Jennifer L. Braster
Nevada Bar No. 9982
Andrew J. Sharples
Nevada Bar No. 12866
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145
(T) (702) 420-7000
(F) (702) 420-7001
jbraster@naylorandbrasterlaw.com
asharples@naylorandbrasterlaw.com

Emmett Robinson (admitted *pro hac vice*)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(T) (216) 586-3939
(F) (216) 579-0212
erobinson@jonesday.com

Attorneys for Defendant
Experian Information Solutions, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTOPHER ABERNATHY,

Plaintiff,

v.

CONTINENTAL SERVICE GROUP, INC. d/b/a ConServe and EXPERIAN INFORMATION SOLUTIONS, INC.,

Defendants.

Case No. 2:17-CV-636-APG-NJK

EXPERIAN'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Experian's motion sets forth compelling reasons why summary judgment should be granted in its favor on all of Plaintiff's claims. Recognizing his case is doomed by his own deposition testimony, Plaintiff opposes the motion by relying heavily on a declaration that directly and repeatedly contradicts record evidence. But this thinly-veiled attempt to stave off

summary judgment is unavailing. Because Plaintiff cannot point to any legitimate evidence that creates a genuine issue of material fact, Experian is entitled to summary judgment on all claims.[1]

I. PLAINTIFF FAILED TO RAISE A GENUINE ISSUE THAT EXPERIAN CAUSED ANY DAMAGES.

Plaintiff does not contest that (1) damages are an essential element of a claim under both 15 U.S.C. § 1681e(b) and 15 U.S.C. § 1681i, (2) he testified at his deposition that he did not sustain any damages as a result of Experian's reporting of his ConServe account, and (3) despite Experian's explicit formal request for them, he produced no documents to support any claim of damages. Thus, his FCRA claims fail *in toto*.

Plaintiff seeks to avoid this inevitable result by attempting to discredit *his own* deposition testimony. He asserts that his damages testimony is "irrelevant" and therefore inadmissible under Federal Rule of Evidence 401 and, also, that his own testimony is "prejudic[ial]" and therefore should be excluded under Federal Rule of Evidence 403. (Plaintiff's Opposition to Experian Information Solutions, Inc.'s Motion for Summary Judgment ("Opp.") at 25.[2]) Neither contention is supported—or supportable—by citation to any fact, logical argument, or legal authority.

Plaintiff also argues that his own deposition testimony should be disregarded because Experian's counsel asked leading questions. But it is axiomatic that leading questions at the

[1] By and large, this brief does not engage with the allegations leveled against Experian's counsel throughout Plaintiff's opposition and, particularly, on pages 17 through 21. Suffice it to say, both Experian's local counsel and its counsel admitted *pro hac vice* strenuously object to these profoundly inaccurate claims. The allegations, aside from being inaccurate, are irrelevant and not supported by record evidence. Further, contrary to Plaintiff's characterization, Experian's discussion, in its opening brief, of Plaintiff's counsel's conduct—and Credit Restoration's role—in this litigation provided important information about the origins and underpinnings of this lawsuit and how it could be that a plaintiff's testimony could differ so significantly from the allegations in the governing Complaint. Further, Experian's discussion of the roles played by Plaintiff's counsel and Credit Restoration was based entirely on record evidence, in the form of Plaintiff's own deposition testimony, and (in the case of Credit Restoration) reference to controlling statutes.

[2] Experian cannot reference an ECF number as it is unclear when, and if, Plaintiff filed his Opposition with the Court. *See* Experian's Motion to Strike (ECF No. 51).

deposition of an opposing party are appropriate (indeed, are expected and essential). The very rule of evidence cited by Plaintiff provides that "[o]rdinarily, the court should allow leading questions . . . when a party calls . . . an adverse party." Fed. R. Evid. 611(c). Even if this were not the case and leading questions were disallowed (rather than the norm) at party depositions, Plaintiff still would not prevail on this point. Though he now (incorrectly) characterizes Experian's counsel's leading questions as "objectionable" (Opp. at 22), Plaintiff's counsel did not object to any question as leading at the deposition, and "[a]n objection to an error or irregularity at an oral examination is waived if . . . it relate[d] to . . . the form of the question . . . and . . . is not timely made during the deposition," Fed. R. Civ. P. 32(d)(3)(B). *See also, e.g.*, *Miller v. TGI Friday's, Inc.*, No. 05-CV-6445, 2007 WL 723426, at *3 (N.D. Ill. Mar. 5, 2007) ("counsel failed to object to . . . leading questions [posed to the deponent by her own attorney] during the deposition and, as a result, has waived the objection"). Plaintiff's argument therefore fails on this basis as well.[3]

