Nos. 15-2329/15-2330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ALAN SMITH,

Plaintiff-Appellee/Cross-Appellant,

v.

LEXISNEXIS SCREENING SOLUTIONS, INC.,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
For the Eastern District of Michigan, Case No. 4:13-cv-10774
The Honorable Mark A. Goldsmith

FIRST BRIEF OF DEFENDANT-APPELLANT/CROSS-APPELLEE LEXISNEXIS SCREENING SOLUTIONS, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-2329 Case Name: David Alan Smith v. LexisNexis Screening Solutions, Inc.

Name of counsel: Frederick T. Smith, Thomas J. Piskorski, Kara L. Goodwin

Pursuant to 6th Cir. R. 26.1, LexisNexis Screening Solutions, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. LexisNexis Screening Solutions, Inc. as an entity no longer exists. The corporate successor to LexisNexis Screening Solutions, Inc. is First Advantage LNS Screening Solutions, Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 16, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Thomas J. Piskorski

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

STATEMENT IN SUPPORT OF ORAL ARGUMENT 1

STATEMENT OF JURISDICTION.....2

STATEMENT OF ISSUES 3

STATEMENT OF THE CASE.....4

I. Factual Background.....4

A. Smith Applies To Work At Great Lakes.....4

B. LexisNexis' Procedures For Preparing Criminal Background Reports.....6

C. LexisNexis Prepares A Credit Check And Criminal Background Report On Smith.....10

D. Smith Disputes His Criminal Background Report.....12

E. Smith's Claimed Damages.....14

II. Procedural History.....16

SUMMARY OF THE ARGUMENT 19

ARGUMENT.....23

I. The Trial Evidence Does Not Support The Jury's Verdict That LexisNexis Failed To Follow Reasonable Procedures To Assure Maximum Possible Accuracy Of The Information In Its Criminal Background Report About Smith 23

A. Legal Standard.....23

B. Smith Did Not Meet His Burden Of Proving That LexisNexis Willfully Violated Its Obligations Under The FCRA.....25

C. Smith Did Not Meet His Burden Of Proving LexisNexis' Negligently Failed To Follow Reasonable Procedures To Assure Maximum Possible Accuracy In Violation Of The FCRA.....30

D. Smith Did Not Present Sufficient Evidence To Support The Jury's Award Of Compensatory Damages 34

1. Smith Did Not Present Sufficient Evidence Of Emotional Distress.....34

2. Smith Did Not Present Sufficient Evidence Of Harm To Reputation 36

II. Even If The Willfulness Finding Is Upheld, The Punitive Damages Award Is Excessive And Should Be Reduced.....37

A. LexisNexis' Conduct Was Not Reprehensible.....38

B. The Disparity Between The Harm Suffered By Smith And The Size Of The Punitive Damages Award Demonstrates That The Punitive Damages Award Is Excessive 41

C. Comparing The Punitive Damage Award With Civil Or Criminal Penalties Is Not Applicable 43

D. Under Similar Circumstances, This Court Has Instructed That An Award Of Punitive Damages Equal To The Amount Of Compensatory Damages Is Appropriate.....44

III. The District Court Abused Its Discretion In Denying LexisNexis' Motion For A New Trial And/Or A Remittitur Regarding The Excessive Compensatory Damages Award.....46

CONCLUSION.....52

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Trim, LLC v. Oracle Corp.,
383 F.3d 462 (6th Cir. 2004) 47

Arnold v. Wilder,
657 F.3d 353 (6th Cir. 2011) 41

Bach v. First Union Nat'l Bank,
149 F. App'x 354 (6th Cir. 2005) .....*passim*

Bach v. First Union Nat'l Bank,
486 F.3d 150 (6th Cir. 2007) .....*passim*

Bagby v. Experian Info. Solutions, Inc.,
162 F. App'x 600 (7th Cir. 2006) 35

Balsley v. LFP, Inc.,
691 F.3d 747 (6th Cir. 2012) 23

BMW of N. Am. v. Gore,
517 U.S. 559 (1996).....38, 39, 45

Boris v. Choicepoint Servs.,
249 F. Supp. 2d 851 (W.D. Ky. 2003).....28, 36, 37, 51

Bryant v. TRW, Inc.,
689 F.2d 72 (6th Cir. 1982) 48

Childress v. Experian Info. Solutions, Inc.,
790 F.3d 745 (7th Cir. 2015) 29, 33

Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.,
532 U.S. 424 (2001).....37

Cortez v. Trans Union, LLC,
617 F.3d 688 (3d Cir. 2005) 48

Dalton v. Capital Assoc. Indus., Inc.,
257 F.3d 409 (4th Cir. 2001) 24, 29, 30

Henson v. CSC Credit Servs.,
29 F.3d 280 (7th Cir. 1994) 29, 33

Kaplan v. Experian, Inc.,
No. 09-10047, 2010 WL 2163824 (E.D. Mich. May 26, 2010).....34

Khoury v. Ford Motor Credit Co., LLC,
No. 13-1149, 2013 WL 6631471 (E.D. Mich. Dec. 17, 2013).....27

Lagrassa v. Jack Gaughen, LLC,
No. 1:09-0770, 2011 WL 1257384 (M.D. Pa. Mar. 11, 2011).....27

Lentz v. City of Cleveland,
333 F. App'x 42 (6th Cir. 2009) 47

Millstone v. O'Hanlon Reports, Inc.,
528 F.2d 829 (8th Cir. 1976) 48

Moore v. First Advantage Enter. Screening Corp.,
No. 4:12CV00792, 2013 WL 1662959 (E.D. Mich. Apr. 17, 2013).....36

Morris v. Credit Bureau of Cincinnati, Inc.,
563 F. Supp. 962 (S.D. Ohio 1983) 48

Nelski v. Trans Union, LLC,
86 F. App'x 840 (6th Cir. 2004) .....*passim*

Noble v. Brinker Int'l, Inc.,
391 F.3d 715 (6th Cir. 2004) 23

Philbin v. Trans Union Corp.,
101 F.3d 957 (3d Cir. 1996) 28

Pinner v. Schmidt,
805 F.2d 1258 (5th Cir. 1986) 47

Ruffin-Thompkins v. Experian Info. Solutions, Inc.,
422 F.3d 603 (7th Cir. 2005) 34

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007).....20, 21, 25, 27

Sarver v. Experian Info. Solutions,
390 F.3d 969 (7th Cir. 2004) .....*passim*

Shannon v. Equifax Info. Servs., LLC,
764 F. Supp. 2d 714 (E.D. Pa. 2011).....28

Sheffer v. Experian Info. Solutions, Inc.,
No. 02-7407, 2003 WL 21710573 (E.D. Pa. July 24, 2003).....28

Sloane v. Equifax Info. Servs., LLC,
510 F.3d 495 (4th Cir. 2007) 34, 49, 50

Spence v. TRW, Inc.,
92 F.3d 380 (6th Cir. 1996) 19, 24, 31

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003).....*passim*

Stevenson v. TRW Inc.,
987 F.2d 288 (5th Cir. 1993) 47

Weisgram v. Marley Co.,
528 U.S. 440 (2000).....23

STATUTES

15 U.S.C. § 1681e(b) .....*passim*

15 U.S.C. § 1681n.....3

15 U.S.C. § 1681p.....2

15 U.S.C. § 1681s(a)(2)(A).....43

28 U.S.C. § 1291.....2

28 U.S.C. § 1331.....2

OTHER AUTHORITIES

Fed. R. Civ. P. 50(a).....16, 23

Fed. R. Civ. P. 50(b) 2, 17, 23

Fed. R. Civ. P. 59(a)(1)(A) 2, 17

Fed. R. Civ. P. 59(e).....2, 18

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant-Appellant/Cross-Appellee, LexisNexis Screening Solutions, Inc., requests that the Court grant oral argument in this case, as provided by Sixth Circuit Rule 34. Oral argument is appropriate because it will assist the Court's decisional process and allow the parties to address and answer any questions the Court may have regarding the parties' respective arguments and the relevant legal authorities.

STATEMENT OF JURISDICTION

Plaintiff-Appellee/Cross-Appellant David Alan Smith ("Smith") alleges a claim under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. The District Court had jurisdiction under 15 U.S.C. § 1681p and 28 U.S.C. § 1331.

This Court has jurisdiction under 28 U.S.C. § 1291, because this is an appeal from the District Court's Opinion and Order, dated and filed on September 30, 2015, denying LexisNexis' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), granting in part and denying in part LexisNexis' motion for a new trial pursuant to Fed. R. Civ. P. 59(a)(1)(A) and/or remittitur pursuant to Fed. R. Civ. P. 59(e), and entering a modified judgment of $150,000 for punitive damages (reduced from the jury's award of $300,000). (Order, RE 70, PageID ## 1390-1429).

LexisNexis filed a timely Notice of Appeal with the District Court on October 30, 2015, appealing the District Court's decisions. (Notice of Appeal, RE 72, PageID ## 1431-1433).[1]

[1] Smith's motions for attorneys' fees and costs currently are pending in the District Court. (RE 61, 67, 76, 77).

