**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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| MICHAEL H. BARSKY,<br><br>Plaintiff,<br><br>v.<br><br>EXPERIAN INFORMATION SOLUTIONS, INC. et al.,<br><br>Defendants. | Case No. 4:15-cv-1017-CDP |

**DEFENDANTS EXPERIAN INFORMATION SOLUTIONS, INC. AND EQUIFAX INFORMATION SERVICES, LLC'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Plaintiff Michael Barsky lost his job in 2008. ¶ 5.[1] After incurring tens of thousands of dollars in credit card charges, he permanently stopped making payments on his card balances. He now seeks $1.6 million in damages, ECF No. 1-1 at 1, from the three national credit reporting agencies ("CRAs")[2]—Experian, Equifax, and Trans Union—alleging they violated the Fair Credit Reporting Act[3] ("FCRA") by reporting these delinquent debts as delinquent, and by not weighing in on what statute of limitations might apply to each of Mr. Barsky's debts and what its effects would be given the specific facts associated with each debt.

Plaintiff's claims find no support in the case law or in the plain text of the FCRA. Indeed, his claims are contrary to law: CRAs are not obligated to investigate and render a determination on the legal status of a debt. Plaintiff's claims relating to his purportedly "time-

[1] All "¶" references are to Plaintiff's Complaint, ECF No. 1.

[2] The Fair Credit Reporting Act ("FCRA") uses the term "consumer reporting agency" rather than "credit reporting agency." 15 U.S.C. § 1681a(f).

[3] 15 U.S.C. § 1681 *et seq.*

barred" debts are without merit. Accordingly, Experian and Equifax ask that judgment on the pleadings be entered in Defendants' favor as to all claims premised on this time-bar theory.

## I. BACKGROUND

Plaintiff Michael Barsky incurred debts in excess of $23,000 "on a number of . . . credit cards," ¶ 6, issued by "Capital One Bank, Chase[,] . . . LVNV," and other creditors (the "Creditors"), ¶ 7. He alleges that he lost his job in "the great recession in 2008," ¶ 5, and that sometime thereafter he "stopped paying [his debts]," ¶ 6. Eight years after the 2008 job loss, those debts remain unpaid. ¶ 2. Mr. Barsky admits that he "actually fail[ed] to pay"—and continues to "fail[] to pay"—those debts. *Id*.

Despite this these admissions, Plaintiff is suing Experian, Equifax, and Trans Union for $1.6 million, alleging that he has been "prevented . . . from moving beyond his economic problems to re-establish a good credit reputation," ¶ 5, *not* because of the substantial amount of back credit-card debt he owes, but rather because the CRAs have reported these debts, which Plaintiff *admits* he incurred and never paid, as incurred and never paid. Specifically, he asserts (1) that the debts he owes are "time barred under any fairly arguable state statute of limitations," ¶ 7, and (2) that the CRAs were obligated to either erase the fact that these debts exist from Mr. Barsky's credit file entirely or else render an opinion as to whether each individual Creditor would be time-barred from collecting on the debt(s) owed it in a hypothetical future court action, *e.g.*, ¶¶ 19, 21, 27. Contrary to statute and case law, Plaintiff alleges Experian and Equifax's "failure" to either (1) delete the debts from Plaintiff's credit file or (2) express an opinion on what statute of limitations might apply and what its effects might be, constitutes a violation of the FCRA, in particular 15 U.S.C. § 1681e(b) (requiring CRAs to maintain "reasonable

procedures" to maintain maximal accuracy of the consumer reports[4] they issue) and 15 U.S.C. § 1681i (requiring that CRAs "reinvestigate" consumer claims of inaccuracy in certain instances).[5] ¶¶ 21, 22, 26, 27.

## II. LEGAL STANDARD

"A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is governed by the same standards as a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Bowen Eng'g Corp. v. Pac. Indem. Co.*, No. 15-CV-32, 2015 U.S. Dist. LEXIS 87721, at *3 (E.D. Mo. July 7, 2015) (citation omitted). *See NanoMech, Inc. v. Suresh*, 777 F.3d 1020, 1023 (8th Cir. 2015) ("We review a motion for judgment on the pleadings under the same standard that governs a motion to dismiss under Rule 12(b)(6)."). To survive a motion for judgment on the pleadings, then, Mr. Barsky must allege facts sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Grobe v. Vantage Credit Union*, 679 F. Supp. 2d 1020, 1030 (E.D. Mo. 2010) (Perry, J.). He may not rely on "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Rather, his complaint must provide enough factual "heft" to *plausibly* "sho[w] that [he] is entitled to relief." *Id.* at 557 (first alteration in original) (citation omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This "context-specific task . . . requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Here, without question, Mr. Barsky has failed to plead a plausible time-bar claim.

