Nos. 15-2329 / 15-2330

In the

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

SECOND BRIEF OF PLAINTIFF-APPELLEE/CROSS-APPELLANT DAVID ALAN SMITH

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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: Smith v. LexisNexis Screening Solutions

Name of counsel: John Soumilas, Ian B. Lyngklip

Pursuant to 6th Cir. R. 26.1, David Alan Smith
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.

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 February 22, 2016 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/ John Soumilas

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.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee/Cross-Appellant, David Alan Smith, 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 Defendant-Appellant/Cross-Appellee LexisNexis Risk Solutions, Inc.'s (Lexis) motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), granting in part and denying in part Lexis's 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) (hereinafter, Order on Rule 50(b)), RE 70, PageID ## 1390-1429.

Lexis filed a 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. Smith filed a Notice of Cross-Appeal with the District Court on October 30, 2015, appealing only the portion of District Court's September 30, 2015 Opinion and Order reducing the jury's punitive damages award. Notice of Cross-Appeal, RE 74, PageID ##1435-37.

STATEMENT OF ISSUES

For purposes of Smith's Cross-Appeal, the sole issue is whether the District Court erred in reducing the jury's punitive damages award from $300,000 to $150,000.

STATEMENT OF THE CASE

I. Factual Background

The District Court provided a complete summary of the relevant facts in this matter in its Order denying Defendant's motion for a judgment as a matter of law pursuant to Rule 50(a). Jury Trial Transcript (Tr.), RE 54, PageID ## 1017-1019, 1021-22.

For purposes of Lexis's appeal, there are additional pertinent facts in two areas. First, with respect to Lexis's procedures for creating the employment background screening reports it sells, Smith adduced facts at trial establishing that:

- Lexis failed to obtain the best public record of the crimes that it placed on Smith's report, namely the record from the Florida Department of Law Enforcement which contained the criminal defendant's full middle name (Oscar Lee) and the last four digits of his social security number, which were completely different from Smith's. Tr., RE 48, PageID ## 740-49; Trial Ex. 8, App. ## 037-040. Lexis never obtains these full records unless its customer makes a specific request. Tr., RE 48, PageID ## 740-49, 807-08.

- Lexis failed to require Plaintiff's prospective employer, Great Lakes Wines & Spirits, to submit Smith's middle name (Alan) with its request for a consumer background report. Tr., RE 48, PageID ## 749-54, 758. Lexis *never* requires employers to submit middle names of candidates about whom Lexis prepares consumer background reports. *Id.* at PageID ## 808-09.

- Lexis failed to use the middle initial "A" which it obtained from Equifax prior to its initial sale of a consumer background report to Great Lakes Wines & Spirits on December 12, 2012 in order to rule out any relation between the Florida criminal records for David Oscar Lee Smith and David Alan Smith. Tr., RE 48, PageID ## 759-62.

- Lexis has no special accuracy-assuring procedures for consumer background reports involving consumers with very common names like David Smith. Tr., RE 48, PageID ## 748, 754, 769-70.

- Lexis did not use Smith's or any consumer's social security number when searching its own National Criminal File (NCF) database, even though social security numbers are sometimes linked with particular crimes housed in that database. Tr., RE 48, PageID ## 746, 754, 805-07. Indeed, it is Lexis's practice never to use social security numbers to search its NCF database when searching for criminal records that it places on consumer reports. *Id.* at PageID ## 754-55, 806-07.

- Lexis admitted that if it had obtained either Smith's middle name or David Oscar Lee Smith's social security number, it would not have placed the inaccurate Florida criminal records on Plaintiff's consumer background report. Tr., RE 48, PageID ## 748, 762.

Second, both David Alan Smith and his wife testified in detail regarding the consequences of Lexis's inaccurate report. Smith was told to "go home" from his workplace in the presence of other people. Tr., RE 47, PageID ## 586-87, 590-91. He was distressed about being labeled as someone with a criminal record. *Id.* at PageID ## 598, 661. He was struggling to meet his bills. *Id.* at PageID ## 600-01, 664-65. He was embarrassed about being out of work and not being the provider his father was. *Id.* at PageID ## 602, 665-66. The family missed a mortgage payment and worried about having the car repossessed. *Id.* at PageID ## 664-66. Smith was ashamed to have to borrow money from family. *Id.* at PageID ## 601. He was depressed at home and short-tempered with his wife. *Id.* at PageID ## 642, 665-66.