STATEMENT OF ISSUES

1. Whether the District Court erred in concluding that the trial evidence supported the jury's verdict that LexisNexis willfully failed to follow reasonable procedures to assure the maximum possible accuracy of the information in the report it sold about Smith to Great Lakes Wine & Spirits on December 12, 2012.

2. Whether the District Court erred in concluding that the trial evidence supported the jury's verdict that LexisNexis negligently failed to follow reasonable procedures to assure the maximum possible accuracy of the information in the report it sold about Smith to Great Lakes Wine & Spirits on December 12, 2012.

3. Whether the District Court erred in concluding that the trial evidence supported the jury's verdict awarding Smith $75,000 in compensatory damages.

4. Whether the District Court erred in concluding that the trial evidence supported a punitive damages award of $150,000 (the reduced amount by the District Court from the jury's award of $300,000).

5. Whether the District Court abused its discretion in denying LexisNexis' motion for a new trial.

STATEMENT OF THE CASE

I. Factual Background

A. Smith Applies To Work At Great Lakes

Smith was born on March 12, 1965. (Jury Trial Transcript ("Tr."), RE 47, PageID # 576). On or about March 5, 2002, Smith began working for Tasson Distributing ("Tasson"), delivering alcoholic beverages. (Tr., RE 47, PageID # 579).

In November 2012, Tasson was sold to Great Lakes Wine and Spirits ("Great Lakes"). (Tr., RE 47, PageID ## 581-82, 614). Tasson employees, including Smith, were not automatically rehired and were not guaranteed a position with Great Lakes; each Tasson employee had to apply for a job with Great Lakes. (Tr., RE 47, PageID ## 582-83, 675).

On December 6, 2012, Smith applied for a job with Great Lakes, requesting the position of delivery driver, the same position he held at Tasson. (Tr., RE 47, PageID ## 582-83, 615; Trial Ex. A, App. ## 072-077). On December 7, 2012, Smith and his wife went on vacation. (Tr., RE 47, PageID ## 583, 617).

On December 12, 2012, Smith received an email[2] from Great Lakes with an offer of employment for a full-time merchandiser position — not the delivery driver position for which he applied. (Tr., RE 47, PageID ## 588-90, 618; Trial

[2] The email was sent to Smith's wife's email address, which Smith regularly used for work communications. (Tr., RE 47, PageID # 588).

Exs. 1, 2, App. ## 013-015). Merchandisers follow delivery drivers and are responsible for stocking the store shelves after drivers deliver the product. (Tr., RE 47, PageID ## 583, 618-19). Smith's offer of employment for the merchandiser position was at a pay rate of $11.00 per hour, $5.00 less per hour than he had been earning as a driver at Tasson, and the merchandiser position generally is considered a position with less responsibility than driver. (Tr., RE 47, PageID ## 590, 619-20; Trial Ex. 2, App. # 015). Smith testified that he would have taken the merchandiser position "if [he] had no other opportunity," but that he "would not be able to live on that wage." (Tr., RE 47, PageID ## 620-21).

Smith's employment offer provided that "[c]ontinued employment, subsequent to this offer, is conditional based upon your satisfactory completion of a . . . credit check . . . and criminal history check." (Tr., RE 47, PageID # 676; Trial Ex. 2, App. # 015). Smith authorized Great Lakes "to obtain a consumer report" and provided Great Lakes his first, middle, and last name, Social Security number, driver's license number, date of birth, sex, street address, and phone number. (TR., RE 47, PageID ## 584, 616, 682-83; Trial Ex. B, App. # 078).

Great Lakes contracted with LexisNexis, a consumer reporting agency ("CRA") as defined by the FCRA, to compile a credit check and criminal history check on Smith. (Tr., RE 47, PageID ## 683-84; Tr., RE 48, PageID ## 726-27).

B. LexisNexis' Procedures For Preparing Criminal Background Reports

LexisNexis can create a criminal background report in one of two ways depending on the particular product or package purchased by the customer (*i.e.*, the employer): by county or by database. (Tr., RE 48, PageID ## 742, 844-47). The customer decides which method LexisNexis will use to prepare the criminal background report. (Tr., RE 48, PageID # 846).

To create a criminal background report by county, LexisNexis physically visits a specific court or accesses an online court system (as decided by the customer) to search for criminal records using an individual's personal identifiers (name, date of birth, Social Security number) as provided by the customer, and includes in the report any matches between the prospective employee's personal identifiers and the personal information that appears in a public criminal record. (Tr., RE 48, PageID ## 847-48).

To create a criminal background report by database, LexisNexis searches its proprietary national criminal database, called the National Criminal File Database, which contains criminal records LexisNexis has collected by purchasing "bulk data files" containing raw criminal data from court systems and various government

agencies.[3] (Tr., RE 48, PageID ## 739-41, 777, 847). The bulk data files contain data and information regarding the crimes and the individuals convicted of committing the crimes that the contributing source or agency chooses to make available. (Tr., RE 48, PageID ## 740-41). For example, the bulk data files that LexisNexis received for its database from the Bay County, Florida Circuit and County Courts and from the Florida Department of Corrections did not contain Social Security numbers. (Tr., RE 48, PageID ## 780-81). This is not unusual — due to increasing concerns over identity theft, many courts and other governmental agencies have removed or redacted Social Security information from criminal records such that the bulk data file criminal records rarely include Social Security numbers. (Tr., Re 48, PageID ## 779, 815).

When an employer orders a report by database, LexisNexis does not need to physically visit specific courts or access online court systems; instead, LexisNexis searches its database to find any matches between the identifiers that it has received from an employer with the information appearing in the criminal records. (Tr., RE 48, PageID ## 740-41, 847).

The minimum required information an employer must provide to LexisNexis in requesting a criminal background report by database is first name, last name,

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[3] Certain governmental agencies, such as the Florida Department of Law Enforcement, do not make raw criminal data available for CRAs like LexisNexis to purchase. (Tr., RE 48, PageID # 782).

and date of birth. (Tr., RE 48, PageID ## 753-54). LexisNexis also asks the employer to provide the middle name and Social Security number. (Tr., RE 48, PageID # 774). Because many people do not have a middle name or have more than one middle name, LexisNexis does not require the middle name in order to run a criminal background check by database. (Tr., RE 48, PageID # 808). Likewise, because Social Security numbers rarely are included in criminal records, LexisNexis does not require a Social Security number to run a criminal background check by database. (Tr., RE 48, PageID ## 815-16).

Before LexisNexis will include a criminal record on a criminal background report, it requires a match between a prospective employee's first name, last name, and date of birth as provided by the employer and the first name, last name, and date of birth as reflected in the criminal record in the database. (Tr., RE 48, PageID ## 753-54). LexisNexis will use additional information (*e.g.*, middle name or Social Security number) if provided by the employer and present in the criminal record in the database. (Tr., RE 48, PageID # 815).

LexisNexis' procedure and practice in preparing criminal background reports is to rely only on information it receives directly from the customer or the consumer — *i.e.*, the employer or the prospective employee about whom the search is being run. (Tr., RE 48, PageID ## 761, 787-88). For example, if an employer orders a credit check at the time it orders a criminal background report, LexisNexis

may obtain information on the prospective employee from a third party source like Equifax as part of the credit check; however, LexisNexis does not, as a matter of practice or procedure, use the information obtained from the third party source during a credit check to prepare a criminal background report because LexisNexis is unable to validate or confirm the information's accuracy and it is not uncommon for there to be multiple names or multiple variations of a name returned from Equifax or other credit bureaus. (Tr., RE 48, PageID ## 761, 787-88).

The process and procedures that LexisNexis uses for running and reviewing criminal background reports meet or exceed industry standards — *i.e.*, LexisNexis' procedures for collecting bulk data files for its database, requiring personal identifying information, and matching and reporting criminal records for criminal background checks are the same as or more rigorous than procedures used by other CRAs. (Tr., RE 48, PageID ## 861-63).

In 2012, LexisNexis sold approximately 10 million criminal background reports; as of December 2014, LexisNexis ran and sold more than 20 million criminal background reports per year. (Tr., RE 48, PageID ## 731-32). In an effort to ensure quality and accuracy, LexisNexis tracks the dispute rate for its criminal background reports. (Tr., RE 48, PageID ## 855-56). LexisNexis' internal data shows that only .2% of all criminal background reports are disputed, meaning that 99.8% of LexisNexis reports are never disputed. (Tr., RE 48, PageID

856-57, 865; Tr., RE 49, PageID # 921). This dispute rate does not vary depending on whether the criminal background report is run by county or by database. (Tr., RE 48, PageID # 858).