[4] The FCRA uses the term "consumer report" rather than the more familiar "credit report." 15 U.S.C. § 1681a(d). The definition of "consumer report" does not include a credit report issued by a CRA to the consumer himself. *Id.*

[5] The Complaint also purports to allege violations of §§ 1681e(b) and 1681i pertaining to "Re-aged Accounts," a "Metlife Paid Mortgage," and a "Chase Account Dismissed With Prejudice." ¶¶ 13-18. While these allegations are just as meritless as the time-bar allegations, full refutation of them would involve reliance on documents outside the pleadings. This Motion therefore pertains only to Plaintiff's time-bar claims—allegations that constitute the crux of his Complaint. *E.g.*, ¶¶ 2, 5-12, 19-21, 25, 27.

Regarding the FCRA, "[i]n passing" that Act, "Congress . . . struck a balance between the rights of citizens to be reported about accurately and the need for efficiency among credit reporting agencies." *Smith v. Auto Mashers, Inc.*, 85 F. Supp. 2d 638, 641 (W.D. Va. 2000). "The balance . . . struck places a comparatively light burden on reporting agencies regarding the accuracy of information they gather. In order to comply with FCRA . . . , a reporting agency need only disregard information that is plainly wrong or suspicious." *Id.* "Congress [has] made clear that FCRA was intended to be a balanced regulatory scheme that recognizes the vital role of consumer reporting agencies." *Equifax Inc. v. FTC*, 678 F.2d 1047, 1048 n.3 (11th Cir. 1982). "The statute has been drawn with extreme care, reflecting the tug of the competing interests of consumers, CRAs, furnishers of credit information, and users of credit information." *Nelson v. Chase Manhattan Mortg. Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002). *See also, e.g.*, *Scharpf v. AIG Mktg., Inc.*, 242 F. Supp. 2d 455, 459 (W.D. Ky. 2003).

## III. ARGUMENT

Plaintiff, as shown, does not deny he incurred the debts in question but, in fact, *admits* that he "actually fail[ed] to pay" them. ¶ 2. They remain due and owing. *Id.* To Experian and Equifax's knowledge, no court has ever sanctioned the argument Plaintiff advances—that it is a violation of the FCRA to report such debts as outstanding, or that a CRA like Experian and Equifax must render, and publish, a legal judgment about what statute(s) of limitations might apply to a hypothetical collection action and the effect those statutes might have. In fact, statutory and case law uniformly reject Plaintiff's position. There are accordingly at least three independent reasons why all of Plaintiff's "time-barred debt" allegations should be dismissed.

### A. Plaintiff's Time-Bar Claims Amount to a Legal Dispute about the Status of the Debts that CRAs Cannot Adjudicate.

Mr. Barsky does not dispute that he owes the debts in question and has never paid them. Instead, he disputes the *legal status* of his debts—whether the applicable state statute of limitations might bar a creditor from seeking judicial enforcement of the debts. But the FCRA "does not require CRAs to resolve legal disputes about the validity of the underlying debts they report." *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015). "[U]nder the FCRA," CRAs are "neither qualified nor obligated to resolve" the legal status of a debt. *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008).

CRAs are in the business of, and are tasked by the FCRA with, aggregating and reporting credit-reporting data in an "accurate and cost-effective" way. *Heupel v. Trans Union LLC*, 193 F. Supp. 2d 1234, 1240 (N.D. Ala. 2002). The FCRA was enacted to both protect consumers as well as to *promote efficiency* in the banking and credit system by minimizing the costs and burdens placed on CRAs in collecting and furnishing *factually accurate* credit information to would-be lenders. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) (FCRA enacted "to promote efficiency in the Nation's banking system and to protect consumer privacy"). CRAs do not possess legal expertise and are not in a position to render legal judgments on the validity or enforceability of debts. Any judicial decision to—contrary to the FCRA—place these sorts of burdens onto CRAs would dramatically increase CRAs' costs and, by extension, dramatically increase the costs of credit for consumers.

This, then, is why "determining whether the consumer has a valid defense [to the validity of a debt] is a question for a court to resolve in a suit [between the consumer and creditor,] not a job imposed upon consumer reporting agencies by the FCRA." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (quotation omitted). *See Wright*, 805 F.3d at 1242.

