database when they're available.

A No. We're not looking at the CRONUS database, because, once again, Legal and Compliance did not feel as though this was FCRA-governed.

Q Right. And with respect to that, since the company was of the view that this was not FCRA-governed information, also when they send personal credit reports to the homes of consumers who asked

for their reports, there wasn't any -- any information about OFAC. Correct?

A Right. As part of the policy review prior to developing the solution, since Legal and Compliance determined it wasn't FCRA data, it wouldn't need to be disclosed on the report returned directly to the consumer.

Q Right. So that was a deliberate decision made by the company at its Legal Department and Compliance Department?

MR. LUCKMAN: Objection, Your Honor.

THE WITNESS: That's correct.

THE COURT: Overruled.

BY MR. SOUMILAS:

Q Who was the head of Compliance?

[317] **A** I'm sorry. I don't remember who the head of Compliance was at the point it was developed. And I don't know who it is today, if that's your question.

Q At the point of the Cortez case, do you remember who was the head of Compliance?

A No. I'm sorry. I don't.

Q Okay. Let's take a look just for a moment at Exhibit 5, which is in front of you. That is another exhibit that was entered into evidence in connection with the *Cortez* litigation history.

(Witness examines document)

Q And would you agree with me that, beginning on Page 3 of that exhibit, that is the type of thing that we call a personal credit report?

(Witness examines document)

A I want to stipulate that I'm far less familiar with the direct-to-consumer version of a credit report than I am with the version of the credit report that one of our customers would have gotten.

Q Got it.

A So I'm not really familiar with the direct-to-consumer version, which is the version in No. 5.

Q Okay. So we could agree that this is not -- Exhibit 5 is not the version that a TransUnion customer would have gotten. It would have been something that goes to consumers at their [318] home.

A That's correct.

Q And would you agree with me that pursuant to the procedures at the time that you were working there, no OFAC information would ever be included in this type of a report (Indicating) that went to the consumer, that we see as Exhibit 5?

A Right. That's correct.

Q That is correct. And that is from the beginning of whenever you took over concerning the OFAC product in the early 2000s through November 2010, when you left.

A Right. From the time the product was launched in 2002 until the time I left, it was not being included on the consumer version of the report.

Q And I don't want to belabor the point, but just for the record, would you agree with me that Exhibit 5, which is the Cortez file disclosure, doesn't have a single word about OFAC in it, in any of its 16 pages?

(Witness examines document)

A Just give me a minute to look at this.

Q Sure. Take your time.

(Witness examines document)

A I have looked through it, and I don't see any section that has OFAC messages.

Q Okay. And that's consistent with the practice, as you [319] understood it, at least?

A That's correct.

Q Now, you said you were familiar that Sandra Cortez did bring a lawsuit against TransUnion in 2005. Correct?

A That's correct. I was deposed by you, and I testified at the trial.

Q And you were there throughout the trial in Philadelphia in 2007, correct?

A That's correct.

Q Would you agree with the statement in the stipulation that we read into the record, that Ms. Cortez claimed in that lawsuit that TransUnion violated the FCRA, allegedly because TransUnion confused Ms. Cortez's identity with the identity of someone with a similar name who was on the OFAC specially-designated nationals list?

MR. LUCKMAN: Objection, Your Honor. We have gone through the trouble of having a stipulation.

THE COURT: The stipulation also said that they may be allowed to ask witnesses --

MR. LUCKMAN: Excuse me?

THE COURT: They would be allowed to question witnesses about it --

MR. LUCKMAN: About the stipulation?

THE COURT: No. About the *Cortez* case, if you look at Paragraph 2.

[320] **MR. LUCKMAN:** Yes.

THE COURT: That is what he is doing.

MR. LUCKMAN: Okay.

MR. SOUMILAS: Thank you, Your Honor.

BY MR. SOUMILAS:

Q So you would agree with that statement, that that was one

of Ms. Cortez's allegations that TransUnion confused her

identity with someone with a similar name on the OFAC

specially-designated nationals list?

A Yes. That's what I remember hearing being read.

Q Got it. Do you have an understanding whether Mr. Ramirez in this case is claiming that his identity was confused with someone on the OFAC specially-designated nationals list?

A I -- I guess I -- I assume that.

THE COURT: Now I'm going to actually do my own objection.

She hasn't worked there since 2010. So I don't know why this witness -- the claim is what the claim is.

MR. SOUMILAS: She gave a deposition in this case, Your Honor, the Ramirez case. So she's familiar with it. But I can move along.

THE COURT: Yeah, move along.

BY MR. SOUMILAS:

Q Would you also agree, focusing on *Cortez*, that Ms. Cortez alleged in that lawsuit that TransUnion failed to disclose to [321] her any information about OFAC in her file disclosure?

A Yes, it was not part of the disclosure.

Q And you recall that there was a verdict in Philadelphia in the *Cortez* case, correct?

A Yes. There was some type of monetary award.

Q Is it your -- you were there for the verdict?

A I think I had already left to go back home, but I think I was told about it afterwards.

Q As the head of the OFAC product, were you told that the jury found against TransUnion on those allegations that I just read to you from the stipulation?

A Well, I knew she got a monetary award, but I don't really know the legal details or ramifications. I'm sure someone in Legal was notified, but I -- it wasn't shared with me.

Q Okay. Is it your understanding that Sandra Cortez has won her case against TransUnion?

A Um, I know she got, um, you know, a monetary settlement. So, I don't know if you only get those if you win a case.

Q Okay. So, after you participated in that case, no one told you who won or lost the trial?

A I knew there was a monetary settlement. And if there were discussions taking place, I was not part of them.

Q Yeah. And I don't mean to be nitpicky, but it's important.

Was it a monetary settlement? Or was there a jury verdict [322] in favor of Ms. Cortez, and against TransUnion, to your

knowledge?

MR. LUCKMAN: Your Honor, I'm going to object to the form of the question.

THE COURT: Overruled. It's what her understanding is.

Right? What you were told.

THE WITNESS: I know there was a jury. And I know they came to a decision and awarded her some money. So, I don't really know how to describe that.

BY MR. SOUMILAS:

Q Okay. Let's focus on the period after the jury verdict.

A Okay.

Q So that was in 2007, you recall, the jury verdict? Correct?

A I think it was the spring of 2007.

Q You are correct.

And you stayed on with the company through the fall of 2010.

A That's right.

Q And you continued to be the OFAC product manager for that product through the end.

A Yes. I was managing the product until I left.

Q And am I correct that, focusing on this time frame of after the verdict in 2007 through the time you left the company [323] in the fall of 2010, that TransUnion continued to use Accuity to get OFAC information?

A Yes. Accuity continued to be the vendor. And they were still the vendor when I left in November of 2010.

Q Got it. And TransUnion continued to not include any information about OFAC in the personal credit reports that it sent to consumers at their homes when they requested it. Isn't that right?

A At the time I left, I don't think OFAC was being disclosed on the reports delivered to the consumer.

Q Am I correct that, between the verdict in 2007 and the time you left in 2010, you are not even aware of any discussions at TransUnion to disclose the OFAC information to consumers?

A Well, I think I should clarify something. I really wasn't involved at all in Consumer Relations. So there could have been discussions. I was not part of them, no.

Q You were not familiar of any efforts taken by TransUnion to disclose OFAC information to consumers between the time of the Cortez verdict in 2007 and the time you left in 2010. Correct?

A I was not aware of any efforts, no.

Q But you were the product manager for this product.

A Yes. But Consumer Relations, you know, is really kind of self-contained. They do all the work on their version of the [324] credit report, themselves.

Q Well, you did do some work for Consumer Relations towards the end of your years with TransUnion, didn't you?

A Could you explain that to me?

Q Yes. Didn't you have some role in working with TransUnion to handle disputes from consumers concerning OFAC towards the end of your career at TransUnion?

A Yes, there was a procedure put in place.

Q And the procedure involved you, personally.

A Yes, it did.

Q Okay. And am I correct, this is towards the end of your career with TransUnion?

A I'm not sure when we started blocking the names, if that's what your question is.

Q That is my question. So let's talk a little bit about your role in handling consumer disputes that came to TransUnion through Consumer Relations about one of these OFAC alert products. Okay?

A Okay.

Q Do I understand, Ms. Gill, that information from Consumer Relations about the consumer who's disputing would be forwarded to you personally?

A Yes. After Consumer Relations did some vetting on the -- if you want to call it the claim of an OFAC hit.

Q And this was a new procedure put in place, correct?

[325] **A** Yes, it was.

Q So back in the days of the *Cortez* case, TransUnion wouldn't process disputes from consumers concerning OFAC information in particular.

A To my knowledge, there weren't any requests for disputes about OFAC.

Q Well, you said OFAC was not disclosed to consumers anywhere back in those days. Correct?

A Right.

Q And am I correct that there was no procedure at TransUnion that you were aware of to handle disputes about OFAC should they occur?

A That's correct.

Q Okay. So the procedure came in place later. Correct?

A Yes.

Q And then you were personally involved, and that's towards the end of your career at TransUnion.

A That's correct.

Q And am I correct that Consumer Relations would let you know: Such and such a consumer brought a dispute to our attention, and they say they're not on the OFAC list, for example?

A That's correct.

Q And you would review that dispute personally, wouldn't you?

[326] **A** I would review the request, yes.

Q And you would look at the actual OFAC list maintained by the U.S. Department of the Treasury, in that looking-into process that you engaged in?

A Yes. I would look on the Treasury website.

Q And you would look for information made available by the U.S. Treasury on its website concerning the person who's considered a match to that consumer. Correct?

A Correct. And that was the same information that we were returning in the case of a match.

Q Right. And you would use your judgment to try to figure out whether there was an actual match or whether there was some mismatch, if you will?

A Correct. And Consumer Relations was doing some vetting on their end with identifying the customer. And then once they did their identification, they would send the request to me.

Q And you would look at all the information that the Treasury Department had made available for that specially-designated national. Correct?

A Right. As part of the entry, which was also returned in the case of a hit.

Q And, in your experience, when you located some information on the Treasury Department's list that related to the hit that came back from that consumer, you would instruct Consumer Relations to block that hit from happening in the future. [327] Correct?

A No, that's not really the way it worked. If we determined the name should be blocked, I would write up a service request, and the IT people were somehow blocking it in the table.

So it wasn't Consumer Relations that was doing the blocking. It was a different group of IT people.

Q Okay. So let's get this sequencing correct. Consumer Relations would get the dispute in the first instance, correct?

A Yes.

Q Forward it to you for your review of the Treasury Department's information. Correct?

A Correct.

Q And your judgment call on what was a good match or not a good match. Correct?

A That's correct.

Q And then when you determined that the match was not a good match, you would forward it on to technical people to block that from happening again in the future.

A Yes.

Q And you --

A So instead of a hit message, they would be getting a clear message.

Q Got it. And when we say "a block," that means that the hit message would just be blocked from ever appearing in the [328] future?

A That's correct.

Q And you did that for every single one of the cases where you found the name on the Treasury list, correct?

A No. That's not correct. Actually, there was a lot of requests that came in that weren't actually hits. I don't know why, but people would say: I don't like the

fact that an OFAC message is on my credit report, even though it was a clear.

So there were a number of more requests -- there were more requests that wouldn't have matched, and I didn't end up submitting a request, than, you know, actual names that needed to be blocked. So the majority of the requests were really not legitimate.

Q You remember giving a deposition in this case, the Ramirez case, don't you, Ms. Gill?

A Yes, I do.

Q And, that deposition took place in Chicago. Am I right?

A That's correct.

Q And that was in -- let's see if I could get the date for this. December 2013. Does that sound right?

A That's correct.

MR. SOUMILAS: May I approach, Your Honor?

THE COURT: You may.

MR. SOUMILAS: Do you have a copy, Counsel?

MR. LUCKMAN: What page?

[329] **MR. SOUMILAS:** So I would like Ms. Gill to turn her attention to Page 36 of that deposition transcript, beginning at Line 21.

Would you like a copy, Your Honor?

THE COURT: I would.

MR. SOUMILAS: I have one.

(Document handed up to the Court)

THE COURT: Okay.

BY MR. SOUMILAS:

Q So you understood that when you were giving this deposition testimony Ms. Gill, you were under oath just like you are today. Correct?

A That's correct.

Q And you have done that before in other cases. Correct?

A Yes.

Q And, I want to go through the testimony that you gave that day concerning this issue of disputes during your deposition in 2013. Okay?

A Okay.

Q Let's begin with Page 36, Line 21, where the question is (As read):

> "QUESTION: But Consumer Relations wasn't processing these OFAC alerts. They were asking you to do that, right?"

Do you see the answer, your answer?

A Yes.

[330] **Q** What is it?

A "Right."

Q Next question:

> "QUESTION: So with respect to the group of people..."

MR. SOUMILAS: Would you mind putting that up, Mr. Reeser?

(Document displayed)

BY MR. SOUMILAS:

> "QUESTION: So with respect to the group of people who had disputed the OFAC alerts and their names were being sent to you from Consumer Relations, and you found the name on the OFAC list or the Treasury Department list, did you block all of them?"

And then there's an objection to the form.

Do you see that?

A Yes, I do.

MR. LUCKMAN: Your Honor, another objection presently before he moves on. It's not a proper question to impeach her. She --

THE COURT: Well, maybe not, but she is considered the defendant, since she's giving the testimony as to when she was -- right? You can use the deposition testimony of a party for any purpose.

MR. LUCKMAN: Understood. But he can't impeach her with a different question.

[331] **THE COURT:** So he's not impeaching her. I agree with that. He's not impeaching her.

MR. LUCKMAN: I thought that was the intent.

THE COURT: He can use the deposition if she's considered a party, which I believe she is, and he can use it for any purpose. So, I think that's why. Otherwise, I would agree with you.

MR. LUCKMAN: Okay.

BY MR. SOUMILAS:

Q So, I think your answer to that one was:

"ANSWER: I'm not sure I understand what you mean by 'block them all.'"

Isn't that your answer?

A Yes, that is my answer.

Q So I believe there's a followup to your concern and it's:

"QUESTION: Okay. Did you send a service request to this team that did the blocking or the bypassing for each person who had disputed OFAC information who you could find on the Treasury database?"

And your answer is?

A "Yes." "Yes."

Q Thank you. Now, I also would like to ask you a couple of questions about the matching logic. And, again, this is what we have called earlier in your testimony the name-only procedure. Do you recall that?

[332] **A** That's correct.

Q And, again, for now, I want to focus on the time period from the verdict in Cortez in April 2007 through the time you left the company in November of 2010. Okay?

A Okay.

Q And, am I correct that you are not aware of any discussions in that time frame whatsoever about changing the name-only matching logic?

A No. I was not aware of discussions, of changing it.

Q And you are not aware of any documents that were prepared by TransUnion about changing the name-only matching logic between April 2007 and the time you left the company in the end of 2010. Isn't that right?

A I can't remember any -- any discussions about changing the matching logic.

Q But you were the head of that product, the product manager through the end. Correct?

A Yes, I was.

MR. SOUMILAS: Okay. Thank you, Ms. Gill. I don't have any further questions right now.

THE COURT: Should we take our lunch break now? Or how long do you think you will be?

MR. LUCKMAN: That would have been my first question, Your Honor.

THE COURT: That is your first question?

* * *

[338] development, people on the technical side and marketing people.

And we would do a review with Legal and Compliance and we talk about things like: Is the product going to be FCRA governed? What type of data a client would submit to us to receive the data back? What type of data we would be returning to them if we're not -- if it would need to be disclosed or disputed? And then lastly, probably, the contract. How would they cover contractual use of the product?

Q. I think the term "permissible purpose" was used, but could you explain for the jury what a

permissible purpose is under the Fair Credit Reporting Act?

A. Sure. Under the Fair Credit Reporting Act, which is the FCRA, I can think of three reasons why you would be permitted to access credit type data.

The first would be for extension of credit; if you were applying for a credit card, some type of loan. The second would be for employment purposes. And the third would be for insurance purposes.

Q. If a product is governed by the Fair Credit Reporting Act, then, I take it, a customer would need to have one of those permissible purposes to obtain the information?

A. That's correct.

Q. Okay. And TransUnion sells products that are both governed and non-governed by the Fair Credit Reporting Act?

A. That's correct.

[339] **Q.** And for non-governed what, if any, permissible purpose would you need?

A. You wouldn't need permissible purpose under FCRA, but an example would be a database that was created from non-credit type data. So from sources other than the people that contribute data to us to update our database.

An example would be public -- phone directories that could be used in a database. You know, information that's publicly available. And people that didn't have FCRA purpose, permissible purpose, could access that data along with people that did have FCRA permissible purpose.

Q. Are you familiar with the beginnings or the genesis of the Name Screen product? How it came to be?

A. Yes.

Q. Could you explain that to the jury, please?

A. Sure. It was a little different than other things we had done in the past because we received quite a few requests from customers that were on the smaller scale, of TransUnion customers, requesting us to provide them with some type of OFAC solution.

Q. Did you learn why they needed an OFAC -- let me start with this. Corporate speak is solution, they needed a solution. What does that mean?

A. It means a product.

Q. A product that does something?

[340] **A.** Right. And we're talking about a data product or information product.

Q. And what, if anything, did you learn about why the customers needed that product, OFAC product?

A. Well, as a result of the terrorist events of 9/11, the Patriot Act was announced in October -- I'm sorry, the terrorist events of 9/11, the Patriot Act was announced in October of 2001 and a component of the Patriot Act compliance was checking names against the OFAC list.

Q. To your knowledge, the customers were coming to you for a product that would check names against the list?

A. Yes. And there was widespread interest.

Q. Meaning?

A. A lot of customers. Instead of just one or two, there was a lot of customers, smaller -- on the smaller side that were requesting it.

It seemed like the larger customers may have already had an OFAC solution in place, because there were other things that customers needed to screen for, not just, you know, credit extension. They needed to screen things like wire transfers and other things that TransUnion, you know, couldn't help them with.

Q. Now, also, I know we -- what did you call the product when it first started? What was the name?

A. The original name was OFAC Advisor.

* * *

[345] **THE COURT:** Now 89 is admitted.

MR. LUCKMAN: I apologize.

THE COURT: That's okay.

(Trial Exhibit 89 received in evidence)

(Document displayed)

BY MR. LUCKMAN

Q. If you could read the two provisions? They are actually highlighted there, but they are in front of you under the product description.

A. Okay.

Q. Explain to me -- read the first one to yourself and then explain to the jury what it means.

A. Would you like me to read the first highlighted sentence?

Q. Whatever is easiest for you to help you explain.

A. Okay.

"Name elements from the customer's request are used as input to the system to be matched against records for individuals on Thompson Financial Publishing's FAC File database."

Q. Okay. First of all who is Thompson?

A. That was the predecessor name to the company we now know as Accuity. So they were originally called Thompson Financial Publishing.

Q. Okay. And it says:

"The name elements from the customer's request are [346] used as input."

What does that -- tell the jury, please, what that means?

A. Input is basically the information we receive from a TransUnion customer to access whatever product they are requesting. So typically it would come from a customer application for credit. So that information is transmitted by the credit grantor to TransUnion.

Q. Okay. And the second portion, if you could read that, please? And I'm going to ask you to explain that.

A. Sure. "

Customers will use OFAC Advisor as a means towards complying with the USA Patriot Act of 2001 and OFAC regulations, basically requiring that they check the U.S. Treasury Department's OFAC file to verify that they are not conducting business with or on behalf of an individual or entity that is sanctioned under OFAC laws."

Q. Can you explain for the jury how the OFAC Advisor or Name Screen was part of the compliance effort for the TransUnion customers?

A. Well, customers came to TransUnion looking for an OFAC product and it was developed. And what -- what the Patriot Act regulations were stating is they need to check the OFAC database and if there is a match, they need to do due diligence after they get the match.

Q. What does that mean?

[347] **A.** They need to investigate further to determine if the person is really a match on the OFAC file.

Q. Do the customers need to keep any sort of records regarding their search of the OFAC list?

A. Yes, they did.

MR. SOUMILAS: Objection, your Honor.

THE COURT: Well, you can lay a foundation, I guess.

MR. LUCKMAN: Sure.

BY MR. LUCKMAN

Q. Are you aware, ma'am, whether the TransUnion customers that sought this product needed to keep a record of doing the screen, the screening of the list?

MR. SOUMILAS: Same objection.

THE COURT: I will allow it.

A. Yes. There was a recordkeeping requirement in the Patriot Act that clients or customers would need

to provide proof that they had OFAC screened in case of an audit.

BY MR. LUCKMAN

Q. Okay. And did they need to keep proof of -- to your knowledge, proof of flags or hits or no hits or just outright the screening?

A. Right. They needed to prove that they had screened the customer. So in TransUnion's case we would return a clear message indicating that they had checked the database, but it wasn't a match; or in the case of a hit, there was a potential [348] name match and they needed to check further.

So there is value in the fact that it was a clear message and it would prove that they had, you know, done their part or their requirement to OFAC screen.

Q. The compliance was to search and have a record to prove you searched, correct?

A. Correct.

Q. Ma'am, what, if anything, was told to the TransUnion customers about the use of the OFAC screen for credit eligibility determinations?

A. It was prohibited. It was just informational -- informational to be used as a first step, more or less, in their OFAC compliance. So it was specifically stated in the addendum that it wasn't to be used for credit purposes or, you know, denial of credit.

Q. All right. Thank you.

After, well, 2010 -- which I want to say is after the *Cortez* decision -- what, if any, changes were made in the manner in which the OFAC product, the Name Screen product, was sold by TransUnion?

A. In November of 2010 TransUnion made a change to the wording in the message.

Q. I'm going to ask you to take a look at Exhibit 62 in the book, please? Tell me if you recognize that?

MR. SOUMILAS: 62?

[349] (Brief pause.)

MR. LUCKMAN: Is there a problem with that?

(Discussion held off the record.)

MR. LUCKMAN: Is there an objection to it?

MR. SOUMILAS: It wasn't disclosed.

THE COURT: Is there a stipulation as to the admissibility of this document?

MR. SOUMILAS: Your Honor, this was not one of the documents disclosed in the prior procedures that we would use for this witness. So there is no stipulation and I'm looking at it for the first time.

THE COURT: Okay. Is there a stipulation to its admissibility?

MR. SOUMILAS: No.

THE COURT: No, all right.

MR. LUCKMAN: I'm sorry. Could I have one moment, your Honor? I didn't think there was an objection to it.

THE COURT: You may.

(Discussion held off the record amongst defense counsel.)

MR. LUCKMAN: I apologize. Was there an objection?

MR. SOUMILAS: Your Honor, could we have a sidebar for just one moment?

MR. LUCKMAN: Probably a better idea.

THE COURT: Okay.

(Proceedings held at side bar.)

[350] **MR. LUCKMAN:** It may well be that internally I made the request and didn't make it to John, but I'm pretty sure the document was --

MR. NEWMAN: It was on their list of exhibits they might use. And in our communication back we said that we might use any of the exhibits that are on your list, as well as these others.

And so we didn't specifically say --

THE COURT: What was the objection?

MR. SOUMILAS: It was not on our list and they have

never told us --

THE COURT: It's on an exhibit list. I see it.

MR. SOUMILAS: Well, I'm saying to your Honor that the procedure was 24 hours before a witness, they are supposed to tell us about the witness and exhibits.

THE COURT: Do you object to its admissibility in general, the request? Just the request of this particular witness?

MR. SOUMILAS: No.

THE COURT: All right. I'll let it in.

MR. LUCKMAN: All right.

(Proceedings held in open court.)

MR. LUCKMAN: I apologize.

BY MR. LUCKMAN

Q. Ms. Gill, can you tell the jury what No. 62 is?

[351] **A.** Yes. No. 62 is a document by the name of "Fast Track Project Document" and it's a request to change the wording in the OFAC message.

Q. And who made the request?

A. I made the request to the IT department.

Q. Why did you make the request?

A. Because I was instructed that the wording of the message needed to change from "match" to "potential match."

Q. And is that the purpose of Exhibit 62?

A. Yes.

MR. LUCKMAN: And could we have -- I move to admit number 62 now.

MR. SOUMILAS: No objection.

THE COURT: Okay. 62 admitted.

(Trial Exhibit 62 received in evidence)

(Document displayed)

BY MR. LUCKMAN

Q. The top of it says "Fast Track Project Document." Can you tell me what that means, please?

A. Sure. Fast Track is the high priority.

Q. "High priority" meaning what?

A. It would take precedence over other requests in the programming queue.

Q. Was the change accomplished, to your knowledge?

A. Yes, it was. In November of 2010.

[352] **Q.** Before you left?

A. Right before I left.

Q. Does that show the new message in English and Spanish?

A. That's correct.

Q. What was the purpose of changing -- to your knowledge, what was the purpose of changing from "match" to "potential match"? And I will not say the Spanish.

A. The intent was to provide better messaging.

Q. To whom?

A. To the people that were using the OFAC product.

Q. The --

A. TransUnion's customers.

Q. Better messaging to the people that use it?

A. Yes.

Q. Why do you want them to have better messaging?

A. Just as a reminder that it's a potential match. It's the first step in their compliance. And if they are getting a hit, they need to do due diligence and verify that the person, you know, is or isn't on the list.

Q. And how, if at all, were customers notified of this change?

A. It would have been announced to them in the form of a general announcement, which was sent to all customers.

MR. LUCKMAN: I'm going to ask the witness to see No. 70, but I want to make sure that we did it the right way.

[353] **MR. SOUMILAS:** 70? I think it was disclosed. 26 and 70 both, yes.

MR. LUCKMAN: Perfect.

BY MR. LUCKMAN

Q. Take a look No. 70, please? Let me know if you need help.

A. Yes. It's Technical General Announcement No. 92 dated in November of 2010.

Q. And what was the purpose of that, ma'am?

A. It was communication to all of our customers that the wording in the OFAC message was changing.

THE COURT: I'll admit 70.

(Trial Exhibit 70 received in evidence)

MR. LUCKMAN: If you could go to the next page, please, and blow that up just a little bit?

(Document displayed)

BY MR. LUCKMAN

Q. Is that what we're seeing on the screen, is that was what was sent or made available to the customers?

A. Yes. This was the detailed -- you know, all the details regarding the change.

Q. Okay. And there is some technical details in there as well?

A. Yes.

Q. About how it worked?

A. Yes.

[354] **Q.** Okay.

A. But what we're seeing here is the current version of the message, which is "Input name matches name on the OFAC database." And we're changing it to "Input name is potential match to name on the OFAC database."

Q. Did this one have an appendix with the technical detail on it?

A. Yes, it did.

MR. LUCKMAN: Can you show exhibit -- I think it's Appendix A?

(Discussion held off the record amongst counsel.)

(Document displayed)

A. Pardon me. There are some technical difficulties on the bottom of Page 2. I don't know if that's what you're referencing. Bottom of Page 2 and top of Page 3.

BY MR. LUCKMAN

Q. That's okay. We can move on. Never mind. Thank you.

Ms. Gill, do you feel or believe that you wilfully violated the Fair Credit Reporting Act in connection with your efforts to develop and sell the Name Screening product?

MR. SOUMILAS: Objection.

THE COURT: Sustained.

MR. LUCKMAN: Thank you. Nothing further.

THE COURT: Do you have anything further,

Mr. Soumilas?

[355] **MR. SOUMILAS:** I do. Just a couple of questions.

REDIRECT EXAMINATION

BY MR. SOUMILAS

Q. Ms. Gill, I have a couple of follow up items based on what Mr. Luckman asked you.

Let's begin with, I think you answered that as to the OFAC disputes that you recall handling at the end of your career, there were a handful or very few?

A. Yes. That's what I remember.

Q. Okay. Would you please take a look Exhibit 6 in front of you.

(Witness complied)

Q. Are you there?

A. Yes.

Q. And would you just tell the jury what this document is?

A. It's some type of legal document, but I'm not sure I see a name of this document. It's something about the Ramirez case.

Q. Let me help you. If you look right next to the Ramirez caption on the right-hand side, it says "Response of TransUnion, LLC to Plaintiff's First Set of Interrogatories." Do you see that?

A. Yes, I do.

Q. And do you understand that interrogatories are questions that are answered by the corporation in this case?

A. I'm not familiar with the term, but I -- I understand your [356] description.

Q. Okay. Take a look Interrogatory No. 14, please, which is on Page 11 of that exhibit.

MR. SOUMILAS: And before my question, your Honor, this is an interrogatory response by the defendant being presented to a corporate representative. I'd like to have it admitted into evidence, please.

THE COURT: Any objection to the Exhibit 6?

MR. LUCKMAN: Just with the objection which -- there is an objection to the interrogatory.

THE COURT: All right. Well, I think it's an appropriate interrogatory.

MR. LUCKMAN: It is an interrogatory, sure.

