UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

DEFENDANT EXPERIAN INFORMATION SOLUTIONS, INC.'S REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Experian and Equifax asserted in their opening brief that, to their knowledge, "no court has ever sanctioned the argument Plaintiff advances." Mem. in Supp. of Mot. for Partial Judgment on the Pleadings ("Br."), ECF No. 34-1, at 4. Plaintiff, in his Response, only confirms this conclusion. He does not point to a single case in which a Court has recognized this type of claim. This Court would have to break entirely new legal ground—and disregard the numerous, on-point cases discussed in Experian's opening brief—in order to rule in Plaintiff's favor on this motion.

The lack of legal support is a pervasive problem in Plaintiff's brief. Apart from a quotation from *Experian*'s opening brief and a single passing reference to *Iqbal*, 13 of the 15 pages of Plaintiff's brief do not include a single case citation. And the cases cited on the two pages that deviate from this pattern are no help to Plaintiff, as they consist in their entirety of a technical footnote, a set of two 1970s cases on common-law fraud, and another set of three cases offered to refute an argument—"technical accuracy"—that Experian's opening brief never makes.

Plaintiff has utterly failed to plead a violation of the FCRA[1] as to his "time-bar" claims. His Complaint does not identify a single inaccurate or incomplete *fact* related to these claims. His only allegation is that Experian should have stated whether it believed the debts might be time-barred. But this is not a *fact*. It is a *legal conclusion* that Plaintiff, a Court, or a would-be creditor reviewing the Plaintiff's credit report is free to draw from the factual circumstances surrounding Plaintiff's debts—facts which are uncontested as to Plaintiff's "time-bar" claims.[2] Case law, the FCRA, and good sense all lead to the inevitable conclusion: Experian's motion for judgment on the pleadings on Plaintiff's "time-bar" claims should be granted.[3]

ARGUMENT

Rather than relying on pleaded facts, and showing how those facts create a right to relief recognized by statute or case law, Plaintiff, in his Response, instead relies on a hodgepodge of emotional appeals and speculation not grounded in fact or law. *E.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("*factual allegations* must be enough to raise a right to relief above the speculative level" (emphasis added)). When this extraneous material is set aside, it is clear that Plaintiff concedes most—indeed, virtually all—of the key legal and factual points raised in Experian's opening brief.

I. Plaintiff Concedes His Time-Bar Claims Are Disputes About the Legal Status of His Debts.

Plaintiff, in his Response, effectively concedes that determining whether a debt might be time-barred—*i.e.*, determining whether a statute of limitations operates to bar a creditor from

[1] The abbreviations used in this Reply are the same as those used in Experian's opening brief. All "¶" references are to the Complaint, ECF No. 1.

[2] Plaintiff does allege (incorrectly) in his Complaint that certain accounts were "[r]e-aged," but that claim is made separately from his "time-bar" claim. *See* ¶¶ 13-15. *See also* Br. at 3 n.5 (noting this Motion is limited to Plaintiff's "time-bar" claims).

[3] Plaintiff and Experian agree that the "time-[]bar[]" claims are "the largest component of the case." Pl.'s Resp. to Defs.' Mot. for Partial Judgment on the Pleadings ("Response") at 1-2. Separately, though Experian believes that the proper outcome of its motion is clear, it continues in its request for oral argument given the importance of this issue to proper interpretation of the FCRA. *See* ECF No. 34-2.

obtaining a court judgment in aid of collection in a given situation—involves determining the legal status of the debt. *See* Response at 5 (stating Experian could avoid "resolving legal issues" by requiring data furnishers to make time-bar decisions rather than making those determinations itself). And he does not expend a drop of ink to counter the numerous cases cited in Experian's opening brief which provide that CRAs like Experian have no duty to weigh in on legal matters like this. *See, e.g.*, *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015) (the FCRA "does not require CRAs to resolve legal disputes about the validity of the underlying debts they report"); *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008) ("under the FCRA," CRAs are "neither qualified nor obligated to resolve" the legal status of a debt). *See also* Br. at 5-9. Because, as case law confirms, *see* Br. at 8-9, the applicability of a specific statute of limitations to a specific debt in a specific case is a legal determination, and because case law is also clear that CRAs have no duty to resolve issues regarding the legal status of debts, judgment should be entered in favor of Experian.