Plaintiff further attempts to discredit his own testimony by arguing that the "least sophisticated consumer" standard, as discussed in an unreported Colorado case, applies to render his testimony a nullity. (Opp. at 22-23.) He particularly highlights the term "actual damages," implying that Experian's counsel's use of this "term of art" confused Plaintiff during his deposition. (*Id.* at 23 ("One cannot expect the least sophisticated consumer to be familiar with this term of art.").) As the sole case Plaintiff cites makes clear, however, the "least sophisticated

[3] Plaintiff's counsel also contends that Experian asked leading questions "to intimidate Plaintiff," and that this caused Plaintiff to provide "erratic" testimony. Opp. at 23. Setting aside the multiple *non sequiturs* contained within these assertions, Plaintiff's testimony was far from erratic—he consistently and matter-of-factly testified that he sustained no damages. *See, e.g.*, Experian's Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof ("MSJ"), ECF No. 29, at 10-11. Further, there was nothing intimidating or inappropriate about Experian's counsel's conduct during the deposition. Statements to the contrary by Plaintiff's counsel (who was not present at the deposition) are unfounded and inappropriate. Should the Court desire to conduct its own review, a DVD recording of the deposition is attached to this brief. (*See* Ex. A to the Declaration of Jennifer Braster.)

consumer" standard is used by courts "to determine whether a debt collector's representations were false, deceptive, misleading, unfair, or unconscionable." *Hudspeth v. Capital Mgmt. Servs., L.P.*, No. 11-CV-3128, 2013 U.S. Dist. LEXIS 25260, at *9 (D. Colo. Feb. 25, 2013). It has nothing to do with Experian (which is not a debt collector), depositions, or the claims against Experian in this case, and thus is wholly inapplicable. Moreover, the term "actual damages," though far from complex, was never used during Plaintiff's deposition. Instead, Experian's counsel, as excerpted in Experian's opening brief, broke down the damages inquiry into a series (not "one or two" as Plaintiff claims (Opp. at 24)) of straightforward questions regarding, *e.g.*, whether Plaintiff had experienced a credit denial, had experienced an adverse employment action, or had sustained any emotional harm. (*See* MSJ at 10-11.) Plaintiff answered all of these, and other, damages-related questions in the negative.[4] (*Id.*)

While Plaintiff asks the Court to ignore his frank, detailed, properly obtained deposition testimony (or at least those portions that are unfavorable to his case), he urges the Court to embrace the contradictory, self-serving "declaration" accompanying his opposition. But as Plaintiff acknowledges, the "sham affidavit rule prevents a party who has been examined at length on deposition from raising an issue of fact simply by submitting an affidavit contradicting his own prior testimony." *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (citations omitted). This is precisely what Plaintiff seeks to do here. He asserts that because "he is now more informed" about actual and emotional damages (Opp. at 25), the Court should credit the numerous statements in his declaration that directly contradict his prior testimony that he

[4] *Mace v. United States*, No. 15-CV-4060, 2017 WL 1102736, at *9 (N.D. Cal. Mar. 23, 2017), relied on by Plaintiff, is inapposite. The deposition questions at issue in *Mace* were filled with legalese attempting to make a fairly nuanced and complex point regarding an attenuated theory of liability. *Id.* at *8-9. They differed significantly from the straightforward questions posed to Mr. Abernathy regarding damages—such as whether he was denied credit or lost a job. More importantly, while the *Mace* court noted that the deposition responses were "not . . . as strong as the [party seeking to use them to survive summary judgment] suggests," the Court still credited the deposition responses and relied on them in ruling in that party's favor. *Id.* at *9.

sustained no damages at all. For example, Plaintiff unequivocally testified that he experienced no emotional damages[5] and had not seen a doctor or therapist as a result of the reporting of the ConServe debt (*see* MSJ at 11), but he now asserts in his declaration (though not in his opposition brief) that he felt "stigmatized" and was "very depressed and often did not want to get out of bed in the morning" (Opp. Ex. 1 at 6). Such striking disparity between a party's deposition testimony and a subsequent declaration is the exact sort of contradiction the sham affidavit rule is designed to prevent. *Yeager*, 693 F.3d at 1080-81.