The family finances established that Mr. Smith was financially vulnerable,

and could not afford to be out of work. *Id.* at PageID ## 584, 601, 656-58. Mr. Smith struggled to find another job. *Id.* at PageID ## 601-02. He was embarrassed. *Id.* at PageID ## 598, 661. Mrs. Smith called the six weeks when Smith was out of work the most difficult time of their 19 year marriage. *Id.* at PageID ## 603, 664-66.

II. Procedural History

Lexis has provided an accurate recounting of the procedural history of this matter in the First Brief of Defendant-Appellant/Cross-Appellee LexisNexis Screening Solutions, Inc. (First Brief).

SUMMARY OF THE ARGUMENT

1. The Fair Credit Reporting Act (FCRA) at section 1681e(b) requires that "whenever" a consumer reporting agency prepares a "consumer report" it "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the [agency's] report relates." 15 U.S.C. § 1681e(b). The reasonableness of procedures under FCRA section 1681e(b) is "determined by reference to what a reasonably prudent person would do under the circumstances." *Nelski v. Trans Union, LLC*, 86 Fed. App'x 840, 844 (6th Cir. 2004).

The evidence presented at trial was more than sufficient to support the jury's conclusion that Lexis failed to follow reasonable procedures to assure the maximum possible accuracy of the information it reported about Smith. Smith presented evidence that Lexis intentionally adopted procedures which led to reduced accuracy of its reports, including not requiring subscribers to submit full personal identifying information such as middle name, and obtaining incomplete criminal record information. Smith further presented evidence that his circumstances were far from isolated or "improbable," and that Lexis had notice of problems with its procedures through at least hundreds of consumer disputes by consumers about whom Lexis likewise inaccurately reported criminal record information.

The jury properly weighed the evidence presented, and the District Court appropriately declined to remove the reasonableness and negligence inquiries, which are almost universally questions for the trier of fact, from the jury's purview here. *See, e.g.*, *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 619 (6th Cir. 2012) (reversing summary judgment on reasonableness of FCRA compliance procedures).

2. The District Court did not err in finding that the evidence presented at trial supported the jury's award of actual damages, including those attributable to emotional distress and/or harm to reputation. Both Smith and his wife provided detailed testimony regarding the consequences of Lexis's inaccurate reporting, which is sufficient to support the emotional distress award. *Bach v. First Union Nat'l Bank*, 149 Fed. App'x 354, 361 (6th Cir. 2005) (*Bach I*) ("[a]n injured person's testimony alone may suffice to establish damages for emotion distress" if the person testimony provides "sufficient detail"). Smith likewise presented substantial evidence to support the jury's conclusion that Lexis's inaccurate reporting harmed his reputation. *Armstrong v. Shirvell*, 596 Fed. App'x 433, 448 (6th Cir. 2015) (a plaintiff's testimony regarding harm to reputation suffered due to defendant's actions was sufficient evidence to support jury verdict).

3. Smith presented sufficient evidence to support the jury's finding that Lexis's violation of the FCRA was willful, and the District Court properly refused to take the fact-bound issue of willfulness from the jury. The standard to prove a

willful violation under the FCRA presents the factual question of whether the defendant's actions entailed "'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)).

Lexis conceded at trial that it was aware of the requirements of the FCRA, which multiple circuit courts have found to be unambiguous. Lexis furthermore had the benefit of substantial notice of its repeated failure to accurate attribute criminal records on reports in the form of thousands of successful consumer disputes. Adoption of a general policy or practice that creates an unjustifiably high risk of violating the FCRA is evidence of willfulness. *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 620 (6th Cir. 2012). Thus, the very same knowingly-adopted procedures for compiling background reports which support the jury's finding of negligence likewise allow a reasonable jury to conclude that Lexis ran an unjustifiably high risk of reporting inaccurate information to employers.

4. The jury's $300,000 punitive damages verdict here was appropriate under the standards set forth in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003), and the District Court erred in reducing the award. The District Court properly concluded that Lexis's conduct with respect to Smith was sufficiently reprehensible to support a punitive damages award because Smith was financially vulnerable. The Court below, however, misapplied the second *State Farm* factor,

assuming that Smith was required to show identical errors on a "widespread scale," (Order on Rule 50(b), RE 70, Page ID # 1420), when in fact this factor merely requires evidence of "repeated actions." *Bach I*, 149 Fed. App'x at 365. Furthermore, the District Court erred in assuming the jury's $75,000 compensatory damages award here was "substantial" and therefore a basis to reduce punitive damages. In reality, compensatory damages awards termed "substantial" by the Sixth Circuit are much higher than the award here.