THE COURT: So is there any -- so are we admitting it just with respect to Interrogatory No. 14?

MR. SOUMILAS: Yes.

THE COURT: Just admission with respect to Interrogatory No. 14. Is there any objection other than the objections that were --

MR. LUCKMAN: Other than the objections that are there, correct.

THE COURT: Overruled.

Okay. So Exhibit 6, as to Interrogatory No. 14, is admitted.

(Trial Exhibit 6, as to Interrogatory No. 14, received in [357] evidence)

MR. SOUMILAS: Could we please display that to the jury, Mr. Reeser? And would you focus first on the question for 14?

(Document displayed)

BY MR. SOUMILAS

Q. So it reads:

> "State the number of natural persons in the United States who have made a dispute to TransUnion regarding an erroneous inclusion on an OFAC record from February 9, 2010 through the present."

Do you see that?

A. Yes I do.

Q. And that's towards the end of your career with TransUnion. You said you were there through November 2010, correct?

A. Correct.

Q. So take a look at the answer, please, underneath.

(Document displayed)

Q. There are a number of objections first that say it's vague and ambiguous and burdensome to answer this and so forth.

Do you see what the answer at the bottom is:

"...TransUnion responds to this interrogatory as follows."

How many disputes?

A. Approximately 493.

[358] **Q.** Okay. Next Mr. Luckman showed you an exhibit -- and I'm very sorry we had some confusion about that. I didn't know he was going to use it, but it's Exhibit 62 that he asked you to look at. Do you have that handy?

A. Yes, I do.

Q. And that was the technical request to do this change from displaying that the input name is a "match" to the OFAC database, to saying that it's a "potential match," correct?

A. That's correct.

Q. Now, the first time TransUnion acted on that point was, according to this exhibit, mid October 2010?

A. I don't know when I wrote up the request, but if it was fast tracked, it was probably, you know, shortly before the date on this.

So I would have written up a request and then this is the document they would write up to explain in detail what programs they were changing.

Q. So would you please take a look at Page 4 of that exhibit?

MR. SOUMILAS: And display Page 4, please? The Section that says "Project Schedule."

(Document displayed)

BY MR. SOUMILAS

Q. Would you agree with me that according to this document, the start date for the project was October 13, 2010?

A. Yes, but there was probably discussions in advance prior [359] to this document being written up

or the actual, you know, work being done by the programmer.

Q. Sure. But the start date there is October 13, 2010?

A. Yes.

Q. And the finish date was the same for the analysis, and the next day for the coding and testing, correct? **A.** Yes.

Q. So the project was done by the very next day, October 14, 2010?

A. Yes.

Q. Okay. Mr. Luckman showed you another document. Let me spend a moment with that, if I may. This is the Exhibit 70.

MR. SOUMILAS: Could you pull that up again?

(Document displayed)

BY MR. SOUMILAS

Q. Have you got it?

A. Yes, I do.

Q. All right. And you said that this was part of the announcement to customers about this change of "match" to "potential match," correct?

A. That's correct.

Q. All right. And this is a general announcement. It's not directed to any particular customer, this particular exhibit, correct?

A. I believe all customers are on the general announcement [360] list. There are, you know, probably thousands of recipients.

Q. But --

A. But all TransUnion customers get this announcement.

Q. But what we have here is the general announcement, not any particular sending to any particular customer; would you agree?

A. Well, there's a -- a list. It wasn't maintained by me, but there was a list of all the recipients.

Q. Do you know what the difference is between a release and an announcement?

A. In my opinion, a release was a general term we used when a change was being made and a release would usually include more than one item. So in a release we would be doing a few changes and they would all be announced together.

Q. And it would be announced to customers?

A. Yes.

Q. Okay.

A. And this technical general announcement is an example of an announcement of changes. So it talks about, you know, OFAC Name Screen changes, amongst other things.

Q. Okay. Let's focus on Exhibit 70 for a moment longer, the first page. At the bottom there is a box that begins with "Notice." Do you see that?

A. Yes.

Q. And in the second paragraph there is a sentence that begins with "No part". Do you see that?

[361] **A.** "No part"?

Q. Second paragraph, middle sentence. "No part of this publication."

A. Oh, yes, I do. "No part of this publication," I see the sentence.

Q. Could you just read the whole sentence to the jury?

A. Sure.

"No part of this publication may be stored in a retrieval system, transmitted, reproduced or distributed in any form or by any means, electronic or otherwise, without the explicit prior written permission of TransUnion."

All right. Would you please take a look at Exhibit 26, which should be in the other binder?

A. I have it.

Q. And do you know what that is?

A. Yes. This is a release announcement. So this is for internal distribution at TransUnion. And all the various departments would be included in this. And under the section where it says who is affected, everybody would be getting a notification of a release announcement. That list -- that distribution list was also extensive, from what I remember.

Q. So your understanding is that this is something -- the same type of message, but internal to TransUnion?

A. Yes.

[362] **Q.** All right. Let's go back to Exhibit 70, which, as you told me, is the general announcement. And Mr. Luckman had asked you to look at some

appendix that I don't think we found. Do you recall that?

A. Yes. I don't think there is an appendix in my copy here.

Q. So, but you did reference Page 2 of that exhibit as part of your answer. Do you recall that?

A. Yes.

Q. And would you agree with me that if you look in the middle page -- the middle part, excuse me, of Page 2 of Exhibit 70 under the heading "Fixed Format Inquiry," do you see that?

A. Yes.

Q. It provides "no program changes are required," correct?

A. That's correct.

Q. And immediately under that, under "Fixed-Format Response,"again it reads that "no program changes are required," Correct?

A. Right. And just to clarify things, an FFI is the response -- I'm sorry, the inquiry that's sent in to the system through larger customers. So it's considered the computer-to-computer version. And the FFR is the machine readable response.

And the format follows the bottom of Page 2 to the top of Page 3. So it's not the print image that's, you know, easily readable by all of us in this room.

[363] **Q.** But you told me this document that has the language "no program changes are required" is the document that gets distributed to customers. That's not the internal document, that's the one that goes out to customers?

A. Right. But if you look on Page 3, it says "print image display changes." So that's where the -- where someone is getting a printed image of a credit report and that's where the wording is changing.

Q. I understand the wording is changing --

A. Yes.

Q. -- but the announcement to customers does not say anything about programming changes. In fact, it says "no program changes are required." Would you agree with that?

A. Yes. But if someone was getting the print image directly from TransUnion, they would have started to get the new message. They wouldn't have had to do anything.

Q. Thank you, Ms. Gill.

A. Okay.

MR. LUCKMAN: Your Honor?

THE COURT: Yes.

MR. LUCKMAN: Very brief.

THE COURT: That's fine. It's your redirect.

MR. LUCKMAN: I can't remember what it is, but it's short.

* * *

Excerpts from Trial Transcript (June 14, 2017)

* * *

[411] entities, and individuals who have been targeted by the Department of Treasury to have sanctions imposed against them because they present or the U.S. government believes that they present some threat to the U.S. national security and foreign policy interests.

Q And who puts this list together of these SDNs and blocked persons?

A The Office of Foreign Assets Control.

Q Is that part of the Department of the Treasury?

A It is.

Q How long has the list been around?

A From what I understand, they first started making it available, I want to say some time in the 19-- either in the eighties or maybe even the seventies. From what I understand.

I -- one thing I would add, too, is that the concept of list-based sanctions program is fairly new. Most of the list-based -- not list-based programs, but the targeted-based programs is something that's developed over the last 30 or 40 years. Whereas before, we just had country-wide embargoes. Like the Cuban embargo, for example.

Q I understand. Now, focusing on SDNs for a moment, could you please tell the jury who are some of the SDNs on the OFAC list?

A Who are specific SDNs?

Q Sure, yeah.

[412] **A** Well, I guess the most famous ones are -- most famous one would be Osama Bin Laden, probably.

Q Oh, he's still not on the list?

A He's still on the list.

Q Even though he's dead.

A Yes. and interestingly, I've represented parties that passed away, and remained on the list for several years afterwards.

Q Why would that continue?

A The reason is because the government doesn't know at what -- if they were to take him off the list and have his assets released, who those assets would go to.

So this is the understanding I've developed from conversations with officials at OFAC, is that you can't just take someone off the list because they died. There has to be a reasonable -- if there's a reasonable cause to believe that those assets could go to other SDNs or to others engaged in nefarious conduct, you want to keep them on the list.

Q What other types of people who may be known to the public are on the OFAC list?

A Um, El Chapo.

Q Explain who that is.

A El Chapo was -- if I'm getting this correct, was the head of the Sinaloa Cartel, which has been accused by the U.S. government of being a Mexican drug cartel. And he's also quite [413] famous for having escaped jail several times in Mexico. He's currently in

New York, awaiting trial in Eastern District of New York.

Viktor Bout. I don't know if you know that name, but Viktor Bout was a Russian arms dealer. If anyone's seen the movie *Lord of War* with Nicholas. Cage it's loosely based on Viktor Bout. But he was formerly referred to by the U.S. as The Merchant of Death.

So I would say those maybe are the three most famous ones.

Q Would you say generally that the list is comprised of terrorists, money launderers, drug traffickers, those that proliferate in the weapons of mass destruction?

A Those undermining democratic processes, those engaged in human-rights abuses. But typically, those areas that you described are what the SDN is known -- most well known for. But it's typically conduct that we would view as bad conduct or nefarious conduct, yes.

Q No Boy Scouts on the list.

A Not that I'm aware of, no.

I would note, however, I have represented some of those parties on those lists, so I don't agree with all of the allegations that have been made. But, as far as a general characterization.

Q So part of your practice includes that if someone thinks that they are listed by the government, they are placed by the [414] government on the OFAC list but shouldn't be there, you have worked on those type of cases as well?

A Correct.

Q And you've also worked on the other side, where financial institutions are trying to avoid doing any business with people that are listed on -- who are SDNs or the list, excuse me.

A Correct.

Q Okay. What types of information does the U.S. government provide concerning the SDNs on the OFAC list?

A Well, whatever information they have available to them. So it could be names, address, passport numbers, dates of birth, national ID numbers or Social Security numbers. I have even seen email addresses on there before.

Q How long is the list?

A The last time I checked, it was over 6,000 names.

Q Have you ever seen a single entry on this list that is listed by name only, and no other information, whatsoever, about that SDN?

A Not that I recall.

Q Is there usually some type of other information, whether it be date of birth, address, something?

A Nationality, yeah. At least, usually a nationality. Or where the party is located.

Q Now, are you aware of the penalties that are imposed by the U.S. government for violating OFAC?

[415] **A** I am.

Q And are you familiar with the penalties that would be imposed on financial institutions?

A I am.

Q And how about on persons who may, themselves, be SDNs on the list?

A I am, yes.

Q Okay. From a legal perspective, are credit bureaus or credit reporting agencies like TransUnion subject to any type of a penalty by the Treasury Department if they simply do not provide any information to anyone about SDNs?

MR. LUCKMAN: Objection, Your Honor. Beyond the scope of the report, asking for a legal conclusion. It's not relevant.

THE COURT: Overruled.

BY MR. SOUMILAS

Q You can answer it.

A If I understand your question correctly, you're asking me if there's any legal requirement for credit reporting agencies to assist in the screening of individuals?

Q That's what I'm asking.

A No. Not that I'm aware of.

Q And, is there any penalty or consequence if credit reporting agencies just simply stay out of that realm entirely, and don't do anything to identify SDNs to their clients, or to [416] anyone at all?

A No. Not that I'm aware of.

Q If credit reporting agencies choose to identify an SDN, are you aware of the legal standards that they must follow in identifying them?

A Yes.

Q And are you aware of the standard of maximum possible accuracy, under the Fair Credit Reporting Act?

MR. LUCKMAN: Objection.

THE COURT: Sustained. Sustained.

BY MR. SOUMILAS

Q Let's go back to penalties that might be available to -- not available, but penalties that might be paid by financial institutions if they transact any business with SDNs.

What happens if a bank or some other institution does business with an SDN?

A Well, it depends upon what particular sanctioning authority is implicated, because there's several different statutes, and there's different executive orders and regulations.

But typically, it breaks down into two separate types of penalties. You have civil penalties, which are monetary fines. And then you have criminal penalties, which can include both criminal fines, as well as terms of imprisonment.

If you are going to look at the whole universe of [417] potential sanctions violations and what the penalties associated with those violations would be, in the civil context, penalties range -- again, depending on the sanctions authority implicated -- anywhere from $10,000 all the way up to $10 million. And in the criminal context, $50,000 all the way up -- I'm sorry. In the civil context, $10,000 all the way up to $1 million. In the criminal context, $50,000 all the way up to 10 million.

And criminal terms of imprisonment are anywhere from five years all the way up to 30 years.

Q And this is just for doing business with an SDN?

A Correct.

Q Any type of business?

A Well, so it's important to understand there are certain exemptions in general licenses that are contained within the statutes, or within the regulations, themselves, which may allow certain types of transactions.

So for example, if two years ago you were to fly on Iran Air, which was an SDN at the time, you would have been allowed to because there's a travel exemption related to dealings with Iran Air. So really, it's not -- I don't want to say it's all transactions, but it's virtually all transactions.

Q How about giving credit with someone? Would that be a type of prohibited transaction?

[418] **A** I'm not aware of any exemptions or general authorizations that would allow that.

Q What are the consequences for SDNs?

A Well, really, the consequences for the SDNs are the fact that they, themselves, have been designated, and therefore they have any assets under U.S. jurisdiction blocked and remain blocked until such time as they're removed. And they cannot transact with U.S. persons, in any way.

And why this is a major consequence for SDNs is because most of international trade is done in U.S. dollars. So if you're not able to pay in U.S. dollars or

receive payment in U.S. dollars, this can have a dramatic impact on your business.

Also, what we have been's seeing recently, there's been a series of prosecutions out of various jurisdictions around the country, is that SDNs who were involved in causing U.S. persons to violate, for example by obfuscating the SDN's own involvement in the transaction, are now being subjected to civil and criminal penalties, as well. So there's a wide variety of legal consequences.

I would also say, as someone who has represented a number of SDNs over a years, is that they suffer reputational damage in their home jurisdictions. They -- I've seen SDNs be arrested in their home jurisdiction, or investigated in their home jurisdiction. And so there's both legal consequences as well as just practical consequences.

[419] **MR. LUCKMAN:** Objection, Your Honor. Move to strike that testimony about the impact.

THE COURT: I want to clarify. That's for people who are, in fact, on the list.

THE WITNESS: Yes, Your Honor.

THE COURT: All right. I think with that --

MR. LUCKMAN: Thank you, Your Honor.

MR. SOUMILAS: And that was my question, Your Honor.

BY MR. SOUMILAS

Q For those people who are in fact on the list, as a general rule, would they be prohibited from getting a loan or credit in the United States?

A Yes, they would be.

Q Okay. Given the penalties that you just described for both the financial institutions and the SDNs, is it your opinion that it is important to accurately identify who is an SDN?

A Yes.

Q And what types of tools are available for the proper identification of SDNs?

A Well, you have interdiction or screening software that's typically considered the front line or the first line of defense.

You also have due diligence tools that can help you dig down a little deeper to get more information about the [420] particular parties that have been returned as possible matches.

You have the information which should be contained in a customer information file that was collected from the customer at the time that the transaction was either engaged or at the time that customer was on-boarded.

So, there's a variety of different ways and methods and tools to use.

Q Now, as part of your practice, for your clients, have you personally worked in situations where it was important to properly and accurately identify whether someone is an SDN?

A Yes.

Q Whether they refused to do business with them, or maybe to say that they're not an SDN?

A Yes.

Q And have you seen your financial-institution clients use any type of computer software as part of a process of going about to properly identify SDNs?

A I have.

Q What type of computer software have you seen as part of your practice with your clients?

A I have seen them use interdiction screening software, as well as due-diligence tools.

Q And focusing on the screening software first, what ones are you familiar with?

A MK Data Services. HotScan. There's one called ATTUS -- [421] used to be called ATTUS Technologies. That's A-T-T-U-S Technologies. They're now referred to as CSI. Accuity Compliance Link, I've also heard of. So there's a few different ones.

Q And what do you do in relation to your clients' efforts to use software to correctly identify SDNs?

A So what I tell them is a lot of the work revolves around what policies they should have in place. Policies and procedures. And so a lot of that involves minimizing false positives, so that they don't have to sift through hundreds or thousands of possible matches that are not anywhere near being actual matches.

So things we will do is tell them: Okay, you should look at two or more identifying pieces of information. You should adjust your filter, maybe, to take out certain key words that maybe you are getting repeat hits on but which are not leading to actual matches.

Setting up good guys lists so people that keep getting caught in the filter, but you've already

screened to demonstrate that you know them, you have a relationship with them, and they are not that actual SDN.

Also, gray lists. Companies where it's unclear whether they are owned or controlled by SDNs.

And I think that maybe an important note, too, is it's not -- the SDN designation is not just to that particular entity or [422] person, but anyone owned or controlled by them.

So "control" is -- you can separate that out. "Control" are parties who are actually identified in association with the main targeted SDN, but then "owned" are parties or entities where the aggregate ownership is owned 50 percent or more by one SDN or a number of SDNs.

So, we do a lot of that kind of work, as well.

Q Okay. So you said a lot there. I'm going to try to follow up on a couple of things, if I remember them.

A Okay.

Q Let's focus on, I think you used the word "filter." To filter for identifying information?

A Correct.

Q Would you just explain in layman's terms what advice would you give concerning filtering.

A Right. So for example, if a client comes to me and they say: We keep getting hits for Robert Mugabe Road, they may ask: Do we need to keep searching for this word "Mugabe"? Because that obviously, in Zimbabwe, would be a very famous name and associated with a lot of different addresses.

So we may say: No, you can adjust for filter to take that out.

Or it could be a particular company name that we've already accounted for and we've already done our due diligence, and have come to a conclusion that it's not an actual match to [423] the SDN list.

Q And do you give any advice concerning the filtering of personal identifying information such as names, dates of birth, addresses?

A We do. We tell our clients that you should look at two or more identifying pieces of information. Particularly when it comes to names, because there are so many common names that are contained on the OFAC list.

Q So does that mean two at the same time? In other words, to get a match on both a name and an address, or a name and a date of birth?

A No. It's usually a name and an address, or a name and a date of birth, a name and a passport number. Address and a date of birth. Date of birth and a passport number. So, a mix.

Q So let me just clarify that, because I'm not sure I understood.

Is your advice to your client, to your clients, that they should get a mix of personal identifiers in order to make a proper identification?

A Of a possible match, yes.

Q And what is the minimum number of identifiers, in your experience, that you have seen your clients use to properly identify SDNs?

A Two.

[424] **Q** Is anybody using just a name-only match to identify SDNs, in your experience?

A That I currently represent? No.

Q And, in the -- the industry that you work in, would you consider it to be a common practice for financial institutions to use only a name and no other identifier in order to identify SDNs?

A No.

Q Do most financial institutions use multiple identifiers, such as a mixture or a combination of name and some other variable?

A My clients do, and from I understand, most do. Yes.

Q Now --

A Can I just correct that? I want to say, instead of "most," many do. Because I don't have the universe of data on all financial institutions. So --

Q Thank you.

In your opinion, is a name-only procedure for identifying SDNs reliability in accurately identifying people who might actually be on the OFAC list?

A No.

Q And why not?

A Because you would have a high number of false positives returned.

Q So you have used that term a couple of times now, "false [425] positives" Would you tell the jury what that is?

A A false positive is where you have a possible match but it ends up not being the actual party on the SDN list.

Q And in your practice, do your clients sometimes come back with false positives?

A They do.

Q And is it your understanding that your clients wish to have false positives?

MR. LUCKMAN: Objection, Your Honor.

THE COURT: I'll sustain that.

BY MR. SOUMILAS

Q Do you give any advice to your clients as to whether they should reduce false positives?

A I give advice that they should minimize the number of false positives.

Q And why is that?

A Because there's only so much -- so many resources they have to allocate to sanctions compliance.

So if you are sifting through large numbers of false positives, it becomes -- one, you're spending more money, and probably unnecessarily.

And then, two, it becomes harder to identify the actual matches to the SDN list, because there's more to look through.

Q In your experience, have you seen financial institutions that have a blanket policy to just decline to do business with [426] possible SDNs if they just return as possible SDNs?

A I have seen that, yes.

Q And why is that?

A Well, really, they freak out once they hear that they have a possible match.

A lot of these guys buy screening software, and they say: Well, we put the money into having this software, so why are we now going to have to go through additional steps?

It costs them money. And then, the risk is way too high, given some of the penalties we've discussed. These are very substantial numbers for these individuals. So they just don't want to incur the risk.

MR. LUCKMAN: Objection, Your Honor. I move to strike that anecdotal discussion about what people are afraid of or not.

THE COURT: I'm not sure where this is going. Why don't you move on.

MR. SOUMILAS: Sure.

BY MR. SOUMILAS

Q Going back to the SDN list, the OFAC list for a moment, Mr. Ferrari, you've -- you said you have spent years reviewing this list?

A I have.

Q And have you ever seen Social Security numbers on that list?

[427] **A** I have. I believe so, yes.

Q And have you seen passport numbers?

A I have seen passport numbers.

Q Addresses?

A Addresses, yes.

Q Nationalities?

A Yes.

Q Dates of birth?

A Yes.

Q Among the people on the OFAC list, do you have an understanding of how many of them are Americans living here in the United States?

A Very few.

Q How few?

A I would say at most, 2 percent but probably under 1 percent of the parties on that list are U.S. -- and when I say "U.S. persons," I don't just mean Americans living in the United States, but U.S. citizens anywhere located, permanent legal residents, U.S. companies.

Q So 98 to 99 percent just live overseas somewhere?

A That's my belief, yeah.

I just want to clarify that. We also run a sanctions research blog and site called sanctionlaw.com. And several years ago we actually did that statistical analysis, but that was probably in 2013. And I reference the number being 98 to [428] 99 percent. So that's where I'm getting that from.

MR. SOUMILAS: Thank you.

THE COURT: Cross-examination?

MR. LUCKMAN: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. LUCKMAN

Q Hello, Mr. Ferrari.

A Good morning.

Q We met earlier. My name is Bruce Luckman. I represent TransUnion. I'm going to be asking you some questions, into the microphone.

A Okay.

MR. LUCKMAN: Good?

THE REPORTER: (Nods head)

BY MR. LUCKMAN

Q You weren't retained by Mr. Ramirez to get him off the OFAC list, were you?

A I was not.

Q Okay. And you weren't retained by Mr. Ramirez in any way having to do with the transaction with Dublin Nissan in 2011, were you?

A I was -- well, I guess it depends.

Q Having to get -- because in 2011, were you retained by Mr. Ramirez?

A No, I was not.

* * *

[458] **THE COURT:** She didn't say that.

Okay. All right. Is the plaintiff prepared to call their next witness?

MR. FRANCIS: Yes, your Honor. Your Honor, plaintiff calls Michael O'Connell.

And before Mr. O'Connell testifies, based upon your Honor's rulings this morning and the stipulation reached between the parties, we move into evidence Exhibits 34 and 35.

THE COURT: All right. 34 and 35 admitted.

(Trial Exhibits 34 and 35 received in evidence)

MICHAEL O'CONNELL,

called as a witness for the Plaintiff herein, having been duly sworn, testified as follows:

THE WITNESS: I do.

THE CLERK: Can you please state your name and then spell your last name for the record.

THE WITNESS: Sure. Michael O'Connell.

O, apostrophe, C-O-N-N-E-L-L.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. FRANCIS

Q. Good morning, Mr. O'Connell. My name is Jim Francis. We haven't met before, but I am one of the counsel who represents the class in this case that's been brought against TransUnion.

I want to begin with some basic questions about your [459] background. Am I correct that you are employed by TransUnion?

A. Yes.

Q. Okay. And what is your current position at the company?

A. Vice-president of Product Development.

Q. Okay. And that's a title that you have held for some period of time, correct?

A. Correct.

Q. All right. And over 15 years, would you say?

A. Approximately, yes.

Q. Okay. Has anything changed about your job or your duties and responsibilities at TransUnion since, say, 2013?

A. Yeah. I got a couple of new product categories that we have been building within TransUnion.

Q. Okay. But other than that, your position is the same, correct, as it was back in 2013?

A. Yeah. Just different product categories, some new advancements we have.

Q. I got you. And would I be correct that you have been at TransUnion, from what I calculate, over 30 years?

A. That's correct.

Q. And specifically I think you know that this case involves the OFAC product, correct?

A. Correct.

Q. And am I correct that you actually were the one who was responsible for rolling out TransUnion OFAC product?

[460] **A.** That's right.

Q. Okay. And you did that -- when did that start, back in 2002?

A. Correct, yes.

Q. And when I say you were the one who did it, were you the one who was primarily responsible for bringing the OFAC product to the market?

A. Yes. For developing and launching in the market, yes.

Q. Okay. And prior to 2002 am I correct that TransUnion did not sell that product?

A. That's correct.

Q. All right. And you know that you're appearing today not in your individual capacity, but as a representative of TransUnion, correct?

A. Yes. I understand that.

Q. And you gave a deposition in this case back in 2013; do you recall that?

A. I do.

Q. And you testified in that case as a representative of TransUnion, correct?

A. Yes.

Q. All right. So what I want to establish is given your role in rolling out the OFAC product, would I be correct in stating that you would be familiar with the matching logic that the product used from the period, say, of 2002 through at least [461] 2013?

A. That's correct.

Q. Okay. And were you involved in the company's decisions in terms of where TransUnion would get its OFAC data from?

A. Yes.

Q. Okay. And were you involved in the company's decisions to employ the match logic that TransUnion used in connection with the OFAC product?

A. Yes.

Q. All right. And would you have been a person who would have been involved in working with the company in response to any legal compliance issues that related to the OFAC product and any changes that might have been made?

A. Changes that would have been made, yes.

Q. Okay. So, if, for example, TransUnion was -- made a change to OFAC in response to a case or a government inquiry, you would have been involved in carrying out those changes, correct?

A. Those that were related to our consumer relations activity was a more specialized team, but the majority of them, yes.

Q. Okay. But am I correct that you're not on the Board of Directors of TransUnion?

A. No, I'm not.

Q. Okay. And you report to somebody else at TransUnion?

A. That's correct.

[462] **Q.** Who do you report to?

A. Senior vice-president of product.

Q. Okay. And am I correct that you're not an attorney?

A. That's correct.

Q. And you're not -- do you know who Denise Norgle is?

A. I do.

Q. And Denise Norgle, for at least some point, was TransUnion's general counsel, correct?

A. Yes.

Q. Okay. So you wouldn't have been involved, correct me if I'm wrong, in any decisions that TransUnion's legal department made with regard to compliance issues related to OFAC, correct?

A. That's correct.

Q. All right. Now, one of the things that you were designated to testify about -- not only at your deposition, but you were also offered as a witness in this case by TransUnion's counsel in its opening as somebody who was familiar with the match logic, is that right?

A. That's right.

Q. All right. So I want to ask you about TransUnion's match logic for OFAC, and let's start in 2002. Okay?

A. Okay.

Q. Am I correct that the match logic that TransUnion utilized for OFAC was what you call name match?

A. I'm sorry. Ask me that again?

[463] **Q.** Yeah. TransUnion's -- the match logic that TransUnion used in connection with rolling out OFAC was a name match logic, correct?

A. The software that we purchased from Accuity, yes.

Q. And what that means is that the only identifiers that would have been queried in terms of returning a search or a hit would have been name, correct?

A. That's right.

Q. All right. So when you rolled it out, date of birth was not built into that match logic, correct?

A. That's right.

Q. Address was not built into that match logic, correct?

A. That's correct.

Q. Passport, for example, if it existed, was not built into that match logic, correct?

A. That's correct.

Q. No other identifying information other than the name, correct?

A. That's correct.

Q. All right. Now, you were asked at your deposition about whether there was a juxtaposition of names within the match logic. Can you explain what that means?

A. Yeah. That is where we have name reversals, where you don't necessarily know what the order of the names being provided, either on the OFAC file or on the input, and being [464] able to account for somebody making a mistake and reversing those names on the input.

Q. Right. So, for example, the match logic for the OFAC product would deliver a hit if there was a match to the first and last name or if the first and last name were reversed, correct?

A. Yes. The potential match would involve any -- those two names regardless of which order it was in, yes.

Q. So Sergio Ramirez would match not only to Sergio Ramirez. It would also match to Ramirez Sergio, correct?

A. That's correct.

Q. Now, am I correct that TransUnion sells other products other than OFAC? I think that's pretty obvious, right?

A. Yes.

Q. You sell basic credit reports to lenders, right?

A. That's right.

Q. And one of the things that you sell is public records?

A. Yes.

Q. And can you just expand upon what a public record is?

MR. LUCKMAN: Objection. Relevance.