Plaintiff further argues that Experian "took advantage of his lack of knowledge regarding the elements, and the type of evidence, that support the various components of the term 'actual damages.'" (Opp. at 25.) But again, the term "actual damages" was never invoked at Plaintiff's deposition, and one needs no knowledge regarding the legal "elements" and type of evidence that support an actual damages claim in order to truthfully answer questions about damages—*e.g.*, whether any applications for credit were denied during a given time period. In fact, plainspoken, direct answers to factual questions are, practically speaking, more likely to convey the truth than after-the-fact statements crafted by counsel with the aim of surviving summary judgment. *See Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005) (noting judge's concern that extensive corrections to deposition testimony, made only after a summary judgment motion was filed, "were not corrections at all, but rather purposeful rewrites tailored to manufacture an issue of material fact").

Plaintiff also asserts he should get a pass on the sham affidavit rule because "there must be a mechanism to provide relief to parties, like Plaintiff, who was [sic] simply confused during his deposition testimony." (Opp. at 25.) Setting aside that he expressed no confusion while being

[5] In fact, at his deposition, Plaintiff chuckled at the notion that he could have been emotionally harmed by Experian's reporting of the ConServe account. (*See* Ex. A to the Declaration of Jennifer Braster at 1 hour, 6 minutes, 38 seconds.)

questioned about damages during his deposition, and that his counsel found none of the damages questions objectionable, there is an additional mechanism to provide relief to confused deponents—the errata sheet. Yet Plaintiff made no errata changes to his deposition transcript.

Even if one were to brush all of this aside, Plaintiff's attempt to revive his case via the declaration still fails. Though it contains numerous general references to the declaration, Plaintiff's opposition brief nowhere identifies *what* facts in the declaration save him from summary judgment in Experian's favor. With two exceptions that cite to page 1, every one of the dozens of citations to the declaration within Plaintiff's brief simply cites to "p. 1-6," no matter where the cited fact is actually located in the declaration.[6] (*See, e.g.*, Opp. at 3, 4, 10.) What is more, the declaration is unreliable in that it is riddled with errors.[7]

The substance of the declaration, even if deemed credible and admissible, still does not save Plaintiff from summary judgment for lack of damages. First, the declaration claims that Plaintiff suffered damages regarding a property he rented from Triumph Property Management. (Opp. Ex. 1 at 5-6.) He claims that he "had forgotten about Triumph" (*id.* at 6) and therefore did not mention it at his deposition because Experian's counsel "did not ask [him] about Triumph

[6] It appears that the declaration was not drafted—or at least not fully drafted—until after Plaintiff's opposition brief was filed (if indeed it was filed). (*See* Motion to Strike, ECF No. 51, at 4.) Assuming the opposition was filed under seal on December 18, the "errata" containing Plaintiff's declaration was not filed (again, if at all) until December 22—four days after the already-extended deadline for filing opposition materials. Given (1) this late filing, (2) that, as discussed above, the opposition brief contains only generalized references to the declaration, and (3) that the declaration in its final form was actually seven pages, not six as the opposition brief suggests, it is fairly clear that the declaration was assembled after the fact—further reason to disregard its contents.

[7] By way of example, the declaration asserts that an "ND" marking on a credit report means that "data was reported during those months." (Opp. Ex. 1 at 2.) The opposite is in fact the case. It also purports to quote from a September 14, 2016 credit document that does not contain a large portion of the purportedly quoted language. (*Id.* (attributing the statement "In the 24-month payment, the September 2016 field included the word 'Negative'" to the document when in fact the document (Opposition Exhibit 10) does not contain the statement).) And the declaration asserts that Mr. Abernathy "got promoted to Sgt. status in the Navy." (*Id.* at 7.) The Navy does not use the rank (or, more properly, "rate") of sergeant. *See* Rate Insignia of Navy Enlisted Personnel, http://www.navy.mil/navydata/ranks/rates/rates.html (accessed Dec. 29, 2017).