C. LexisNexis Prepares A Credit Check And Criminal Background Report On Smith

As part of its standard hiring process, Great Lakes ordered a credit check and criminal history check for Smith. (Tr., RE 47, PageID # 676). The product that Great Lakes purchased from LexisNexis for the criminal background report was the "National Criminal Record File Plus," meaning Great Lakes requested that LexisNexis run the criminal background report on Smith by database.[4] (Tr., RE 48, PageID # 857).

To order the report, a Great Lakes employee completed an Internet order form and provided Smith's personal information to LexisNexis. (Tr., RE 47, PageID ## 683-84; Tr., RE 48, PageID ## 749-50). LexisNexis' Internet order form provides space for the employer to input the employee's first name, middle name, last name, date of birth, and Social Security number. (Tr., RE 47, PageID # 684). When it ordered the report for Smith, Great Lakes provided LexisNexis with Smith's first name, last name, date of birth, and Social Security number — even

[4] Great Lakes had the option of purchasing a report run by county (for example, to include criminal records from the Florida Department of Law Enforcement), but instead purchased a report by database. (Tr., RE 48, PageID # 857).

though Great Lakes had it, Great Lakes did not provide LexisNexis with Smith's middle name. (Tr., RE 47, PageID # 684; Tr., RE 48, PageID ## 783, 786). Great Lakes admits that it "failed" to provide LexisNexis with Smith's middle name. (Tr., RE 47, PageID ## 685-86).

Based on Great Lakes' order, LexisNexis searched for criminal records in its database that matched Smith's information as provided by Great Lakes; LexisNexis' search revealed that two sources in its database — Bay County, Florida Circuit and County Courts and the Florida Department of Corrections — had criminal records matching Smith's first name (David), last name (Smith), and date of birth (March 12, 1965). (Tr., RE 48, PageID ## 740, 776-77; Trial Ex. 3, App. ## 021-022; Trial Ex. L, App. # 096). Specifically, the criminal records matching such personal identifier information were for uttering a forged instrument committed by David Oscar Smith with a date of birth of March 12, 1965.[5] (Tr., RE 47, PageID ## 595-97, 624-25; Trial Ex. 3, App. ## 021-022). Because Great Lakes did not provide LexisNexis a middle name for Smith, LexisNexis could not exclude the middle name of Oscar as a match. (Tr., RE 48, PageID # 788).

[5] Smith testified that, before trial, he ran an Internet search on Google and/or Spokeo and discovered that there are more than 125,000 individuals in the United States with the name "David Smith." (Tr., RE 47, PageID ## 578, 613-14). However, Smith further testified that he does not know how many David Smiths share the same date of birth. (Tr., RE 47, PageID # 614). The search of LexisNexis' national database identified only one David Smith born on March 12, 1965 with a criminal record.

Likewise, the criminal records in LexisNexis' database from Bay County, Florida Circuit and County Courts and the Florida Department of Corrections did not contain Social Security number information, so LexisNexis could not exclude the criminal records as a match based on Smith's Social Security number. (Tr., RE 48, PageID ## 746, 780-81, 789). Because LexisNexis could not exclude the criminal records that matched Smith's first name, last name, and date of birth, it included those records on the report it provided to Great Lakes. (Tr., RE 48, PageID ## 788-89; Trial Ex. 3, App. ## 021-022).

D. Smith Disputes His Criminal Background Report

On December 17, 2012, after returning from vacation, Smith went to Great Lakes to inquire about his employment status.[6] (Tr., RE 47, PageID # 586). Smith talked to a Great Lakes management employee who instructed him to go home and wait for a letter regarding his employment status. (Tr., RE 47, PageID ## 586, 628).

Later that same day, Smith received a letter from Great Lakes stating that it was rejecting his application for employment. (Tr., RE 47, PageID ## 590-92, 629; Trial Ex. 5, App. # 031). The letter stated that the action "was influenced by information in a consumer report" made, at Great Lakes' request, by LexisNexis, but that LexisNexis "did not make the adverse decision and cannot provide the

[6] Smith had not seen the December 12, 2012 email offer of employment while he was on vacation. (Tr., RE 47, PageID ## 586, 590).

reason for the decision." (Tr., RE 47, PageID ## 591-92; Trial Ex. 5, App. # 031). The letter included a copy of the criminal background report, which contained the criminal records of David Oscar Smith and a summary of Smith's rights under the FCRA. (Tr., RE 47, PageID ## 592-93).

When Great Lakes received Smith's background report, Vicki Strawsine ("Strawsine"), Human Resources Director for Great Lakes, noticed that the criminal history information included offenses for David Oscar Smith when Strawsine knew Smith's middle name was Alan, which led her to believe that Smith may not have committed the crimes identified in the report; Strawsine also recognized that the report listed crimes committed in Florida, which made her suspicious of the accuracy of the information in the report. (Tr., RE 47, PageID ## 686-87). Despite her suspicions, Strawsine decided not to hire Smith and felt that it was Smith's responsibility to contact LexisNexis to get the criminal history information corrected before Great Lakes would consider him for hire. (Tr., RE 47, PageID ## 691-92).

On December 17, 2012, soon after seeing the report, Smith called Great Lakes to report that the criminal history information on the report was incorrect; Great Lakes instructed Smith to contact LexisNexis. (Tr., RE 47, PageID ## 598-99, 624). Smith contacted LexisNexis to dispute the report and LexisNexis instructed Smith to fax his driver's license as proof of identification so it could

investigate the disputed criminal history information in his report. (Tr., RE 47, PageID ## 598-99). Smith faxed LexisNexis a copy of his driver's license that same day — December 17, 2012. (Tr., RE 47, PageID ## 599, 629; Trial Ex. 6, App. # 032).

On January 11, 2013, LexisNexis sent Smith a letter indicating that LexisNexis had completed its investigation and that the disputed criminal history information in Smith's report had been revised. (Tr., RE 47, PageID ## 602, 630; Trial Ex. 9, App. ## 041-045). The January 11, 2013 letter also provided Smith a copy of the revised report showing no criminal history and stated that LexisNexis had provided a copy of the results of the investigation and the revised report to Great Lakes. (Tr., RE 47, PageID ## 630-31; Trial Ex. 9, App. ## 041-045). On January 10, 2013, LexisNexis had sent an email to Great Lakes providing a link to the updated revised report showing no criminal history for Smith. (Tr., RE 47, PageID ## 693-94; Trial Ex. D, App. ## 080-081). On January 29, 2013, Smith began working for Great Lakes as a delivery driver. (Tr., RE 47, PageID # 633).

E. Smith's Claimed Damages

At trial, Smith claimed economic loss in the form of six weeks of lost wages ($2,640) for a merchandiser position with Great Lakes. (Tr., RE 48, PageID # 727).

Smith also claimed that he suffered emotional distress as a result of the LexisNexis report. (Tr., RE 47, PageID # 642). Smith testified that he was "down in the dumps," "depressed," and didn't know how he was going to make a living. (Tr., RE 47, PageID # 642). Smith never discussed his feelings with anyone other than his wife and never sought or considered seeking any kind of medical treatment for the emotional distress he claims to have suffered. (Tr., RE 47, PageID # 642).

Smith also claimed that, on one occasion, the owner of the Blue Link Party Store jokingly referred to Smith as the owner's "favorite felon." (Tr. RE 47, PageID # 607).

Smith's wife testified that Smith was "a bit angry about not being able to pay the bills . . . short with [her] . . . [and] depressed that he couldn't provide for his family." (Tr., RE 47, PageID # 665). The period of time that Smith was not working, from December 17, 2012 to January 29, 2013, was stressful for Smith "mainly" because they did not know if they would be able to pay the bills. (Tr., RE 47, PageID ## 665-66). In November 2012, the Smith family monthly expenses were $4,000 per month, which included a mortgage payment, car payments, school loans, repayment of a $15,000 hardship loan the Smiths received in May 2012 to pay off credit card debt, and food and gas and other bills. (Tr., RE 47, PageID ## 656-57, 671). Smith and his wife each earned approximately

$30,000 per year pretax, which meant that, on a monthly basis, their take-home pay after taxes was $4,000, or "just enough" to pay their bills. (Tr., RE 47, PageID ## 657-58, 670). In August, September, and October 2012, Smith was delinquent in making credit card payments. (Trial Ex. 3, App. # 018).

In order for Smith to pay his mortgage and bills during the period of time he was not working from December 17, 2012 to January 29, 2013, he had to borrow money from his parents and sister, which he felt "ashamed" about. (Tr., RE 47, PageID ## 600-01). Smith's wife believes that they may have missed a payment on their mortgage during this time, although there is no evidence that they actually did. (Tr., RE 47, PageID # 664).

II. Procedural History

On February 25, 2013, Smith filed his Complaint in the Eastern District of Michigan, asserting a claim under the FCRA. (Complaint, RE 1, PageID ## 1-5).