THE COURT: Overruled.

A. Some public records could come from any source that is made publicly available through -- whether it be property information, civil judgment information, tax lien information. Things of that nature is typically referred to as public record [465] items.

BY MR. FRANCIS

Q. Right. So in connection with a regular credit report, there could be a public records section that could include a bankruptcy, for example?

A. That's correct.

Q. Or a tax lean or a judgment, something like that, correct?

A. That's correct.

Q. And those records come from a state or local government or federal government, correct?

A. Or the companies that gather that information from those courthouses, yes.

Q. And am I correct that TransUnion does not use name match logic for public records?

A. That's correct.

Q. And am I correct that TransUnion does not use name match only logic for any other product?

A. Not to my recollection, no.

Q. Okay. And would you agree with me that it would be inappropriate for TransUnion to use name match logic only for public records?

A. No. It depends on what the -- no, I wouldn't agree. I think it depends on what the information is being collected for and used for.

Q. Sir, you gave a deposition back in December of 2013, I [466] think, correct?

A. Yes.

Q. Okay.

MR. FRANCIS: Your Honor, may I approach?

THE COURT: You may.

(Whereupon document was tendered to the witness.)

THE COURT: Do you have an extra copy?

(Whereupon document was tendered to the Court.)

BY MR. FRANCIS

Q. Sir, what I would like you to do is turn to Page 60 of your deposition?

A. Six zero?

Q. Six zero. And specifically Line 5.

(Witness complied.)

Q. When you gave your deposition back in December of 2013, you swore to tell the truth, correct?

A. Yes.

Q. And you gave an oath in that case -- or that time, correct?

A. Yes.

Q. Now, at Page 60 I asked you -- or I didn't ask you, Mr. Gorsky of our firm asked you:

"QUESTION: And you agree that name matching only would be inappropriate for every other piece of credit data that appears on a consumer's TransUnion credit report."

[467] Do you see my question there?

A. I do.

Q. Would you read your answer?

A. It says:

"ANSWER: Yes."

Q. Okay. So --

A. That's not the question you asked me, though, just a minute ago.

Q. Okay, okay. But I think we can both agree that for general credit reports and general credit data TransUnion does not use name match only, correct?

A. That's correct.

MR. FRANCIS: Mr. Reeser, would you please put up Exhibit 1? And specifically the top half portion.

(Document displayed)

BY MR. FRANCIS

Q. Mr. O'Connell, I want to explore with a real-life example what the name match only logic was that TransUnion used in connection with OFAC by using a credit report that was entered into evidence here as Exhibit 1 in this case, okay?

So if you look at this report, would you agree with me that the subject input name is Ramirez, last name Sergio L.

A. Yes.

Q. Okay. And you've seen TransUnion credit reports before, correct?

[468] **A.** I have.

Q. Okay. And the top information here is information which pertains to Mr. Ramirez, correct?

A. That's information contained on our credit file.

Q. Right. So this information would have come from TransUnion's database, correct?

A. Our credit database.

Q. Your credit database. And so the data that we see here -- current address; former address, Fremont, California; Redwood City; Redwood City; Social Security Number, 4070; date of birth, 4/76; employer and address; and former employer and address -- am I correct that all of that data would have been in TransUnion's credit database at the time this report was generated?

A. Yes.

MR. FRANCIS: Now, Mr. Reeser would you please pull up the bottom section of the report -- or the middle section, excuse me.

(Document displayed)

BY MR. FRANCIS

Q. Mr. O'Connell, you're familiar with the way OFAC Advisor Alert messages would have appeared on a TransUnion credit report from 2002 through 2013, correct?

A. Yes.

Q. And if you look at -- let's pick one of the -- one of the [469] records. The first record relates to a Ramirez Aguirre, Sergio Humberto. Do you see that?

A. I do.

Q. Now, based upon the input data that you saw from Mr. Ramirez, would this record match according to TransUnion's name matching logic back in 2011?

A. Because two of the names, if they appeared on the OFAC file, matched two of those, yes.

Q. Okay. So it doesn't matter that the last name here might be Aguirre, is that correct?

A. As long as it matches to the two names, that's correct.

Q. Right, okay. And it doesn't matter that there is a Humberto there, correct?

A. Correct.

Q. And it doesn't matter that above, when we looked at the data that TransUnion had in its database, that neither the name Aguirre or Humberto was there, correct?

A. It didn't matter what was on the --

Q. In terms of the match. It would match regardless of the fact that neither of those names was in TransUnion's database?

A. Yeah. A credit database is not included in any of the matching comparisons. It's strictly the input information provided by the end-user compared to the OFAC listing. There is no interpretation or translation that occurs between that.

Q. Right. So as you look at this first OFAC Advisor Alert, [470] do you know whether or not the name Aguirre here is the last name?

A. I don't.

Q. You don't know. And do you know whether the name Humberto is the first, middle or last name?

A. I don't know.

Q. Okay. So to be clear, it doesn't matter in terms of the match, as long as two of those names would match with Sergio or Ramirez, it would deliver a hit, correct?

A. Correct.

Q. All right. And that was consistent with TransUnion's match logic for the time period 2011, correct?

A. That is correct.

Q. All right. And it's also the case that it was -- that would return a hit even after 2011, correct?

A. A potential match, yes.

Q. Okay. What I'm saying, in terms of just the name logic alone, am I correct that that logic that you just outlined, that was -- that was in place at least up through December of 2013, correct?

A. Yes.

Q. Okay. Didn't change in 2012, correct?

A. We made a number of changes to the name prior to that, related to, like, middle initial matching, to eliminate -- the Accuity software had a lot of other different matching rules [471] that existed that we didn't feel comfortable with.

So, for example, if there was a middle initial, a single letter, we wouldn't allow that to count as one of the names. There was also logic where there was just a single name, a single word name. So we eliminated a lot of those types of rules. So that's -- those things were changed.

Q. Are you saying that you weren't using name match only logic in 2013?

A. No, I'm not saying that. I'm explaining the type of name matching logic we used.

Q. Okay.

MR. FRANCIS: Mr. Reeser, would you please put up Plaintiff's Exhibit 8, and specifically Page 82?

(Document displayed)

BY MR. FRANCIS

Q. Okay. So I just want to make sure we understand how this match logic works.

This is a page, Mr. O'Connell, from the actual -- the class list in this case. There is a class list that contains the names of over 8,000 people. This is a page that refers to strictly Maria Hernandez's. Do you see that?

A. No. Actually, I'm sorry, I don't.

MR. FRANCIS: Okay. Mr. Reeser, can you blow that up?

[472] **BY MR. FRANCIS**

Q. Actually, if you want, if you look in your binder -- you should have a binder in front, the binder right there. It's actually Exhibit 8, Page 82.

A. Okay.

Q. Okay?

MR. FRANCIS: And, Mr. Reeser, if you could zero in -- yeah. Highlight a little bit, if you can, the top part of the names. (Document displayed)

BY MR. FRANCIS

Q. Okay. As I said, this is the class list in this case and this just pertains to the name Maria Hernandez.

So would I be correct in stating that at least during the time period in question, 2011, if there was an OFAC record with the name Maria and Hernandez, all of the people who were listed on this page would be returned as a hit or a potential hit by TransUnion?

A. That's correct.

Q. Okay. Thank you.

MR. FRANCIS: You can take it down.

(Document removed from display.)

MR. FRANCIS: And, Mr. Reeser, if you would also now put up Page 2 of Exhibit 23?

(Document displayed)

[473] **BY MR. FRANCIS**

Q. And if you'll go to your binder to Exhibit 23?

(Witness complied)

A. Yes.

Q. So, Mr. O'Connell, I will represent to you that Exhibit 23 is an excerpt of the government's Office of Foreign Assets Control, the Treasury's OFAC list. Do you have that in front of you?

A. I do.

Q. Okay. So what I'd like you to take a look at --

MR. FRANCIS: And if we can blow this up, Mr. Reeser, right here?

(Document enlarged.)

BY MR. FRANCIS

Q. All right. So one of the names on the list -- and I'm just picking this at random -- is a Fernandez Montero Marco Jose. Do you see that?

A. I see that up there, yes.

Q. Okay. So if somebody had any of those two names, am I correct that TransUnion would deliver a hit -- or the credit report would deliver a hit for that person?

A. Not the credit report. The OFAC service would deliver the potential match, yes.

Q. Right. So the hit -- a hit would be returned in connection with any of those two names, correct?

[474] **A.** Yes.

Q. Okay. Now, just finishing up with the OFAC matching logic. Am I correct that beyond running the person's name through the Accuity software, TransUnion would not do anything further with regard to confirming whether or not that individual was a match on the list?

A. We had -- we had them -- we had Accuity do a number of things, including removing aliases and synonyms that they would have added to their software. So there was a number of things that we would do to make that software more effective.

Q. Are you saying that beyond -- once the name was delivered back to TransUnion, that TransUnion would take additional steps to see whether there were additional identifiers in the file?

A. No. We removed some of the names that were in the file that Accuity had added.

Q. You would do that separate and apart from Accuity delivering the data?

A. No. I'm describing Accuity's process of removing names from the data that they provided us that that software utilized.

Q. Okay. But in terms of the name coming back after Accuity did whatever it did, TransUnion would not do anything further to confirm whether or not a person was actually on the OFAC list, is that correct?

A. That is correct.

[475] **Q.** Okay. It wouldn't perform any type of independent investigation or any independent analysis of -- to see whether or not the person was actually on the list, is that correct?

A. That's correct. Our understanding of it was the end-user, that was their responsibility, to ensure that they investigated with the individual that they were engaged with, whatever transaction that they were working with.

Q. Okay. So it was TransUnion's view, at least through 2013, that it was not its role to figure out whether somebody was actually on the list or not, correct?

A. We weren't engaged with -- correct. We weren't engaged with the consumer that was a part of the transaction. And our interpretation of the OFAC regulations indicated that once they look up a name on the list -- and whether they did it manually on a document like this and found the name -- the end-user was expected to then compare all the information that they had about their -- the individual they had engaged and compare it to the information on the OFAC list, make a determination if they needed to take any additional steps.

Q. All right. Now, am I correct that at some point TransUnion was notified by the Department of Treasury of its concern about the number of false positives?

A. I've gotten different Treasury Departments that have contacted us with different views. The OCC is a Treasury Department that expressed concern with us actually having the [476] synonym files removed. So that OCC group was part of the Treasury Department. Some of the language that they audited, financial institutions not allowing broader match rules, was communicated as a concern that we didn't deliver enough potential matches.

Q. Right. But I'm specifically referring to a notice from the Department of Treasury to TransUnion in which the Department of Treasury expressed that it was concerned about the level of false positives. Are you aware of that?

A. I'm aware of the letter that was sent to our legal department, yes.

Q. Okay. And just so we're on the same page, a false positive is a -- is somebody who was actually not on the list, but who has been returned through a hit, correct?

A. As a potential match, yes.

Q. All right.

MR. FRANCIS: Mr. Reeser, would you please put up Exhibit 34, please?

(Document displayed)

BY MR. FRANCIS

Q. Mr. O'Connell, at your deposition you were asked about this letter the Treasury sent to TransUnion, correct?

A. Yes.

Q. And you can see at the top --

MR. FRANCIS: I don't know if, Mr. Reeser, you can [477] highlight it so we can see the date?

(Document enlarged.)

BY MR. FRANCIS

Q. So this is the letter that we were just talking about from

the Department of Treasury to TransUnion. It's dated

October 27th, 2010.

MR. FRANCIS: And would you please highlight the first

sentence or two?

(Document enlarged.)

BY MR. FRANCIS

Q. And I'll read it since it might be difficult for the members of the jury to see. It begins with:

"Since our meeting with you in July 2007 and subsequent correspondence of May 27, 2008, the Office of Foreign Assets Control continues to hear from credit bureau clients and individual consumers who have been adversely affected by screening products related to OFAC targets that are associated with consumer credit reports.

> "While OFAC appreciates your firm attempts to provide tools to help ensure that persons on OFAC's Specially Designated Nationals and Blocked Persons List do not access the U.S. financial system, it is obviously important that such tools provide accurate information in an understandable manner."

Do you see that?

[478] **A.** I do.

Q. Okay. And the next sentence is what I was asking you about earlier.

MR. FRANCIS: Can you expand that?

(Document enlarged.)

BY MR. FRANCIS

Q. (As read)

> "We remained concerned that name matching services used by credit bureaus to inform clients about potential dealings with persons on the SDN list may be creating unnecessary confusion."

Do you see that?

A. I do.

Q. Okay. The first sentence references a meeting in July of 2007. Do you know anything about that meeting?

A. I don't know.

Q. Okay. And it also references correspondence of May 27th, 2008. Do you know anything about that?

A. I don't.

Q. Okay. Do you know whether or not Treasury was advising TransUnion back at that time that it was concerned about false positives?

A. I don't know.

Q. Okay. And would you agree with me that at least as of October of 2010, the U.S. Department of Treasury is telling [479] TransUnion they were concerned about the rate of false positives?

A. Yes. This letter indicated some concerns, yes.

MR. FRANCIS: And would you please, Mr. Reeser, just continue down for the last part of that first paragraph?

(Document enlarged.)

MR. FRANCIS: Yes.

BY MR. FRANCIS

Q. It goes on to read that:

"An interdiction product that does not include rudimentary checks to avoid false positive reporting can create more confusion than clarity and cause harm to innocent consumers. This is particularly worrisome

when interdiction products are disseminated broadly in conjunction with credit reports."

Do you see that?

A. I do.

Q. Okay. Do you know what is meant by the term "interdiction product"?

A. Yes.

Q. Is the OFAC product that TransUnion sold and what I asked you about earlier, is that an interdiction product?

A. Yes. It's -- the Accuity software is an interdiction product and at the time was the market leading user of that software.

[480] So I understand the rudimentary aspect of that because this is the same software that was used more than any other software in the financial services industry. So it was used exactly the same.

Q. And would you agree with me that TransUnion's OFAC product was disseminated in connection with credit reports? Just like this last sentences references.

A. It can be delivered at the same time as a credit report, yes.

Q. Okay.

MR. FRANCIS: And then just the second paragraph please? Then we can move on.

(Document displayed)

BY MR. FRANCIS

Q. All right. The paragraph references a recent appellate court decision and then the last sentence reads:

"We are particularly interested in procedures or policies you have established to mitigate the impact of false positives on credit applicants."

Do you see that?

A. I do.

Q. All right. And at some point TransUnion responded to that letter from Treasury, correct?

A. Correct.

Q. In fact, it was a letter that was sent by TransUnion's [481] general counsel, Ms. Norgle, back to the Treasury, correct?

A. Yes.

MR. FRANCIS: Mr. Reeser, would you please pull up Exhibit 35? Now, can you highlight the top portion of that so we can see the date, please? That's fine. (Document displayed)

BY MR. FRANCIS

Q. So the date of this letter is February 7, 2011. Do you disagree with me that that's when Ms. Norgle responded to Treasury's first letter?

A. I do not.

Q. And you work with Ms. Norgle, or did you at some point, correct?

A. I have worked with her, yes.

Q. Okay. And in connection with OFAC, you worked with her, correct?

A. Yes.

Q. And then she responds --

MR. FRANCIS: Can we see the first paragraph blown up as well?

(Document enlarged.)

BY MR. FRANCIS

Q. She responds: This letter -- and I'll paraphrase for the sake of time.

[482] "This letter is TransUnion's response to your letter of October 27, 2010.

"Like you" -- if you go further below -- "TransUnion recognizes the importance of balancing the important goal of blocking access to the U.S. financial system by persons on the SDN list against the equally important goal of minimizing the potential for inconvenience or adverse impact to a consumer."

After February 7th of 2011, am I correct that TransUnion continued to use the name matching logic?

A. That's correct.

Q. Am I correct that at least after February of 2011 and up through 2013, when you testified in this case, TransUnion never began using dates of birth in connection with the OFAC product?

A. We never put in it production, no.

Q. Okay. And am I correct that TransUnion, after receiving this letter from -- receiving the OFAC letter from Treasury, never began using addresses to help screen or reduce false positives?

A. That's correct.

Q. Okay. And at no point after February of 2011 and up through December of 2013 did TransUnion ever use another vendor for OFAC compliance, correct?

A. We did not.

Q. Okay. And at no point after receiving the letter from [483] Treasury and responding -- and TransUnion responding back in February of 2011, did TransUnion consider stopping selling the sale of OFAC data, is that correct?

A. That's correct.

Q. All right. And, sir, you would agree with me that there is no law or requirement of any sort that requires TransUnion to sell the OFAC product, is that correct?

A. TransUnion or any other company, yes.

Q. Correct. So you can just stop selling it if you wanted to, correct?

A. Yes.

Q. And at no point after February of 2011 did TransUnion ever consider bringing the OFAC list in its own database and creating its own product for sale in connection with a credit report, correct?

A. We did consider it.

Q. You didn't do it though, correct?

A. Couldn't, no.

Q. Okay. Is it your testimony that TransUnion could not import the OFAC database into a separate database?

A. We could not accurately match the file or build the software and the delivery tools that Accuity had built in their software. We had looked at it several times. Technically we did not have the capabilities at the time to do that.

Q. And at any time did you develop the capability to develop [484] your own OFAC product?

A. We did.

Q. Okay. But not up through 2013, correct?

A. No. In 2015, 2016, we had new capabilities.

Q. Okay. And you had no limitations, am I correct, on importing the OFAC list into a database maintained by TransUnion, correct?

A. Just copying the file?

Q. Yes, or a routine feed. Copying the file like Accuity got the file.

A. A routine feed, no, we did not have the ability to do that.

Q. Okay. And is it your testimony that you had no ability to actually get the OFAC list into a separate database?

A. Not one that we could production wise, no.

Q. Okay. At any point did you consider, let's try another vendor?

A. We would have, if Accuity hadn't told us they were actually going to build that version of the software that would provide those enhancements to us. So when they had committed to us to make that software available, we didn't see the need to try to pull out that software and replace it with another that did similar things.

Q. But as of the time that you testified in this case in 2013, you were still using the same match logic that was [485] employed in connection with Mr. Ramirez's report, correct?

A. With the other changes that I had mentioned already.

Q. What changes subsequent to Mr. Ramirez's report did you employ?

A. We employed the removal of the Synonyms file so that we couldn't match on name variations and the extent of different name variations that the Accuity product regularly offered in the marketplace.

Q. And for an example, when you say "Synonyms," you mean if a name were Cortes, C-O-R-T-E-S, previous to that change that would match to Cortez, C-O-R-T-E-Z, correct?

A. That's correct. By removing that information, it would no longer generate a potential --

Q. Right. And you made that change to Synonyms, correct?

A. Yes.

Q. All right. Subsequent to February of 2011 and up through 2013 what other exchanges did you make?

A. We continued to look at other name logic assumptions and we analyzed a lot of different matching logics. We had a number of different teams that looked at different criteria and matching criteria to determine if we could bring down the number of potential hits without exposing the risk of allowing true potential hits to be delivered.

Q. Sir, isn't it true that as of December of 2013, you employed no additional matching criteria other than name?

[486] **A.** Since then?

Q. As of 2013 --

A. Yes.

Q. -- and from 2011 isn't it true you didn't employ any other matching criteria other than name?

A. The matching criteria, yes, that's true.

Q. Okay. Now, am I correct that TransUnion at some point did look at methods for reducing false positives?

A. Yes. We had a number of research efforts that looked at different criteria and options, yes.

Q. And through that research you had did discover that there were ways that you could reduce the number of false positives, correct?

A. Not with putting at risk significantly allowing more true potential hits.

Q. That wasn't my question. The research that you had done indicated that there were ways that you could have reduced the number of false positives, correct?

A. Yes.

Q. Okay. And, for example, one of the things that you considered was using a 10-year range for date of birth, correct?

A. Yes.

Q. And what that would have meant was if the date of birth that was in the OFAC file was greater

than 10 years of [487] difference than what was in the consumer's file, that would not deliver a hit, correct?

A. Yes.

Q. That was one of the things you looked at?

A. Yes, yes.

Q. Okay. And one of the other things that you looked at was removing hits where there wasn't an exact match of all of the names, correct?

A. Yes.

Q. All right. And, in fact, you had -- you had research that you had conducted indicated that you could get the rate of false positives down to zero percent, is that correct?

A. If you just didn't deliver any hits, yes, that's true.

Q. Okay. And in terms of just using date of birth, right, aren't I correct that about 80 percent of the OFAC records contain a date of birth?

A. I think that's a close approximation, yes.

Q. Okay. So would I be correct, there was no reason that where a date of birth existed within the OFAC record, that TransUnion couldn't have designed a program which would cross reference to see if that date of birth was there and it didn't match and exclude that as a hit. You could have done that if you wanted to, correct?

A. No. Not at the time we could not.

Q. Are you telling -- are you telling us that once the hit [488] came back into TransUnion's database from the Accuity software, you could not run an

additional filter to screen out any dates of birth that didn't match with the consumer's file?

A. At the time, at that period of time, no, we could not.

Q. And you're saying at the time of 2011, correct?

A. That's right.

Q. 2012?

A. That's right.

Q. 2013?

A. 2013 is when we were able to start doing analysis where we had some technology people take a look at the criteria with the date of births and be able to use some of the newer softwares and tools that we had.

Prior to that, the challenges what the government filed was all that information that you see on the OFAC record didn't really have standard formatting to it. It kind of was all around. And what happened is the date of births themselves were in 10 to 15 different formats, including ranges of years. So there wasn't a consistent format for a date of birth to match to. Nor did we have the software and capabilities to perform that kind of a match at that time.

In 2013 we did then have more technical capabilities and Accuity continued to delay their deployment of their software. So we started planning how we could technically go about building that software around the top of Accuity, which we [489] eventually were able to figure out with some of our best technology people. But prior to then, it was not possible for us to do.

Q. When you say it's not possible, are you saying that it wasn't possible for you to build a separate database for the data that came in from the OFAC record?

A. Having the database is just one small piece of being able to productionalize a product.

Q. Are you telling us that you couldn't have imported the data from OFAC and then had your system, as it does with other credit reports, look to see whether or not there is a different date of birth in the file that is now downloaded into its own system and cross reference that with what's in the consumer's file? You couldn't do that?

A. No, we could not.

Q. Is TransUnion one of the big three credit bureaus in the world?

A. We are.

Q. Uh-huh. Okay. You mentioned 2013. But just to be clear, as of December of 2013, you still had not employed any other match criteria other than name, correct?

A. Correct.

Q. All right. Now, would you agree with me that TransUnion's customers believe that when they get a report back that includes OFAC data, that that data is accurate that it gets [490] from TransUnion?

A. They believe that it was fit for use with the OFAC regulation. In fact, customers expected us to be delivering more potential matches.

Q. Sir, do you remember being asked that question at your deposition, about what your customers expected?

A. Yes.

Q. Would you please turn to Page 34 of your deposition, Lines 1 through 10?

MR. FRANCIS: And could you, Mr. Reeser, please put up excerpt six?

(Document displayed)

A. I'm sorry. What page was that?

BY MR. FRANCIS

Q. 34. Now, at your deposition you were asked this question:

> **"QUESTION:** To ask you the question more practically, do your clients have some expectation that the possible matches that TransUnion provides in response to an OFAC add-on has some reasonable basis that it may, in fact, be true?"

And there is an objection. And your answer is what?

A. (As read)

"ANSWER: Generally, yes."

Q. Okay. So your clients aren't getting OFAC data from TransUnion thinking: Oh, this doesn't mean anything. It's not [491] accurate. Right? They expect it to be accurate?

A. They expect it to be a potential match to a name in the OFAC list that they would then screen.

Q. Okay.

A. That's what they would expect.

Q. Just a few more things, Mr. O'Connell.

As of December 2013 when you testified in this case, am I correct that you had no data that confirmed that any of the name matches that TransUnion had ever sold to a customer was actually a person on the OFAC list?

A. It would not know that, no.

Q. You had no data at all?

A. No.

Q. That would indicate that one of the reports and one of the hits that TransUnion sold or delivered was actually a hit of somebody on the OFAC list, correct?

A. That's correct.

Q. I have no further questions.

THE COURT: Mr. Newman?

MR. NEWMAN: Mr. O'Connell, do you need some water?

THE WITNESS: Yes, actually. Thank you.

MR. NEWMAN: Oh, you've got some right there.

THE WITNESS: Yes, I'm good.

MR. NEWMAN: Are you good?

THE WITNESS: Yes.

* * *

[521] end-user agreements with our customers, confirming the way they are supposed to use that information, or not use that information.

And it's also the type of language that we require our resellers of our services to pass along to their end users who sign up for that.

Q In other words, it's not -- there's not a contract between TransUnion and the end user. This is language that TransUnion requires the reseller to include in its contracts with the end user. Correct?

A Yes. That's right.

Q And why is this language there?

A To ensure we're absolutely clear with our end users that we do not want them using that information in any way to take adverse action on that transaction. It's only to be used for their OFAC regulation and compliance, and that's it.

Q And, will you please turn to --

MR. NEWMAN: Just two more exhibits, Your Honor, I promise.

BY MR. NEWMAN

Q Will you please turn to Exhibit 72.

(Request complied with by the Witness)

A Yes.

Q What is Exhibit 72?

A This is an example of a contract between TransUnion and [522] our reseller. If that reseller wants to resell the OFAC Name Screen service.

MR. NEWMAN: Your Honor, I offer 72 into evidence.

THE COURT: Any objection?

MR. FRANCIS: No objection, Your Honor.

THE COURT: 72, admitted.

(Trial Exhibit 72 received in evidence.)

(Document displayed)

MR. NEWMAN: And if we can just zoom in quickly on the passage in the middle, with the "1," and then the indented text.

And there's this language, and it says (As read) "Prior to the OFAC Advisor being provided to a Customer, Reseller obtain from each such Customer..."

(Reporter interruption)

MR. NEWMAN: I will slow down, I apologize.

BY MR. NEWMAN

Q This Paragraph 1 is a requirement that TransUnion imposes on all resellers, correct?

A Yes. This is the paragraph where there's -- at a minimum, this language needs to be flowed down into their customer contracts that they want to sell this service to.

Q And what does the term "Subscriber" mean?

A That's the end user that's contracting for the service.

Q And it says:

[523] "'In the event Subscriber obtains...'"

MR. NEWMAN: Am I doing better?

(Reporter nods)

MR. NEWMAN: Thank you. I apologize.

"'In the event Subscriber obtains TransUnion's OFAC Advisor services in conjunction with a consumer report, Subscriber shall be solely responsible for taking any action that may be required

by federal law as a result of a match to the OFAC File, and shall not deny or otherwise take any adverse action against any consumer based solely on Trans Union's OFAC Advisor services.'"

BY MR. NEWMAN

Q What's the purpose of that language?

A To ensure that it's clear to our resellers that not only do we want to hold them accountable for that rule, but also making sure that they understand they need to hold their customers accountable, so we require that to flow down to their customers, in their contracts.

Q Can you please turn to Exhibit 93.

(Request complied with by the Witness)

Q Do you have 93? They might not have been in all the binders.

A I don't have 93. Mine ends at 92.

(Off-the-Record discussion between counsel)

MR. NEWMAN: Your Honor, may I approach the witness?

* * *

[533] **THE COURT:** Well, let me ask you this way. Can you ask it as a question?

MR. FRANCIS: Yes.

THE COURT: You know: From that decision, did you understand that this is what the Court had said?

MR. FRANCIS: Yes, Your Honor.

BY MR. FRANCIS

Q Mr. O'Connell, you had expressed certain -- your views as to certain aspects of what you thought the *Cortez* decision said.

Are you aware that actually one of the things that the *Cortez* decision said was that the jury could have reasonably concluded that TransUnion could have taken steps to prevent and minimize the possibility of an erroneous OFAC alert by using or checking the date of birth of the consumer against the birthdate of the person on the SDN list?

Are you aware that's what the Court said, at least at that part of the decision?

A Not to that degree, no.

Q Oh. Okay. So, following *Cortez*, am I correct, TransUnion, at least through 2013, from 2010 when the decision came down through 2013, never used the date of birth in connection with the OFAC product?

A We could not, no.

Q Okay. My decision was you didn't -- my question was you

[534] did not do it. Correct?

A Correct.

Q All right.

You also expressed some statements regarding the Norgle letter, Ms. Norgle's letter back to Treasury, from February 7, 2011, which was Exhibit 35 which I asked you about before.

A Uh-huh.

Q And you discussed the response of Ms. Norgle to that letter.

Would you please look at Exhibit 35, and turn to Page 3.

MR. FRANCIS: Can you put up Page 3, please?

(Document displayed)

THE WITNESS: Yes.

MR. FRANCIS: And would you blow up the top portion of Page 3, please.