Given that neither Experian nor Equifax has any obligation to weigh in on the merits of a defense to the *validity* of Plaintiff's debts, *a fortiori* they have no obligation to decide whether and how a statute of limitations might apply to a debt, since statutes of limitations *do not affect validity* but rather only the creditor's ability to obtain a court judgment in a given jurisdiction. "[A] statute of limitations does not eliminate the debt; it merely limits the judicial remedies available." *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). *See Sansone v. Sansone*, 586 S.W.2d 87, 89 (Mo. Ct. App. 1979) (A "statute of limitation does not extinguish the debt but only bars the remedy." (citing *Thompson v. McCune*, 63 S.W.2d 41 (Mo. 1933)).

This legal-status doctrine is not only supported by case law, but it also makes good practical sense and comports with the purposes of the FCRA discussed above. The impracticalities and costs of Plaintiff's novel theory that Experian and Equifax are obligated to render a judgment on the applicability of a statute of limitations to a given debt would be severe. Perhaps the most daunting part of such an inquiry would be the choice-of-law question. The Complaint apparently assumes that Missouri law—and thus the relevant Missouri statute of limitations—would apply to all of Plaintiff's debts. But such a conclusion is far from clear—here, or in the typical FCRA case. Rendering an opinion on the hypothetical ability of a creditor to obtain a court judgment against a consumer on a given debt thus would require Experian and Equifax to inquire into—and legally analyze—a variety of factors, including whether the contract between the consumer and debtor contained a choice-of-law clause, the place of contracting, the consumer's state of residence at the time the contract was executed and/or performed, the creditor's place of business, etc.

And even if Experian or Equifax were able to successfully wade through these legal factors and hypotheticals, the time-bar question would remain unanswered. Once they

determined what state's law might apply, Experian and Equifax would also have to draw their own legal conclusions as to which of that state's statutes of limitations would be applicable in the hypothetical event that the creditor brought suit under the given circumstances. This case is a prime example of the additional problems such an inquiry would present. Even assuming Missouri law applies to each and every one of the accounts Plaintiff alleges is time-barred, Experian and Equifax would be required to determine *which* statute of limitations applied, as Missouri law establishes different limitations periods for different types of debt contracts.

Under Mo. Ann. Stat. § 516.120(1), "actions upon contracts, obligations or liabilities" must, with some exceptions, be brought "[w]ithin five years." One such exception is for "[a]n action upon any writing . . . for the payment of money." *Id.* § 516.110(1). In that case, a *ten-year* limitations period applies. *Id.* Plaintiff admits that he stopped paying his debts sometime after he "lost his job" "in 2008." ¶ 5. Thus, whether a five- or ten-year statute of limitations applies here is highly relevant to the question whether a creditor is time-barred from seeking a Missouri court judgment for the debts today. This issue, again, should be litigated between Plaintiff's Creditors and Plaintiff in a court of law, not collaterally litigated on the pages of Plaintiff's credit report. "[C]redit reporting agencies are not tribunals." *Carvalho*, 629 F.3d at 891.

And even this is not the full extent the issues Experian and Equifax would be required to pass judgment on if Plaintiff's theory is given credence. The CRAs would also have to determine, *e.g.*, whether any Creditor has a suit pending against the consumer (thus having tolled or met the requirements of the statute of limitations), or whether a given jurisdiction provides for waiver of the statute of limitations when a consumer makes a payment on a time-barred debt and,

if so, whether the consumer has made such a clock-resetting payment. This is all well beyond the duties and expertise of CRAs.

The 'creativity' of Plaintiff's allegations means that there is limited case law addressing his precise argument (though, as shown, there is much case law rejecting this entire *class* of arguments: that the FCRA requires CRAs to weigh in on the legal status of debts), but what case law there is supports dismissal here. *Wang v. Asset Acceptance, LLC*, 681 F. Supp. 2d 1143 (N.D. Cal. 2010), involved California's more onerous analog to the FCRA, the CCRAA. Similar to the FCRA, the CCRAA section at issue in *Wang* "prohibit[ed] the furnishing of incomplete and inaccurate information." *Id.* at 1148. The plaintiff in *Wang* argued that his creditor violated the statute by failing to report to the CRAs that his debt was "no longer within the applicable statute of limitations." *Id.* While allowing the case to proceed on other grounds, the court rejected this line of argument out of hand and found, "as a matter of law, that [the defendant] had no duty to report applicable statutes of limitations." *Id.* And *Wang* is by no means the only case to reach a conclusion like this. *See, e.g.*, *Saylor v. Pinnacle Credit Servs., LLC*, 118 F. Supp. 3d 881, 886 (E.D. Va. 2015) (the plaintiff's claim that the debt collector "violated the FC[R]A by reporting an account on which the applicable . . . statute of limitations had run" was "without merit as a matter of law"); *Murphy v. Ocwen Loan Servicing, LLC*, No. 13-CV-555, 2014 WL 651914, at *7 (E.D. Cal. Feb. 19, 2014) (granting motion to dismiss where the "[p]laintiffs d[id] not identify a particular provision of the FCRA mandating that a furnisher, when reporting a debt, disclose whether or not it may obtain a court-ordered judgment on that debt."); *Johnson v. Trans Union, LLC*, No. 10-CV-960, 2012 WL 983793, at *5, *7 (N.D. Ill. Mar. 22, 2012), *aff'd*, 524 F. App'x 268 (7th Cir. 2013) (rejecting argument CRAs violated FCRA by reporting child-support debt that the plaintiff argued he was "not legally obligated to pay . . . because no court