A jury trial was held October 21, 2014 to October 24, 2014. (Tr., RE 45-50, PageID ## 482-1003). On October 22, 2014, LexisNexis made an oral motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). (Tr., RE 48, PageID ## 820-823, 875-877). The District Court took LexisNexis' motion under advisement and submitted the matter to the jury. (Tr., RE 48, PageID ## 827, 877). The jury returned a verdict in Smith's favor, finding that LexisNexis both negligently and willfully failed to follow reasonable procedures to assure

maximum possible accuracy of the information in the report it sold about Smith to Great Lakes on December 12, 2012, and awarded Smith $75,000 in compensatory damages and $300,000 in punitive damages. (Verdict Form, RE 35, PageID ## 203-204). After the jury returned its verdict, the District Court ordered supplemental briefing on LexisNexis' motion for judgment as a matter of law. (Tr., RE 50, PageID ## 999-1000; Stipulated Order, RE 39, PageID ## 251-253). On December 30, 2014, the District Court denied LexisNexis' motion for judgment as a matter of law. (Order, RE 54, PageID ## 1015-1043).

On February 6, 2015, LexisNexis filed a renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59(a)(1)(A) and/or remittitur pursuant to Fed. R. Civ. P. 59(e). (Motion, RE 57, PageID ## 1047-1079). On September 30, 2015, the District Court denied LexisNexis' motion for judgment as a matter of law and granted in part LexisNexis' motion for a new trial and/or remittitur, ordering that the jury's punitive damages award be reduced from $300,000 to $150,000. (Order, RE 70, PageID ## 1390-1429).

On October 30, 2015, LexisNexis filed a timely Notice of Appeal, appealing: (1) the District Court's denial of LexisNexis' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b); (2) the District Court's denial of LexisNexis' motion for a new trial pursuant to Fed. R. Civ. P. 59(a)(1)(A); (3) the

District Court's denial of LexisNexis' motion for remittitur of the jury's actual damages award pursuant to Fed. R. Civ. P. 59(e); and (4) the District Court's modified judgment reducing the jury's punitive damages award only to $150,000. (Notice of Appeal, RE 72, PageID # 1431).

SUMMARY OF THE ARGUMENT

1. The FCRA, 15 U.S.C. § 1681e(b), requires CRAs to "follow reasonable procedures to assure maximum possible accuracy" when preparing a consumer report. As a CRA, LexisNexis is required only to exercise reasonable care, which is determined "by reference to what a reasonably prudent person would do under the circumstances." *Spence v. TRW, Inc.*, 92 F.3d 380, 383 (6th Cir. 1996). The FCRA is not a strict liability statute and does not subject a CRA to liability whenever a report contains information inapplicable to the intended subject of the report. *Nelski v. Trans Union, LLC*, 86 F. App'x 840, 844 (6th Cir. 2004).

The trial evidence does not, as a matter of law, support the finding that LexisNexis failed to follow reasonable procedures to assure maximum possible accuracy. LexisNexis' procedures met or exceeded industry standards, its consumer dispute percentage is extremely low and, especially important, other than this case, there is not one instance in the trial record that the failure to require a middle name — rather than request a middle name (in this case, LexisNexis requested a middle name but Great Lakes did not provide it) — produced a criminal background report with information inapplicable to the intended subject. Indeed, the trial evidence established that LexisNexis' procedure of requesting, but not requiring, a middle name is reasonable because many people do not have a

middle name or have more than one middle name. Far more reliable is LexisNexis' procedure of requiring a date of birth. Furthermore, there was nothing unreasonable in LexisNexis not cross-checking information in a criminal background report and information in a separate credit report. *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (a requirement "that each computer-generated report be examined for anomalous information and, if it is found, an investigation be launched," would *not* "be reasonable given the enormous volume of information [a CRA] processes daily").

Imposing liability in this case, in its rare circumstances resulting in an improbable outcome, would make the FCRA a strict liability statute. LexisNexis' procedures were eminently reasonable and preclude finding a FCRA violation.

2. The trial evidence does not support a finding of willfulness, which is necessary for the imposition of punitive damages. Willful violations of the FCRA are assessed for "reckless disregard." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 60, 69 (2007). An action is considered reckless only if, under an objective standard, it carries "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 68. The Supreme Court has explained that "a company subject to [the] 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.

For the reasons discussed above, the trial evidence does not support a finding of willfulness. There is nothing to suggest, let alone support, a finding that LexisNexis knew that requesting, rather than requiring a middle initial, created an unjustifiable risk of known or obvious harm. Indeed, that there never was a prior instance of any problem caused by a failure to require a middle initial makes a willfulness finding insupportable. The same is true for not performing a comparative analysis between credit information and criminal record information.

3. For the reasons already discussed, the trial evidence does not support a finding of negligence by LexisNexis.

4. The jury award of $72,360 for emotional distress/harm to reputation is not supported by the evidence. Smith's generalized testimony and conclusory statements that he was depressed and stressed because he was not employed between December 17, 2012 and January 29, 2013, are not enough to sustain any emotional distress award, let alone one of $72,360. Smith presented no evidence that he ever visited a doctor, was prescribed or took medication, or experienced the manifestation of any physical symptoms (*e.g.*, weight loss, loss of sleep) related to his alleged emotional distress.

Similarly, Smith's harm to reputation evidence is limited to his opinion that Great Lakes management "doesn't trust [him] in the same way that the Tassons did" because he feels he "do[esn't] have as much responsibility" (Tr., RE 47, PageID # 604), and that on one occasion, the owner of a company jokingly referred to Smith as the owner's "favorite felon," (Tr. RE 47, PageID # 607). This evidence is insufficient to support an award for damages for harm to reputation.

5. Even assuming the finding of willfulness is affirmed,[7] the $150,000 punitive damages award (reduced by the District Court from $300,000) is excessive. There is no evidence satisfying the standards for punitive damages set forth in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) — *i.e.*, that LexisNexis' culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *See Bach v. First Union Nat'l Bank*, 486 F.3d 150, 155-56 (6th Cir. 2007).

6. Because the amount of compensatory damages is insupportable under the trial evidence, the District Court abused its discretion in denying LexisNexis' motion for a new trial on compensatory damages and/or remittitur.

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[7] Punitive damages are only available for willful violations of the FCRA. *See Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005).

ARGUMENT

I. The Trial Evidence Does Not Support The Jury's Verdict That LexisNexis Failed To Follow Reasonable Procedures To Assure Maximum Possible Accuracy Of The Information In Its Criminal Background Report About Smith

A. Legal Standard

This Court reviews *de novo* a district court's denial of a renewed motion for judgment as a matter of law filed pursuant to Fed. R. Civ. P. 50(b). *Balsley v. LFP, Inc.*, 691 F.3d 747, 757 (6th Cir. 2012). Fed. R. Civ. P. 50 allows the Court "to remove cases or issues from the jury's consideration when the facts are sufficiently clear that the law requires a particular result." *Weisgram v. Marley Co.*, 528 U.S. 440, 447-48 (2000) (quotation omitted); Fed. R. Civ. P. 50(a) (judgment as a matter of law is appropriate on any issue for which "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). Judgment as a matter of law should be granted "if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004) (quotation omitted).

Smith's claim is under 15 U.S.C. § 1681e(b), which requires CRAs to "'follow reasonable procedures to assure maximum possible accuracy' when preparing a consumer report." *See Nelski*, 86 F. App'x at 844 (quoting 15 U.S.C.

§ 1681e(b)). LexisNexis concedes that the criminal background report it provided to Great Lakes included information about David Oscar Smith. Even if this information is deemed inaccurate,[8] inaccurate information in a criminal background report does not automatically make LexisNexis liable. Instead, LexisNexis, as a CRA, is required only to exercise "reasonable care," which is determined "by reference to what a reasonably prudent person would do under the circumstances." *Spence*, 92 F.3d at 383. The circumstances of this case — a criminal record matching the first name, last name, and date of birth of two different individuals — are rare. Indeed, the trial record contains no other instance of such a match. Yet, Smith claims that LexisNexis' procedures are "unreasonable" simply because they did not prevent such a rare event from occurring. Smith is wrong.

Significantly, the FCRA is not a strict liability statute. *Nelski*, 86 F. App'x at 844. Rather, to succeed on his claim under § 1681e(b), Smith must prove: (1) LexisNexis reported inaccurate information about Smith; (2) LexisNexis either negligently or willfully failed to follow reasonable procedures to assure maximum

[8] A report is "inaccurate" only when it is "patently incorrect" or when it is "misleading in such a way and to such an extent that it can be expected to have an adverse effect." *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001) (quotation omitted). Here, Great Lakes contracted with LexisNexis to provide a criminal background report on "David Smith" with a date of birth of March 12, 1965. (Tr., RE 47, PageID ## 684-86; Tr., RE 48, PageID ## 783, 786; Trial Ex. 3, App. # 16). The report that LexisNexis provided to Great Lakes contained precisely that information.

possible accuracy of the information about Smith; (3) Smith was injured; and (4) LexisNexis' conduct was the proximate cause of Smith's injury. *Id.* Smith failed to present sufficient evidence to meet his burden, making judgment as a matter of law appropriate.