(Document displayed)

BY MR. FRANCIS

Q Among other things, the paragraph reads that (As read):

"In response to the *Cortez versus TransUnion* decision, TransUnion initiated a practice under which a consumer obtaining his consumer report is notified if we would consider his name to be a potential match to the SDN file."

Do you see that?

A I do.

Q And then the next sentence is:

[535] "That notification is accompanied by instructions on how the consumer can obtain further information from TransUnion about our OFAC Name Screen service, and how to request TransUnion to block the return of a potential match message on future transactions."

Do you see that?

A I do.

Q Is it -- was that true?

A Did we do that? Yes.

Q Okay.

A Absolutely.

MR. FRANCIS: Mr. Reeser, would you please turn to Exhibit 3.

(Document displayed)

BY MR. FRANCIS

Q Mr. O'Connell, Exhibit 3 is the letter that TransUnion was sending to consumers who were considered to be a match during the period of February, 2011 through July of 2011. There's testimony that this is the letter (Indicating), and this is how TransUnion would advise consumers of OFAC information in their file.

Have you seen this letter before?

A I have not.

Q Okay. I will represent to you -- and if you can find it, you let me know -- there is no instruction at all that [536] TransUnion provided to consumers in this class as to how to block information in their credit file.

Well, take a look at it, and tell me if I'm wrong.

A Well, at the bottom of the letter, it provides: For additional questions, contact TransUnion. For any additional questions or concerns.

Q Can you tell me where in this letter there are instructions to the consumer as to how to block OFAC information on their file?

A No.

Q Okay. It's not there, is it?

A Not what you just said, no.

Q Yeah. Would you please turn in your binder to Exhibit 9.

(Request complied with by the Witness)

Q Mr. Newman asked you some questions about TransUnion's attempt to reduce the rate of false positives following 2011. Correct?

A Yes.

Q And one of the things that you mentioned was that you asked Accuity to deliver a different type of product. Correct?

A An enhancement to the existing product.

Q Yes. And that was in 2011, correct?

A That's right.

Q But you didn't get that from them until 2013, isn't that correct?

[537]

A Yes.

Q So you waited two years.

A Well, they continued to move the date of availability, so in parallel to waiting for them to commit -- as they kept moving their date, we did pursue analysis on our own to try to figure out if it was possible or feasible for us to be able to build it, ourselves.

Q You never told them: If you don't give this to us by next month, we're going to use somebody else.

Correct?

A I don't recall that specific discussion, no.

Q Did you ever call up Experian, your competitor, and ask: Who do you use?

A We don't have those kind of conversations with competitors.

Q Did you ever call up your competitor, Equifax, and ask: Who do you use?

A No, we don't do that.

Q Okay. Did you do anything to change the match logic between 2011 and 2013 whale you waited for Accuity to get back to you over two years?

A No.

Q Now, at Exhibit 9, can you identify this document for me, please?

A Yes.

[538] **Q** Okay. What is it?

A It's an analysis that's a part of our consumer relations disclosure and dispute project.

Q Yes.

MR. FRANCIS: Your Honor, plaintiff and the class move Exhibit 9 into evidence.

MR. NEWMAN: No objection.

THE COURT: 9, admitted.

(Trial Exhibit 9 received in evidence.)

MR. FRANCIS: Can you please put that up, Mr. Reeser, the first page?

(Document displayed)

BY MR. FRANCIS

Q Exhibit 9 is a -- a slide, series of slides that relate to an analysis that TransUnion performed back in 2011. Correct?

A Yes.

Q Correct? Okay. Would you please turn to the third page.

(Document displayed)

Q On this slide, which is entitled "OFAC Disclosure/Dispute Enhancements Project Scope," there are a series of key goals and objectives that are identified.

Do you see those?

A I do.

Q And there is one that is in bold. Do you see that?

A I do.

[539] **Q** And what's in bold is:

"*Tighten the OFAC matching rules to reduce the return of false positive results.*"

Do you see that?

A I do.

Q Would you agree with me that as of 2011, TransUnion was concerned that its matching rules were not tight enough and it was resulting in too many false positives?

A We are always trying to analyze improvements in products. So yes, we always wanted to continue to bring down false positives.

Q Now, when you're saying you're always wanting to improve products, are you telling me, with this product, there's a slide show like this for every month you're looking at this, to reduce false positives?

This is a specific study, isn't it?

A This is a specific study. But there are many others like it, yes.

Q Okay. And, would you please turn to Exhibit 10. It's in the binder. It's the next exhibit. Are you able to identify this document for the Court?

A Yes.

Q Okay. And what is this document?

A This was a subsequent analysis after the -- after the previous one, where they weren't able to identify ways to do [540] the date-of-birth analysis before, this one was a subsequent effort a little later, like a year or two later, trying to, again, try to look for different ways to be able to do that.

MR. FRANCIS: Plaintiff and the class move Exhibit 10

into evidence.

MR. NEWMAN: No objection.

THE COURT: 10, admitted.

(Trial Exhibit 10 received in evidence.)

MR. FRANCIS: Would you please put up the first page of Exhibit 10.

(Document displayed)

BY MR. FRANCIS

Q Am I correct, sir, that this is another series of slides that TransUnion put together to study the OFAC hit analysis issue?

A Yes.

Q Okay. And would you please turn to Page 11 of Exhibit 10.

(Request complied with by the Witness)

(Document displayed)

A Yes.

Q Page 11 of Exhibit 10 outlines certain data that TransUnion compiled. Correct?

A Yes.

Q All right. And just real quickly, I want to go over what the columns are, so we understand what this data is.

[541] **A** Uh-huh.

Q The first column is "OFAC Hit Rate." Do you see that?

A I do.

Q And what does that mean, exactly?

A That's the percentage of potential matches delivered with the product.

Q Right. And the next column is "Percentage only Potential Candidates." Do you see that?

A I do.

Q And what does that indicate?

A I'm not sure what the criteria was to identify potential versus the false positive, but, intended to represent the percentage of only true potential hits.

Q And the next column after that is "Percentage some Potential Candidates." What does that refer to?

A I'm assuming it's a mix of potential and false.

Q And the last column is "Percentage only False Positives."

Do you see that?

A I do.

Q Doesn't that column indicate hits that were only false positives where there was no actual or accurate hit?

A I don't know what their definition in this analysis of "false positive" was, but objectively, that's what their intention was, yeah.

Q But you were part of the efforts that TransUnion was [542] making to study this data. Correct?

A I was not part of this analysis.

Q All right.

A I wasn't aware of it.

Q And then if you look, under the "Rule," there are various rules that are listed. Correct?

A Yes.

Q And there is a rule one, two, three four down from the top, that says "Name Rule 1A and date of birth," and there's a greater-than sign, "10 Years." Do you see that?

A I do.

Q Do you know what that means?

A The "greater than ten years"?

Q Do you know what that rule is?

A Just from reading on this, it's a date of birth greater than ten years' difference from the OFAC file.

Q Right. And do you know what 1A is?

A I don't.

Q If I tell you that 1A was a rule that TransUnion designed to prevent a hit from being delivered where all parts of a name didn't match, would you disagree with me that that's what 1A is?

A If you say so.

MR. NEWMAN: Objection.

[543] **BY MR. FRANCIS**

Q And would you agree with me, if you go over to the column "Percentage False Positives," the number is "0%."

A Yes.

Q Do you see that?

A I do.

Q Do you agree with me that TransUnion, at least as of 2011, had identified a method of returning hits that would result in a zero percent false positive?

They were -- they identified a method for doing that. Correct?

A No.

Q You don't agree that zero percent --

A This is a manual analysis that people were manually doing to compare those rules. And if we were

to figure out a technical method to be able to deploy this at production, that would be this. But this was strictly a manual effort to do those comparisons.

So I -- I want to be clear about what you said.

Q Do you disagree with me that TransUnion's information was that if that rule was applied, Rule 1A, and date of birth greater than ten years, it would result in a zero percent false positive?

A Yes, it would.

Q Okay. Now, in response to some of Mr. Newman's questions,

* * *

[545] **THE WITNESS:** I'll get there.

MR. SOUMILAS: Here, just hand him this (Indicating).

MR. FRANCIS: Yeah.

May I just approach the Witness Your Honor?

THE COURT: You may. 8-36.

THE WITNESS: I got it, thank you.

BY MR. FRANCIS

Q Mr. O'Connell, I will represent to you that the stack that I just placed in front of you --

(Document displayed)

Q -- represents the class of over 8,000 people in this case. Is it your testimony that TransUnion's enhancements and products benefited those 8,000 people?

A Absolutely.

Q Absolutely.

A Absolutely.

Q It's your testimony that the members of this class who were identified as being a hit on the OFAC list were benefited by TransUnion's practices.

A Yes.

Q Okay.

MR. FRANCIS: No further questions.

THE COURT: Mr. Newman, anything further?

RECROSS-EXAMINATION BY MR. NEWMAN

* * *

Memorandum of Points and Authorities in Support of Motion for Judgment as a Matter of Law (N.D. Cal. June 15, 2017)

I. INTRODUCTION

This case arises under the FCRA which governs the behavior of consumer reporting agencies ("CRA"), such as the defendant, TransUnion. TransUnion provides a service to lenders known as "OFAC Name Screen Alert" ("Name Screen"), which U.S. businesses use to comply with federal anti-terror and anti-drug trafficking rules administered by the Treasury Department's Office of Foreign Assets Control ("OFAC"). Plaintiff alleges that between January 1, 2011 and July 26, 2011, TransUnion's Name Screen product was sold in a manner that violated two provisions of the FCRA: one requiring that a CRA employ reasonable procedures designed to assure that consumer reports are prepared with maximum possible accuracy (15 U.S.C. § 1681e(b)) and one governing how credit file information must be disclosed to consumers (15 U.S.C. § 1681g).

Plaintiff does not seek to recover actual damages. Rather, he pursues classwide statutory damages under 15 U.S.C. § 1681n, which requires proof of a willful violation of an objectively clear legal requirement imposed by the FCRA. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60 (2007); *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 248-49 (3d Cir. 2012). Plaintiff, on behalf of the Class, seeks to recover between $100 and $1,000 per class member on the grounds that TransUnion willfully violated the FCRA's requirements. *See* 15 U.S.C. § 1681n(a). Plaintiff's theory of the case is premised on two

assumptions: that the Third Circuit's decision in *Cortez v. Trans Union,* LLC, 617 F.3d 688 (3d Cir. 2010) constitutes a "requirement" of the FCRA, and that TransUnion willfully failed to comply with this requirement.

At this point in the trial, Plaintiff's case-in-chief has come to an end and Plaintiff has been fully heard on his claims against TransUnion. After Plaintiff's presentation of the evidence, there can be no dispute that Plaintiff has failed to meet his burden of proof on his three claims for statutory violations of Section 1681 of the FCRA. Specifically, Plaintiff has failed to adduce evidence to support a finding that: (1) TransUnion *willfully* violated the obligations of Section 1681g(a) to provide all information in the credit files of class members; (2) TransUnion *willfully* violated the obligations of Section 1681g(c) to provide the class with a statement of their FCRA rights; and (3) TransUnion *willfully* violated the requirements of Section 1681e(b) to assure maximum possible accuracy in its credit reports. Indeed, a review of a summary of the witnesses' wide-ranging testimony demonstrates that no evidence was adduced to address the fundamental question of whether TransUnion's conduct amounted to a willful violation. Instead, where TransUnion's conduct was addressed, the evidence compels the opposite conclusion.

First, with respect to Plaintiff's claims that TransUnion willfully failed to disclose all information in the credit files of class members, and willfully failed to provide class members with a statement of their FCRA rights, in violation of Section 1681g, the evidence shows that TransUnion disclosed all

information that *Cortez* suggested should be disclosed. The evidence shows that TransUnion chose not to seek Supreme Court review of *Cortez*, but instead attempted to comply fully with what the *Cortez* ruling seemed to say, and to comply on a nationwide basis, using the best methods that its technology then allowed. The evidence has shown that TransUnion developed the most efficient disclosure process it could under the technology constraints of the time, it acted efficiently and in a coordinated manner to continuously work towards effective and comprehensive disclosure, and that when it did develop technology capable of disclosing the OFAC information simultaneously with consumer reports, it did so. Through the testimony of its employees, TransUnion has reinforced the position it has maintained throughout this litigation that it did not willfully disregard requirements under the FCRA at any point during the class period (and Plaintiff's opening statement appears to concede a lack of willfulness, instead describing TransUnion's measures as "half-hearted").

Second, with respect to Plaintiff's class claim under Section 1681e(b), the evidence shows that TransUnion did not *willfully* fail to employ reasonable procedures to achieve maximum possible accuracy. TransUnion undertook significant efforts to comply with *Cortez*, and these efforts achieved maximum possible accuracy at the time. The evidence has shown that, rather than willfully disobeying the law, TransUnion made substantial and deliberate efforts to comply with the guidance set forth in *Cortez*, and TransUnion corrected the specific issues that led to the award in favor of the plaintiff in that litigation.

Plaintiff has failed to produce any evidence that TransUnion disregarded any legal obligations *Cortez* may have imposed. Accordingly, because Plaintiff lacks proof of a willful violation, the class claims under Section 1681e(b) fail.

Finally, in the alternative, TransUnion moves to decertify the Class on the grounds that the evidence presented at trial is insufficient to establish the elements of Federal Rule of Civil Procedure 23.

II. ARGUMENT

A. Legal Standard For Granting a Motion for Judgment as a Matter of Law

Fed. R. Civ. P. 50(a)(1) provides: "If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient, evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue."

Although a court ruling on a motion for judgment as a matter of law must view the evidence in the light most favorable to the non-moving party and draw all factual inferences in the non-movant's favor, judgment as a matter of law is proper if the evidence, construed in the light most favorable to the non-moving party, compels the conclusion that there is no legally sufficient evidentiary basis for a jury to find for the non-moving party on the issue or claim. *Acosta v. City & Cty. of San Francisco*, 83 F.3d 1143, 1145 (9th Cir. 1996); *Headwaters Forest Defense v. Cty. of*

Humboldt, 240 F.3d 1185, 1197 (9th Cir. 2000) (rev'd on other grounds). A "mere scintilla of evidence" is generally insufficient to prevent entry of judgment as a matter of law. *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir. 1986). The non-moving party must show substantial evidence to support a verdict in favor of the non-moving party. *Gillette v. Delmore*, 979 F.2d 1342, 1346 (1992) (citing *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988)). Substantial evidence is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* (citing *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987)).

Here, even construing all the evidence in the light most favorable to Plaintiff, there is no legally sufficient evidentiary basis to find that TransUnion *willfully* violated Section 1681g or Section 1681e(b) of the FCRA.

B. Plaintiff Has Not Proven a Willful Violation of FCRA § 1681g.

Plaintiff has failed to establish that, when Plaintiff or any member of the Class requested his or her file from TransUnion, TransUnion willfully failed to clearly and accurately disclose to Plaintiff or any other member of the Class all information in the consumer's file at the time of the request. In other words, Plaintiff has not satisfied his burden to prove that TransUnion undertook any actions with respect to disclosing information in consumer files that entailed an unjustifiably high risk of harm that was known or so obvious that it should be known.

The evidence also has shown that TransUnion's post-*Cortez* procedures to disclose such information to consumers were objectively reasonable. TransUnion witnesses testified at trial that TransUnion sought to comply with *Cortez* on a nationwide basis as best it could, as quickly as possible and in a manner that delivered information effectively. It is not disputed that *all* the information described in Section 1681g(a) and (c) was actually provided to Plaintiff and the Class. Plaintiff has not been able to prove that TransUnion's disclosure procedures "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 50; *Fuges*, 707 F.3d at 248.

The evidence, including the testimony of TransUnion witness Robert Lytle, has shown that all the information was transmitted and received within the statutory time deadline; roughly contemporaneous delivery provided the same substantive information. Importantly, Plaintiff has not offered any evidence that this method creates a material risk of harm. The evidence, based on actual consumer behavior, demonstrates that the manner of disclosure effectively conveyed the information meant to be conveyed. The evidence also shows that TransUnion's contemporaneous delivery procedure "had no practical effect" on Plaintiff's ability to receive information he needed to inquire further as to the results he received. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017) (rejecting "informational injury" theory and finding that because plaintiff did not suffer a concrete injury as a result of the deprivation of information, he therefore lacked Article III standing to pursue a claim under 15 U.S.C. § 1681g(c)).

At trial Plaintiff testified that he called TransUnion on February 28, 2011, the next day after visiting the Dublin Nissan dealership, and was informed that he "was not on the OFAC list" and that he would be sent his file disclosure. (Transcript of Trial Proceedings on June 12, 2017 ("Day 1 Transcript") at 150:20-151:7.) He testified that he "had a sense of relief that [he] wasn't on the OFAC list." (*Id.* at 151:5-6.) He received his credit file disclosure "a couple days after" (*id.* at 151:8; Ex. 75), and received the OFAC letter *the next day*. (*Id.* at 153:10-16; Ex. 3.) The OFAC letter is dated March 1, 2011, meaning that it was generated one day after Plaintiff called TransUnion and only two days after Plaintiff and his wife purchased the vehicle at Dublin Nissan. (Ex. 3.) By March 16, 2011, two weeks after the transaction, Plaintiff wrote his letter to TransUnion asking to "get [him] off the OFAC list." (Day 1 Transcript at 156:24-157:3; Ex. 54.) By March 22, 2011, TransUnion informed Plaintiff that his name had been removed from the Name Screen Alert list. (*Id.* at 157:23-158:10; Ex. 53.) Plaintiff also testified that, since March 2011, he has not had any issues with an OFAC flag. (*Id.* at 166:3-5.)

Thus, the evidence sufficiently conveys that neither Plaintiff, nor any class member, suffered any concrete harm as a result of TransUnion's contemporaneous disclosure process. Plaintiff has proffered no evidence showing that TransUnion's conduct adversely affected consumers' ability to effectively dispute reported information. It is undisputed that Plaintiff himself effectively exercised his dispute rights in response to the supposedly non-

compliant disclosure format. (*Id.* at 153:10-16, 156:24-157:3; Exs. 3 and 54.)

Plaintiff has not put forth any evidence to suggest that TransUnion willfully violated anyone's rights or acted recklessly. The information delivered to Plaintiff was disclosed in a manner that is simple for a consumer to understand, and convenient to act upon if necessary, such as by requesting reinvestigation of a potentially inaccurate item—which, again, Plaintiff in fact did. The evidence establishes that TransUnion's disclosure procedures, which included presenting information in a separate letter with language TransUnion intended to be consumer-friendly, represented a reasonable application of Section 1681g. Indeed, Plaintiff has failed to provide any evidence at trial that any class member failed to understand what was disclosed as part of his OFAC disclosure.

The evidence at trial has not shown that TransUnion willfully attempted to deprive Plaintiff or any other class member of all the information in their files, or to prevent delivery of the § 1681g(c) statement of rights to anyone. To the contrary, as evinced by Mr. Lytle's testimony, TransUnion believed in good faith that it developed a solution that would make effective and legally-compliant disclosures to consumers. The evidence also proves that class members received effective notice of their rights, and thus suffered neither harm nor material risk of harm.

Therefore, the evidence presented at trial, construed in the light most favorable to Plaintiff and the Class, compels the conclusion that there is no legally sufficient evidentiary basis for a jury to find for

Plaintiff and the Class on their claims under FRCA Section 1681g(a) and (c).

C. Plaintiff Has Not Proven a Willful Violation of FCRA § 1681e(b).

Plaintiff also has not presented evidence at trial that TransUnion's conduct willfully violated Section 1681e(b). The only requirement of Section 1681e(b) is that when a CRA "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." The evidence proves that TransUnion's internal processes were reasonably designed to meet the maximum *possible* accuracy standard in 2011.

The evidence also has shown, including through testimony of Dublin Nissan representative Annette Coito, that end users of the Name Screen product were expressly instructed that Name Screen alone could *not* be used to make an adverse credit decision. The evidence demonstrates that TransUnion sought to comply with the requirements under the FCRA and protect consumers' rights. The evidence establishes that at all times TransUnion sought to communicate accurate information to its customers. Therefore, Plaintiff has not established that TransUnion's conduct amounted to a willful effort to deliver inaccurate OFAC results as to Plaintiff or the Class.

The evidence at trial has shown that, after the Third Circuit's decision in *Cortez*, TransUnion did a great deal to achieve the maximum possible accuracy standard, and specifically to address issues raised in the *Cortez* ruling. The evidence, including the testimony of TransUnion employee Michael

O'Connell, demonstrates that TransUnion sought to comply with *Cortez*, and that TransUnion's response to *Cortez* was reasonable because it made nationwide changes to its Name Screen product, including by refusing Accuity's Synonyms file to reduce the number of "false positives" and to avoid the exact issue (Cortez/Cortes) that gave rise to the *Cortez* litigation itself. In fact, Mr. O'Connell testified that if TransUnion had used the Accuity product straight off the rack without any modifications via the Rules feature, the hit rate would have been about five percent. (Transcript of Trial Proceedings on June 14, 2017 ("Day 3 Transcript") at 493:15-19.) By employing the rules feature and refusing the Synonyms file, TransUnion lowered the hit rate to less than 0.5 percent, which is *substantially* lower than the "high" hit rate of twenty percent as described by Plaintiff's expert witness, Erich Ferrari. (*Id.* at 429:14-25, 494:18-21, 506:6-10.) Therefore, this compliance decision rendered TransUnion's screening algorithm tighter, and thus more "accurate" as Plaintiff defines accuracy. In fact, Mr. O'Connell testified at trial that, to the best of his knowledge, the Name Screen product had the lowest false positive rate of any OFAC software on the market. (*Id.* at 505:4-6.)

Additionally, TransUnion witness Colleen Gill has testified that TransUnion took steps to ensure that its description of OFAC results was modified to state that a positive result was only a "potential" match. That TransUnion took steps to add this language, prior to commencement of the class period here, demonstrates that it did not *willfully* violate Section 1681e(b) or *Cortez*. The effect of this evidence is that TransUnion's actions reduced both actual and

potential risk of misuse, and this is a further reason why Plaintiff's accuracy claim fails.

The trial testimony of Mr. Ferrari actually bolsters TransUnion's defense in this case. Mr. Ferrari's testimony established that the stakes of OFAC compliance are high and that a company such as TransUnion should take appropriate measures to provide its customers with the full range of information necessary for that customer to make a final determination as to whether an individual is a true SDN. Mr. Ferrari's testimony also establishes that the purpose of screening products, such as TransUnion's Name Screen product, is to provide an initial screen of the unusably lengthy SDN list and to require employees at the financial institution who wishes to transact business with a potential SDN to review any possible hits with their own eyes.

Plaintiff has identified only TransUnion's alleged failure to use a date-of-birth ("DOB") filter, also referred to as multifactor matching, for not achieving maximum possible accuracy standards during the class period. However, Mr. O'Connell testified that there was no DOB filtering technology available during the class period. TransUnion was informed through its third party service provider, Accuity, that the feature was not available. However, TransUnion was led to believe that such a filtering feature would be offered in late 2011—after the close of the class period. The evidence has shown that despite statements that it would do so before the end of 2011, Accuity did not actually offer to TransUnion any OFAC product capable of taking DOB into account until after the end of the class period, and even then,

when TransUnion tested it, TransUnion found that it did not improve accuracy. The legal standard involves consideration of "maximum *possible* accuracy," but Plaintiff's witnesses at trial, including Mr. Ferrari, have failed to proffer evidence of the existence of any *possible* technology that in 2011 could have achieved a greater accuracy rate, or at least any such technology that TransUnion both actually knew of, at the time, and *willfully* refused to implement.

Therefore, the evidence, construed in the light most favorable to Plaintiff and the Class, compels the conclusion that there is no legally sufficient evidentiary basis for a jury to find for Plaintiff and the Class on their claim under FCRA Section 1681e(b).

D. In the Alternative, the Class Should Be Decertified.

In the alternative, TransUnion moves to decertify the Class on the grounds that the evidence presented at trial is insufficient to establish the elements of Federal Rule of Civil Procedure 23. Plaintiff has presented no evidence that anyone else in the Class had an experience similar to Plaintiff's. The "potential match" language never appeared on Plaintiff's credit report, because Dublin Nissan received data on a non-approved form from 1994, without TransUnion's knowledge. The evidence also shows that Dublin Nissan ignored both its own contractual obligations as well as Plaintiff's request to follow the established OFAC requirement that a transacting party taking reasonable measures to determine whether a "potential match" was or was not an SDN before rejecting a transaction. There is no evidence that any other class member had a similar experience.

Therefore, the typicality element of Rule 23(a)(3) is not satisfied.

Commonality also is lacking under Rule 23(a)(2). As to his Section 1681g claims, Plaintiff has not proven any common experience relating to how the disclosure was communicated. Plaintiff testified that he received his written OFAC disclosure the day after he received his main disclosure. It cannot be determined on a common basis who in the proposed class read the main disclosure and the separate OFAC letter together as a single disclosure, and who did not. Similarly, as to Plaintiff's Section 1681e(b) claim, whether each communication was accurate as to each individual simply cannot be determined through common proof. Rather, an individualized analysis of each OFAC record and consumer is required.

Plaintiff also has failed to adduce evidence to satisfy the adequacy element under Rule 23(a)(4). "The presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representative." *Graham v. Overland Sols., Inc.*, No. 10-CV-672 BEN (BLM), 2011 WL 1769610, at *2 (S.D. Cal. May 9, 2011). Plaintiff admitted at trial that he made a false statement on his credit application (i.e., that he had never had a vehicle repossessed), which suggests a unique defense. Therefore, Plaintiff is not an adequate class representative.

Finally, the Class must be decertified because individualized issues predominate, such that Rule 23(b)(3) is not satisfied. The evidence shows that

multiple issues here should be determined individually (e.g., whether each communication of "potential match" data was accurate as to each individual). Likewise, even if "potential match" data were reported, the end user may well have followed the contracts and Treasury guidance, and closed the transaction seamlessly, perhaps even without the consumer's knowledge.

III. CONCLUSION

In light of the above, TransUnion respectfully requests that the Court grant this Motion for Judgment as a Matter of Law.

Dated: June 15, 2017

STROOCK & STROOCK & LAVAN LLP

* * *

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

Attorneys for Defendant TRANS UNION LLC

Excerpts from Trail Transcript (June 16, 2017)

(The following proceedings were held outside of the presence of the Jury)

THE COURT: Good morning. All right. So, we have TransUnion's motion for judgment.

MR. NEWMAN: Yes, Your Honor.

THE COURT: Anything you want to add to what was in the paper? I did read it.

MR. NEWMAN: Yes. Your Honor. Throughout the course of this case, we've heard plaintiff say, throughout most of this: We can prove it, we can prove it.

Through summary judgment: you've got to give us a chance to prove it; the evidence is going to come in.

In response to summary judgment they said: Oh, this is what our forecasted evidence is going to be, let us do it. It's going to come in.

Throughout the course of this week there's been no evidence on the key element of willfulness here. There's been an abject and total failure of proof. And we respectfully request that judgment as a matter of law be entered on behalf of TransUnion on each and every claim.

THE COURT: Do you want to respond, Mr. Francis?

MR. FRANCIS: Yes, I'm happy to respond, Your Honor, and let's start with that issue, willfulness. Because I can go [554] through each of the claims and respond to the motion in the order, but since he's starting with willfulness let's start there.

THE COURT: Everyone can be seated.

MR. FRANCIS: So Mr. Newman is correct: In response to our summary-judgment briefing in this case we did outline what the evidence was and how it would be presented. And every single thing that we outlined in claimant's response to summary judgment is in evidence today. As for willfulness, I'll start with the EB claim.

It is clear that TransUnion used a name-match-only product, starting from 2002. It was getting notified by the Department of Treasury in 2007 and 2008 -- your Honor has seen those letters -- that it was concerned with TransUnion's rate of false positives. TransUnion did nothing to change its name-match logic. At least through the class period here.

And I think the testimony was not even until 2014, which is outside the class period in this case, did they make any changes at all.

I think Your Honor heard me ask Mr. O'Connell all of the things that they could have done to prevent innocent people from being matched in the OFAC list. First of all, they could have stopped selling the data. That was a choice to them. The law doesn't require it. They chose, notwithstanding Treasury's concerns, to continue selling this list, even though they knew [555] the name-match logic that they were applying that they got from Accuity was creating a high rate of false positives. If that's not a support for willfulness, I don't know what is.

But we have more than that. As far as the -- the logic, itself, Your Honor saw that there was another credit reporting agency, its main competitor, that was able to employ the technology to properly screen this applicant. And did so.

So the argument that we didn't have the technology, and it wasn't available to us, is -- is belied by the Experian report that we saw. That is one of their arguments with regard to the EB claim; we are trying to get Accuity to respond and get us a better product. I think any reasonable jury could find that taking five or seven or ten years is too long.