Property Management," but rather asked only about "Trent Property Management" (*id.* at 5). But a closer look at the record shows that these claims found in the declaration (but *not* in Plaintiff's brief) are the result of a clever twisting of Plaintiff's deposition testimony. The transcript of Plaintiff's deposition does in fact reflect that Experian's counsel questioned Plaintiff regarding "Trent Property Management," (Ex. L[8] (Abernathy Tr.) at 49:22-24), but review of the video recording of the deposition shows that counsel in fact said "Triumph Property Management." (Ex. A to the Declaration of Jennifer Braster at 1 hour, 4 minutes, 52 seconds.) The "Trent" reference is an error in transcription. This is further underscored by the fact that the document that Plaintiff and Experian's counsel were both reading from when the question was posed referred to "TRIUMPH PROPERTY MANAGEM," not to "Trent." (Ex. B to the Declaration of Jennifer Braster at 19.) Moreover, even if this were not the case, the declaration does *not* assert that Plaintiff was prohibited from renting from Triumph due to the (accurate) reporting of his ConServe account but instead simply asserts that Plaintiff was concerned he might be denied the opportunity to rent and so "asked [his] wife and brother to help [him] rent the property." (Opp. Ex. 1 at 5.) The application was approved, and, the declaration says, once Triumph found out Plaintiff would be living at the property, it required him to submit his own application, which was *approved*. (*Id.* at 5-6.)[9]

The declaration also faults Experian's counsel for "not ask[ing] [Plaintiff] about any damages [he] suffered after November 2016." (*Id.* at 7.) It asserts that Plaintiff was worried post-November that the reporting of his ConServe account "would . . . disqualify [him] from [his] promotion" to "[sergeant] status in the Navy." (*Id.*) But, as previously noted, there are no

[8] Unless otherwise indicated, all "Ex." references are to the exhibits to the declarations of Amanda Hoover and Jennifer Braster (ECF No. 29-1 at 1-9 and ECF No. 29-2 at 159-61, respectively), filed concurrently with Experian's Motion for Summary Judgment.

[9] In light of these facts, the declaration's claims about emotional damages are specious. And at any rate, Plaintiff explicitly denied sustaining any emotional damages at his deposition. (*See* MSJ at 11.)

sergeants in the Navy. *See supra* at 6, n.7. And the declaration does not assert that Plaintiff actually lost a promotion, assuming one was in fact received. Further, in his written discovery responses, Plaintiff refused to respond to requests targeted to evidence dated after November 2016 on the grounds that it was not relevant. He objected, for example, to over a dozen individual requests for production because they were allegedly "irrelevant to [Experian's] . . . reporting [of the ConServe account] from October through November 2016 which is at issue in this litigation," and objected to six interrogatories on the same basis. (*See* Ex. O (Pl.'s RFP Responses) at 4-10; Ex. P (Pl.'s Interrogatory Responses) at 5, 7, 8.) Having stymied discovery on the grounds that only Experian's reporting during October and November 2016 was at issue in the case, Plaintiff cannot now be permitted to unilaterally expand the scope of the litigation after discovery has closed. The declaration's claims regarding the alleged 2017 Navy Federal Credit Union Mortgage denial (*id.* at 7) are unavailing for the same reason.[10]

In short, the record contains no evidence that Plaintiff sustained any damages as a result of Experian's reporting (let alone sufficient evidence from which a jury could reasonably find in Plaintiff's favor). The sole possible exception is Plaintiff's declaration, which was untimely, directly contradicts his prior deposition testimony, and is patently incorrect on multiple points. And even if all that were set aside, the declaration still does not establish actual damages attributable to Experian's reporting. Because Plaintiff has no case against Experian in the absence of damages, summary judgment should be granted in Experian's favor.

[10] The mortgage-related assertions also fail to help Plaintiff because he offers no support for the assertion that he would have received a 3.5% interest rate from Navy Federal Credit Union. Further, Plaintiff fails to take into account the fact that, setting the ConServe account aside, he had had 12 *additional* negative accounts (*see* MSJ at 5)—the accuracy of which is not at issue here—on his report.