B. Smith Did Not Meet His Burden Of Proving That LexisNexis Willfully Violated Its Obligations Under The FCRA

The United States Supreme Court's decision in *Safeco* set the standard for a willful violation of the FCRA. Under *Safeco*, willful violations of the FCRA are assessed for "reckless disregard." 551 U.S. at 60, 69. An action is considered reckless only if, under an objective standard, it carries "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 68 (quotation omitted). The Supreme Court explained that "a company subject to [the] 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.

There is no evidence of recklessness to support a willful violation in this case. Indeed, the uncontroverted record evidence establishes that:

(1) LexisNexis knew of its obligations under the FCRA;

(2) LexisNexis had procedures in place to ensure FCRA compliance, including maximum possible accuracy of the information in its criminal background reports (Tr., RE 48, PageID ## 752-54, 774-76, 815, 850-51);

(3) The procedures LexisNexis used for running and reviewing criminal background reports, including reporting records that match first name, last name, and date of birth, met or exceeded industry standards for matching and reporting criminal records (Tr., RE 48, PageID ## 861-63);

(4) LexisNexis conducted internal studies to ensure its procedures resulted in the maximum possible accuracy of its reports (Tr., RE 48, PageID ## 855-56); and

(5) LexisNexis' procedures assured maximum possible accuracy in that they resulted in a dispute rate of only .2% for all criminal background reports, meaning that 99.8% of LexisNexis criminal background reports were never disputed (Tr., RE 48, PageID ## 856-57; Tr., RE 49, PageID # 921).

Importantly, there is no evidence that LexisNexis' procedure of requesting, but not requiring, a middle name *ever* resulted in an inaccurate criminal background report prior to Smith's report. Smith's situation is the first time a problem has arisen by using first name, last name, and date of birth for a criminal record report (of course, LexisNexis requested the middle name but Great Lakes did not provide that information). Moreover, once LexisNexis was made aware of the potentially inaccurate information in Smith's report, it promptly investigated based on new information it received from Smith (*i.e.*, his middle name), corrected the error, and issued a revised report. (Tr., RE 47, PageID ## 599, 602, 630-31).

Based on this undisputed evidence, there is simply no legally sufficient evidentiary basis for a jury to conclude, under an "objective standard," that LexisNexis acted in reckless disregard of its FCRA obligations. *See Safeco*, 551 U.S. at 68-69. Under similar circumstances, district courts have found no willful violation as a matter of law. *See, e.g.*, *Khoury v. Ford Motor Credit Co., LLC*, No. 13-1149, 2013 WL 6631471, at **4-5 (E.D. Mich. Dec. 17, 2013) (no willful violation where evidence established the defendant recognized its FCRA obligations and had procedures in place to train employees about the FCRA because a one-time "mistake cannot be actionable under the willful or reckless FCRA culpability levels"); *Lagrassa v. Jack Gaughen, LLC*, No. 1:09-0770, 2011 WL 1257384, at *5 (M.D. Pa. Mar. 11, 2011) ("[A] violation of the FCRA by itself does not amount to willful noncompliance with the FCRA"; "the evidence submitted by [the CRA] supports a finding that there were procedures in place to ensure FCRA compliance, and that this incident was likely a mistake. Such an error, at best, amounts to negligence, not a knowing, intentional or reckless violation of the FCRA.") (citations omitted); *Shannon v. Equifax Info. Servs., LLC*, 764 F. Supp. 2d 714, 725-26 (E.D. Pa. 2011) (finding, as a matter of law, that CRA's "procedures and actions were not in reckless disregard of the FCRA" where the procedures met industry standard — *i.e.*, the procedures were the same or similar to those used by other CRAs — and thus the CRA's actions "did not

constitute a high risk that was known or should have been known"); *see also Sheffer v. Experian Info. Solutions, Inc.*, No. 02-7407, 2003 WL 21710573, at *3 (E.D. Pa. July 24, 2003) (recognizing that a willful violation or a finding of recklessness under the FCRA requires "something more than an isolated instance" of error "which [the CRA] promptly cure[s]"); *Boris v. Choicepoint Servs.*, 249 F. Supp. 2d 851, 862 (W.D. Ky. 2003) (same).

Rather than presenting evidence establishing that LexisNexis acted knowingly or recklessly, Smith asked the jury to find that this single instance of reporting inapplicable information, without more, amounted to willful noncompliance. However, it is well-established that the FCRA does not impose strict liability for inaccuracies, and a single inaccurate report by itself does not amount to willful noncompliance. *See Nelski*, 86 F. App'x at 844; *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (finding, as a matter of law, that plaintiff "has not produced sufficient evidence of willful noncompliance with § 1681e(b)" because "one instance . . . falls short of evidence of a willful violation"); *Dalton*, 257 F.3d at 418 (holding as a matter of law that "no reasonable jury could conclude that [the CRA] acted willfully in violating § 1681e(b)" where it had no notice of similar mistakes and corrected its mistake shortly after the plaintiff challenged the accuracy of the report).

Smith argued below that LexisNexis should have recognized an internal discrepancy within Smith's criminal background report between the credit check information LexisNexis received from Equifax — identifying Smith as "Dave A. Smith" — and the criminal record information for "David Oscar Smith," and then investigated and resolved that discrepancy before providing the criminal background report to Great Lakes, and that LexisNexis' failure to do so establishes recklessness. No court has required a CRA to engage in this type of internal investigation and analysis. Indeed, the Seventh Circuit has rejected such an argument, holding that a requirement "that each computer-generated report be examined for anomalous information and, if it is found, an investigation be launched," would *not* "be reasonable given the enormous volume of information [a CRA] processes daily." *Sarver*, 390 F.3d at 972; *see Childress v. Experian Info. Solutions, Inc.*, 790 F.3d 745, 747 (7th Cir. 2015) (requiring investigation of otherwise matching records before reporting would "put an enormous burden on the [CRA]" and "is not 'reasonable'"); *Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 (7th Cir. 1994) (stating that "[s]uch a rule would also require credit reporting agencies to engage in background research which would substantially increase the cost of their services," costs that would, in turn, have to be passed on to their customers).

Because the record lacks sufficient evidence to support a finding that LexisNexis acted in reckless disregard of its FCRA obligations, no reasonable jury could have found that LexisNexis willfully violated the FCRA and judgment as a matter of law is appropriate.

C. Smith Did Not Meet His Burden Of Proving LexisNexis' Negligently Failed To Follow Reasonable Procedures To Assure Maximum Possible Accuracy In Violation Of The FCRA

A CRA like LexisNexis is not liable under the FCRA if it followed "reasonable procedures to assure maximum possible accuracy, but nonetheless reported inaccurate information" in the criminal background report. *See Sarver*, 390 F.3d at 971-72. It is Smith's burden to prove that LexisNexis negligently failed to follow reasonable procedures. *Nelski*, 86 F. App'x at 846; *Dalton*, 257 F.3d at 416. Smith failed to meet his burden, making judgment as a matter of law appropriate.

Smith presented no evidence — other than that the criminal background report contained information about another David Smith with the same date of birth — to prove that the procedures LexisNexis used for matching and reporting criminal record information were unreasonable. As already discussed, the FCRA is not a strict liability statute — the FCRA specifically contemplates that mistakes will occur, especially given the "complexity" and "volume of information involved," and "a mistake does not render the procedures unreasonable." *Sarver*,

390 F.3d at 972. Contrary to Smith's position, a CRA is not liable under the FCRA for failing to follow reasonable procedures simply because there were other "possible" procedures that, in hindsight, may have prevented the inaccurate information in his report. Rather, § 1681e(b) holds a CRA "only to a duty of reasonable care," which "is determined by reference to what a reasonably prudent person would do under the circumstances." *Spence*, 92 F.3d at 383.

Here, the record evidence establishes that the procedures LexisNexis used in matching and reporting the criminal history records in Smith's report meet or exceed industry standards — *i.e.*, what other reasonably prudent persons do under these circumstances. (Tr., RE 48, PageID ## 861-63). Smith presented no contrary evidence regarding industry standards. Such uncontroverted evidence establishes that LexisNexis' procedures were reasonable. *See Nelski*, 86 F. App'x at 846 (stating that the adequacy of procedures is judged according to what a reasonably prudent person would do under the circumstances and evidence that the procedures meet industry standard is relevant in determining whether procedures are reasonable).

Indeed, LexisNexis' procedures are designed to assure maximum possible accuracy by requiring a match between a prospective employee's first name, last name, and date of birth as provided by the employer and the first name, last name, and date of birth as provided in the criminal record in the database before including

a criminal record on a report. (Tr., RE 48, PageID ## 753-54). In addition, if the employer provides additional identifying information such as a middle name or a Social Security number, LexisNexis will use that additional information to confirm or exclude a match if that information is also available in the criminal record in the database. (Tr., RE 48, PageID # 815). Thus, LexisNexis relies on all of the information provided by employers in preparing its reports. These procedures demonstrably result in overwhelmingly accurate reports: only 2 in 1,000 consumers (.2%) contended that LexisNexis made an error on their criminal background reports. (Tr., RE 48, PageID ## 856-57; Tr., RE 49, PageID # 921). Significantly, there is no evidence that LexisNexis' procedure of requesting, but not requiring, a middle name ever has resulted in an inaccurate criminal background report prior to Smith's report.[9] This evidence, coupled with Smith's lack of evidence, conclusively establishes that LexisNexis' procedures are reasonable.