And the argument that the technology does not exist is belied by what Experian did. And not only Experian. Dealertrack also had an OFAC screening product that properly got it right.

So with all of that evidence, I don't think there's any question that a reasonable jury could find that they willfully violated the law.

They want to make the argument that this case is about what happened in response to *Cortez*. We don't view it that way. We view that they were on notice from 2002 and 2005 when they sold this product. One of other pieces of evidence that's come in is they had hundreds and hundreds of disputes from [556] consumers who were disputing this information. So, this is not the first time it happened. They had had --

THE COURT: Well, that evidence, though, late in the class period. Correct?

That interrogatory response is sometime in 2010 to the present.

MR. FRANCIS: It is, but --

THE COURT: Do you have anything more to say on this? I have to tell you, the jury could find it. I deny the motion there.

MR. NEWMAN: Let me just make my record, Your Honor.

THE COURT: Of course.

MR. NEWMAN: What is missing is the connection between TransUnion's state of knowledge. Simply because, you know, there may have been something else out there and there was no evidence that there was, there's been no evidence of what other technology was being used or the reasons why those other particular results --

THE COURT: Does the jury have to believe Mr. O'Connell?

MR. NEWMAN: Does the jury have to believe Mr. O'Connell?

THE COURT: Yeah. No, right?

MR. NEWMAN: Well, it's their burden to prove that there was a willful -- plaintiff has the burden to prove a [557] willful violation. So there's no evidence that you are basically --

THE COURT: How did Ms. Gill, right -- the dispute comes in and she removed the person from the list. With nothing more than them disputing it. Why couldn't that have happened before?

MR. NEWMAN: Why couldn't that have happened before?

THE COURT: Yeah.

MR. NEWMAN: Well, first of all, what Ms. Gill testified about was all before the class period. Ms. Gill was no longer employed at TransUnion by the time the class period began. And by the time the class period began, TransUnion was using new procedures. There was evidence --

THE COURT: But they were removing -- the evidence is that when someone disputed it, they were removed from the list.

MR. NEWMAN: Right.

THE COURT: Based on nothing more than TransUnion looking at the very same information that was available to them before. They didn't conduct -- she didn't testify that there was any additional investigation that was done.

MR. NEWMAN: Well, she would receive the information from the consumer -- whatever the consumer sent in, and she would look at that and she would make the determination.

THE COURT: Well, here, the evidence is that Mr. Ramirez sent a handwritten note that was one line, right, [558] that said "Remove me." And he was removed.

So there's an inference to be drawn that the information that TransUnion had was exactly the same information that they had before they identified him as a potential hit.

MR. NEWMAN: Other than the consumer standing up and saying "I'm not the guy." You have a human being saying, "No, really, I'm not the guy." That is information. That is an additional piece of information.

THE COURT: Well, come on. A terrorist, whoever is on the list could say the same thing.

MR. NEWMAN: They could, but --

THE COURT: I'm going to deny it on that claim.

MR. NEWMAN: Okay.

MR. FRANCIS: With regard to -- that satisfies the evidence for the EB claim and the willfulness on that claim.

I would also point out that which I think is a very powerful piece of testified that Mr. O'Connell testified to supporting the EB claim, the reasonable procedures claim, was that they had a method by which they could have gotten the false positives down to zero. They never tried it.

But turning, turning attention to the Section 1681(g) claim, the evidence already is in through Mr. Lytle that during the class period, TransUnion did not include any OFAC disclosure information in the disclosures that it sent to the class during the time period. It's not there.

[559] The testimony was that every single person in the class was somebody who received a file disclosure, and it would never disclose the OFAC information.

THE COURT: That's the question that I said --

MR. NEWMAN: But where's the evidence that, you know, that was clearly understood by TransUnion to be a violation of the law?

THE COURT: It doesn't have to be clearly understood. It's reckless --

MR. NEWMAN: Well, even reckless. Where is the evidence that it was reckless or a desire to violate?

THE COURT: There is no standard of a desire to violate the law. That is not the standard at all. Right? That is not the standard.

MR. NEWMAN: Well, where is the evidence of recklessness? Where is the evidence of something that -- you know, put Mr. Lytle on notice he was doing it the wrong way?

THE COURT: Well, they were told. First they had been operating under the assumption that it wasn't covered by the FCRA.

MR. NEWMAN: I'm --

THE COURT: And that was TransUnion's reason, as I understand it, for not including it in this first place.

MR. NEWMAN: Right.

THE COURT: They are then told, and accept that it is [560] covered by the FCRA, but they continue to do it the same way.

MR. NEWMAN: They didn't continue doing it the same way, they began disclosing it. And the Cortez decision didn't say anything at all about how it should be disclosed. TransUnion received no guidance as to the specific manner of disclosure. And TransUnion did disclose.

THE COURT: Okay. That's an argument that they can make, but that's enough to go to the jury.

MR. FRANCIS: Your Honor, just on that point, very quickly, the *Cortez* decision did say how it should be disclosed. It says it should be disclosed with the file because it's part of the file. That was the issue in *Cortez*.

So the *Cortez* decision gives TransUnion very, very clear instructions that this is a piece of information that is in the consumer's file.

THE COURT: I don't know if that's in the stipulation, though, which is what's in evidence at this point.

MR. FRANCIS: Well, I'm talking about in terms of arguing the Rule 50 motion before Your Honor.

THE COURT: He's arguing it based on the evidence in the case up to this point.

MR. FRANCIS: Yes. But the evidence here is clear that none of the file disclosures sent to the class included OFAC information.

In addition, the evidence is also clear that the letter [561] that they sent, the OFAC letter to consumers, did not include any statement of FCRA rights, did not include the right to dispute, did not include the right to block, did not include any of the rights that the FTC's rights require. And as a result of that, it's a clear violation and a willful violation of the FCRA Section --

THE COURT: Why couldn't the jury find willfulness there, just based on the fact that they told the government they were doing something different than what they were doing?

MR. NEWMAN: I don't think there's a contradiction between those two, Your Honor. We said we were disclosing, and the manner was explained in the letter how to contact us. And in fact, TransUnion did process --

THE COURT: That's not what the letter said. You can make an argument, but there's certainly an inference to be drawn that what Ms. Norgle told the OFAC -- I think it was OFAC.

MR. FRANCIS: Yes, Your Honor.

THE COURT: -- is different than what they were actually doing. Again, it's argument, but this is all what the jury could find.

MR. NEWMAN: Understood, Your Honor. And in the alternative, we move to decertify the class. We believe the evidence has shown that there is great diversity of experience within this class, the elements of Rule 23 must be maintained [562] through judgment, and the evidence as it's come in has shown that Mr. Ramirez's experience was quite different from anyone else in the class.

THE COURT: It was, I think, but not in a way that's material to whether there was a violation or not.

MR. NEWMAN: I understand Your Honor's order, and you understand our objections.

THE COURT: I do. And they are preserved.

MR. NEWMAN: Okay. One other matter that Mr. Luckman would like to address relating to some of -- the close of testimony, the other day. And we want to express some concerns about the way the questioning was presented about the Cortez opinion, --

THE COURT: I'm glad you're bringing that up. So let me tell what you my understanding is.

MR. NEWMAN: Yeah.

THE COURT: The only reason the opinion -- the opinion is relevant to TransUnion's state of mind. It's relevant. The only reason it isn't being admitted is because I think it would confuse the jury. It's a long Third Circuit opinion. It would consume them.

MR. NEWMAN: Correct.

THE COURT: But what the stipulation said and what I believe is appropriate is the plaintiff can question any particular witness about what's in it. And the words that are [563] in it. I don't think that's improper at all. So with that, do you still have a concern?

MR. LUCKMAN: Absolutely, Your Honor. I think that what the plaintiff did was cherry-pick a line out of the section of *Cortez* that's dicta about negligence. Cherry-picked it, and read it to someone who said he'd never read the case, he just had an understanding about it.

So I think that under the *Cortez* --

THE COURT: But didn't he also testify that he was there as a representative of TransUnion? You're certainly not going to tell me that nobody at TransUnion read that decision. TransUnion is charged with knowledge of that decision.

MR. LUCKMAN: Of course, but --

THE COURT: Okay.

MR. LUCKMAN: But now all the jury -- Your Honor, in that case, you know, I would like to cherry-pick out a section of the District Court's opinion which said that all you have to do is add the word "possibly"; you may have avoided liability.

THE COURT: You're welcome to do so. I think that all comes in. That goes to -- it's all relevant to willfulness.

MR. LUCKMAN: So I guess my objection was -- and I stand by the objection -- that cherry-picking portions of a case to ask a witness who hasn't said he read it, he only understands it, would be confusing to

the jury and prejudicial to TransUnion because there's another 2,000 lines.

[564] **THE COURT**: Would you prefer that we admit the whole opinion, then? Because it was TransUnion's objection to admit. That's not cherry-picked. The whole thing is in front of them. So we could do that. We could admit the whole opinion, put it in evidence, and that will be evidence that the jury could consider.

MR. LUCKMAN: I think that's impossible for an uneducated -- unsophisticated in matters of appellate law, for them to appreciate what the decision says.

THE COURT: Maybe. Maybe. But the fact is those words are what those words are. And TransUnion interpreted it however they did.

And it's sort of -- TransUnion has to sort of explain: This is what we interpreted it, this is why we responded to it, the way it did.

I mean, this is an unusual case in the sense that you have an opinion that is directly relevant to willfulness. Although Mr. Francis says: Not so much.

MR. LUCKMAN: Well, Your Honor, if I may, the *Cortez* case was tried when TransUnion's state of mind was: This is not FCRA-governed.

The *Cortez* case did not have the same evidence that this case has. The Court did not have before it the same evidence this case has about the ability and the wherewithal and the technological advancements to do things that were different.

[565] This case has a whole different texture to it. And what they have done is sort of end run, you know, do not pass Go, go straight to jail, and take you back

two 2005 or -7 when the case was tried and very different facts and witnesses, and read to the jury a decision based on a very different factual setting. And I think that's why it's so unfair and prejudicial to TransUnion, that what was otherwise inadmissible came in, and it came in without any context.

THE COURT: I guess I disagree with you. It is admissible. It's judicially noticeable, it's admissible, and it's relevant. I kept the opinion out on 403 grounds and that I thought it would confuse the jury. But not because it's inadmissible. It is admissible.

MR. LUCKMAN: So the reason it was -- part of the reason it was prejudicial is it's a very lengthy, poorly-written, you know, appellate decision.

THE COURT: I am not going to subscribe to that. That may be TransUnion's position, and they can certainly say that. But there were a lot of things in that opinion.

For example, they made -- the Third Circuit made it abundantly clear that they thought TransUnion's position that it wasn't covered by the FCRA was hard to believe.

MR. LUCKMAN: No question. Oh, I'm not --

THE COURT: Why isn't that relevant? Why isn't that relevant?

* * *

[585] **Q**. Were you tasked with any communication roles relating to the OFAC products?

A. My specific role was to draft a communication to consumers that informed them about the fact that

they might be a possible match to information on the OFAC list.

Q. When were you given that assignment?

A. The assignment was given in late 2010.

Q. And who did you receive the assignment from?

A. I received it through meetings with the President of Consumer Services and with the Legal Department and, also, in conjunction with an individual who was working with me at the time.

Q. Can you give us some names? Who was the president of consumer relations?

A. Sure. The president of consumer relations was Mark Marinko. The individual in the Legal Department that I worked with most closely was Denise Norgle. And then I also worked closely with Sean Walker.

Q. And what did you understand the purpose to be in drafting this letter that was going to go to consumers to let them know they might be a potential match on the OFAC list?

A. As I understood it, it was the result of a decision in a court case, which was the Cortez case, and the purpose was to simply notify consumers that they might be a potential match to information on the OFAC list.

[586] **MS. ELLICE**: Could we please display Exhibit 3, which has been previously admitted into evidence?

(Document displayed)

BY MS. ELLICE

Q. And you have some binders in front of you, Mr. Katz. They might be easier for you to see.

A. Okay.

Q. And are you seeing anything on the screen in front of you?

A. Yes, I see it.

Q. Okay. So it's behind Tab 3 in one of those books.

MS. ELLICE: Can we show the whole thing at first please?

(Document displayed)

BY MS. ELLICE

Q. Does Exhibit 3 look to you like the one you assisted in drafting?

A. Yes, please.

Q. As far as you know, in your role in corporate communications and consumer relations, had TransUnion ever sent a letter like this before?

A. To my knowledge, no.

Q. Did you personally read the Cortez decision?

A. I read through it. I wouldn't say that I read the entire decision.

Q. Were you being asked to provide any legal input on this [587] letter?

A. No, not at all.

Q. Now, I think you testified that you were tasked with making the language more simple and friendly, is that right?

A. Yes.

MR. FRANCIS: Objection. Leading.

THE COURT: Sustained.

BY MS. ELLICE

Q. Mr. Katz, could you repeat your answer please as to what your role was in drafting this letter, what your assignment was.

A. Sure. My specific assignment was to draft the letter, but what we were trying to do across the board in consumer relations, and in my role also in corporate communications, was to make the communications to consumers more friendly in general. Because when consumers are presented with complex legal language, it was very difficult for them to process it.

Q. So I'd just like to go through the parts of this letter since you had a role in drafting it.

MS. ELLICE: Let's look at just the very first line under the intro. There we go. That's perfect.

(Document enlarged.)

BY MS. ELLICE

Q. Okay. And could you just read that for the jury?

A. Sure. It says:

[588] "Regarding OFAC (Office of Foreign Assets Control) database. Thank you for contacting TransUnion. Our goal is to maintain complete and accurate information on consumer credit reports."

Q. Okay. Let's move down to the next paragraph, and give it a second to come up on the screen.

(Document displayed)

Q. I will ask you -- starting from the third sentence that starts "As a courtesy," would you please read that to the jury, please?

A. (As read):

> "As a courtesy to you, we also want to make you aware that the name that appears on your TransUnion credit file, Sergio Ramirez, is considered a potential match to information listed on the United States Department of Treasury Office of Foreign Assets Control (OFAC) database."

Q. As you sit here today, do you recall whether you had any role in drafting that highlighted portion?

A. I did, yes.

Q. Anything in particular?

A. I would say essentially the entire paragraph, the way that it's worded.

Q. And is there any particular language here that you inserted to make the -- to make the letter seem more consumer [589] friendly?

A. Sure. The "As a courtesy to you, we want to make you aware" part is probably the most intentional language that was meant to simplify and be friendly to a consumer.

Q. And why did you believe this would make the language more consumer friendly?

A. Well, one of the goals, as I said, was to be courteous to a consumer, speak in terms that they would understand and would be approachable, and so we felt that that language would accomplish that.

Q. And what about the language "is considered a potential match to information listed on the United States Department of Treasury's OFAC database," did you draft that language?

A. Yes, I believe that I did.

Q. Did you come up with the term "potential match"?

A. I did not.

Q. Do you know who did?

A. I do not know who did, no.

Q. Let's move down to the third paragraph, please. And give it a second to come up, please, Mr. Katz.

(Document displayed)

Q. And if you could just read this aloud for the jury, in case they can't see it clearly?

A. Sure. It says:

> "The OFAC database contains a list of individuals and [590] entities that are prohibited by the U.S. Department of Treasury from doing business in or with the United States. Financial institutions are required to check customers' names against the OFAC database, and if a potential name match is found, to verify whether their potential customer is the person on the OFAC database. For this reason, some financial institutions may ask for your date of birth, or they may ask to see a copy of a government-issued form of identification, such as a driver's license, Social Security card,

> passport, or birth certificate. Some financial institutions will search names against the database themselves or they may ask another company, such as TransUnion, to do so on their behalf. We want you to know that this information may be provided to such authorized parties."

Q. What was the purpose of having this paragraph in there?

A. Again, we wanted to inform the consumer as much as possible about why they were receiving the letter and we felt that this explained as much as possible about how the information might be used by a potential lender in the process that they might be asked to go through once the lender or creditor had received that information.

Q. In your many years of experience in customer relations, did you believe that this paragraph would accomplish its goal of being simple and easy to understand to a consumer?

[591] A. Yes, I did.

Q. Now, let's move down to the second half of the page. What's the purpose of this section?

A. This section was not something that we specifically drafted. It's simply showing the specific information that was returned in terms of the consumer's name when it was presented against the OFAC list.

Q. Where did those names come from? Where did that information come from?

A. They came from OFAC.

Q. From the U.S. Department of Treasury?

A. Correct.

Q. And why did you believe it was important to repeat this information here in the letter?

A. Again, we wanted the consumer to understand as much as possible what information had been presented and what the lender or creditor would see, and for them to understand the name that was being presented as it appeared and why it might have been related to their name.

Q. All right. Let's just move down finally to the last section of this letter.

(Document displayed)

Q. And if you can read just the first paragraph of this section?

A. (As read):

[592] "For more details regarding the OFAC database, please visit http//www.ustreas.gov/offices/enforcement/ofac/faq/index.shtmi," I believe it says.

Q. Do you have an understanding of what that web address would direct a consumer to?

A. Sure. It was an FAQ section.

MR. SOUMILAS: Objection. This is hearsay.

THE COURT: Overruled.

BY MS. ELLICE

Q. You can answer.

A. Sure. It's an FAQ section on the U.S. Treasury website.

Q. And why did you believe it was important to put that into the letter?

A. We -- again, we were trying to give the consumer as much information as possible. And while we felt that we had presented that in the letter, if the consumer wanted to get additional information, we thought that was one of the -- one of the best places to do so.

Q. Okay. And the last portion of this letter, would you read that to the jury, please, Mr. Katz?

A. It says:

> "If you have additional questions or concerns, you can contact TransUnion at 1(855)525-5176 or via regular mail at TransUnion, LLC, P.O.Box 800, Woodlyn, Pennsylvania, 19094. When contacting our office, please [593] provide your current file number 234206417."

Q. That phone number that's listed there, do you know whether that's the general TransUnion phone number?

A. It is not.

Q. What is it?

A. It was a separate and distinct phone number that we set up so that consumers could get directly to information about how -- steps that they could take regarding the letter that they received so that they wouldn't have to go through the standard phone system, which would prompt them for various options. This way they could just go directly to that information.

Q. And the file number that's provided there, is that intended to be specific to the consumer who is receiving the letter?

A. Yes. It is specific.

Q. And why do you put it down there?

A. By putting it in the letter, the consumer can reference it and, therefore, there can be little question as to what they are looking to address.

MS. ELLICE: Thank you, Mr. Katz.

CROSS EXAMINATION

BY MR. FRANCIS

Q. Mr. Katz, good morning.

A. Good morning.

[594] **Q**. I do not have much for you today, but I do have a few questions.

You mentioned earlier in reference to the letter that was just put up that you were involved in the drafting of that letter, is that correct?

A. Yes, that's correct.

Q. Okay. Now, am I correct that you weren't the only person who was involved in drafting that letter?

A. Yes.

Q. And am I also correct that another person who was involved in drafting that letter was a person by the name of Denise Norgle, is that correct?

A. Yes.

Q. Okay. And am I correct that Denise Norgle was TransUnion's general counsel at the time?

A. Yes.

Q. Okay. And so would it be fair for me to state that the letter that we just looked at was written between -- by you and Ms. Norgle from legal working in conjunction, correct?

A. Yes. That's true, yes.

Q. And I think you said this, but I want to make sure that it's clear. You never worked within the Legal Department at TransUnion, correct?

A. No. I never did.

Q. You're not a lawyer, correct?

[595] A. Correct.

Q. All right.

MR. FRANCIS: Now, Mr. Reeser, would you please put up Plaintiff's Exhibit 34, please?

And would you blow up the first paragraph, please?

(Document displayed)

BY MR. FRANCIS

Q. Mr. Katz, you weren't here this week, but there was some testimony about this letter that the Department of Treasury sent to Ms. Norgle at TransUnion, and I just have a couple quick questions for you.

There is a reference in the first sentence about a meeting with you in July of 2007. Were you involved in any meetings with Ms. Norgle and the Department of Treasury in July of 2007?

A. I was not.

Q. Okay. So you don't -- do you know of any -- anything that came out of that meeting?

A. I do not.

Q. Okay.

A. No.

Q. And there was also a reference to May 27th, 2008. Specifically, that there was correspondence that the OFAC department had sent to TransUnion. Are you -- do you have any knowledge about that, that correspondence?

A. No, I don't.

[596] **Q**. Okay. And generally, other than putting aside whether you were at the meeting in July of 2007 and/or were copied on the correspondence of May 27th, 2008, am I correct that you -- you weren't knowledgeable about any of the meetings or communications that Ms. Norgle was having with the Department of Treasury regarding TransUnion's OFAC product?

A. That's correct. I was not knowledgeable of those.

MR. FRANCIS: All right. You can take that down, Mr. Reeser.

(Document removed from display.)

BY MR. FRANCIS

Q. Am I correct, sir, that most of the time you were working on the consumer relations side of TransUnion as opposed to the client servicing side?

A. From 2005 to 2010, yes.

Q. Okay. And would I be correct in stating that if -- if we had questions about the match logic or the available technology that TransUnion had at its

disposal regarding OFAC Advisor Alerts, you're probably not the guy to ask those questions to, correct?

A. I am not the guy.

MR. FRANCIS: Okay. Mr. Reeser, would you please put up Plaintiff's -- or, excuse me, Exhibit 3?

(Document displayed)

[597] **BY MR. FRANCIS**

Q. Mr. Katz, Ms. Ellice asked you some questions about this letter that I think you said you contributed to drafting.

MR. FRANCIS: Mr. Reeser, could we blow up the top half of that letter, please?

(Document enlarged.)

BY MR. FRANCIS

Q. If you look -- sir, if you look at the second paragraph, Ms. Ellice asked you questions about that paragraph. Specifically she pointed to the "As a courtesy to you" language.

Do you see that?

A. Yes, I see that.

Q. And she pointed out that it reads:

"As a courtesy to you, we also want to make you aware that the name that appears on your TransUnion credit file, Sergio L. Ramirez, is considered a potential match to information listed on the U.S. Department of Treasury's Office of Foreign Assets Control database."

Do you see that?

A. Yes, I see it.

Q. I understand that you wanted to make this letter friendly to the consumer. But that's not really a true statement, is it?

MS. ELLICE: Objection, your Honor. Argumentative.

[598] **THE COURT**: Overruled.

A. Can you repeat the question?

BY MR. FRANCIS

Q. Yes. You are asserting here in this letter that the reason TransUnion is providing this OFAC data to Mr. Ramirez is because of the courtesy that it wanted to extend to him. That's not true, is it?

A. I think we wanted to provide the letter in a manner that was being as direct and speaking to the consumer in a manner that was easy for them to understand and as courteous as possible, so.

Q. Sir, am I not correct that the reason TransUnion was sending this letter to Mr. Ramirez was because the law required it to disclose this information to him, not as some courtesy?

MS. ELLICE: Objection, your Honor. The witness has testified he's not a lawyer. The question calls for a legal conclusion.

THE COURT: Overruled.

A. Well, I understand -- and I am not a lawyer. I understand that there was a requirement as a result of the decision in *Cortez* to provide certain information. I think providing it as a courtesy to the consumer in a courteous manner is what we did.

BY MR. FRANCIS

Q. Sir, you mentioned that you had reviewed the *Cortez* [599] decision in your direct testimony to Ms. Ellice. Do you recall that?

A. Yes.

Q. And didn't you testify that the reason this letter started getting used was because of the *Cortez* decision; isn't that correct?

A. I'm not -- again, I'm not an attorney. My understanding was simply that I was asked to prepare this letter to communicate with consumers that they were a possible match to the OFAC list.

Q. And am I not correct, sir, from -- that you learned through your review of the *Cortez* decision that a jury found that TransUnion willfully violated the law in that case by failing to include --

MS. ELLICE: Objection, your Honor.

BY MR. FRANCIS

Q. -- OFAC information in -- in disclosures to consumers?

THE COURT: He can answer if he knows.

A. I -- I don't know the answer. I didn't -- I didn't review the case to that extent. I just -- I just basically glanced at it.

BY MR. FRANCIS

Q. Sir, isn't the reason this letter was being sent was because TransUnion knew that it had an obligation under the law to send it to consumers?

[600] **A**. Again, I'm not -- I'm not an attorney. What I knew was that I was tasked with drafting a

letter to inform the consumer that they were a possible match.

Q. Okay. And let's go down a little bit further, okay?

MR. FRANCIS: I'm sorry. Mr. Reeser, please keep that up.

BY MR. FRANCIS

Q. The second part of that sentence that begins with "As a courtesy to you" is that -- it reads:

"Sergio L. Ramirez is considered a potential match to information."

Do you see that?

A. Yeah, I see it.

Q. Would you agree with me that neither that sentence nor this paragraph communicates who considered Mr. Ramirez a potential match?

A. I'm not sure what you're asking. I'm sorry.

Q. Do you believe that this -- this letter, this section specifically, communicates who considers Mr. Ramirez a potential match?

A. I -- you know, my -- my assumption and the reason that I believe those words were used was because the analytics that were used to determine the match considered the individual a potential match.

Q. Do you -- do you remember that I took your deposition in [601] this case a few years ago?

A. I do.

Q. And do you remember me asking you questions about what that part of this letter meant?

A. I believe I do, yeah.

Q. Okay. And would you disagree with me if I told you that you weren't even certain at that time who considered Mr. Ramirez a potential match?

MS. ELLICE: Your Honor, if Mr. Francis could direct us to a portion of the --

THE COURT: No. He can ask answer the question. He can answer the question.

A. I believe what I indicated at the time was that the potential match was determined by the analytics or the matching logic that was used to determine whether someone was a match. I'm pretty sure that's what I indicated.

BY MR. FRANCIS

Q. Sir, you testified that you believed that the letter was unclear at that time, didn't you?

A. I don't think I did.

MR. FRANCIS: Your Honor, may I approach the witness?

THE COURT: You may.

(Whereupon document was tendered to the witness.)

MR. FRANCIS: May I hand the Court a copy?

(Whereupon document was tendered to the Court.)

[602] **BY MR. FRANCIS**

Q. Mr. Katz, I'd like you to turn your attention to Page 119, please.

(Witness complied)

Q. Are you there?

A. Yeah.

Q. Okay.

MS. ELLICE: Your Honor, can I ask before he starts reading that he just direct me to the exact lines that he's planning to read from?

THE COURT: It's 119. Wasn't Mr. Katz an employee of TransUnion at the time he was deposed?

MR. FRANCIS: Yes, your Honor.

THE COURT: So the deposition may be used for any purpose.

MR. FRANCIS: Thank you, your Honor.

BY MR. FRANCIS

Q. Are you there, sir?

A. Yeah, I am there.

Q. Okay. At Line 4 I ask:

"QUESTION: So when you drafted this, you weren't sure of who was saying the consumer is a potential match, correct?"

And after the objection you said what?

A. I'm sorry. Direct me to the objection.

Q. "MR. NEWMAN: "Objection, misstates testimony."

[603] **MR. FRANCIS**: Mr. Reeser, if you can pull this up in a timely manner, please do so. If not, I can do it without the exhibit.

BY MR. FRANCIS

Q. What was your answer to my question that you weren't sure who was saying the consumer was a potential match?

A. I -- are you referring to Line 17? I just want to make sure --

Q. No. I'm referring to Line 9.

A. Oh, okay. Line 9 reads:

"ANSWER: Yeah, I agreed."

Q. Okay. And then after that I asked you specifically, and I will quote:

> "QUESTION: Okay. You agree, right? You don't know if it was Equifax saying that they are a potential match, Accuity saying they are a potential match, or Experian saying they are a potential match. You weren't sure of where the match was coming from, is that correct?" And please read your answer.

A. I say:

> "ANSWER: Right. My understanding simply was that we were informing the consumer that they were a potential match and that's what was critical to provide to the consumer."

Q. And please turn to the page before that, Page 118.

(Witness complied)

[604] **Q**. And at the bottom, Line 21 I ask:

> "QUESTION: Okay. A potential match according to whom?"

And what was your answer to that question?

A. (As read)

"ANSWER: Again, I'm not -- I am uncertain."

Q. Okay. So would you agree with me now that this letter doesn't tell the consumer who is considering them a potential match to the OFAC list?

A. I would agree that I was uncertain as to who specifically was making that determination, and that's basically where I'm at on that.

Q. Right. But my question is: Would you agree with me that the letter doesn't communicate clearly and accurately to the consumer who was considering him a potential match?

A. I -- I suppose it leaves some room for interpretation as to how the potential match was derived.

MR. FRANCIS: I have no further questions, your Honor.

THE COURT: Anything further, Ms. Ellice?

MS. ELLICE: Brief redirect, your Honor.