The only counterargument Plaintiff offers on the (dispositive) legal-status issue is that Experian could avoid making legal determinations about "time bars" if it were somehow able to force the task onto data furnishers.[4] That is, Plaintiff says Experian could avoid the statute-of-limitations issue by instructing data furnishers "to not report or explain time barred balances."[5] Response at 5. But it is up to Congress, not Experian, to delineate data furnishers' legal duties

[4] Plaintiff downplays the notion that determining exactly what statute(s) of limitations might apply to a given debt in a given circumstance—and exactly how it would apply—involves a number of nuanced legal issues. *See* Response at 2. But other than his inadequate pass-the-buck theory, discussed above, he does not offer a single fact or a single line of legal analysis that explains his assertion that Experian would not have to weigh, and render judgment on, the various issues discussed in its opening brief, Br. at 6-8, in order to make a legal determination as to the effect of a given statute of limitations in a given situation. Even the basic question of whether a five- or ten-year statute of limitations might hypothetically apply in this case is an open one. *Id.* at 7.

[5] In contradiction to this assertion that Experian should somehow require data furnishers "to not report [allegedly] time barred balances," Response at 5, Plaintiff elsewhere says he "does not claim that the FCRA prohibits the reporting of 'time bared debts,'" *id.* at 13. "[T]he FCRA," he says, "specifically allows this." *Id.*

under the FCRA. Further, this proposed approach would involve Experian "parroting" information provided by data furnishers, a practice that Plaintiff, in his Complaint, alleges is itself illegal. *See* ¶¶ 20, 22 (it is a "violat[ion] [of] 15 U.S.C. § 1681i" to "'parrot'" data reported by a data furnisher). Perhaps most important, cases cited in Experian's opening brief explicitly reject the notion that creditors and other data furnishers have a duty to weigh in on statute-of-limitations issues. *Wang v. Asset Acceptance, LLC*, 681 F. Supp. 2d 1143, 1148 (N.D. Cal. 2010) ("as a matter of law, . . . [the creditor defendant] had no duty to report applicable statutes of limitations"); *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."); *Saylor v. Pinnacle Credit Servs., LLC*, 118 F. Supp. 3d 881, 886 (E.D. Va. 2015) (claim that 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").

II. Plaintiff Likewise Concedes that the FCRA Explicitly Permits CRAs to Report Debts "Barred" by a Statute of Limitations.

Plaintiff's Response confirms that 15 U.S.C. § 1681c(a) itself also provides independently sufficient grounds for granting judgment to Experian here. Abandoning his prior claim to the contrary,[6] Plaintiff now admits that § 1681c(a), as pointed out in Experian's opening brief, Br. at 11, "specifically allows" for "the reporting of 'time barred debts,'" Response at 14. But Plaintiff clings to the notion that, as to each of these validly reported debts, Experian must report whether obtaining a court judgment on a given debt might be time barred. Neither

[6] *See* ¶ 19 ("reporting of time barred debt" "rampant" at Experian and other CRAs and resulted in "falsely suppressing the number of . . . potential consumer borrowers.").

§ 1681c(a), nor case law, nor any provision of the FCRA supports this conclusion, as previously shown.[7] *Supra* at 2-4; Br. at 5-11.

III. Plaintiff's Complaint Admits Accuracy, and Plaintiff, in his Response, is Unable to Point to a Single Alleged Inaccuracy.