5. The District Court was well within its discretion to deny Lexis's request for a new trial because a review of the evidence set forth above, when viewed in the light most favorable to Smith, demonstrates that the verdict is not "clearly excessive," reached as a result of passion, bias, or prejudice, or "so excessive or inadequate as to shock the conscience of the court." *Am. Trim. L.L.C. v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004).

ARGUMENT

I. Introduction

Certain FCRA cases present classic jury issues: Did a consumer reporting agency (CRA) act reasonably in gathering information about a particular record? Did it reasonably attribute that record to a particular person? Was a misattribution reasonable? Could the misattribution have been reasonably avoided? What would have a reasonably prudent person done under the circumstances? Was an inaccurate report an isolated act of carelessness or was the CRAs conduct reckless? The case at bar presented those jury questions.

The jury of eight empaneled here answered these questions, as it was properly charged to do. The jury's verdict could have been different, as is the nature of trials. But it was not different. The trial court made no error in submitting the case to the jury on both liability and damages. And the jury spoke – well within the bounds of reasonableness based upon the evidence presented, and without offending the U.S. Constitution. The jury's verdict should therefore stand.

II. Lexis's Appeal Fails Because Smith Presented Sufficient Evidence That Lexis Negligently And Willfully Violated FCRA Section 1681e(b) As Well As Sufficient Evidence Supporting The Jury's Awards of Actual And Punitive Damages

Following the trial in this matter, Lexis challenged each aspect of the jury's verdict, insisting upon briefing under both Fed. R. Civ. P. 50(a) and Fed. R. Civ. P. 50(b). Lexis Rule 50(b) Brief, RE 40, PageID ## 254-71; Lexis Rule 50(b) Brief,

RE 57, PageID ## 1047-79. The District Court considered Lexis's arguments, which were nearly identical in both sets of briefing, and denied both motions in well-reasoned Orders based squarely upon Sixth Circuit precedent. Order on Rule 50(a), RE 54, PageID ## 1015-43; Order on Rule 50(b), RE 70, PageID ## 1390-1429. Lexis now repeats all of these same arguments, and they fail for all of the same reasons.[1]

A. Standard of Review

Courts of appeal review *de novo* a district court's denial of a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b). *Nelski v. Trans Union, LLC*, 86 F. App'x 840, 843 (6th Cir. 2004). This review does not involving weighing evidence, questioning the credibility of witnesses, or substituting the reviewing court's judgment for that of the jury. *Rhinehimer v. U.S. Bancorp Investment, Inc.*, 787 F.3d 797, 804 (6th Cir. 2015). such a motion may only be granted when, "viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences, 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." *Balsley v. LFP, Inc.*, 691 F.3d 747, 757 (6th Cir. 2012).

[1] *Cf. Simmons v. Napier*, ___ Fed. App'x ___, 2015 WL 5449962, at *3 (6th Cir. Sept. 16, 2015) (quoting *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none.").

B. Smith Presented Sufficient Evidence of Liability

The Fair Credit Reporting Act (FCRA) at section 1681e(b) requires that "whenever" a CRA such as Defendant Lexis prepares a "consumer report" it "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the [agency's] report relates." 15 U.S.C. § 1681e(b).

In order for a consumer to show negligent non-compliance with FCRA section 1681e(b), he or she must show that: (1) the defendant reported inaccurate information about the plaintiff; (2) the defendant failed to follow reasonable procedures; (3) the plaintiff suffered injury; and (4) the defendant's conduct was the proximate cause of the plaintiff's injury. *Nelski*, 86 Fed. App'x at 844.

The second of the four elements set out in *Nelski v. Trans Union, LLC* considers whether the defendant failed to follow reasonable procedures to assure maximum possible accuracy. 86 Fed. App'x at 844. The reasonableness of procedures under FCRA section 1681e(b) is "determined by reference to what a reasonably prudent person would do under the circumstances." *Id.* *See also Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3d Cir. 1996). "Judging the reasonableness of a credit reporting agency's procedures involves weighing the potential harm from inaccuracy against the burden of safeguarding against such

inaccuracy." *Philbin*, 101 F.3d at 963. A plaintiff is not required to specify deficiencies in a CRA's procedures. *Nelski*, 86 Fed. App'x at 845.