II. PLAINTIFF FAILED TO RAISE A GENUINE ISSUE THAT EXPERIAN'S REPORTING WAS INACCURATE.

Plaintiff does not contest that he only can prevail on his claims under 15 U.S.C. § 1681e(b) and 15 U.S.C. § 1681i if he first establishes that the disputed information is inaccurate. Rather, he attempts to sweep his fatal deposition testimony under the rug while relying on faulty and unsupported arguments. But the (still) undisputed facts show that Plaintiff cannot meet the threshold inaccuracy requirement and, thus, Experian is entitled to judgment as a matter of law.

Plaintiff's primary argument for inaccuracy is that it was inaccurate for Experian to report the ConServe account as a paid collection account once it had been paid (even though it was in fact a paid collection account). That is, Plaintiff repeatedly asserts that it was inaccurate to report the paid ConServe collection account "as a 'PAID/COLLECTION'" rather than just "'Paid in Full.'" (Opp. at 5; *see also id.* at 7 (asserting it was inaccurate to report the ConServe account "as a Collection Account" once it was paid); *id.* at 7 ("Experian ***inaccurately*** showed the Account as PAID-*COLL ACCT*"); *id.* at 27.) This argument is based on the erroneous premise that once a collection account is paid, a credit reporting agency must retroactively change its reporting of that account to show that it never was a collection account. Such a practice would make consumer reports *less* accurate, frustrating the very purpose of the FCRA. That Plaintiff paid off the ConServe debt does not change the fact that it was indeed a collection account, any more than paying off an auto loan would change the fact that what was paid off was an auto loan. The ConServe account was a paid collection account, and as Plaintiff himself agreed at his deposition, it is accurate to report it as such. (Ex. L (Abernathy Dep.) at 47:4-20.)

Likewise meritless is Plaintiff's assertion that Experian's reporting was inaccurate because credit-monitoring documents—prepared by a third party[11] and containing merged information from the three major credit reporting agencies—did not state that Plaintiff disputed the ConServe account. (*See* Opp. at 28; *see also* Opp. Exs. 10, 16.) These documents differ from the "credit file disclosures" actually created by Experian and provided directly to Plaintiff by Experian. (*See* Hoover Decl. ¶¶ 6-7; Exs. D, E.) And both credit file disclosures arguably at issue in this case—dated September 19, 2016 and October 5, 2016—plainly state that Plaintiff disputed the accuracy of the ConServe account. (*See* Ex. L (Abernathy Dep.) at 42:5-43:9; Ex. D (Sept. 19, 2016 Disclosure) at 4.) Further, even if this were not the case, the FCRA requires maximum possible accuracy with respect to *consumer reports*, 15 U.S.C. § 1681e(b), and the tri-merge credit-monitoring documents produced by Plaintiff in discovery are not consumer reports.[12] Plaintiff has offered no evidence to the contrary.

Finally, Plaintiff's opposition brief attempts to manufacture an issue of material fact by arguing that the "'C' for Collection" entry in Experian's November 2016 disclosures was inaccurate and that no monthly payment information was reported. (Opp. at 28-29.) These arguments contradict Plaintiff's own testimony that the ConServe account was reporting accurately during the October-November timeframe at issue. (MSJ at 12-13.) And in any event, it is not inaccurate to report a collection account as being a paid collection account once it is paid off (as explained above), neither is it inaccurate to omit monthly payment information for a collection account, particularly given that there is no evidence that there was a monthly payment

[11] These documents did not originate with Experian Information Solutions, Inc. Experian's 30(b)(6) testified that such documents are produced by a different entity, and no contrary evidence has been presented by Plaintiff. (Ex. C to the Declaration of Jennifer Braster at 36:1-6.)

[12] "Consumer report" is a statutorily defined term limited to reports obtained by creditors, employers, and the like for the purposes of determining whether to extend credit, employment, etc. *See* 15 U.S.C. § 1681a(d). The term does not encompass tri-merge documents—like those produced in discovery by Plaintiff—that are provided to a consumer for credit monitoring purposes.

schedule for the ConServe collection account. Thus, Experian is entitled to summary judgment on this independent basis as well.