ha[d] entered a 'judgment' against him"; "argument rests on the false premise that a parent cannot be deemed to owe overdue child support unless a *court* issues an order *holding* that support is overdue"; "real dispute" was "with [the child-support agency], not with [the CRAs]").

If, as the court in *Wang* held, creditors—who are much more familiar with the terms governing their debt agreements with consumers than are CRAs—have no duty to report on the statute of limitations, then surely CRAs—whose sources of information are much more limited and all second-hand—have no such duty either. *Cf. Saunders v. Branch Banking and Trust Co. of Va.*, 526 F.3d 142, 150 (4th Cir. 2008) ("Claims brought against CRAs based on a legal dispute of an underlying debt raise concerns . . . because the creditor is not a party to the suit, while claims against [creditors] do not raise this consideration.").

### B. The FCRA Explicitly Permits the CRAs to Report Plaintiff's Debts Without Reference to Any Statute of Limitations.

Plaintiff's "time-bar" claims also must be dismissed for the independent reason that, far from disallowing the practice, the FCRA actually *permits* CRAs to report "[a]ccounts placed for collection or charged to profit and loss," 15 U.S.C. § 1681c(a)(4), for seven years after they are placed in collections or charged off, *regardless* of what statute of limitations might apply to the underlying debt.[6] *E.g.*, *Hancock v. Ocwen Loan Servicing, LLC*, No. 14-CV-1380, 2015 WL 632325, at *3 (W.D. Okla. Feb. 13, 2015) (The "FCRA allows the inclusion of information in consumer reports . . . regarding '[a]ccounts placed for collection or charged to profit and loss' for seven years." (quoting 15 U.S.C. § 1681c(a)(4))).

[6] The seven-year period begins to run 180 days after the date of the delinquency which "immediately preceded the collection activity [or] charge [off]." 15 U.S.C. § 1691c(c)(1). Proper application of the seven-year period is not at issue here because Plaintiff has not raised it and because, at any rate, Experian and Equifax have, via their standard procedures, properly applied § 1681c(a)(4) to ensure no accounts covered by § 1681c(a)(4) and older than seven years appear in Plaintiff's credit file. In fact, of the nine Creditor accounts Plaintiff disputed, seven already have been deleted via this standard procedure and no longer appear on Plaintiff's credit report. The two remaining accounts did not become delinquent until November 2009 and January 2010, and thus are within the seven-year period.

That the FCRA does not require CRAs to consider statutes of limitations when reporting on accounts in collections or charged off is made clear by comparing § 1681c(a)(4)—the statutory provision at issue here—with § 1681c(a)(2), the provision that governs the reporting of "[c]ivil suits, civil judgments, and records of arrest." The latter explicitly requires CRAs to take account of the relevant statute of limitations when reporting on "[c]ivil suits, civil judgments, and records of arrest," § 1681c(a)(2), but Congress omitted any such requirement from § 1681c(a)(4), at issue here. Here are the two sections side-by-side:

> [N]o consumer reporting agency may make any consumer report containing any of the following items of information:
>
> * * *
>
> (2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or **until the governing statute of limitations has expired**, whichever is the longer period.
>
> * * *
>
> (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years. . . .