To the extent Smith argues that LexisNexis acted negligently by not investigating and resolving the "discrepancy" within Smith's report between the information LexisNexis received from Equifax — identifying Smith as "Dave A. Smith" — and the criminal record information for "David Oscar Smith," before providing the criminal background report to Great Lakes, Smith is wrong. To start,

[9] There is also no trial evidence that any other CRA requires a middle name before running a criminal background report.

the record evidence establishes that it would not be reasonable for LexisNexis to rely on the information obtained solely from Equifax because LexisNexis cannot validate or confirm the accuracy of that information and many Equifax reports contain multiple names; discrepancies are therefore common and checking each of them would not be a reasonable procedure. (Tr., RE 48, PageID ## 761, 787-88). Further, and as discussed in more detail above, the Seventh Circuit specifically has rejected such an argument, holding that a requirement "that each computer-generated report be examined for anomalous information and, if it is found, an investigation be launched," would *not* "be reasonable." *Sarver*, 390 F.3d at 972; *see Childress*, 790 F.3d at 747; *Henson*, 29 F.3d at 285.

As a CRA, LexisNexis is in the business of reporting information that exists in various information databases. Pursuant to its procedures, LexisNexis uses all of the information provided by employers to run reports and relies on employers to provide complete and accurate information. The best proxy for report accuracy — how often LexisNexis' reports are disputed by consumers — establishes that these procedures result in highly accurate reports. Under such circumstances, there is insufficient evidence to conclude that LexisNexis negligently failed to follow reasonable procedures. Therefore, judgment in favor of LexisNexis is proper.

D. Smith Did Not Present Sufficient Evidence To Support The Jury's Award Of Compensatory Damages

The jury awarded Smith $75,000 in compensatory damages (Verdict Form, RE 35, PageID ## 203-04), which appears to include $2,640 in lost wages (Tr., RE 48, PageID # 727) and $72,360 for emotional distress/harm to reputation. Even if LexisNexis' procedures were unreasonable, judgment as a matter of law is appropriate because Smith did not produce sufficient evidence to support this award.

1. Smith Did Not Present Sufficient Evidence Of Emotional Distress

The FCRA does not presume damages; instead, the consumer must affirmatively prove that he is entitled to damages, including emotional distress damages. *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (noting the "high threshold for proof of damages for emotional distress" under the FCRA) (quotation omitted). As courts recognize, emotional distress is "so easy to manufacture" and "is easily susceptible to fictitious and trivial claims." *See, e.g.*, *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 503 (4th Cir. 2007); *Sarver*, 390 F.3d at 971; *Kaplan v. Experian, Inc.*, No. 09-10047, 2010 WL 2163824, at *5 (E.D. Mich. May 26, 2010). Accordingly, this Court requires that, when testimony is the only evidence of emotional distress — as opposed to, for example, evidence of physical injuries or medical treatment

resulting from emotional distress — the plaintiff must "reasonably and sufficiently explain[] the circumstances" surrounding his or her emotional injury and may not rely on "mere conclusory statements." *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 361 (6th Cir. 2005) ("*Bach I*").

Smith and his wife testified that Smith was depressed and stressed "mainly" because he did not know if he was going to be able to pay the bills, which Smith claims resulted from his inability to work from December 17, 2012 to January 29, 2013. (Tr., RE 47, PageID ## 642, 665-66). Smith presented no evidence that he ever visited a doctor, was prescribed or took medication, or experienced the manifestation of any physical symptoms (*e.g.*, weight loss, loss of sleep) related to his alleged emotional distress. Smith's evidence for emotional distress is nothing more than conclusory statements, which are insufficient as a matter of law to prove emotional distress. *See, e.g.*, *Bagby v. Experian Info. Solutions, Inc.*, 162 F. App'x 600, 604-05 (7th Cir. 2006) (a plaintiff's testimony that "she 'stress[es],' gets tension headaches, and clashes with her fiancé over her credit problems, are, at most, self-serving and conclusory statements about her emotional distress," and where "she did not seek any medical or psychological treatment for the emotional distress she claims resulted from Experian's actions," are insufficient as a matter of law to establish emotional distress damages); *Moore v. First Advantage Enter. Screening Corp.*, No. 4:12CV00792, 2013 WL 1662959, at *4 (E.D. Mich. Apr.

17, 2013) (finding a plaintiff's "own general testimony, and that of his wife, as to 'shame, rejection, humiliation and embarrassment of not being able to provide for his family'" to be "conclusory allegations" insufficient as a matter of law to establish emotional distress damages).

2. Smith Did Not Present Sufficient Evidence Of Harm To Reputation

Although it is true that the FCRA permits recovery for not only emotional distress but for injury to one's reputation and creditworthiness, there must be proof to support a finding of compensatory damages for each, *Boris*, 249 F. Supp. 2d at 860-61. Damages for emotional distress and damages for harm to reputation "are based on entirely different evidentiary foundations." *Id.* at 861. A plaintiff's credible testimony can support his own claim of emotional distress, but harm to reputation "must rest upon some extrinsic evidence, not just upon Plaintiff's opinion." *Id.*

Here, the evidence Smith presented on harm to reputation is limited to his opinion that Great Lakes management "doesn't trust [him] in the same way that the Tassons did" because he feels he "do[esn't] have as much responsibility." (Tr., RE 47, PageID # 604). Smith's vague, subjective, and illogical opinion that his new employer holds less trust in him based on criminal convictions belonging to another David Smith is insufficient to support damages for harm to reputation. *See Boris*, 249 F. Supp. 2d at 861. Similarly, Smith's testimony that on one occasion,

the unidentified owner of a company jokingly referred to Smith as the owner's "favorite felon," (Tr. RE 47, PageID # 607), is insufficient evidence to support an award for damages for harm to reputation. *See Boris*, 249 F. Supp. 2d at 861.[10]

II. Even If The Willfulness Finding Is Upheld, The Punitive Damages Award Is Excessive And Should Be Reduced

Even if the evidence could support a finding that LexisNexis willfully violated the FCRA,[11] the $150,000 punitive damages award (reduced by the District Court from $300,000) is excessive. This Court reviews the constitutionality of an award of punitive damages *de novo* to determine whether the award is excessive. *State Farm*, 538 U.S. at 416; *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001); *Bach I*, 149 F. App'x at 363.

In reviewing the punitive damages award, this Court "should assume that any compensatory damage award has sufficiently made a plaintiff whole for [his] injuries," and, therefore, "punitive damages are appropriate only where the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve

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[10] No Great Lakes representative testified to holding less trust in Smith and the unidentified company owner did not testify.

[11] If the Court concludes, as earlier argued, that LexisNexis did not willfully violate its obligations under the FCRA, the punitive damages award must be vacated in its entirety. *See Bach I*, 149 F. App'x at 364 (recognizing that the FCRA provides for an award of punitive damages only after finding willful noncompliance with the statute).

punishment or deterrence." *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 154 (6th Cir. 2007) ("*Bach II*") (quotation omitted). As the Supreme Court and this Court have recognized, "punitive awards, designed as tools of deterrence and retribution, have upward limits imposed by the elementary notions of fairness contained in the Due Process Clause." *Bach I*, 149 F. App'x at 364 (citing *State Farm*, 538 U.S. at 416-17).

The Supreme Court has provided three guideposts for courts to consider in reviewing punitive damages awards:

(1) the degree of reprehensibility of the defendant's misconduct;

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

(3) the difference between the punitive damages award by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm, 538 U.S. at 418 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996)).

Application of the *State Farm* guideposts establishes that both the $300,000 punitive damages award by the jury and the $150,000 reduced punitive damages award by the District Court are excessive.

A. LexisNexis' Conduct Was Not Reprehensible

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517

U.S. at 575. In determining reprehensibility, the following factors should be considered:

> (1) whether the harm caused was physical as opposed to economic;
>
> (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
>
> (3) whether the target of the conduct had financial vulnerability;
>
> (4) whether the conduct involved repeated actions or was an isolated incident; and
>
> (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident."

State Farm, 538 U.S. at 419. This Court has adopted these *State Farm* factors in evaluating the reprehensibility of a defendant's conduct in FCRA cases. *See Bach II*, 486 F.3d at 153; *Bach I*, 149 F. App'x at 364.