III. EXPERIAN FULFILLED ITS OBLIGATIONS UNDER THE FCRA.

The undisputed evidence shows that Experian followed reasonable procedures and conducted reasonable reinvestigations in its handling of Plaintiff's credit file. Although Plaintiff devotes the majority of his argument on these points to emphasizing the purported inaccuracies in Experian's reporting (Opp. at 27-29), he acknowledges that Experian cannot be liable for such inaccuracies if its procedures were reasonable (*id.* at 27 ("a CRA can avoid liability if it proves an inaccurate report was generated despite its following reasonable procedures")). Plaintiff contends that Experian could not have maintained reasonable procedures here because Experian's Rule 30(b)(6) witness testified that she did not personally try to confirm whether Plaintiff made a payment on the account on August 26, 2016; rather, Experian used the ACDV process to verify the account's accuracy with ConServe. (*Id.* at 29.) Although Plaintiff repeatedly mischaracterizes the testimony of Experian's Rule 30(b)(6) witness as indicating that Experian "does not concern itself" with, and "would not do anything to confirm," the accuracy of the account (*id.* at 29-30), he does not dispute that Experian (1) *twice* reinvestigated the account, (2) updated its reporting consistent with ConServe's responses to the ACDVs; (3) reported the results of its reinvestigations to Plaintiff; and (4) invited him to "provide . . . additional information or documents about [his] dispute to help [Experian] resolve it." (MSJ at 16 (quoting Ex. G at 2).)

Plaintiff also does not dispute that he and Credit Restoration declined the invitation. Neither Plaintiff nor the credit clinic ever provided any proof documents—such as receipts or other documents indicating, *e.g.*, the fact and date of payment—to Experian during the account dispute process. According to Plaintiff, no such documents were provided because "he/CRN always had difficulties uploading documents to on [sic] Experian's website." (Opp. at 5.) But all three dispute letters Credit Restoration sent to Experian were sent via U.S. Mail, not "on Experian's website," and all had other documents attached to them (*e.g.*, Plaintiff's driver's license, social security card, and an electric bill). (*See* Exs. A (August 12, 2016 Letter), F (September 14, 2016 Letter), J (November 2, 2016 Letter).) Moreover, Plaintiff admitted that

Credit Restoration should have provided the screenshot of his account statement to Experian when it disputed the account.[13] (*See* Ex. L (Abernathy Dep.) at 40:18-24.) And Experian's Rule 30(b)(6) witness testified that if valid documentation regarding the disputed account had been provided, Experian would have reviewed it and "update[d] [the account] accordingly." (Ex. C to the Declaration of Jennifer Braster at 32:18-21.)

Plaintiff contends that "it is well settled that a CRA cannot exclusively rely on ACDV procedures to prove that a 'reasonable investigation' took place once a consumer disputes the accuracy of the furnisher's information" (Opp. at 30 (emphasis omitted)) without attempting to distinguish (or even address) the numerous cases cited in Experian's opening brief that have held the ACDV process to be reasonable as a matter of law (*see* MSJ at 15). Plaintiff instead relies on two inapposite cases. In *Bradshaw v. BAC Home Loans Servicing, LP*, 816 F. Supp. 2d 1066, 1073 (D. Or. 2011), the court could not "conclude that defendants' investigations were reasonable as a matter of law" because "[t]he ACDVs listed only a general reason why plaintiffs were disputing the payment information on their account and did not fully summarize the nature of plaintiffs' dispute." *Id*. at 1074. Here, there is no evidence, nor does Plaintiff argue, that Experian failed to fully summarize the nature of his dispute in its ACDVs. And in *Grigoryan v. Experian Info. Sols., Inc.*, 84 F. Supp. 3d 1044 (C.D. Cal. 2014), the court held that the exclusive use of the ACDV process was not reasonable because the plaintiff had provided proof documents, in the form of payment receipts, and there was "no evidence that defendants forwarded the receipts" to the data furnisher during the ACDV process. *Id*. at 1075. Here, it is undisputed that no proof documents were provided to Experian when the account was being disputed.

[13] Plaintiff gets his footnote regarding the screenshot account statement exactly wrong. He says Experian's counsel attempted to "bully and intimidate" Plaintiff by telling him that "[Credit Restoration] never provided the 'Screen shot,'" when in reality the screenshot was produced during discovery. (Opp. at 10-11, n.5.) But Experian has never denied that the screenshot was produced in discovery, and for Experian's counsel to have used it during Plaintiff's deposition while asserting that a copy had not been produced would have been absurd. Rather, the discussion at the deposition centered on the fact that a copy of the screenshot was never provided to Experian *during the dispute process* (*i.e.*, was never provided pre-litigation in support of the take-our-word-for-it disputes filed by Credit Restoration on Plaintiff's behalf). (*See* Ex. L (Abernathy Dep.) at 38:16-40:23.)