Plaintiff denies that his Complaint fails to assert any inaccuracy related to his "time-bar" claims. But his one paragraph (free from case law) on this point, Response at 14-15, does nothing more than baldly assert that he has "previously demonstrated that [Experian's reporting of factually accurate debts without weighing in on the statute of limitations] is both incomplete and inaccurate," *id.* at 14. As discussed in Experian's opening brief, Br. at 11-12, Plaintiff must plead *factual* inaccuracy in order to state a claim. Br. at 11-12. *E.g.*, *Carvalho v. Equifax Info. Servs., LLC*, 588 F. Supp. 2d 1089, 1099 (N.D. Cal. 2008) ("credit item must have been factually inaccurate"), *aff'd*, 629 F.3d 876 (9th Cir. 2010); *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"); *Williams v. Colonial Bank*, 826 F. Supp. 415, 418 (M.D. Ala. 1993) (same), *aff'd*, 29 F.3d 641 (11th Cir. 1994). The effect a given statute of limitations might have—the only "inaccuracy" Plaintiff identifies—is a legal question, not a factual inaccuracy giving rise to a potential FCRA claim. This will not due. A plaintiff must show "*factual* inaccuracy, rather than the existence of disputed legal questions." *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 38 (1st Cir. 2010).

Related to this argument, Plaintiff tries to muddy the waters by raising the specter of "technical accuracy"—*i.e.*, the proposition that a credit report is "accurate" within the meaning

[7] As Plaintiff admits, the only effect the "statute of limitations" has in any part of § 1681c(a) is to "extend[] the obsolescence period" on certain debts, Response at 14 (emphasis omitted), *i.e.*, to *lengthen* the amount of time a given debt may be reported.

of the FCRA, even if it omits relevant facts, so long as the facts included are technically true. *See, e.g.*, *Ray v. Equifax Info. Servs., LLC*, 327 F. App'x 819, 826 n.3 (11th Cir. 2009) (report "technically accurate" when it contains "factually correct information about a consumer" that is nevertheless incomplete (quotation marks and citation omitted)). But his discussion of "technical accuracy" is a straw-man argument. Plaintiff argues that if Experian had relied on the claim of "technical accuracy" in its opening brief, that claim would be unavailing. But Experian never once raised "technical accuracy," as Plaintiff largely concedes. *See* Response at 7 (Experian did not "use[] the term 'technical accuracy' in its memorandum"). And, at any rate, the credit reports Plaintiff alleges are at issue here are much more than technically accurate. Not only is Plaintiff unable to identify any affirmatively untrue statements, his Complaint does not allege a single *factual omission* related to his "time-bar" claims.

IV. Plaintiff's Response Fundamentally Flawed and Internally Inconsistent.

Plaintiff levels a number of other scattershot accusations and arguments in his Response.[8] While none of these—alone or in combination—are sufficient to support his position, several merit brief discussion for purposes of clarification.[9]

First, Plaintiff theorizes that Experian does not analyze statute-of-limitations legal questions because Experian is part of a secret plot to commit a massive "fraud on the banking

[8] Plaintiff's discussion of a HUD letter to FHA-approved mortgagees is an example. *See* Response at 10. Such letters are irrelevant to the interpretation of the FCRA. But even if they were somehow relevant, the letter Plaintiff quotes does not support his position, as the letter indicates the agency takes *all* collection accounts into consideration, apparently without regard to whether a hypothetically applicable statute of limitations might or might not bar enforcement of a specific debt via judicial decree. U.S. Dep't of Hous, & Urban Dev. Mortgagee Letter 2013-24 at 3 (Aug. 15, 2013), http://portal.hud.gov/hudportal/documents/huddoc?id=13-24ml.pdf. The letter also states that charge-off accounts (which make up most of the accounts about which Plaintiff complains) are excluded from FHA analysis altogether. *Id.*

[9] Experian does not address every imaginative argument made by Plaintiff. *E.g.*, Response at 9 (suggesting parties should "stipulate and argue the whole ['time-bar'] issue at once," notwithstanding the fact that this is a motion for judgment on the pleadings, that the "whole issue" is already presented to the Court on the papers, and that no stipulation is required or even relevant, as Experian is moving based on the facts *as pleaded by Plaintiff* in his Complaint), 11 (if Experian were the government its "practice[s] would surely violate due process"). These arguments are self-evidently unavailing.