Evaluating the *State Farm* reprehensibility factors establishes that LexisNexis' conduct was not reprehensible:

(1) LexisNexis' alleged FCRA violation in this case was "purely economic rather than physical." *See Bach I*, 149 F. App'x at 364 (recognizing that harm caused by a FCRA violation is the result of "a transaction in the economic realm, not from some physical assault or trauma, and there were no physical injuries") (quoting *State Farm*, 538 U.S. at 426). That Smith claims to have suffered emotional distress as a result of LexisNexis' conduct does not change this conclusion because emotional distress "is not the sort of physical injury the *State*

Farm case contemplates, and thus, the first factor is not present." *Bach I*, 149 F. App'x at 364.

(2) Because LexisNexis' actions occurred in the "economic realm," it cannot be said that the allegedly tortious conduct displayed an indifference or reckless disregard for the health and safety of others. *See id.* at 365. Therefore, the second indicator of reprehensibility is not met. *Id.*

(3) LexisNexis assumes that the third factor of reprehensibility is met because Smith was financially vulnerable.

(4) There is no evidence of repeated actions or that Smith's inaccurate report was anything other than a single isolated incident. To the contrary, the record evidence establishes that claims that LexisNexis criminal background reports are inaccurate are exceedingly rare and there is no trial evidence that any other dispute was the result of the same actions at issue in this case. In addition, LexisNexis promptly investigated and issued a revised report once made aware that David Oscar Smith was not David Alan Smith. Thus, the fourth factor is not met. *See id.*

(5) Even if this Court concludes that LexisNexis' conduct was negligent or reckless, there is no evidence that LexisNexis acted out of intentional malice, trickery, or deceit. Accordingly, the fifth factor is not met. *Id.* at 365-66.

Because only one of the five factors for reprehensibility is present, LexisNexis' conduct was not reprehensible under *State Farm*. *See id.* (concluding that where only one of the five reprehensibility factors —the plaintiff's financial vulnerability — was present, the FCRA defendant's conduct was not reprehensible). Accordingly, the reprehensibility guidepost establishes that $150,000 in punitive damages is excessive. *See Bach II*, 486 F.3d at 154.

B. The Disparity Between The Harm Suffered By Smith And The Size Of The Punitive Damages Award Demonstrates That The Punitive Damages Award Is Excessive

The disparity between compensatory and punitive damages in this case further supports the conclusion that the punitive damages award (both the jury's award of $300,000 and the District Court's reduction of the jury's award to $150,000) is excessive, for three reasons.

First, the jury's punitive damages award of $300,000 is four times the size of the compensatory damages award, a ratio that "might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425.

Second, the compensatory damage award itself — $75,000 — is unreasonably large. *See Arnold v. Wilder*, 657 F.3d 353, 372 (6th Cir. 2011) (recognizing that $57,400 in compensatory damages was "not a nominal amount"); (Order, RE 70, PageID # 1417) (District Court recognizing, after reviewing case law, that the compensatory damage award in this case "is certainly generous, and

may sit on the high end of what would be appropriate under these circumstances"). The Supreme Court and this Court recognize that where, as here, the compensatory damages award is substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; *Bach II*, 486 F.3d at 156 (holding that "where the plaintiff has received a substantial compensatory damages award" due to emotional distress, then a punitive to compensatory "ratio of 1:1 . . . is an appropriate result").

Third, the $75,000 compensatory damages award unquestionably included a punitive element. Because Smith was seeking wage loss damages of only $2,640, almost the entirety of the $75,000 compensatory damages award — $72,360 or more than 96% of the award — was for emotional distress/harm to reputation. "This fact compels the conclusion that the punitive damage award is duplicative, and that either a new trial on punitive damages or a remittitur of the damages award is appropriate." *Bach I*, 149 F. App'x at 366. The Supreme Court's observations about the ratio of punitive to compensatory damages awarded in *State Farm* are applicable to this case:

> The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation [the plaintiffs] suffered at the actions of [the defendant]; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

State Farm, 538 U.S. at 426.

For these reasons, the evaluation of the ratio of punitive to compensatory damages awarded in this case supports a finding that the punitive damage award is excessive.

C. Comparing The Punitive Damage Award With Civil Or Criminal Penalties Is Not Applicable

State Farm next directs the Court to consider the disparity between the punitive damage award and the civil or criminal penalties imposed or authorized in comparable cases. The maximum civil penalty that the Federal Trade Commission can seek for knowing violations of the FCRA is $2,500 per violation, 15 U.S.C. § 1681s(a)(2)(A). The jury's punitive damages award is 120 times the size of that maximum civil penalty and the District Court's reduced punitive damages award is 60 times the size of that maximum civil penalty. However, this Court has recognized that the maximum civil penalty is not applicable to actions brought under the FCRA by private citizens and, thus, "this guidepost is not particularly helpful in assessing the constitutionality of the punitive damage award" in a FCRA case. *Bach I*, 149 F. App'x at 367. Accordingly, *Bach* instructs this Court to rely solely on the first two *State Farm* guideposts in determining whether a FCRA punitive damages award was unconstitutionally excessive. *Id.*

D. Under Similar Circumstances, This Court Has Instructed That An Award Of Punitive Damages Equal To The Amount Of Compensatory Damages Is Appropriate

In *Bach I* and *Bach II*, this Court analyzed the excessiveness of a punitive damages award in a FCRA case. The plaintiff's granddaughter fraudulently opened a bank account and credit cards in plaintiff's name, which the granddaughter caused to become overdrawn and for which she ran up a high balance that was never paid, and which the bank repeatedly attempted to collect. *Bach I*, 149 F. App'x at 356-58. The bank continued to report unfavorable credit information regarding plaintiff, an elderly widow, for more than 1.5 years despite repeated notification that the information was inaccurate, causing plaintiff to be denied several mortgage loans and a credit card. *Id.*

On appeal regarding an excessive punitive damages award, this Court found only one of the *State Farm* reprehensibility factors — the plaintiff's financial vulnerability — present and stated that "[t]he absence of any of the other factors establishing reprehensibility cut in favor of reduction of the punitive damages award." *Bach II*, 486 F.3d at 154. Although recognizing that the bank "engaged in blameworthy conduct," this Court found the bank's conduct "not particularly outrageous as judged by the reprehensibility factors set forth in *State Farm*" — *i.e.*, the bank did not act with reckless disregard for the health and safety of others, engage in repeated instances of misconduct, or act with intentional malice. *Id.* at

155. This Court stated that "the vulnerability of a victim, without more, ought not be the basis for 'convert[ing] all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.'" *Id.* (quoting *Gore*, 517 U.S. at 576). In addition, the plaintiff received a substantial amount in compensatory damages, much of which was attributable to her claimed emotional distress. *Bach I*, 149 F. App'x at 366.

This Court concluded that because the plaintiff received a considerable compensatory damages award, which the Court "should assume . . . has sufficiently made a plaintiff whole for her injuries," and the only reprehensibility factor present was the plaintiff's financial vulnerability, the plaintiff "ought not also receive a sizeable punitive damages award." *Bach II*, 486 F.3d at 154, 156. Under such circumstances, a 1:1 ratio between compensatory and punitive damages — meaning an award of punitive damages equal to compensatory damages — is appropriate. *Id.* at 156; *see also State Farm*, 538 U.S. at 425 (recognizing that when compensatory damages are substantial, a 1:1 ratio between punitive and compensatory damages "can reach the outermost limits of the due process guarantee").

Just as in *Bach II*, LexisNexis' conduct was not particularly outrageous or egregious as judged by the reprehensibility factors set forth in *State Farm*; to the contrary, the only reprehensibility factor present is Smith's financial vulnerability.

In addition, Smith received a considerable compensatory damages award, almost the entirety of which must be attributed to emotional distress/harm to reputation. "This is not a case, for example, where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Bach II*, 486 F.3d at 156 (quoting *State Farm*, 538 U.S. at 425). Rather, this case is analogous to *Bach*, and a ratio of 1:1 between compensatory and punitive damages is an appropriate result.[12]

Because both the jury's punitive damages award of $300,000 and the District Court's reduced punitive damages award of $150,000 exceeds the an appropriate ratio, the punitive damages award is excessive, exceeds the outermost limits of the due process guarantee, and should be reduced.

III. The District Court Abused Its Discretion In Denying LexisNexis' Motion For A New Trial And/Or A Remittitur Regarding The Excessive Compensatory Damages Award

This Court reviews the District Court's decision not to grant a new trial or a remittitur due to the jury's excessive award of damages for an abuse of discretion. *Bach*, 149 F. App'x at 362. A compensatory damages award is excessive and should be reduced if "it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Lentz v. City of Cleveland*, 333

[12] LexisNexis' position is that no punitive damages award is supportable. Even if the Court finds a punitive damages award supportable, it should not be based on a ratio relative to the jury's $75,000 compensatory damages award because, as argued in Sections II.B. and III., the jury's compensatory damages award is unsupported and excessive.