And, Shoma, let's bring back up that exhibit we were just looking at, Exhibit 3. I know you need a second to switch over.

REDIRECT EXAMINATION

BY MS. ELLICE

Q. Mr. Katz, who is this letter from?

* * *

[679] **A**. No, not always.

Q. How did they look before, say, 2004?

A. So in 2004, 2005 TransUnion changed the look and feel of the disclosure. Previous to that date you would have received what looked like a computer printout from a mainframe file. So everything was in

capitals. There is no bolding. There is no shading. There is no graphics. Anything like that.

In 2004, 2005 we worked with our print vendors to be able to enhance the look and feel of that disclosure to make it more readable, I would say, from a consumer's perspective.

Q. You just used the term "print vendor." What is a print vendor?

A. Sorry. Yes. TransUnion prints and mails thousands of pieces of information each day. Those could be disclosures, letters, disputes to different credit grantors or different companies. That type of production, that type of scale can't be accomplished by TransUnion. So we work with an outside vendor who produces all of that work and print for us.

Q. Do you use more than one print vendor?

A. We do.

Q. Who are your print vendors -- what were the print vendors in use in 2011?

A. In 2011 we would have been using SourceHOV, which is our primary print vendor. A company called RR Donnelly, which is a [680] financial statement production company. As well as Metrolina.

Q. Where are those three companies located?

A. Source HOV is located in the Livonia, Michigan. RR Donnelly at the time was in West Caldwell, New Jersey. And Metrolina is located in Charlotte, North Carolina.

Q. Is there anything special about the Metrolina print vendor?

A. Yes. Metrolina provides for TransUnion what we refer to as alternative formats. They -- so when a consumer requests a copy of a credit report disclosure or a letter as being sent to them, they can identify themselves as visually impaired. In those instances they can choose to receive a copy of their disclosure or letter or correspondence either in a Braille or audio or even in a large print format.

So those -- so Metrolina in Charlotte would produce for us disclosures or letters or corrected copies in an audio or Braille format. The main print vendor would produce those in a large print format.

TransUnion also produces disclosures, letters, corrected copies and others in Spanish language, in addition to the Braille and audio and large print.

Q. So more on 75. What was the physical process for creating credit file disclosures in May of 2010?

A. Okay. So in May of 2010 TransUnion would send to the print vendor what's called a print-ready file or a print image [681] of what was supposed to be sent to the consumer. That information would go through the software that the print vendor provides to convert it into this nice look and feel, and then we would then mail it out to the consumer.

Q. The print vendor would actually mail it out?

A. Yes, correct.

Q. They would handle it at their factory, their location and make sure it actually got out?

A. Absolutely.

Q. And did TransUnion have processes to audit their print vendors to make sure they were doing what they were supposed to do?

A. Yes. That is part of my daily responsibility, daily reconciliation to the print pieces that are mailed, as well as on-site audits which occur, I believe, once every year or two years. As well as the invoice reconciliation that we would do.

Q. Did something happen in May 2010 with respect to the technology used to deliver file disclosures to consumers?

A. So in May 2010 TransUnion embarked on using -- instead of the print image file that was sent to the print vendor, switching that over to a data file. So we were moving from the print image to a process called XML. So XML is a data file as opposed to producing that in a print image or print-ready form, it would send the data specifically to the print vendor.

Q. What is the difference between the print image technology

* * *

[685] **Q**. Is that the same OFAC information that -- as was sent to purchasers of credit reports, if there were any purchasers?

A. Yes.

Q. Now, in relation to Exhibit 75, when was Exhibit 73 printed? If you could compare Exhibit 75 to Exhibit 73?

A. So the disclosure versus this OFAC letter?

Q. Yeah. The two documents.

A. So they would have been provided -- they would have been printed within hours, at most a day of each other.

Q. And I'll -- I'll tell you that Exhibit 75 bears the date of February 28, 2011, and Exhibit 3 bears the date of March 1st, 2011. And we know that February has 28 days, correct?

A. Right. So what happened -- what would have happened is the disclosure was requested on the 28th. That disclosure was batched up. It was created on the 28th. The OFAC information was run the next day, March 1st. And then both of those pieces would have been delivered to the print vendor.

Q. Are you aware of any delay for any member of this class that was more than one day?

A. No.

Q. And you said earlier that often it was printed within hours. How do you know that to be true?

A. Because I managed the print process. So what happens is, [686] again, each day the disclosures are requested at the end of the day, they are batched up. After midnight they are transmitted and/or looked at against OFAC. That file is completed and sent to the print vendor. Then the print vendor's processes are automated and run through their steps until they are done.

Q. Why wasn't the information in Exhibit 3 included in Exhibit 75? Why wasn't it included together?

A. We did not have the ability to include those together in the same -- at the same time.

Q. Why was that?

A. Again, the disclosure comes in a print image format. The OFAC letter comes in a separate file. It may not go to the same print vendor. There is not a way to -- to ensure that that could go together at that point in time.

Q. And did that state of affairs persist between January and July 2011?

A. It did.

Q. And what was happening -- what were you doing during that period January through July 2011?

A. So I believe it was in March of 2011 is when we began after some conversations, began looking at ways of how we could do indeed just that, which is to include that OFAC information into that disclosure.

Again, when I was talking earlier about the change from the print image file to the XML file -- because in an XML file [687] you have to define the placement, as I said, of each piece of data -- that began to open up the door for us to be able to use this other file that was coming in with the OFAC information and include that into the disclosure. That's what we did, which was released end of July 2011.

Q. And do you believe you made that change as quickly as you could have?

A. I know we did, yes.

Q. During the period January through July 2011, why wasn't the information in the Summary of Rights also dropped into Exhibit 3?

A. Right. The OFAC. Because it was provided as part of the credit file disclosure, Exhibit 75, that we

had sent to the consumer that same day, or within hours of each other.

Q. Was there any desire to deprive consumers of that information?

A. No. I would say it -- as an example, I -- I got a swing set a couple years back and that swing set had the directions. They didn't include the directions in every single box that they sent to me. They only included the directions in one of the boxes. Obviously, when I needed the directions I would get them out of that box.

Q. Did anyone ever tell you that it violated the Fair Credit Reporting Act to send the OFAC information in the way we have been discussing?

[688] **A**. Absolutely not.

Q. Did anybody ever tell you it violated the Fair Credit Reporting Act to send the Summary of Rights in the way we have been discussing?

A. Absolutely not.

Q. And were these communications prepared out of a desire to obey the law?

A. Absolutely.

Q. And what was your specific role in regard to communications of this kind?

A. Again, my specific role was to ensure that -- that that information was conveyed to the print vendor and to the consumer.

Q. Okay. Let's turn to what's been previously admitted as Exhibit 27. You should have it in your book as well.

MR. NEWMAN: And let's have the whole document, please, and zoom up. There we go.

(Document displayed)

BY MR. NEWMAN

Q. What is Exhibit 27?

A. Exhibit 27 is a printout of what our operations team would call the FIN Comments or Comments tab. It is a tab within our -- the application the operators use.

Q. Are you familiar with documents of this kind?

A. I am.

* * *

[694] **A**. Just what we just finished talking about, that how exactly the comment would be added to the FIN Comments tab when a match was made.

Q. Does everyone who gets a disclosure, do they also have a report sold about them with OFAC information necessarily?

A. No.

Q. Can you explain that?

A. Sure. A disclosure is a credit report that you get directly from TransUnion. That's what I would say it is. A credit report is something that's sold about you when you apply for credit, or provided. So not necessarily if you're not a credit active person, you may ask for your disclosure and you got your disclosure and it may have OFAC information in it, but it was never distributed to anybody else.

Or the opposite might be true, you might have your credit report and apply for credit a lot and never ask for a disclosure.

Q. And how much does -- most of the time does TransUnion charge consumers for their own credit reports, for their own disclosures?

A. No. So -- no. The answer is no.

Q. Why is that?

A. The FCRA allows for one -- a consumer to request a copy of their credit report every 12 months from each of the credit report reporting agencies. If you are denied credit, if you [695] are on welfare, if you're a victim of fraud, if you are unemployed, you're entitled to a free copy of your credit report.

The vast majority of the credit reports, I would say, that TransUnion distributes are for a reason free.

MR. NEWMAN: Can we go back to Exhibit 27, please?

(Brief pause.)

BY MR. NEWMAN

Q. While we're waiting for that to come up, so it's possible that a person could get their own credit report before applying for credit and then after receiving that, contact TransUnion and say: Hey, I haven't applied for credit yet. I'm going to be in the market for a mortgage soon. Can you please look into these things?

Is there a way TransUnion makes that possible?

A. Yeah. That's actually what most -- most of our suggestions would be, is that if you are looking to do a large purchase, that you would first get a copy of your

credit report so you have an understanding of what's on there so there is no surprises when you go to the bank, or anywhere else. And then if there are inaccuracies, if you notice something wrong, then you would dispute that information with the credit reporting agency that you got that information from.

Q. And you used the term "dispute." Does that word "dispute" suggest that the consumer was actually denied credit before the

* * *

Transunion's Memorandum in Support of Proposed Jury Instructions (N.D. Cal. June 18, 2017)

Defendant Trans Union LLC ("TransUnion"), pursuant to this Court's Amended Pretrial Order dated July 15, 2016 (Dkt. No. 196), hereby submits its Memorandum of Law in Support of Proposed Jury Instructions to be Included in the Court's Final Charge to the Parties.

A. [Re-Requested] Jury Instruction Re Jury Cannot Deliver a Compromise Verdict

This proposed instruction informs the jury that it may not deliver a compromise verdict. *Romberg v. Nichols*, 970 F.2d 512, 521 (9th Cir. 1992) ("When a jury compromises its verdict, its verdict should not stand.") This is not duplicative of Proposed Jury Instruction No. 22 re Duty to Deliberate. Instruction No. 22 broadly instructs the jury as to its duties, ranging from the pragmatic ("elect one member of the jury as your presiding juror") to the sage ("[d]o not be unwilling to change your opinion if the discussion persuades you that you should"). While Instruction No. 22 also mentions that the jury must reach a unanimous verdict, this proposed instruction is specifically targeted to the process of reaching a unanimous verdict and provides important information to the jury that it may not "horse trade" in reaching its verdict. The *process* of accomplishing unanimity is not addressed by Instruction No. 22.

B. [Re-Requested] Jury Instruction Re Prohibition Against Quotient Verdict

This proposed instruction informs the jury that it may not deliver a quotient verdict. It is proper and necessary for this Court to instruct the jury that arriving at a potential damages calculation by pre-agreement is prohibited. *See Freight Terminals, Inc. v. Ryder Sys., Inc.*, 461 F.2d 1046, 1053 (5th Cir. 1972). This instruction not duplicative of Instruction No. 22 because it specifically advises the jury of a prohibited method of calculating damages. It is important for the jury to be instructed on a method of deliberation that could potentially set aside its verdict. *See Nat'l R.R. Passenger Corp. v. Two Parcels of Land One 1691 Sq. Foot More or Less Parcel of Land in Town of New London, New London Cty. & State of Conn.*, 822 F.2d 1261, 1268 (2d Cir. 1987).

C. [Re-Requested] Jury Instruction Re Reseller Duties

It is not disputed that the Dublin Nissan auto dealership did not obtain a credit report about Plaintiff directly from TransUnion. Rather, TransUnion's data passed through multiple hands before reaching the salesperson who dealt directly with Plaintiff. TransUnion's evidence has shown that what Dublin Nissan received was not on an approved TransUnion format and is not a TransUnion credit report. TransUnion will be prejudiced if the jury is not informed that under the FCRA, resellers of credit reports have their own independent FCRA duties. *See* 15 U.S.C. §§ 1681a(u), 1681e(e); *see also Waterman v. Experian Info. Sols., Inc.*, No. 12-01400 SJO (PLAx), 2013 WL 675764 (C.D. Cal. Feb. 25, 2013) (15 U.S.C.

§ 1681e(b) applies to resellers); *Willoughby v. Equifax Info. Servs. LLC*, No. 2:13–CV–788–RDP, 2013 WL 8351203, at *3 (N.D. Ala. Aug. 12, 2013) (same); *Dively v. Trans Union, LLC*, No. 11–3607, 2012 WL 246095, at *5 (E.D. Pa. Jan. 26, 2012) (same). As a matter of law, TransUnion is not responsible for how others use its data, particularly when, as here, the information has been altered in contravention of TransUnion's specific directions. Moreover, Plaintiff has proffered no evidence that any reseller or other party who passed along data originated from TransUnion was an agent of TransUnion. An instruction on this subject is essential to prevent the jury from being confused into believing that TransUnion is legally responsible for changes to its data or its approved format subsequent to the data leaving TransUnion's control, and contrary to TransUnion's requirements for use of the data.

D. [Re-Requested] Jury Instruction Re Standing and Causation

Throughout the litigation and at trial, Plaintiff has identified no one who suffered any actual harm as a result of TransUnion's 2011 procedures. That Plaintiff's claim has been permitted to proceed so far does not excuse him from the need to prove standing as a factual matter. As explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), a plaintiff's burden to produce evidence supporting Article III standing progressively increases from the pleading stage through summary judgment and ultimately trial. Accordingly, Plaintiff must proffer evidence to support "a factual showing of perceptible harm." *Id.* at 566 (1992); *see also Spokeo*, 136 S. Ct. at 1550.

The increasing burden of proof mandated by *Lujan* requires the plaintiff to produce enough evidence to enable a reasonable factfinder to find that he has standing. Plaintiff has not proffered any evidence that demonstrates that either individual class members or the class as a whole suffered real-world harm or even an undue risk of harm from the FCRA violations he alleges occurred, but Plaintiff must do so now. *See Sion v. SunRun, Inc.*, No. 16-cv-05834-JST, 2017 WL 952953, at *3 (N.D. Cal. Mar. 13, 2017) ("The Court finds that Sion's conclusory statement that 'Defendant increased the risk that [Sion] will be injured if there is a data breach on Defendant's computer systems' is insufficient, even when coupled with Sion's allegation of emotional distress, to defeat SunRun's motion to dismiss.").

The evidence has shown that there was no "practical consequence" to the class resulting from the challenged actions here. *See Safeco*, 551 U.S. at 63-64. On the Section 1681g disclosure claims, the evidence shows that the allegedly non-compliant disclosure employed during the class period was *more* effective in informing consumers of their rights than the present disclosure method (which Plaintiff concedes is compliant). Likewise, on the Section 1681e(b) accuracy claim, Plaintiff has not identified anyone who actually was denied credit improperly as a result of any TransUnion Name Screen. In order to "willfully" violate the FCRA and recover statutory damages, a consumer reporting agency's action must create an "unjustifiably high risk of harm that is either known or so obvious that it should be known." *See Safeco*, 551 U.S. at 49; *see also Smith*, 837 F.3d at 610-11. The fact that the class as a whole, or any

identified person within the class, did not sustain any concrete injury as a result of TransUnion's actions makes it more likely that there was not an "unjustifiably high risk of harm" that would justify a finding of willfulness under *Safeco*.

The aforementioned authorities are supported by a recent opinion published by the United States Court of Appeals for the Fourth Circuit in *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017). There, the court concluded that an individual who fails to allege a concrete injury stemming from allegedly incomplete or incorrect information listed on a credit report cannot satisfy the threshold requirements of standing. *Id.* In Dreher, the district court did not analyze whether any injury to plaintiff was specific and concrete and found instead that merely any violation of the FCRA sufficed to create an Article III injury in fact. *Id.* The Fourth Circuit court vacated the district court's judgment and remanded with instructions to dismiss on the grounds that the plaintiff had failed to demonstrate that he suffered a concrete injury sufficient to satisfy Article III standing. *Id.*

Here, Plaintiff does not assert that he has suffered any actual injury as a result of the alleged violations of the FCRA. Instead, TransUnion's evidence has shown that its contemporaneous delivery procedure "had no practical effect" on Plaintiff's ability to receive information he needed to inquire further as to the results he received. The evidence has established that neither Plaintiff, nor any class member, suffered any concrete harm as a result of TransUnion's contemporaneous disclosure process. By contrast,

Plaintiff has not introduced any evidence of harm. This is wholly relevant to the claims here because, as *Dreher* confirms, no constitutional standing can exist absent a concrete injury. Plaintiff must prove, as a factual matter, that he and the class sustained injury sufficient to pass muster under Article III as a result of each violation alleged. Because the lack of concrete injury is determinative of liability, the jury should be instructed as to the implications of a finding that neither Plaintiff, nor any class member, suffered any concrete harm as a result of TransUnion's conduct. TransUnion's proposed instruction hews closely to the Constitutional standard. The jury should be permitted to decide, as a factual matter, whether this standard has been met.

E. [Re-Requested] Jury Instruction Re Willful Non-Compliance

The instruction TransUnion proposes (in lieu of the Court's Proposed Jury Instruction No. 19) closely tracks the language of *Safeco Ins. Co. of Am v. Burr*, 551 U.S. 47 (2007), as well as other language from a recent Court of Appeals decision, reversing a jury verdict in favor of the plaintiff, that applies and explains the *Safeco* standard. *Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604 (6th Cir. 2016).

Safeco states that a "willful" failure to comply with the FCRA includes both knowing and reckless violations, but the case mandates a high degree of recklessness for liability to be imposed. 551 U.S. at 56. "While the term recklessness is not self-defining, the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing an unjustifiably high risk of

harm that is either known or so obvious that it should be known." *Id.* at 68 (internal citations omitted). *See also Smith*, 837 F.3d 604, 610 (citing *Safeco*) (negligence in compiling credit report "is a far cry from being willful" and inaccuracies resulting from carelessness are not equivalent to disregarding a high risk of harm of which it should have known).

TransUnion's proposed language about prompt correction of an error being evidence of the lack of willfulness is based on *Smith*, and is supported by the evidence TransUnion has presented at trial. As drafted, the instruction merely informs the jury that it *may* consider the evidence.

TransUnion's proposed instruction that the jury must assess TransUnion's conduct based on the state of affairs during the class period is a common-sense application of *Safeco*. TransUnion cannot fairly be held to a standard of behavior that is only applied in hindsight. Moreover, because 15 U.S.C. § 1681e(b) discusses reasonable procedures to achieve maximum possible accuracy, the statute has a temporal component built into it. What was *possible* in 2017 was not necessarily possible in 2011, and Plaintiff has the burden of proving what was possible in 2011.

F. [Proposed Modification of] Jury Instruction No. 14 Re Definitions

TransUnion proposes a modification to this incomplete instruction. TransUnion's proposed modification equips the jury with the definition of a "consumer report." Importantly, the instruction distinguishes for the jury that a key element of the definition of a "consumer report" is that it must be used or expected to be used for the purpose of

determining "eligibility" for credit, employment, housing or insurance. 15 U.S.C. § 1681a(d). Although the Court has ruled that sale of the report to a third party is not an mandatory element of the "consumer report" definition, the Court has not previously been asked to rule upon the "eligibility" element of the definition, which is expressly within the language of the statute. Plaintiff must prove, on his claim under 15 U.S.C. § 1681e(b), that an inaccurate "consumer report" was prepared as to each member of the class. The jury must find, as a factual matter, that such consumer reports were prepared, and under the statute, a communication is not a consumer report unless the eligibility element is satisfied. Failure to instruct the jury on the eligibility element of the definition of consumer report would be reversible error.

G. [Proposed Modification of] Jury Instruction No. 16 Re 15 U.S.C. § 1681e(b)

The portion of TransUnion's proposed modification defining for the jury the meaning of "inaccuracy" is appropriate. The proposed language stating, "[i]naccuracy means patently incorrect or misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions" is taken directly from controlling Ninth Circuit case law and this additional explanation should be provided to the jury. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009).

TransUnion also is entitled to an instruction that the jury may not impose a different standard of accuracy on it simply by reason of its status as a consumer reporting agency. The First Amendment

provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (quotations and citations omitted), aff'd, 452 U.S. 656 (2004). The Supreme Court recognizes that the First Amendment protects credit reporting. *See Sorrell v. IMS Health, Inc.*, S. Ct. 2653, 2667 (2011) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783 (1985) for the propositions that a "credit report is 'speech'" and that "dissemination of information [is] speech within the meaning of the First Amendment"). The First Amendment also protects the publication of information about matters of public concern. *See Dun & Bradstreet*, 472 U.S. at 758-59 (1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'") (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)). "[P]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). Thus, First Amendment protection extends to the public Treasury information provided by TransUnion via the Name Screen product. *See Sorrell*, 131 S. Ct. at 2666 (recognizing "restrictions on the *disclosure of government-held information* can facilitate or burden the expression of potential

recipients and so transgress the First Amendment") (emphasis added); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (New York law permitting merchants to give a discount to cash-paying customers, but forbidding them from imposing a surcharge on credit card users, is a regulation of commercial speech that must be analyzed under the First Amendment); see also Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional"). TransUnion's status as a consumer reporting agency does not diminish its protections under the First Amendment, including its protected right of free speech, as communicated through its reports. The jury should not be allowed to discriminate against TransUnion because it is a consumer reporting agency, rather than part of the media. *See Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others") (internal citations omitted); *Lovell v. City of Griffin, GA*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995) ("Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well

as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."). TransUnion's proposed jury instruction properly guides the jury to view the determination of "accuracy" through the proper Constitutional lens. TransUnion cannot, by reason of its status as a consumer reporting agency, be held to a different standard of accuracy than would apply to any other publisher of the information at issue in the present litigation. Failure to instruct the jury in the manner requested would deprive TransUnion of its rights under the First Amendment and constitute reversible error.

H. [Proposed Modification of] Jury Instruction No. 21 Re Statutory Damages

TransUnion's proposed modification is essential to a proper instruction regarding what types of damages may be awarded. The remedies provision asserted here by Plaintiff, 15 U.S.C. § 1681n(a)(1)(B), states that "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 . . . 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." (Emphasis added.) Since the statute expressly provides that actual *or* statutory damages may be awarded upon a finding of willfulness, Jury Instruction No. 21 should be revised to allow the jury to allow actual damages, which in this case Plaintiff concedes to be zero. Indeed, when

Congress intends for a plaintiff to recover the "greater of" actual or statutory damages, the statutory language is clear. *See, e.g.*, 18 U.S.C. § 2520 (in context of Electronic Communications Privacy Act, "the court shall assess *the greater of* the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500") (emphasis added). In fact, two different subsections of Section 1681n contain similar language. Section 1681n(a)(1)(B) provides: "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 . . . 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*." (Emphasis added). Section 1681n(b) provides: "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*." (Emphasis added). Congress's intentional omission of the "whichever is greater" language from Section 1681n(a)(1)(A), the relevant provision here, thus evidences an intent to permit an award of actual damages that is *less than* statutory damages.

Here, the plain language of the statute expressly permits the finder of fact to elect between actual and statutory damages, and the jury should be instructed in accord with the plain language of the statute. The statute does not state that the plaintiff should be

awarded the greater of actual or statutory damages; as drafted, the law contemplates that the jury may award the plaintiff his actual damages if they are below $100, just as the jury may award the plaintiff his actual damages if they exceed $1,000.

The instruction should be modified to conform to the statute.

I. [Proposed] Jury Instruction re Structure of the U.S. Judiciary

Throughout this trial, Plaintiff has made references, and sought to introduce evidence, of the prior Cortez rulings at the district and appellate court level. TransUnion's proposed instruction regarding the structure of the United States judiciary is critical to enable the jury to frame key theories proffered by both parties as to notice, TransUnion's state of mind, and to the ultimate issue of willfulness. The proposed instruction does not prejudice Plaintiff in any way. Rather, TransUnion's proposed instruction succinctly and accurately states the hierarchy of the U.S. judiciary and the regions included under the Third Circuit. For these reasons, the proposed instruction will give the jury the proper context to evaluate competing theories of the case.

J. [Proposed] Jury Instruction re Curative Instruction to Remedy Plaintiff's *Cortez*-Reading

A curative instruction must be given to the jury to negate the prejudicial effect of Plaintiff's misuse of excluded evidence. A curative instruction is the preferred remedy for correcting an error when the jury has heard excluded evidence. At the close of trial, a curative instruction is proper with respect to the

portion of the Cortez decision that was read to the jury.

At the second Pretrial Conference held on June 8, 2017, this Court excluded Plaintiff's proposed exhibit no. 32—*Cortez v. TranUnion*, 617 F.3d 688 (3d Cir. 2010) on the grounds that it would be confusing to the jury. On June 15, 2017, Plaintiff's counsel posed a question to Michael O'Connell by forming a question which included a near exact quote from the excluded exhibit (i.e., the *Cortez* decision). (Trial Transcript from 6-14-2017, 158:8-158:18.) Then, on June 16, 2017, this Court clarified its decision to allow Plaintiff's counsel to pose this question because parties were permitted to question witnesses about the contents of the decision because such questions would likely lead to evidence of TransUnion's state of mind. (Trial Transcript from 6-16-2017, 12:17-1.)

This proposed limiting instruction is necessary because the jury will not know what is or is not the proper way to evaluate the evidence. Moreover, the proposed instruction properly frames the Cortez decision according to the stipulation agreed to by the parties. With respect to the portion of the Cortez decision that was effectively read to the jury, a curative instruction should be given to the jury because it must be made clear that the Cortez excerpt cannot be considered as evidence for its substantive content. In other words, the jury may take into account that the Cortez decision occurred and that Mr. O'Connell was generally aware of its holding, but only for that limited purpose. If such an instruction were not to be read to the jury, then the jury may improperly assign weight to that specific excerpt from

Cortez without being able to balance it against the multitude of Third Circuit observations contained in that opinion. While TransUnion does not wish to admit the entire Cortez opinion out of concern that the jury will be confused, and as the Court recognized, the full opinion has been excluded under Fed. R. Evid. 403, TransUnion also believes that the jury should receive guidance as to how to properly apply and understand the evidence it heard at trial.

Dated: June 18, 2017

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP

* * *

By: */s/Stephen J. Newman*
Stephen J. Newman
Attorneys for Defendant
TRANS UNION LLC

Final Jury Instructions
(N.D. Cal. June 19, 2017)

IT IS SO ORDERED.

Dated: June 19, 2017

[handwritten: signature]
JACQUELINE SCOTT CORLEY
United States Magistrate Judge

JURY INSTRUCTION NO. 1 – DUTY OF JURY

Members of the Jury: Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so at the beginning of this case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

JURY INSTRUCTION NO. 2 – WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

7. the sworn testimony of any witness;
8. the exhibits that have been admitted into evidence;
9. any facts to which the lawyers have agreed; and
10. any facts that I have instructed you to accept as proved.

JURY INSTRUCTION NO. 3 – WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that is excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some evidence

was received only for a limited purpose; when I have instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

JURY INSTRUCTION NO. 4 – DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

JURY INSTRUCTION NO. 5 – RULING ON OBJECTIONS

There are rules of evidence that control what can be received into evidence. When a lawyer asked a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may have objected. If I overruled the objection, the question was answered or the exhibit received. If I sustained the objection, the question could not be answered, and the exhibit could not be received. Whenever I sustained an objection to a question, you must ignore the question and must not guess what the answer might have been.

JURY INSTRUCTION NO. 6 – BENCH CONFERENCES AND RECESSES

From time to time during the trial, it became necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury was present in the courtroom, or by calling a recess. Please understand that while you were waiting, we were working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we have done what we could to keep the number and length of these conferences to a minimum. I did not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

JURY INSTRUCTION NO. 7 – STIPULATIONS OF FACT

The parties have agreed to certain facts. You must therefore treat these facts as having been proved.

JURY INSTRUCTION NO. 8 – DEPOSITION IN LIEU OF LIVE TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

The deposition of the following individuals were used at trial:

(1) Annette Coito

(2) Brent Newman

(3) Robert Lytle

(4) Bharat Acharya

Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

If the deposition was read into the record, as with Ms. Coito, do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

JURY INSTRUCTION NO. 9 – USE OF INTERROGATORIES

Evidence was presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given

in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

JURY INSTRUCTION NO. 10 – CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness's memory;

3. the witness's manner while testifying;

4. the witness's interest in the outcome of the case, if any;

5. the witness's bias or prejudice, if any;

6. whether other evidence contradicted the witness's testimony;

7. the reasonableness of the witness's testimony in light of all the evidence; and

8. any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it

differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

JURY INSTRUCTION NO. 11 – EXPERT OPINION

Experts may give opinions on those subjects in which they have special skills, knowledge, experience, training or education. You should consider each expert opinion in evidence and give it whatever weight it deserves. Remember, you decide all the facts. If, in reaching an opinion, you find that an expert relied on certain facts, and you decide that any of those facts were not true, then you are free to disregard the opinion.

The law allows expert witnesses to be asked questions that are based on assumed facts.