15 U.S.C. § 1681c(a) (emphasis added). That Congress chose to include statutes-of-limitations requirements in § 1681c(a)(2) but chose to omit them from § 1681c(a)(4) makes it clear that Congress intended to make the reporting of collection and charged-off accounts dependent on the seven-year rule only, *without any statute-of-limitations requirements*. *See, e.g.*, *Geston v. Anderson*, 729 F.3d 1077, 1082 (8th Cir. 2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Further, when, as in § 1681c(a)(2), statutes of limitations *are* taken into account, their only effect is to *lengthen* the amount of time a delinquency appears on a consumer's credit

report. If the limitations period expires prior to § 1681c(a)(2)'s seven-year period, the "[c]ivil suit[], civil judgment[], [or] record[] of arrest" remains on the report, unaffected by the statute of limitations. Thus, even assuming (contrary to the text of the statute) that the statute of limitations should be accounted for in the present case, it can only serve to augment—not shorten—the length of time the accounts may be reported. *See* 15 U.S.C. § 1681c(a)(2). And, just as important, it is clear that lengthening reporting periods is the only role statutes of limitations play in these circumstances. *Id.* There is no statutory duty to discuss whether or not a statute of limitations might apply on the pages of a consumer's report.

**C. Plaintiff Admits that Experian and Equifax's Reporting is Accurate.**

There is a third independent reason to dismiss Plaintiff's "time-bar" claims: He fails to allege any factual inaccuracy. The Complaint purports to allege claims under two sections of the FCRA—§ 1681e(b) and § 1681i. "[T]o state a claim under 15 U.S.C. § 1681e(b), a consumer must sufficiently allege 'that a credit reporting agency prepared a report containing inaccurate information.'" *Molton v. Experian Info. Sols., Inc.*, No. 02-CV-7972, 2004 WL 161494, at *4 (N.D. Ill. Jan. 21, 2004) (citation omitted). *See, e.g.*, *Ray v. Equifax Info. Servs., LLC*, 327 F. App'x 819, 826 (11th Cir. 2009) (same); *Wright*, 805 F.3d at 1242 ("inaccuracy of the report" an essential element of a § 1681e(b) claim). Likewise, "inaccuracy of the report" is an essential element of a § 1681i(a) claim as well. *Wright*, 805 F.3d at 1242. *See, e.g.*, *Parker v. Certified Profile, LLC*, No. 7:14-CV-37, 2014 WL 3534129, at *2 (E.D.N.C. July 16, 2014) ("[T]o state a claim for violation of § 1681i(a), a plaintiff must allege . . . 'the consumer report in dispute contains inaccurate or incomplete information.'" (citation omitted)); *Paul v. Experian Info. Sols., Inc.*, 793 F. Supp. 2d 1098, 1102 (D. Minn. 2011) ("The weight of authority . . . indicates that without a showing that the reported information was in fact inaccurate, a claim brought under

§ 1681i must fail." (quoting *DeAndrade*, 523 F.3d at 68)). Under both § 1681e(b) and § 1681i(a), the purported inaccuracy must be a *factual* one. *E.g.*, *Carvalho v. Equifax Info. Servs., LLC*, 588 F. Supp. 2d 1089, 1099 (N.D. Cal. 2008), *aff'd*, 629 F.3d 876 (9th Cir. 2010) ("credit item must have been factually inaccurate"); *DeAndrade*, 523 F.3d at 66 ("*actual* inaccuracy" an essential element of a § 1681e(b) claim); *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160 (11th Cir. 1991) (report must contain "a *factual* deficiency or error").

But Plaintiff pleads no inaccuracy in relation to his "time-bar" claims. As already discussed, *supra* at 2, he admits that the debts in question are past due and thereby admits that it is factually accurate for Experian or Equifax to report them as such. His only dispute here is a *legal*, not factual, one.[7]

## IV. CONCLUSION

For all these reasons, Experian and Equifax respectfully requests that the Court enter judgment in favor of Experian and Equifax as to all of Plaintiff's time-bar-related claims.

[7] Even if one were to defy case law and reject the legal-status doctrine, *supra* at 5-9; defy the FCRA and conclude that CRAs must consider statutes of limitations in this context, *supra* at 9-11; and conclude, contrary to the best authorities, that alleged 'misleading' incompleteness—rather than factual inaccuracy, *supra* at 11-12—is all that a plaintiff need plead in order to state a claim, Plaintiff still could not prevail here. Plaintiff himself admits that there is nothing misleading about Experian and Equifax's reporting of the debts at issue because, even in the absence of a specific notation that the debts are supposedly "time barred," Plaintiff says that "[a]ny reasonable consumer creditor," *e.g.*, a potential creditor reviewing Plaintiff's credit report to determine whether it will extend credit, "should know that the accounts are time barred." ¶ 6.

Dated: March 28, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed through the Court's ECF system on March 28, 2016, and will be sent electronically to counsel of record as identified on the Notice of Electronic Filing.

*/s/ Emmett E. Robinson*
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