Accuracy under the FCRA requires more than "merely allowing for the possibility of accuracy." *Cortez v. Trans Union, LLC*, 617 F.3d 688, 709 (3d Cir. 2010). Indeed, there is a "dramatic" difference between mere "accuracy" and "maximum possible accuracy." *Id.* There are "inherent dangers in including any information in a credit report that the credit reporting agency cannot *confirm* is related to a particular consumer." *Id.* at 710 (emphasis added).

Multiple circuit courts have found a report to be inaccurate when information in 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. *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890-91 (9th Cir. 2010) (citing and quoting *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009)); *Dalton v. Capital Associated Indus.*, 257 F.3d 409, 415 (4th Cir. 2001) (citing and quoting *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 895 (5th Cir. 1998)); *see also Pinner v. Schmidt*, 805 F.2d 1258, 1262-63 (5th Cir. 1986).

In this case, as in most cases, the reasonableness of a company's procedures presents factual questions not suitable for judgment as a matter of law. *See, e.g.*, *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 619 (6th Cir. 2012) (reversing summary judgment on reasonableness of FCRA compliance procedures). The

reasonableness of a consumer reporting agency's (CRA's) procedures under FCRA section 1681e(b) is a matter for the jury. *Guimond v. Trans Union Credit Info Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (reasonableness of CRA's procedures "will be a jury question in the overwhelming majority of cases."). *See also Dalton*, 257 F.3d at 416 (reasonableness of CRA's procedures is a jury question); *Seamans v. Temple Univ.*, 744 F.3d 853, 864 (3d Cir. 2014) (reasonableness of procedures is a jury question); *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (reasonableness of procedures is to be determined by a jury unless reasonableness is "beyond question").

Indeed, according to several circuit courts, including the Sixth Circuit, "prior to sending a section [1681e(b)] claim to the jury, a credit report agency can usually prevail only if a court finds, as a matter of law, that a credit report was 'accurate.'" *Cahlin v. General Motors Acceptance Corp.*, 936 F.3d 1151, 1156 (11th Cir. 1991) (citing *Bryant v. TRW, Inc.*, 689 F.2d 72, 78 (6th Cir. 1982)).

1. Smith Presented Sufficient Evidence That Lexis's FCRA Section 1681e(b) Violation Was Negligent

At trial in this case, Smith presented more than sufficient evidence of Defendant's negligent violation of FCRA section 1681e(b). Smith demonstrated that Lexis did not obtain the best publicly available record of the crimes it attributed to Smith, which included the true defendant's full middle name and the last four digits of his social security number. Tr., RE 48, PageID ## 740-49; Trial Ex. 8, App.

037-040. Lexis furthermore failed to require Great Lakes to include Smith's middle name in order to complete the background check. Tr., RE 48, PageID ## 749-54, 758. Smith demonstrated that Lexis nevertheless did have information on his middle name, the middle initial "A" which it obtained from Equifax, but failed to use it.[2] *Id.* at Page ID ## 759-62. If Lexis had required Great Lakes to provide Smith's middle name, or if it had obtained the publicly available records containing David Oscar Lee Smith's social security number, it would not have placed the inaccurate records on the background report it sold about Smith. *Id.* at PageID ## 748, 762.

More broadly, Lexis does not maintain any different procedures for assembling background reports on consumers with common names, such as David Smith. Tr., RE 48, PageID ## 748, 754, 769-70. Indeed, Lexis never uses social security numbers to search its national database of criminal record, although social security numbers which could be used to rule out apparent matches are sometimes present in the database. *Id.* at PageID ## 746, 754, 805-06.

Viewing this evidence, and all inferences therefrom, in the light most favorable to Smith, it is clear that a reasonable jury could conclude that Lexis

[2] Lexis's argument that middle name data from Equifax is somehow "unreliable" is undercut by the fact that Lexis regularly resells Equifax data to its customers as part of consumer reports, and admits that it would not sell such data if it was deemed untrustworthy. Tr., RE 48, Page ID ## 761-62.

negligently violated FCRA section 1681e(b). Surely this is not a case where reasonable minds "could come to but one conclusion in favor of the moving party." *Balsley*, 691 F.3d at 757.