These are sometimes called "hypothetical questions." In determining the weight to give to the expert's opinion that is based on the assumed facts,

you should consider whether the assumed facts are true.

JURY INSTRUCTION NO. 12 – THIS IS A CLASS ACTION

As I told you at the beginning of this case, this lawsuit is proceeding as a class action. A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have similar legal claims. All of these people together are called a "class." The class representative who brings this action is Sergio Ramirez.

In a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. Here, Mr. Ramirez is suing defendant Trans Union on behalf of a class of 8,185 people. If you find it appropriate, you may apply the evidence at this trial to all class members. All members of the class will be bound by the result of this trial. The fact that this case is proceeding as a class action does not mean any decision has been made about what your verdict should be.

The class in this case consists of "All natural persons in the United States and its Territories to whom Trans Union sent a letter similar in form to the March 1, 2011 letter Trans Union sent to Plaintiff regarding "OFAC (Office of Foreign Assets Control) Database" from January 1, 2011- July 1, 2011."

Your verdict in this case, whatever it may be, must be the same for every class member because I have already found that the important issues in the case are common to all class members.

JURY INSTRUCTION NO. 13 – FCRA'S GENERAL PURPOSE

The Fair Credit Reporting Act, otherwise known as the FCRA, requires that "consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." The FCRA regulates Trans Union's reporting of OFAC information, such as the OFAC Alerts at issue in this case.

JURY INSTRUCTION NO. 14 – DEFINITIONS

Plaintiff Sergio L. Ramirez and the members of the certified class are "consumers" as defined in the FCRA.

Defendant Trans Union, LLC is a consumer reporting agency as defined in the FCRA.

JURY INSTRUCTION NO. 15 – THE CLAIMS OF PLAINTIFF AND THE CLASS

Mr. Ramirez and the Class bring three claims against Trans Union under the FCRA: (1) a claim under 15 U.S.C. § 1681e(b); (2) a claim under 15 U.S.C. § 1681g(a); and (3) a claim under 15 U.S.C. 1681g(c)(2)(A). I will now describe each to you.

JURY INSTRUCTION NO. 16 – FIRST CLAIM: 15 U.S.C. § 1681E(B)

The FCRA requires that when any consumer reporting agency prepares a report, it must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the [agency's] report relates."

To find for Mr. Ramirez and the Class on their First Claim, you must find that Trans Union willfully violated this provision.

JURY INSTRUCTION NO. 17 – SECOND CLAIM: 15 U.S.C. § 1681G(A)

The FCRA also requires that when any consumer requests his or her file from a consumer reporting agency, such as Trans Union, the agency shall clearly and accurately disclose to the consumer all information in the consumer's file at the time of the request.

To find for Mr. Ramirez and the Class on their Second Claim, you must find that Trans Union willfully violated this provision.

JURY INSTRUCTION NO. 18 – THIRD CLAIM: 15 U.S.C. § 1681G(C)(2)(A)

The FCRA also requires that, with each written disclosure, a consumer reporting agency, such as Trans Union, must provide to the consumer a summary of rights identified by the Federal Trade Commission.

To find for Mr. Ramirez and the Class on their Third Claim, you must find that Trans Union willfully violated this provision.

JURY INSTRUCTION NO. 19 – WILLFULLY DEFINED

An act is done willfully if it is done knowing that it will violate the Fair Credit Reporting Act or with a reckless disregard of a statutory duty under the Fair Credit Reporting Act. "Reckless disregard" means an action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be

known. A consumer reporting agency does not recklessly violate the Act when it acts in accord with an objectively reasonable interpretation of the Act.

JURY INSTRUCTION NO. 20 – BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE

Mr. Ramirez and the Class have the burden of proving their claims, including that one or more violations of the FCRA was willful, by a preponderance of the evidence. A preponderance is the greater weight of the evidence.

To say it differently: if you were to put the evidence favorable to Mr. Ramirez and the Class and the evidence favorable to Trans Union on opposite sides of the scales, Mr. Ramirez and the Class would have to make the scales tip somewhat on their side. If they fail to meet this burden, the verdict must be for Trans Union. If you find after considering all the evidence that any claim or fact is more likely so than not so, then that claim or fact has been proven by a preponderance of the evidence. If the evidence on that claim appears to be equally balanced, or if you cannot say upon which side it weighs more heavily, then you must find in favor of the defendant on that claim.

You should base your decision on all of the evidence, regardless of which party presented it.

JURY INSTRUCTION NO. 21 – STATUTORY DAMAGES

If you find that Trans Union willfully violated the FCRA with respect to any of the three claims brought by Mr. Ramirez and the Class here, then you must award each member of the Class statutory damages of

no less than $100 and no more than $1,000. It is up to you to set the amount based upon the facts and circumstances of this case.

JURY INSTRUCTION NO. 22 – DUTY TO DELIBERATE

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous as to each issue submitted to you.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views. It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

JURY INSTRUCTION NO. 23 – USE OF NOTES

Some of you took notes during the trial. Whether or not you took notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

You will have in the jury room the exhibits admitted into evidence, except for Exhibit 8(B) which is the class list. We are not providing you with the class list because it contains class members' personally identifiable information.

JURY INSTRUCTION NO. 24 – COMMUNICATION WITH THE COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the court staff, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court.

If you send out a question, I will consult with the lawyers before answering it, which may take some time. You should continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the me—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to me.

JURY INSTRUCTION NO. 25 – RETURN OF VERDICT

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror should complete the verdict form according to your deliberations, sign and date it, and advise the court that you are ready to return to the courtroom.

Excerpts from Trial Transcript (June 19, 2017)

* * *

[724] **MR. NEWMAN**: So we will not display those slides.

THE COURT: Okay.

MR. NEWMAN: Thank you, your Honor.

MR. SOUMILAS: And the final thing, other than jury instructions, is we submitted a request for judicial notice last night that we would like to use for a second phase of closing, should we get there, concerning punitive damages which we think is on all fours on punitive damages.

THE COURT: I did -- I did read through that.

Let's do the jury instructions first. Let's take it in order, because that's something we can do last.

Okay. So let's do then jury instructions. And with respect to -- so I fess up. I did not stay up until 11:00 last night waiting for your submissions.

MR. NEWMAN: That's okay, your Honor. I didn't expect you to.

THE COURT: So I have briefly read through some of them. Let's go through mine, and then you can tell me where yours add in or if you have a change to one of mine.

MR. NEWMAN: Yes, your Honor.

THE COURT: So let's start with seven, which is stipulations of fact. Should I just say here: Parties have agreed to certain facts which have been read to you. You must, therefore, treat these facts as having been proved.

I don't believe there is --

[725] **MR. NEWMAN**: Yes.

MR. SOUMILAS: Yes.

THE COURT: That's correct? Okay.

Okay. So I think the first one is maybe 11, this is a class action. And the plaintiff had submitted --

MR. SOUMILAS: Is it 12, your Honor?

THE COURT: Or, 12, yeah. Sorry, 12.

Had submitted an instruction.

MR. SOUMILAS: And, your Honor, may I just focus for a moment first on the part of 12 that the Court has already provided to the parties.

THE COURT: Yes.

MR. SOUMILAS: I don't know if it's a typographical error or what, but I think we all agree that the class in this case is 8,185 people, not 84. So I'd like that correction.

THE COURT: All right.

MR. SOUMILAS: And then we submitted a supplemental, your Honor, which we call 12a because we think that it's very important to instruct this jury that they cannot treat some members of the class differently for purposes of their verdict. That is a Rule 23 issue. We've briefed on it at the certification motion, the decertification motion.

The Court repeatedly denied TransUnion's attempts --

THE COURT: Yeah, I understand that. So one question I had raised at the beginning of the trial was whether -- and I [726] didn't get any revisions to the

verdict form. So I assume TransUnion, the way the verdict form reads now, there will be a number that will apply to each class member.

MR. NEWMAN: Correct.

THE COURT: So I think it's probably appropriate to instruct them that it would be the same for each class member. However, the second sentence you have I don't think is appropriate because, in fact, the number that the jury decides to impose may, in fact, reflect that there are different experiences. There are some like Mr. Ramirez, who I think actually had some real actual harm, or anyone, for example, who had to call TransUnion and change it, but maybe someone who didn't is different.

In other words, in determining the amount of the statutory damages, I think it would be error for me to instruct them they couldn't consider that. But I will instruct them that their verdict must be the same for each class member.

MR. SOUMILAS: Understood.

MR. LUCKMAN: Your Honor, the Marshal tells me I need to get the Clerk to open our break-out room. I don't want to sit with the witnesses because the jury is going to come in. I apologize.

THE COURT: That's okay.

MR. SOUMILAS: So, your Honor, thank you as to 12a.

THE COURT: Okay. So where should I put that though?

[727] **MR. SOUMILAS**: We were suggesting that you just read it, put it as 12a because we thought that

would make sense in that sequence between 12 and 13 --

THE COURT: I will find somewhere to put it. I would put within 12.

Do you have any thoughts on that, Mr. Newman?

MR. NEWMAN: I agree, your Honor, that it would be error to include that second sentence, and the first sentence is basically fine.

THE COURT: We'll do it as 12a, okay. Or somewhere in there.

Okay, let's see. 13, nothing, correct?

MR. SOUMILAS: So 13, your Honor, is one that we've suggested, a supplemental charge.

Your Honor will recall that we had filed a motion in limine to exclude these contracts that have disclaimers and language that essentially says, you know: We are imposing these obligations on you, buyers of our data.

And your Honor denied that motion and allowed all this testimony before the jury, and now we think it's important to instruct the jury that those contracts do not change the application of the Fair Credit Reporting Act. That's language straight out of the Third Circuit in Cortez, that I believe this Court has also used in denying TransUnion's motion for summary judgment.

[728] **THE COURT**: Okay. I will -- if they were to argue that they didn't Violate the FCRA somehow because it was a reseller, I think that would be an appropriate argument. I don't think they are going to make that argument. I think more it goes to

willfulness, and I think it is relevant to willfulness. You will make whatever argument you want as to that, as will they.

I understand that they are going to argue it wasn't willful. We thought that these -- you know, these resellers -- it was reasonable for us to rely on the resellers to comply with the contract. And you'll make your argument as to why it's not, but I don't -- I don't know that I should instruct -- I think the error with your instruction is that I would be, in essence, instructing them to disregard the evidence which is relevant to willfulness.

MR. SOUMILAS: So, your Honor, we think that this language comes directly out of Cortez on the willfulness argument, which is that the contracts somehow excuse a violation of the FCRA, and they don't.

So I think the jury could be very confused by saying you have these contractual arrangements. Most people think contracts are law. And that they have some affect on TransUnion's duties to comply -- whether negligently or willfully, to comply with the FCRA. And whether the violation is a negligent one or a willful one makes no difference. The [729] issue is should this jury understand that the contracts do not water down TransUnion's duty under the FCRA no matter what they say.

THE COURT: It does not. And I won't instruct them that it does. So they are not going to get that instruction, right? They are just getting an instruction of what their obligation is under the FCRA. And I'm not going to instruct them at all that the contracts somehow water down their argument.

But I don't think Cortez said it was error to admit the contracts --

MR. SOUMILAS: So --

THE COURT: -- right?

MR. SOUMILAS: That's correct, your Honor. I could argue that point about the contracts.

THE COURT: Okay.

All right. What is the next one that we should look at then?

MR. SOUMILAS: So the next one that we propose, your Honor, is a -- is to 19, which is "willfully" defined. And there is -- we have a supplemental charge that we think should be added to the first two sentences of the existing charge, and we very strongly believe that the third and last sentence of the existing charge needs to be removed.

That's the sentence that reads that:

[730] "A consumer reporting agency does not recklessly violate the Act when it acts in accord with an objectively reasonable interpretation of the fact."

That is a pure legal defense. It relates to what the statute and the law is and whether there is an objective reading. Judges are safe -- are gatekeepers on that function and TransUnion tried its motion under Safeco and lost.

We cannot possibly have a jury deliberate about what an objectively reasonable interpretation of the law is. This Court did not permit any testimony on what the law was or how to interpret it. Cortez is not in evidence, the Third Circuit decision. And we think

that this will be so highly prejudicial and confusing to the jury.

So we think the third sentence should go and that the Court should elaborate on willfulness as we propose in 19a.

MR. NEWMAN: Your Honor, we believe that what's been proposed in 19a is an attempt to put the thumb on the scales in terms of a lot of the context evidence that's presented in this case and is not consistent with Safeco.

And, you know, you're basically telling the jury to disregard the evidence that TransUnion has compliance people. And you're asking the Court to disregard that, you know, the law was evolving.

And, you know, again, state of mind and willfulness are appropriate facts to go to the jury, and the proposed [731] instruction is basically telling the jury not to consider that.

THE COURT: Well, what is the objectively reasonable interpretation of the Act, or just that adding the word "potential," or...

MR. NEWMAN: Well, what I'm focused on in their proposed instruction language:

"This is true even if the consumer reporting agency's lawyers" --

THE COURT: Yeah, I wouldn't -- so my instructions, I do not comment on the evidence. I think that's not appropriate to do.

Sometimes maybe the way something was argued, in order to correct an argument I might have to do that, but I stay away from that. So I wouldn't do that.

I'm more intrigued by plaintiff suggesting that we delete the last line of the instruction that's there.

MR. NEWMAN: (As read)

"So a consumer reporting agency does not recklessly violate the Act when it acts in accord with an objectively reasonable interpretation of the Act."

Well, you have had, you know, evidence in this case that there was not a lot of guidance out there in the time, you know, leading up to Cortez. They have talked a lot about, you know, the pre-Cortez period. There is evidence that different agencies had pushed in different directions as to how many hits [732] is too many hits. And I think that that justifies the instruction, which is absolutely consistent with the language of Safeco that a company that acts in accord with an objectively reasonable interpretation is not willful.

THE COURT: But what is the reasonable interpretation of the Act? You didn't -- you didn't point to me what is the Act.

So, for example, we have the Ninth Circuit's recent decision --

MR. NEWMAN: Yes, your Honor.

THE COURT: -- in which they actually held it was not a recently interpretation of the Act. They actually reversed, came to the exact opposite conclusion. We don't have that here.

MR. NEWMAN: Well, right. There is no, like, legal opinion that's been put into evidence that says, you know: You have asked me to examine these provisions of the Fair Credit Reporting Act and the associated regulations and based on the facts you have

given me, I conclude that a reasonable Court applying reasonable guidance...

We don't have that evidence. But the language here in the last sentence is from *Safeco*.

THE COURT: No, I understand that. But the question is whether that language applies to the facts of this particular case.

[733] **MR. NEWMAN**: Well, I think you've heard witnesses say that they think they were doing what the law required of them. And you haven't seen --

THE COURT: Actually, I haven't heard that. What I heard the witnesses say is, I was doing what I was told to do.

MR. NEWMAN: Well, you've heard witnesses --

THE COURT: Nobody even said they even read Cortez. Nobody said they got any advice or anything. So I actually haven't heard that, at least not yet.

All right. Well, I'm going to take this one under advisement.

MR. SOUMILAS: And, your Honor, from our point of view we also have one final issue on the jury charge. It's not a new proposed charge, but the Court's instruction 26 on punitive damages, the very, very last line which says:

"The degree of reprehensibility of a defendant's conduct and the relationship and any award of punitive damages to actual harm inflicted on Mr. Ramirez and the class."

I think using the word "actual" there really confuses the difference between actual damages and

statutory damages in this case. I think you're allowed to recover --

THE COURT: All right. Let's deal with theirs related to -- before we get to punitives, since we have bifurcated that in any event.

[734] **MR. SOUMILAS**: Yes, your Honor.

THE COURT: All right. So TransUnion then -- which one should I look at, Mr. Newman, that maybe have not been --

MR. NEWMAN: So since we just looked at 19, if your Honor could look at our 19? You know, we have added some additional language which we requested.

MR. SOUMILAS: Could you help me, just where that is?

MR. NEWMAN: Page 6 of our proposed instructions.

MR. SOUMILAS: Okay.

MR. NEWMAN: We have added language:

"A good faith attempt to obey the law is not reckless conduct."

We have also added language:

"Evidence that the consumer reporting agency promptly corrected an error after it was brought to its attention."

THE COURT: I'm not going to do that. See that's commenting on the evidence, right? Then I would have to go to all their evidence and blah, blah, blah. You argue the evidence. The jury will decide what they believe. I'm not going to instruct on it.

MR. NEWMAN: And we've also asked for the instruction:

"The relevant time for determining whether TransUnion willfully violated the FCRA is January 1, 2011 through July 26, 2011. You must assess TransUnion's conduct based on what was known and what was technologically feasible at [735] that time."

THE COURT: I don't like the second sentence. But the first sentence?

MR. FRANCIS: The first sentence is problematic as well, your Honor, because the class definition is that time period. That doesn't mean that that's the only time that TransUnion could violate the law.

And, in fact, this is a major issue, that the fact that during this period these reports were prepared and went out doesn't mean that after the period these exact class members didn't continue to suffer injury. So --

THE COURT: I think the problem with that is it may confuse the jury, that they can only consider evidence from that time period; whereas, evidence from before and after, I think, is relevant to that.

MR. NEWMAN: Well, I'm not sure evidence after is, but I understand --

THE COURT: I think arguably it is also, what they did or didn't do afterwards is somewhat relevant to the intent before as well.

Anyway, as I told you guys, willfully statutory damages, pretty much we just let it come in and see what the jury says. All right. So I'm not going to do that.

MR. NEWMAN: Okay.

THE COURT: And then, obviously, I'm not going to give [736] your instruction on standing, but I understand your argument is preserved.

MR. NEWMAN: Correct. We have also argued for what we think are some pretty standard instructions about that the verdict has to be anonymous as to each issue.

THE COURT: They are not standard in the Ninth Circuit. I'm giving the Ninth Circuit model jury instructions.

MR. NEWMAN: Okay. And you have heard -- you have seen our comments on the quotient verdict instruction. I understand your Honor's ruling on that.

We asked for a specific instruction about reseller duties based on what your Honor said earlier about not commenting on the evidence. I think I know what your Honor's ruling is on that, but we have made that argument.

THE COURT: Okay.

MR. NEWMAN: We've addressed standing and causation. We have just gone through 19.

THE COURT: I do want to add something on standing. I do actually think that the trial has shown even more so that there is standing here and that there was concrete injury in particular. And I didn't remember this being before. Mr. Ramirez testified that he actually -- when he got this letter, he then changed plans to going to Mexico, which, of course, makes sense. If you get this letter, you would be: Oh, gosh. Can I even leave the country? What's going to

[737] happen if I try to go back? So that was to him in particular.

And then as to each class member, certainly each that had to notify TransUnion in order to get their name off of it, that's having to do something. I think that's a concrete injury. They had to spend the time to do that, and maybe some anxiety or anything about that.

MR. NEWMAN: And you know our objection to that now.

THE COURT: I do.

MR. NEWMAN: So we have gone through-19.

Next page we reiterate our request for an instruction on the definition of consumer report as:

"A communication which is used or expected to be used or collected to serve as a factor in establishing the consumer's eligibility for credit, insurance, housing or employment."

Obviously, that's in support of our argument that the class on the e(b) claim needs to be limited to those people about whom data was sold.

THE COURT: Okay. Overruled.

MR. NEWMAN: Okay. Next page we reiterate our arguments as to the definition of inaccuracy. And the second sentence is -- you know, really does implicate First Amendment issues. Plaintiff seems to be arguing for a higher standard of accuracy based solely on TransUnion's status as a consumer reporting agency. We've heard evidence that OFAC itself [738] permits delivery of results that are -- could be described as false positives.

You have heard testimony there's other providers of interdiction software that are out there that deliver higher rates of false positives, and we suggest that the First Amendment requires that the accuracy standard must be the same across the board regardless of what industry you're in.

THE COURT: Why though? That would just make the FCRA meaningless.

MR. NEWMAN: Not necessarily, your Honor.

THE COURT: The FCRA says that credit reporting agencies must use reasonable procedures to ensure maximum possible accuracy. That doesn't apply to those banks, which by the way, didn't -- didn't -- they then went and did the human looking at it to make sure it was accurate. I don't even understand that argument.

But I mean you want to preserve your First Amendment argument to the FCRA, okay. TransUnion, you're right, is being held to a different standard. The FCRA holds them to that different standard.

MR. NEWMAN: Well, again, your Honor, we believe the FCRA, you know, permits some new remedies. It provides opportunities for consumers to achieve corrections to their report.

But in terms of whether something is accurate or not [739] accurate, the First Amendment imposes -- the First Amendment does not permit distinctions between a credit reporting agency or Google or the *New York Times*.

I mean, if the *New York Times* were to publish: Mr. Ramirez has a name that is a very much like two

names on the OFAC list, they could not be held liable for that. I mean, it's -- and the First Amendment does not admit distinctions based on status. That's all we're saying.

THE COURT: So that's your objection to the FCRA.

MR. NEWMAN: Correct.

THE COURT: Okay.

MR. NEWMAN: Well, it's our objection to the instruction, your Honor.

THE COURT: No. It's the objection to the FCRA. It's the FCRA that applies that standard to consumer reporting agencies. We're not -- it's not a defamation case. It's based solely on the statute that Congress passed, that because consumer reporting agencies and how these reports are used, you're right. They did put a higher standard on this commercial speech.

MR. NEWMAN: Understood, your Honor.

Our next instruction, we renew our argument that the jury should be permitted to go below $100 based on the language in the statute that says the award is actual damages or.

THE COURT: Okay. The objection is preserved.

[740] **MR. NEWMAN**: Next page. We do -- this is something new. We do believe it's worthwhile to tell the jury a little bit of something about how our courts are structured. We've talked about the Third Circuit, and all we are asking for is simply for the judge to explain to the jury completely truthful factual information as to how our courts are organized.

THE COURT: Why?

MR. NEWMAN: Why? Because it's not going to be readily apparent to them.

THE COURT: Yeah, but why does it matter?

MR. NEWMAN: Why does it matter? It -- because we have -- we've put in evidence that we did not appeal further to the --

THE COURT: Right. Then if we're going to do, then we are going to put in evidence that you don't have a right of appeal to the Supreme Court; that how many cert petitions do they get and they take only about 70 a year, and generally only if there is a conflict in the circuit. And there is no conflict in the circuits on this issue.

MR. NEWMAN: Understood, your Honor.

THE COURT: So we're not going to do this one either.

MR. NEWMAN: Okay. And our last request is, we do -- we are still concerned about the way that plaintiff's counsel questioned the witness about Cortez, and I think we just need to reiterate to the jury the point that questions from counsel [741] are not evidence.

THE COURT: Well, I do -- that will be in my instructions because I will tell them at the beginning. Plaintiff understands that.

MR. NEWMAN: Very good, your Honor.

THE COURT: Yeah.

MR. NEWMAN: And, of course, we preserve our -- if there is anything we forgot to mention.

THE COURT: They are preserved.

MR. NEWMAN: Thank you, your Honor.

THE COURT: There is a lot of legal issues in this.

MR. NEWMAN: Yes, your Honor.

I just want to be sure because your Honor's pretrial order does require us to make sure you're aware of the issues that we are preserving, and I thank you for that.

THE COURT: No. Absolutely, absolutely.

MR. FRANCIS: So can I get a sense? Are we getting three witnesses today and then you're closing?

MR. NEWMAN: We're going to put on, you know, at least two. And we'll make a decision later as to the third, but I think we will be able to finish today.

THE COURT: Can you tell him who the two are?

MR. NEWMAN: So Mr. Turek and Ms. Briddell. And possibly Ms. Cronshaw, not sure.

THE COURT: All right. Thank you.

* * *

[754] a long time. And they have been very, very responsible with any changes, things like this, and making sure that it's flowed down to their end users.

MR. NEWMAN: I have no further questions at this time, Mr. Turek.

THE WITNESS: Thank you.

THE COURT: All right. Ms. Brewer.

CROSS EXAMINATION

BY MS. BREWER

Q. Good morning, Mr. Turek. I'm Carol Brewer and I'm one of the attorneys for the plaintiff and the class.

A. Good morning.

Q. Mr. Turek, you don't dispute that the credit report that Dublin Nissan obtained through Dealertrack and ODE is a genuine TransUnion credit report, do you?

A. That is a credit report we delivered to ODE. Not sure what happened between ODE and Dealertrack.

Q. But the end result, the actual credit report that's Exhibit 1 in this case, TransUnion does not dispute that that is, in fact, a TransUnion credit report, correct?

A. Yes.

Q. Dealertrack just used ODE's system to get the TransUnion credit report to Dublin Nissan, is that right?

A. Say that again? Sorry.

Q. Dealertrack used ODE's system to get the TransUnion credit [755] report to Dublin Nissan.

A. In this case, my understanding is that Dealertrack's system used ODE's credentials to pull it through their technology.

Q. Okay. Well, Dealertrack is a third party to this case; wouldn't you agree?

A. I don't know.

Q. It's not in this case.

A. I -- I don't know that.

Q. Okay. And ODE is not in this case either, is that right?

A. I don't know that.

Q. Okay. Well, TransUnion didn't bring either of those parties into this case, right?

A. I don't know that.

Q. And TransUnion could have brought those parties into this case if TransUnion had thought that either of those parties had any liability here, right?

MR. NEWMAN: Objection.

THE COURT: Sustained.

BY MS. BREWER

Q. Dealertrack provides a secure channel that connects the auto dealers to TransUnion, is that right?

A. Dealertrack is a credit aggregator. They, you know, get the same general announcements that a lot of other software platforms provide, but in this particular case our -- our [756] contractual obligations were with ODE.

Q. But you do not dispute that the raw data on Sergio Ramirez's credit report, which is Exhibit 1 --

MR. NEWMAN: Your Honor, can --

BY MS. BREWER

Q. -- did come from TransUnion?

MR. NEWMAN: Excuse me, your Honor. If she's going to be questioning the witness on Exhibit 1, can we please display it so the witness has it?

MS. BREWER: Sure.

Mr. Reeser, can you blow up the top part of that please?

(Document displayed)

BY MS. BREWER

Q. Mr. Turek, you don't dispute that -- TransUnion does not dispute that this is a genuine TransUnion credit report, correct?

A. It -- it certainly looks like a credit report there.

Q. Okay. You testified that you asked your resellers to use TransUnion's header and -- and that new header was the header that changed "match" to "potential match." Do you remember that?

A. No.

Q. You -- your testimony was that the --

MS. BREWER: If you would take the next section, where it says "Special Messages"?

[757] (Document displayed)

BY MS. BREWER

Q. Okay. In reference to Mr. Ramirez's credit report, it says "Input name matches name on OFAC database." Do you see that?

A. Yeah.

Q. And your testimony was that someone was supposed to change "Input name matches" to "Input name potentially matches." Is that your testimony?

A. Yes.

Q. And who do you contend was supposed to make that change?

A. In this particular case ODE is the entity that should have had "potential" in there.

Q. Okay. So TransUnion could have required ODE to give TransUnion the new format before TransUnion allowed ODE to sell reports, right?

A. So we have a contract with ODE, amendment that required them to have that language in there. We followed our processes the same way we did with every other reseller. And my understanding is this is the only one that -- that it's never had "potential."

Q. Did --

A. I've never seen it.

Q. Did --

A. Never seen it like that before.

[758] Q. Did TransUnion ever check to make sure that it was using the new format before it started selling these reports?

A. So we have been selling the reports through ODE for a long time. And when that came through, they received the bulletin. And just like any of the other changes and all the other resellers, we expected them to follow the procedures that was delivered to them. And, you know, that's -- that's how we typically do it.

Q. But you don't usually check to make sure that they actually follow them? You just rely on the contract?

A. We rely on the contract for a lot of our services, and my understanding is this is the only one that -- you know, the only case I've ever seen.

Q. Okay. TransUnion says that its subscribers like Dublin Nissan are supposed to agree to a contractual provision -- and here you showed a couple of different contractual provisions; that no transaction will be denied and that no adverse action will be taken

against a consumer based just on a potential match to the OFAC Name Screen data.

Is that a fair characterization of what TransUnion's requirement is?

A. Yeah. We require customers that use our data to -- especially with OFAC, not to deny credit based solely on matches.

Q. You don't know whether TransUnion subscribers actually

* * *

[777] A. Yes. So for trainees, of course, because they are still learning the process, we do an increased amount. So when they are in actual training in the classroom, we QA 100 percent of that work. Then we knock it down to about 20 percent for about three months while they are in their nesting or training period, and then it goes down to the 5 percent.

Q. And with regard to the OFAC Name Screen, what, if any, analysis have you done with -- about the number of disputes that -- I'll say then, Consumer Relations received in 2011 and 2012?

A. So we looked at the number of OFAC hits in comparison to the disclosure volume, as well as the calls that we received to the dedicated phone line that we had set up. And just looked at the hit rate, the amount of disputes in relation to the hit rate.