Under the circumstances of this case, Experian's use of the ACDV process was reasonable as a matter of law, and summary judgment should be granted in Experian's favor. *See, e.g.*, *Toliver v. Experian Info. Sols. Inc.*, 973 F. Supp. 2d 707, 728 (S.D. Tex. 2013) (absent notice of "prevalent unreliable information" from a data furnisher that would put Experian on notice that problems exist with its procedures, it was reasonable as a matter of law for Experian to rely on ACDV process); *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004) (same); *Anthony v. Experian Info. Sols., Inc.*, No. 2:14-CV-1230, 2017 WL 1198499, at *5 (E.D. Cal. Mar. 31, 2017) (exclusive reliance on ACDV was reasonable as a matter of law when plaintiff failed to provide evidence that information provided by data furnisher was suspect).

IV. PLAINTIFF FAILED TO RAISE A GENUINE ISSUE THAT EXPERIAN WILLFULLY VIOLATED THE FCRA.

Plaintiff's opposition brief confirms that he has not met the rigorous and objective threshold test for punitive and statutory damages under the FCRA by showing that Experian's actions were a "violation under a reasonable reading of the statute's terms" and that Experian "ran a risk of violating the law *substantially greater* than the risk associated with a reading that was merely *careless*." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70 (2007) (emphasis added). Plaintiff does not contest (and, in fact, affirmatively argues) that Experian reported the disputed account consistently with the information provided to it by ConServe. And there is no dispute that he did not provide Experian with any documents or information that would give it reason to question the reliability of ConServe's records of the account. Plaintiff's sole argument that Experian willfully violated the FCRA is that it relied on the ACDV process in the handling of his dispute. (*See* Opp. at 31.) But neither "pellucid" statutory text nor "guidance from the courts of appeal or the [FTC]," *Safeco*, 551 U.S. at 70, preclude credit reporting agencies from relying on the ACDV process where, as here, there is no reason to question the reliability of the data furnisher. Because there is no evidence that Experian intentionally or recklessly violated the FCRA, Plaintiff's willfulness claim fails as a matter of law.

V. PLAINTIFF DOES NOT DISPUTE THAT SUMMARY JUDGMENT IN FAVOR OF EXPERIAN IS APPROPRIATE ON THE DECEPTIVE TRADE PRACTICES CLAIM.

As argued in Experian's opening brief, the Deceptive Trade Practices ("DTP") statute does not apply here and, even if it did, Plaintiff has not proffered any evidence in support of his claim. (MSJ at 18-19.) Plaintiff effectively concedes these points by failing to address them in his opposition. Because there is no evidence on which a jury could reasonably find for Plaintiff on his DTP claim, Experian is entitled to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

CONCLUSION

For the foregoing reasons and those set forth in Experian's opening brief, Experian asks that the Court grant summary judgment in its favor.

Dated this 8th day of January, 2018.

Respectfully submitted,

/s/ Jennifer L. Braster
Jennifer L. Braster
Nevada Bar No. 9982
Andrew J. Sharples
Nevada Bar No. 12866
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145

Emmett Robinson (admitted *pro hac vice*)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114

Attorneys for Defendant Experian Information Solutions, Inc.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of NAYLOR & BRASTER and that on this 8th day of January 2018, I caused the document **EXPERIAN'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** to be served through the Court's CM/ECF system addressed to:

Vernon Nelson
The Law Office of Vernon Nelson, PLLC
9480 South Eastern Avenue
Suite 244
Las Vegas, NV 89123
Email: vnelson@nelsonlawfirmlv.com

Attorney for Plaintiff

Frank C Gilmore
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503
Email: fgilmore@rbsllaw.com

Brendan H. Little
Lippes Mathias Wexler Friedman LLP
50 Fountain Plaza
Suite 1700
Buffalo, NY 14202

Attorneys for Continental Service Group, Inc. dba Conserve

/s/ Amy Reams
An Employee of NAYLOR & BRASTER