system." Response at 12. Yet he simultaneously asserts that Experian's practices are designed to create a windfall for various banks and other creditors Plaintiff says are being defrauded. *See, e.g.*, *id.* at 2 (Experian does not weigh in on statute-of-limitations legal issues because that is what "it[]s paying clientele" wants), 9 (Experian staying out of statute-of-limitations disputes a "huge cash cow" for creditors).[10]

On a related note, Plaintiff contends that, even with a complete and accurate *factual* picture provided by Experian's reports, "there is no way for a potential creditor to tell the difference between a pre-statute of limitations account and a post[-]statute account." Response at 2. But this is in contradiction to his argument that Experian should itself draw definite conclusions about the applicability of statutes of limitations *from those same facts* and, just as glaringly, contradicts his argument that creditors should be supplying Experian with legal judgments on the applicability of statutes of limitations to specific debts. *See supra* at 3-4; Response at 2-3. That is, the entities (*i.e.*, creditors) Plaintiff asserts should be providing information about the applicability of the state of limitations are also the same type of entities (indeed, often the very same entities) he says are being duped by Experian because they don't understand how potentially relevant statutes of limitations work.

Plaintiff also asserts, with some equivocation, that future creditors have little or no interest in a consumer's old debt if a statute of limitations might prevent the old creditor from obtaining a court judgment with regard to the debt. Response at 6. This is simply not true. The

[10] Similarly, while this line of argument has no bearing whatsoever on the legal and factual merits of Experian's motion, Experian wishes to address briefly a related misconception in Plaintiff's Response. Plaintiff states, and repeatedly implies, that Experian somehow profits from not calculating the statute of limitations for individual debts, supposing that this is done at the express request of data furnishers who, Plaintiff believes, pay to include or exclude information in Experian's credit reports. This is simply wrong, as data furnishers do not pay to *include or exclude* data. To the contrary, Experian's primary customers are the businesses (prospective creditors, etc.) who pay to *receive* credit reports. That is, Experian's primary customers are the prospective lenders and others who Plaintiff claims Experian is deliberately deceiving. Likewise, Plaintiff's insinuations to the contrary, it is in Experian's best interests—commercially and ethically—to ensure reports are as *factually* accurate as reasonably possible.

fact that a consumer has defaulted on a debt, whether or not the applicable statute of limitations has expired, is significant to future creditors because it is one of the factors that is predictive of the consumer's behavior with respect to future debts. Unsurprisingly, consumers who default on their debts present a significant risk to new creditors, regardless of whether or not a court judgment regarding those debts may be readily obtained.

Lastly, Plaintiff argues that Experian, in not weighing in on statute-of-limitations legal issues, is "misrepresenting to future creditors that a judgment could be recovered and their future source of payments seized." Response at 8. But Experian reports *facts* relating to debts and other aspects of consumers' credit. It does not render legal opinions and thus makes no representations one way or the other as to whether a creditor could or could not ultimately prevail on the merits in a hypothetical court action to collect on a given debt. Likewise, Plaintiff asserts that "Experian just needs [to develop] a method to exclude from [its] report[s] . . . the assumption that [a given debt] can result in a judgment." *Id.* at 11. But there is nothing for Experian to exclude, as no such assumption is *included* by Experian in the first place. Experian is not in the business of endorsing, rejecting, or otherwise assessing legal arguments as to whether or not a given party would succeed in obtaining a court judgment, regardless of whether they are made by consumers, creditors, or other entities.

IV. CONCLUSION

For these reasons, as well as those set forth in its opening brief, Experian respectfully requests that the Court enter judgment in favor of Experian as to all of Plaintiff's time-bar-related claims.

Dated: May 6, 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 May 6, 2016, notice of which will be sent electronically to counsel of record as identified on the Notice of Electronic Filing. Counsel may access the filing through the Court's ECF system.

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