The report Lexis sold about Smith was plainly inaccurate under FCRA standards because it contained information about a person other the Smith, the "individual about whom the [agency's] report relates." 15 U.S.C. § 1681e(b). Lexis's suggestion that the report was accurate (First Brief, at p. 32) is entirely misleading and contradicts the record here: Lexis admitted at trial that the criminal records in its report about Smith were inaccurate. Tr., RE 48, PageID # 739.

Lexis argues that Smith's circumstances were "rare," and implies that he was required here to demonstrate that Lexis had notice of other instances of first name, last name, date of birth match leading to an inaccuracy in order to prevail under FCRA section 1681e(b). First Brief, at p. 24. This position has no basis in the statutory text or applicable case law. The FCRA contains separate provisions setting out the responsibilities of CRAs upon receiving notice from consumers of inaccuracies on consumer reports. *See* 15 U.S.C. § 1681i (requiring CRAs to perform reasonable reinvestigations upon receipt of disputes from consumers regarding the completeness and/or accuracy of information). Lexis's argument that a plaintiff must present evidence of notice to prevail on a section 1681e(b) claim

would effectively convert section 1681e(b) claims into claims for failure to properly reinvestigate under section 1681i, and render section 1681e(b) superfluous.

Although he was not required to do, Smith here went beyond showing proof of inaccuracy. Smith adduced evidence that Lexis adopted procedures which reduced the accuracy of its reports, including failing to require subscribers to submit middle names, and not obtaining the best and most complete public records of crimes. Tr., RE 48, PageID ## 739-42, 754-55.

Lexis argues that its low dispute rate somehow provides a defense. First Brief, at p. 34. Lexis is entitled to make (and did, in fact, make at trial) its low dispute rate defense – essentially arguing that cases like Smith's are a "drop in the bucket." That defense, however, is a factual one, not a legal one which would entitle Lexis to judgment as a matter of law. Lexis cites absolutely no authority to suggest otherwise.

The drop in the bucket defense is also unpersuasive. As Lexis's own corporate representative, Mr. O'Connor, admitted at trial, Lexis's .02% dispute rate does not demonstrate that Lexis has a high accuracy rate. Tr., RE 48, PageID # 871. Many inaccuracies could go undisputed for all types of reasons. *Id.* at PageID ## 811-14. Moreover, the 20,000 disputes per year that Lexis stipulated to are not insignificant. Tr., RE 49, PageID ## 920-21. To the contrary, these disputes tend to show that Lexis is on notice that its reports contain inaccuracies stemming from failure to use

all available personal identifying information to match consumers to information on a consumer report.

Lexis's assertion that its reporting about Smith was the first time this problem has arisen is disingenuous and contradicted by the trial record. Particularly, the notice of disputes by the hundreds in four states (and by inference, by the thousands nationwide) that it has placed a criminal record of one person on another person's report (Trial Exs. 10-13, App. ## 046-071) places Lexis on robust notice of the exact inaccuracy at issue in this case. Tr., RE 48, PageID ## 764-69, 868-71. This type of case-specific notice is an additional, independent basis on which a reasonable jury can base a willful non-compliance finding.

More broadly, Lexis and the rest of the consumer reporting industry have been on notice about the problem of "mixing" of one consumer's information with that of another (usually a person with some similar identifying information). This problem is so well known that it lead to multiple enforcement actions against the national CRAs by the Federal Trade Commission and the Attorneys' General of multiple states during the 1990s. *State of Alabama, et al., v. Trans Union Corp.*, No. 92-C-7101 (N.D. Ill. Oct. 26, 1992); *Fed. Trade Comm'n v. TRW, Inc.*, 784 F. Supp. 361 (N.D. Tex. 1991); *Equifax Credit Information Services, Inc. Proposed Consent Agreement with Analysis to Aid Public Comment*, 60 Fed. Reg. 35 (proposed Feb. 22, 1995).