F. App'x 42, 49 (6th Cir. 2009) (quoting *Am. Trim, LLC v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004)).

Unlike punitive damages that are intended to punish and deter, "[c]ompensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 U.S. at 416 (quotations omitted). Here, the jury awarded Smith $75,000 in compensatory damages. Because Smith was seeking wage loss damages of only $2,640, almost the entirety of the $75,000 compensatory damages award — $72,360 or more than 96% of the award — was for emotional distress allegedly caused by an inaccurate report that was corrected within 25 days of Smith disputing it. Such an emotional distress award significantly exceeds awards in other comparable cases. *See, e.g.*, *Stevenson v. TRW Inc.*, 987 F.2d 288, 297 (5th Cir. 1993) (affirming award of $30,000 for mental anguish where plaintiff suffered "terrific shock" and "considerable embarrassment" based on credit inaccuracies and "mental anguish" over lengthy dealings with defendant, including being denied credit three times before the inaccuracies were corrected); *Pinner v. Schmidt*, 805 F.2d 1258, 1265-66 (5th Cir. 1986) (ordering new trial on damages or reduction of $100,000 compensatory damage award to $25,000 where plaintiff suffered no monetary damages but experienced embarrassment and "deep emotional distress" due to damage to creditworthiness and reputation); *Bryant v. TRW, Inc.*, 689 F.2d

72, 76-77, 79 (6th Cir. 1982) (affirming award of $8,000 for "anguish and humiliation"); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 831, 834 (8th Cir. 1976) (upholding award of $2,500 in compensatory damages where plaintiff suffered "loss of sleep, nervousness, frustration and mental anguish" as a result of the FCRA violation); *Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F. Supp. 962, 969 (S.D. Ohio 1983) (awarding $10,000 in compensatory damages because "plaintiff suffered significant injury to his reputation, his family, his work and his sense of well-being").

While there have been awards in excess of $25,000 for emotional distress in the FCRA context, such cases involve circumstances in which the plaintiff repeatedly tried, without success, to have an inaccurate report corrected and/or in which the FCRA violation, and the resulting emotional distress, extended for a significant period of time — circumstances not present here. *See, e.g.*, *Cortez v. Trans Union, LLC*, 617 F.3d 688, 705, 719 (3d Cir. 2005) (upholding $50,000 award for emotional distress where plaintiff suffered "severe anxiety, fear, distress, and embarrassment," experienced loss of sleep requiring medication, frequent crying spells out of frustration, weight loss, and stress due to an erroneous notation that her name appeared on a list of suspected terrorists, and where defendant failed to remove the notation for 18 months despite plaintiff filing 4 disputes to remove the notation).

Although recognizing that the jury's award of $72,360 for emotional distress damages was "certainly generous" and "sit[s] on the high end of what would be appropriate under these circumstances," the District Court abused its discretion by failing to grant a new trial or remit the jury's compensatory damage award based on its incorrect conclusion that the award "is not significantly greater than what other courts have deemed appropriate when faced with similar, if not lesser, stressors." (Order, RE 70, PageID # 1417).

In concluding that the jury's $72,360 emotional distress award was not excessive, the District Court placed "weight" on *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495 (4th Cir. 2007). (Order, RE 70, PageID ## 1414-15, 1417). However, *Sloane* vividly demonstrates the excessiveness of the emotional distress award in this case. In *Sloane*, the Fourth Circuit remitted an award for emotional distress to $150,000 based on anxiety, humiliation, and anger the plaintiff felt as a result of the defendant's 21-month failure to correct credit errors caused by identity theft; physical symptoms, particularly insomnia she experienced as a result; and the impact of the errors on her marriage, including the contemplation of divorce. *Id.* at 503-04. The District Court recognized that the plaintiff in *Sloane* "suffered a great deal more distress over a significantly longer period" than Smith. (Order, RE 70, PageID # 1415). Even if the distress were identical, however, the jury's $72,360 emotional distress award far exceeds the remitted award in *Sloane*.

Specifically, the $150,000 award in *Sloane* was based on the defendant's failure to correct credit errors for 21 months (or approximately 84 weeks), meaning that the award amounted to approximately $1,786 per week in emotional distress. Here, LexisNexis corrected Smith's report in 25 days (less than 4 weeks), meaning that, under *Sloane*, an appropriate emotional distress award would be $7,144 ($1,786 x 4 weeks). Accordingly, under *Sloane*, the jury's $72,360 emotional distress award is excessive.

Likewise, the District Court erroneously concluded that the jury's $72,360 emotional distress award is not "incongruous" with *Bach*, which upheld a $400,000 emotional distress award based on "pain, suffering, and humiliation" the plaintiff experienced over a year and a half while the defendant refused to correct inaccurate information on her credit report. (Order, RE 70, PageID # 1417). The CRA's inexplicable conduct in *Bach* is not even remotely similar to the actions in this case. Furthermore, *Bach's* $400,000 award for 1.5 years (78 weeks) would equate to just $20,512 in emotional distress damages for Smith ($400,000 ÷ 78 weeks = $5,128 per week x 4 weeks). Thus, even when *Bach* is properly considered, the jury's $72,360 emotional distress award is excessive.

Further evidencing the District Court's abuse of discretion in refusing to order a new trial or remit the jury's emotional distress award is its statement that the jury's award is not excessive because it is "on par with … *Boris v. Choicepoint*

Services, Inc., 249 F. Supp. 2d 851 (W.D. Ky. 2003)." (Order, RE 70, PageID # 1416). The facts in *Boris* are not "on par" with the facts in this case — not even close. In *Boris*, the court determined that a jury could find emotional distress damages as high as $75,000 based on the plaintiff's "worry, stress, anxiety, loss of sleep, and anger" due to inaccurate information on a credit report that remained for approximately a year and a half. *Id.* at 855, 859-61. Even considering *Boris*, the jury's emotional distress award of $72,360 to Smith far exceeds that in *Boris*, which would equate to a mere $3,848 emotional distress award for Smith ($75,000 ÷ 78 weeks = $962 per week x 4 weeks).

The above examples inarguably establish that the emotional distress award of $72,360 is beyond the maximum damages that the jury reasonably could find to be compensatory for Smith's loss. Accordingly, the District Court abused its discretion in denying LexisNexis' motion for a new trial or remittitur of the compensatory damages award.

CONCLUSION

The District Court's judgment should be reversed in its entirety. If liability is affirmed based on a finding that LexisNexis negligently failed to follow reasonable procedures, the compensatory and punitive damages awards should be vacated and the case remanded for a new trial on compensatory damages. If liability is affirmed based on a finding that LexisNexis both negligently and willfully failed to follow reasonable procedures, the compensatory and punitive damages awards should be vacated and the case remanded for a new trial on both compensatory and punitive damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 11,601 words (according to the word-processing software, Microsoft Word, which was used to prepare the brief), excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in plain, 14-point Times New Roman typeface; footnotes appear in plain, 14-point Times New Roman typeface.

s/ Thomas J. Piskorski
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Dated: January 20, 2016

CERTIFICATE OF SERVICE

I, certify that on January 20, 2016, I electronically filed the foregoing First Brief of Defendant-Appellant/Cross-Appellee LexisNexis Screening Solutions, Inc. with the Clerk of Courts using the CM/ECF filing system, which will send notification of such filing to:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(g), the following filings from the District Court's record are relevant documents:

Document	**Record Entry**	**PageID # Range**
Complaint	1	1-5
Jury Verdict Form	35	203-204
Jury Instructions	37	207-229
LexisNexis' Memorandum of Law in Support of Its Motion for Judgment as a Matter of Law Pursuant to Fed.; R. Civ. P. 50(a)	40	254-271
Smith's Memorandum of Law in Further Support of His Opposition to LexisNexis' Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(a)	41	272-299
LexisNexis' Reply to Smith's Response to LexisNexis' Brief in Support of Its Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(a)	42	471-479
Transcript of Jury Trial, October 20, 2014	45	482-491
Transcript of Jury Trial, October 21, 2014	47	534-708
Transcript of Jury Trial, October 22, 2014	48	709-910
Transcript of Jury Trial, October 23, 2014	49	911-993
Transcript of Jury Trial, October 24, 2014	50	994-1003

Opinion and Order Denying LexisNexis' Rule 50(a) Motion for Judgment as a Matter of Law	54	1015-1043
Stipulated Order Regarding Post-Trial Motions and Briefing	56	1045-1046
LexisNexis' Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(b) or, in the Alternative, for New Trial Pursuant to Fed. R. Civ. P. 59(a)(1)(A) and/or Remittitur Pursuant to Fed. R. Civ. P. 59(e)	57	1047-1079
Smith's Response in Opposition to LexisNexis' Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial and/or Remittitur	59	1081-1115
LexisNexis' Reply Brief in Support of Its Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial and/or Remittitur	60	1116-1123
Opinion and Order Denying LexisNexis' Renewed Motion for Judgment as a Matter of Law and Granting in Part and Denying in Part LexisNexis' Motion for New Trial and/or Remittitur	70	1390-1429
LexisNexis' Notice of Appeal	72	1431-1433
Smith's Notice of Cross-Appeal	74	1435-1437