And then we also looked at, with the telephone report, like, where those consumers were calling from. Because we had that information, as far as state wide. We were just looking at that so we can get an idea on volumes.

Q. You said "we" looked at. Who actually did the work?

A. So for the analysis, my team did a lot of that, working in conjunction with our technology team.

Q. Okay. And you supervised the team that did the work?

A. Uh-huh. Yes.

Q. Yes? And where did the information come from?

[778] A. Our CRS system.

Q. And could you tell the jury what is your CRS system?

A. So our CRS system is our Consumer Relations System. This is where we enter all of the Consumer Relations activity. So if a disclosure is requested, it would be logged in that system. You could see the date that it was requested, the information that was pulled, the time of the contact, the time that the agent did it, the agent's name. If a dispute then subsequently came in, you would be able to see that. So any type of activity, there would be an audit trail within the Consumer Relations System.

So because of those audit trails, we are able to pull metrics and stats as it relates to any of that activity. So that's how we were able to do the OFAC analysis.

Q. And the records and the stats you're talking about, they are all kept in the ordinary course of TransUnion business?

A. Oh, yes. Absolutely.

Q. And they are created contemporaneously with the event that they are keeping track of?

A. Correct, yes.

Q. And can you take a look Exhibit 69 in the book in front of you, please?

(Witness complied.)

A. Okay.

Q. Do you recognize that document, ma'am?

[779] A. Yes.

Q. What is it?

A. It's an OFAC Activity Report that my team created.

Q. That's what we were just discussing?

A. Yes.

MR. LUCKMAN: Move to admit Exhibit 69.

MS. BREWER: No objection.

THE COURT: 69 admitted.

(Trial Exhibit 69 received in evidence.)

BY MR. LUCKMAN

Q. Can you see that okay, either in front of you or on the screen?

A. Yes.

Q. Okay. Can you describe, please, for the jury what the columns are, what the information you actually have on here?

A. Yes. So this shows the OFAC activity month-to-month from January 2011 to December 2011. The first line are the number of calls that we receive to the OFAC information line. So we had a number, a dedicated OFAC number set up for consumers. And

this shows the number of calls that we received each month.

And then to the far right you'll see the totals. And then the average per month.

The next row is the number of names checked for OFAC --

Q. Just to interrupt you, where is that number located? How do consumers get that number?

[780] A. Which number?

Q. The number that you said people call to the OFAC line.

A. Oh, that was on the OFAC letter that was sent to them. So if a consumer was a hit or a potential match to the OFAC list and they got a letter, there was a phone number at the bottom of the letter.

Q. And what did that phone number provide?

A. The phone number provided additional --

MS. BREWER: Objection, hearsay.

THE COURT: I don't understand the question.

MR. LUCKMAN: I could ask it differently. I'm not asking for hearsay.

BY MR. LUCKMAN

Q. Were you involved in setting up the phone system?

A. Phone number.

Q. The phone number which was involved with that?

A. Yes. Correct.

Q. Are you aware of what occurred when someone called the number?

A. Yes.

MS. BREWER: Objection.

THE COURT: Overruled.

BY MR. LUCKMAN

Q. And could you describe for the jury, in essence, what happened when a person called that number?

[781] **MS. BREWER**: Objection again.

THE COURT: Overruled. It's not hearsay. Go ahead.

A. So if someone called the number, they would receive additional information about what the OFAC Name Alert was and how to dispute that information.

BY MR. LUCKMAN

Q. They wouldn't dispute it on that call, but it gave them information, correct?

A. Correct. It provided them with information they would have to submit to us in order to initiate the dispute.

Q. Okay. And what is the next "Names Check for OFAC," what does that mean?

A. So the number of names checked for OFAC, that is the disclosure request.

Q. Okay. Meaning, people that ask for --

A. For a copy of their credit report.

Q. Does that mean in January 2011 that there are 549,920 people had an OFAC alert on their disclosure?

MS. BREWER: Objection.

THE COURT: Leading?

MS. BREWER: Yes.

THE COURT: Sustained.

BY MR. LUCKMAN

Q. What, if any, does that -- what, if anything, does that say about whether they had an OFAC hit on their disclosure?

[782] A. This was the number of names that were checked. So it was the disclosures. So we -- any disclosures that were processed were bumped against the OFAC database.

Q. Does that -- it does not mean there was an OFAC screen hit. It means there was an OFAC screen?

A. Correct.

Q. And what's the next line?

A. This is the actual number of OFAC hits.

Q. Okay. So of the -- just taking January 11th of the 549,000 disclosures that were screened against OFAC, am I correct that -- if I can read that -- 2,398 were -- actually had alert information on them?

A. Correct.

Q. And that goes again throughout end of the year and has the totals?

A. Correct.

Q. And what's the next number down?

A. This is the number of disputes of the OFAC alert.

Q. What does that mean, ma'am?

A. So for that row above, that 2,398 hits in January, for example, only one person disputed the alert.

Q. Okay. And that information comes from the Consumer Relations System that tracks and records all this information automatically?

A. Correct.

[783] Q. Okay. And what is the next number, percentage of OFAC hits?

A. Right. So that's just a formula just showing the percent of OFAC hits as it relates to the number of names checked. And then the last line is the percent of disputes to hits.

Q. Why is that zero percent?

A. Because it was less than .01 percent.

Q. Okay.

A. Yes.

Q. And I'm not going to go over each of them, but that's the same information for each month during January 2011, correct?

A. Correct.

Q. And to your knowledge, ma'am, that was after TransUnion started disclosing the OFAC information when consumers asked for the consumer disclosure?

A. Correct.

MS. BREWER: Objection. I don't believe there is evidence on that.

THE COURT: Well, I think that there is. Why don't you do it in a non-leading way. Are you aware when they started...

MR. LUCKMAN: Sure.

BY MR. LUCKMAN

Q. Are you aware of when TransUnion started disclosing OFAC information to consumers?

[784] A. Yes. In 2011. We started, you know, getting the process ready at the end of 2010, but in 2011.

Q. Started January 2011?

A. Yes.

Q. Okay. And the next page, please, which is -- starts

January 12th.

(Document displayed)

Q. Without going through each and every one, is this the exact same information but for 2012?

A. Correct.

Q. Do you -- do you know, ma'am, when TransUnion started sending the OFAC information in one envelope instead of two? Do you know when that occurred?

A. I believe it was September.

Q. Of which year?

A. 2011.

Q. Right.

A. If I remember.

Q. Okay. So in 2012, am I correct, ma'am, that TransUnion was disclosing the OFAC information in a single envelope with the file?

A. Yes.

Q. When I say "file," I mean what we have been calling the credit report to the consumer.

A. Correct.

[785] Q. Okay. And so these are the numbers for 12 months during which TransUnion was making the disclosures with -- in a single package?

A. Correct. All together.

Q. Okay. And what, if any, difference are you aware of in the number of disputes of OFAC in 2011 as opposed to 2012 when it was being disclosed in the single envelope?

A. Well, the number, as you can see, was higher in 2011 than in 2012. So when it was a separate letter, we saw more disputes versus when it was all together.

Q. Okay. Thank you.

Ms. Briddell, are you familiar with the history of TransUnion's handling of consumer contacts about the OFAC disputes?

A. Yes.

Q. Okay. And that's handled by your department, correct?

A. Correct.

Q. And can you tell me prior to 2010 if TransUnion disclosed information about OFAC to consumers?

A. No, we did not.

Q. Do you know when that practice changed?

A. The practice changed in -- oh, it was in 2010, was when we started disclosing that information.

Q. Okay. And do you know why?

A. It was a result of a legal mandate.

* * *

[803] A. Based on my role in Consumer Relations, a/k/a Contact Center Services. Since I'm responsible for implementing policies, procedures and training, if there was a mandate that came down from our regulatory agency, I would be involved.

Q. That would be your job?

A. Yes.

MR. LUCKMAN: No further questions, ma'am. Thank you.

THE WITNESS: Okay.

MR. LUCKMAN: But you have stay there.

THE COURT: All right. But I think what we'll do is we will take our morning break. All right?

MR. LUCKMAN: Okay.

THE COURT: So we will take our 20-minute break.

Ladies and gentlemen, please, as always -- we're getting close, but please do not discuss the case.

Thank you.

(Whereupon there was a recess in the proceedings from 9:57 a.m. until 10:18 a.m.)

THE COURT: Thank you, ladies and gentlemen. Ms. Brewer.

MS. BREWER: Thank you, your Honor.

CROSS EXAMINATION

BY MS. BREWER

Q. Ms. Briddell, I'm Carol Brewer. I'm one of the attorneys for the plaintiff and the class in this case.

[804] You've testified about TransUnion's OFAC dispute process and training over a number of years, and that's part of your area of expertise, right?

A. Correct.

Q. And you testified about the number of people who disputed OFAC information over a several-year period, right?

A. Correct.

Q. When did TransUnion first start disclosing OFAC alerts to consumers?

A. 2011.

Q. And that was January 2011?

A. Yes.

Q. And when did it start disclosing OFAC alert information to consumers who -- who got their information online as opposed to in print?

MR. LUCKMAN: Objection, relevance.

THE COURT: Overruled.

A. I'm not exactly sure. I don't recall exactly.

BY MS. BREWER

Q. It wasn't January 2011, though, was it?

A. I don't believe so. I think it was a few months later.

Q. Was it more like September 2011?

A. Possibly.

Q. Now, the number of people who have disputed information between January 2011 and -- the number -- I'm sorry.

[805] The number of people who got an OFAC alert between January 2011 and July 2011 are the people who make up this class, is that your understanding?

A. Correct.

Q. And all of those people got their consumer disclosure in print, in hard copy, right?

A. To my understanding, yes.

Q. And you didn't testify about the number of people who were an OFAC hit, but who looked at their consumer disclosure online, right?

A. I'm not sure of the question.

Q. Okay. You had testified earlier about the number of people who were OFAC hits. In other words, their names were potential matches to people on the OFAC list, right?

A. Yes.

Q. And then they disputed saying: TransUnion, I'm not -- on the OFAC list, so please take my name off the OFAC list, right?

A. Correct.

Q. Okay. But you -- those people that you testified about were all people who got their disclosure in print? In other words, not online, right?

A. Correct.

Q. Okay.

MS. BREWER: I would like to pull up, please, Exhibit 10. And I'd like to direct your attention to Page 5 of [806] Exhibit 10.

If you could blow that up just a little bit? There you go.

(Document displayed)

BY MS. BREWER

Q. You see where it says "CRS Mailed Disclosures" and then "Disclosure Web Service"?

A. Yes, I could see that.

Q. Okay. So it has month-by-month. For example, in February 2011, when Mr. Ramirez had his disclosure mailed, there were 1,723 hits. Do you see that?

A. Yes.

Q. But in the same month it shows that in February of 2011 there were 3,599 OFAC hits online. Is that right?

A. Yes. Via our web service. So that means they requested their report online.

Q. Okay. And in July 2011 it shows there are 1,577 hits in mailed disclosures, but 3,228 hits on the web, right?

A. Correct.

Q. But TransUnion was not providing any of its customers who got their disclosure on the web any information about OFAC, correct, in either February 2011 or July 2011?

A. If the consumer was a hit to the OFAC list, they would receive the letter, regardless if it was mailed or online.

Q. Your testimony is that they -- that all the people who [807] received an OFAC hit online also received a letter?

A. Correct.

Q. Okay. And is that letter the same form as Exhibit 3?

MS. BREWER: If you could bring that up, please, Ken?

(Document displayed)

BY MS. BREWER

Q. If you could look at Exhibit 3?

A. Correct. This is the OFAC alert letter.

Q. And this is the letter that says that people are a potential match to the OFAC list, right?

A. Yes.

Q. And you had testified earlier that this is how customers can request to get their name off, right?

A. This letter is telling them what the OFAC is. And then at the bottom that's where they are provided with the contact number so they know to call us if they have questions and would like to dispute it.

Q. But that letter doesn't say that the OFAC information is part of a consumer disclosure, right?

A. No. The letter does not say that.

Q. And the letter doesn't say that consumers have a right to dispute the OFAC information, right?

A. But the consumer receives the Bill of Rights and it tells them that in their Bill of Rights.

Q. But the Bill of Rights is not contained in the letter, [808] correct?

A. Not in this letter. Not in the same envelope, but it is received by the consumer.

Q. It's received by the consumer in an entirely separate mailing, isn't that right?

MR. LUCKMAN: Objection, your Honor, argumentative.

THE COURT: Overruled.

A. Correct.

BY MS. BREWER

Q. And that letter doesn't have -- Exhibit 3 doesn't have any instructions about how to dispute the information, correct?

A. Well, it does instruct the consumer, if they have additional questions or concerns, where to contact us at.

Q. Yes. It does say: If you have questions or concerns, you can contact a number. But it doesn't tell the consumer that they have a right to dispute the OFAC hit, correct?

A. Not specifically in that paragraph, no.

Q. You suggested that the number of disputes about OFAC declined after July 2011, is that fair?

A. Correct.

Q. And why would you say that the number declined?

A. Because it was not in a separate letter anymore. Now it was all together as part of the disclosure. It was all together, not separate.

Q. But you didn't testify about the format of the disclosure [809] that TransUnion was sending consumers after July 2011, correct?

A. Correct.

Q. And TransUnion continued to have problems after July 2011 with its OFAC disclosure, correct?

MR. LUCKMAN: Objection, your Honor. It's vague.

THE COURT: Well, if she can answer, she can.

A. What do you mean by "problems"?

BY MS. BREWER

Q. You had complaints about TransUnion's disclosures not being in compliance with the Fair Credit Reporting Act.

MR. LUCKMAN: Objection, your Honor. It's confusing and vague.

THE COURT: Overruled. She can answer, if she can.

A. I'm not sure.

BY MS. BREWER

Q. Specifically, TransUnion was receiving complaints that the credit disclosures that it was sending to consumers that gave the OFAC information, the information was contained in a document that was only inserted after the language "end of credit report," isn't that correct?

MR. LUCKMAN: Objection, your Honor.

THE COURT: Overruled. She can answer, if she can.

A. So we did in 2011 start disclosing the information, but prior to that we were not.

[810] **BY MS. BREWER**

Q. Okay.

A. Is that what your question was?

Q. No. What I'm saying is that you have suggested that the reason that the -- the dispute rate went down after July 2011 was because TransUnion was able to get the OFAC alert in the same document as the consumer disclosure, is that right?

A. Yes, that's correct.

Q. And that's -- you're saying -- TransUnion is saying that's the reason. And I'm suggesting that an additional reason was because TransUnion put the OFAC information in the consumer disclosure at the very end of the consumer report after it said "end of consumer report," where the information would be buried?

MR. LUCKMAN: Objection, your Honor, argumentative.

THE COURT: Overruled.

MR. LUCKMAN: It's testifying.

THE COURT: Overruled.

A. The "Additional Information" section has information -- additional information that's not the traditional credit information. So it's not a typical trade line, public record or inquiring information.

So "Other Additional Information," that's the section we would put any of the other types of information not specific to the traditional credit data.

[811] **BY MS. BREWER**

Q. So your testimony is that TransUnion inserted that OFAC information in a different place other than in the consumer disclosure?

A. No. It's part of the consumer disclosure. It's just not in the same section as the trade lines and the public records because we felt that would be confusing to the consumer.

Q. Okay. Well, when TransUnion sends credit reports to its subscribers, it puts that OFAC information right up front, correct?

MR. LUCKMAN: Objection, your Honor, foundation.

THE COURT: Overruled.

A. I'm not exactly sure where it falls on the customer report.

MS. BREWER: Mr. Reeser, could you put up Exhibit 1, please?

If you could blow up the top two sections? I don't know if that's possible.

(Document displayed)

BY MS. BREWER

Q. Ms. Briddell, this is Sergio Ramirez's credit report from TransUnion, is that right?

A. Correct.

Q. And the very top section is his identifying information?

A. Correct.

[812] Q. And the very next section is the OFAC alert?

A. Correct. The "Special Messages" section.

Q. Okay. So would you agree with me that TransUnion does put its OFAC disclosures to its subscribers right up front?

MR. LUCKMAN: Objection, your Honor, foundation.

THE COURT: Overruled.

A. Yes. So "Special Messages" are up front.

BY MS. BREWER

Q. Ms. Briddell, is it TransUnion's contention that TransUnion was able to accurately get OFAC alerts into file disclosures after July 2011?

MR. LUCKMAN: Objection, your Honor.

A. That I can't answer.

BY MS. BREWER

Q. You don't know whether they were accurately able to get file disclosures into consumer reports?

THE COURT: I guess I don't quite understand the question.

BY MS. BREWER

Q. The OFAC alert -- well, the class consists of people who got these letters from January to July --

MR. LUCKMAN: Your Honor --

THE COURT: It seems beyond the scope of her testimony. And she's not a 30(b)6, correct.

MS. BREWER: She testified about --

[813] **MR. LUCKMAN**: Your Honor, may we have a side bar instead of sharing whatever this argument is?

THE COURT: Just lay a foundation. Why don't you just lay a foundation?

BY MS. BREWER

Q. You testified about the disputes by people who got OFAC lists at -- all through 2011 and into 2012, right?

A. Correct. The volumes, uh-huh, of disputes. The OFAC disputes.

Q. And it's TransUnion's contention that the reason the volume of disputes went down is because TransUnion was sending the OFAC disputes in the same letter with -- was including the OFAC alert in the consumer disclosure, right?

MR. LUCKMAN: Objection, your Honor.

THE COURT: Sustained. There certainly was evidence of that. I don't know that she testified that was their contention.

MS. BREWER: I believe it was. I believe it was her contention, but --

MR. LUCKMAN: Your Honor.

THE COURT: The jury, as I have instructed you at the beginning, attorney argument or statements are not evidence. You decide the case based solely on the evidence in the case.

All right. You may move on, Ms. Brewer.

[814] **BY MS. BREWER**

Q. And you were not certain about when TransUnion began disclosing OFAC communications to online consumers, is that correct?

A. Correct. I don't remember the exact time frame.

Q. Is it -- is it TransUnion's contention that the -- that it was accurately sending OFAC alerts to consumers after July 2011?

MR. LUCKMAN: Your Honor --

THE COURT: Sustained.

MS. BREWER: Okay.

One second.

(Discussion held off the record between plaintiff's counsel.)

BY MS. BREWER

Q. Ms. Briddell, I wanted to turn your attention to Exhibit -- I believe it's 68, that you testified about earlier.

MR. LUCKMAN: Did you say 68? I don't think we've --

MS. BREWER: I may have gotten it wrong. Exhibit 69.

I'm sorry.

And can you blow up the top, please, Ken?

(Document displayed)

BY MS. BREWER

Q. It's really, really hard to read, but there seems to be --

MS. BREWER: Can you possibly blow it up so we can see [815] the dispute statistics in September and October of 2011?

(Document displayed)

MS. BREWER: This is 2012. We're looking for 2011. I think it's the first page.

(Document displayed)

BY MS. BREWER

Q. Can you tell which of the columns is the number of disputes? I know the information is over here.

A. From which month? You said September.

Q. October of 2011.

A. October. For October 2011, it looks like 59 OFAC disputes.

Q. Right. Okay. So they -- this seems to be a sharp uptick in the number of disputes for October of 2011. Is that right?

A. Yes. The number did go up.

Q. Why did that happen?

A. Honestly, I don't recollect why there was a sharp increase because then it dropped right back down. I'm sorry. I'm not sure.

Q. Was it because of the format of TransUnion's OFAC disclosures?

MR. LUCKMAN: Objection, your Honor, foundation. She said she didn't know.

THE COURT: Overruled.

A. That could be possible.

[816] **MS. BREWER**: Thank you.

THE COURT: Mr. Luckman?

MR. LUCKMAN: No further questions, your Honor. Thank you, Mrs. Briddell.

THE COURT: Thank you. You are excused.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: All right. Does defendant have another witness?

MR. NEWMAN: Can you give me just a few minutes to consult with Mr. Luckman?

THE COURT: I will give you 30 seconds.

MR. NEWMAN: 30 seconds.

(Discussion held off the record between defense counsel.)

MR. NEWMAN: Your Honor, we rest.

THE COURT: Okay.

All right. Ladies and gentlemen, that, I believe, concludes the evidence in the case.

So what we are going to do then is we are going to take a brief adjournment, and then we are going to proceed and I'm going to instruct you. I'll give you some of the instructions and then the lawyers will give their closing arguments. We probably won't finish them before lunch.

Well, actually, what I want to do is I want to confer with the lawyers now about scheduling, but you are going to get the

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[863] Which takes us to the final question, question four. And this is a question on damages.

Now, as Judge Corley has already instructed you, I believe, if you check a "yes" on any of the first three questions, any of the liability questions, you are entitled to go to damages and award the full statutory damages of $1,000. You don't have to check "yes" to all

three. I'm urging you to do so because that's a correct verdict in this case.

And what are the statutory damages? What amount of statutory damages of not less than 100 or more than 1,000 do you award to each member of the class?

Well, like most laws there is a consequence for violating them. And for a case like this, a certified class action under the FCRA, the consequence is this, 100 to 1,000. No less than 100, no more than 1,000. It's not something we just came up with. It's in the statute. Congress wrote it.

I told you in the opening I wish that number were higher because I would like to ask you for more money to compensate class members, but the top is a fact.

Other laws work this way. When you put people at a risk of harm, for example, because you're speeding on the highway, there is a consequence. The consequence is you get a speeding ticket. And it's some fixed amount of money, $200 or $300. Sometimes there is a range depending on how fast you're going. And the same is true here. There is a consequence of [864] violating every law, and in this case the consequence is 100 to $1,000.

Now, I asked you for 1,000 at the get-go and I'm going to ask for it again. And that's because of the nature of the violation here. We are not talking about some minor item of credit information not being disclosed to consumers or being incorrectly associated with consumers. This isn't your credit card balance. This is the most damning information that you could have on a credit report.

It's whether you're associated with the government's watch list of terrorists, money launderers, drug traffickers, kingpins. The nature of the information here requires the maximum damages provision. These are important rights, and TransUnion is violating them in multiple ways as to thousands of people.

And the risk of harm is obvious and known to TransUnion. Look what happened to Mr. Ramirez, as one example. Mr. Ramirez is a decent, hard working man, who is just trying to raise his family. You might have noticed his teen-age daughter was sitting in the back a couple of days. He tried to go get his wife a car at Dublin Nissan that she was primarily going to drive.

He was there with his father-in-law and the salesman comes out and says: You're on the terror list.

That's not right. That shouldn't happen. He was scared. He was embarrassed. He was shocked. He canceled his vacation [865] to Mexico because he wasn't sure what was going to happen. These are natural reactions when someone informs you of that. It's the risk that TransUnion knows about from Cortez in 2005 through the disputes through the years, through the Treasury Department letters.

And then they also didn't help him correct this problem. Let's be clear about this. He called my office and then the problem was corrected. It wasn't through TransUnion's letter, which so clearly told him what his rights are and how to block it. That's what TransUnion told the Treasury. That's not what they told him.

Mr. Ramirez has taken a week off of work. He's not getting paid. And he's here. And he's here not just for himself. He's here on behalf of complete strangers. This man has fought for justice for the last six years. It's not because it's been easy. It's not because TransUnion has yielded an inch. He deserves the maximum penalty under the law. And so does every single other member of this class.

The judge told you at the beginning and she told you again that your verdict must be the same for every class member. Again, we don't make this up. That's what the law requires. That is because this is a certified class action. You heard that word several times. And that means something. It's not just empty talk.

It means that there is a determination that Mr. Ramirez is

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[878] have had no evidence from the plaintiff to show you that this was not generally effective or that it did not help the other members of the class.

We also know from Mr. Sadie's testimony that what Mr. Burns did, failing even to take a second look at the information he had, was highly irregular. There is no evidence suggesting that TransUnion could have anticipated that Mr. Burns would act contrary to how TransUnion expected Name Screen data to be used. There is no evidence that anyone could have expected Mr. Burns to act contrary to the training he received at his dealership on how to process a Name Screen result to clear the transaction. We simply do not know.

What we do know, as this has been stipulated, is that only 40 consumers during the class period were even at risk of a similar issue because only 40 reports were sold via ODE. There is no proof that the class as a whole faced even the same situation as Mr. Ramirez.

Ms. Coito of the Dublin Nissan dealership seemed to know how to handle OFAC data properly, to view it only as a potential match, and to attempt to clear consumers. Perhaps if ODE had followed the instructions it received and had used an approved format, perhaps even Mr. Ramirez's day would have gone better. Plaintiff has not proven otherwise to you. And you have seen no one else come before you with a similar situation.

Yes, of course, it would not be reasonable to expect 8,000 [879] people to pile into this courtroom. That's not why we have class cases. But one, two, three, four? To amplify the evidence? To show that what happened to Mr. Ramirez actually happened to someone else? That evidence has not been placed before you, ladies and gentlemen.

Mr. Sadie also has explained to you what was the state of knowledge and the state of industry practice in 2011. Mr. Sadie explained that in 2011 it was understood by those who received Name Screen data that it was to be used only as a potential match, as a starting point for a compliance process. And it was never intended a loan to be used to deny credit.

With respect to the class as a whole, you have seen no evidence that OFAC data was misused. You have seen no evidence that any class members were harmed. You have seen no evidence that any class

members even faced any significant risk of harm or hardship.

The other evidence also supports that TransUnion instructed users and resellers on the proper use of its data. Ms. Gill testified that a general announcement went out to thousands of users and resellers to explain the change and to remind them that OFAC data is name screening only, to remind them that name screening should not alone be used to deny credit. Mr. Turek also explained this to you this morning. Ms. Coito seemed to understand this, but you have heard no

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[881] You have seen that TransUnion is committed to consumers and tries to make things easy, easier for them in a system that we all depend on to get credit quickly and to, you know, go into a car dealership and to comply with all sorts of laws while still maintaining security.

You have heard no evidence of anyone in this class who was denied credit or had any transaction delayed because of TransUnion's delivery of an OFAC result. The evidence has shown you that the Ramirez family got its car at the same time, at the same price, and on the same financial terms as they would have even if no OFAC data had been delivered by TransUnion at all. You have heard no evidence either of hardship or of even inconvenience to any class member as a result of the normal screening process.

As you remember, having an effective screening process helps us all move efficiently through that metal detector.

And by the way, it's called a metal detector, not an intent detector. When the machine beeps, that does not signal that the person going through the machine is up to no good. It is just a signal to the end user, the human being using the machine, to take further steps before clearing the subject. And just as with the metal detector, even when we beep, we usually get through without incident.

The evidence has shown you from Mr. Sadie and others that even when a Name Screen Alert has been delivered, the

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[903] Now, TransUnion doesn't appear to also have much regard for the law of class actions. This is a certified class action. That means Mr. Ramirez is typical. He's the appropriate class representative. And that the claims are common and people are similarly situated. That's why we're here. There is no legal standard that you're going to hear from Judge Corley or anybody else about five people coming in or 10 people coming in. And if you -- if you had five people come in, they would say: Well, where are the other 8,000? You know that.

The issue is were the procedures reasonable in ensuring accuracy. And it was the name only matching logic that applied to every single person in this class. That's the evidence. Were the disclosures clear and adequate -- excuse me, clear and accurate? And did they inform people of their rights to block? And they applied to every single person. That's the common evidence that ties this case together when it's a class action.

And Mr. Newman, very careful with his language, he tells you: Well, only about a quarter of these people, 1,800, even applied for credit to have their reputations harmed. Not so, all right? The evidence of the records through our stipulation is during a six-month period, from June -- sorry, January 2011 to July 2011 about 25 percent of the class population applied for credit. That's because people don't apply for credit every day. Not everybody needs a car loan or a credit card all the [904] time.

We don't know the data for the next six months and the six months after that and the year after that. But we know the name only procedure was the same. We know that it attacked every single one of these people. So the fact that we have some select evidence shows that there is a risk of harm, a substantial risk of harm, to 25 percent only over a six-month period.

Yet, there is other risk of harm as well that you heard testimony about. Mr. Ramirez canceled his vacation. People could be misled. Who would possibly think -- seriously, if anybody came in here -- do you expect anybody to come in here and tell you: Well, I thought I was benefited by TransUnion that they linked me to the terrorist list. I was happy. I got some benefit from it. No one is going to tell you that. That argument makes no sense.

Now, TransUnion also says, you know, that they rolled up their sleeves -- I don't know exactly what Mr. Newman said. They got to work after Cortez. Okay. Cortez was decided in 2007. That jury came back and told them they were wrong. They paid no respect to that jury whatsoever. They seemed to think that they wanted to hear from the Court of Appeals, roll the dice

that they were going to reverse that jury verdict. That's what happened.

All right? They didn't need to wait. There is no

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