These enforcement actions led to consent decrees and consent orders where the national CRAs agreed to use up to eight personal identifiers in matching records to a particular consumer's reports – including first name, last name, middle initial, generational suffix or designation, street address, zip code, social security number, and date of birth. *See id.; See, e.g., Fed. Trade Comm'n v. TRW, Inc.*, 784 F. Supp. at 362-63 (requiring "full identifying information" in preparation of consumer reports as to avoid mixed files; "full identifying information" is defined as "full last and first name; middle initial; full street address; zip code; year of birth; any generational designation; *and* social security number.") (emphasis added).

According to these orders, a record should not be placed upon a particular consumer's report unless the CRA can confirm that the record relates to that consumer by matching a significant number of personal identifiers (not just first and last name and the date of birth) between the record and the consumer who is the subject of the report.

The Consumer Financial Protection Bureau (CFPB), which took over enforcement of the FCRA from the Federal Trade Commission in 2012, reaffirmed this guidance in a recent consent order, requiring one of Lexis's competitors to, at a minimum, use first name, last name, middle name, social security number, and generational suffix to match criminal records to consumers. *In re Gen. Info Servs., Inc.*, 2015-CFPB-0028 (Oct. 29, 2015) Doc. 1 at p. 11 ¶ 46(b)(1), *available at*

http://files.consumerfinance.gov/f/201510_cfpb_consent-order_general-information-service-inc.pdf. The CFPB also specifically found that the defendant in the proceeding violated section 1681e(b) of the FCRA by failing to require its customers to provide middle names in connection with employment background reports. *Id.* at p. 5 ¶ 12. The CFRB further required the defendant to affirmatively derive and rely upon middle names derived from a "social security trace" from another entity – the very procedure Lexis here claims is too burdensome or unreliable. *Id.*

Lexis's assertion that its practices are in keeping with industry standards, and specifically that its failure to obtain middle names is acceptable, is flatly contradicted by this authoritative guidance.

Furthermore, Smith presented evidence that Lexis knew that its reports contain inaccuracies through the tens of thousands of disputes and multiple lawsuits by consumers who, just like Smith, had the criminal record of a different person inaccurately attributed to them on their background reports.

The jury was thus presented with substantial evidence demonstrating that Lexis's treatment of Smith was far from rare, and that Lexis had several simple and feasible options for improving the accuracy of its reports. The jury's conclusion after weighing the evidence here was well within the bounds of reasonableness, and the District Court properly declined to disturb it.

2. Smith Presented Sufficient Evidence That Lexis's FCRA Section 1681e(b) Violation Was Willful

In addition to presenting evidence that Lexis negligently violated FCRA section 1681e(b), Smith also proffered sufficient evidence at trial in order to allow a reasonable jury to make a finding of willful non-compliance.

"Any person who willfully fails to comply" with the FCRA can be liable for punitive damages, in addition to actual damages and attorney's fees available for negligent violations of the FCRA. 15 U.S.C. §§ 1681n, 1681o. The FCRA does not define the term "willfully" and does not give any guidance as to how a defendant "willfully fails to comply with any requirement" of the Act. *See* 15 U.S.C. §§ 1681a and 1681n. In its only decision on the subject, the U.S. Supreme Court held that Congress intended the term "willfully" within the FCRA to have its "common law usage." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). The High Court said that the common law "treated actions in 'reckless disregard' of the law as 'willful' violations." *Id.* It thus concluded that "[t]he standard civil usage thus counsels reading the phrase 'willfully fails to comply' in § 1681n(a) as reaching reckless FCRA violations." *Id.* (emphasis added).

The U.S. Supreme Court in *Safeco* did not state that a reckless violation is the only one that can be willful under the FCRA: "If, on the other hand, 'willfully' covers both knowing and reckless disregard of the law, knowing violations are sensibly understood as a more serious subcategory of willful ones." *Id.* at 59 (*citing*

U.S. v. Menasche, 348 U.S. 528, 538-539 (1955) ("'[G]ive effect, if possible, to every clause and word of a statute' ") (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

In *Safeco*, the Court construed not only the meaning of the word "willfully" under FCRA section 1681n (as discussed above), but also the meaning of the word "increase" under FCRA section 1681m. But because the statutory meaning of the term "increase" under FCRA section 1681m was unclear on its face, and also because there was no FTC guidance or appellate court decision on that issue prior to the Safeco case, the U.S. Supreme Court concluded that: "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id*. at 69. The Court thus found that Safeco could not be in willful noncompliance with FCRA section 1681m, relating to adverse action notices for insurance companies, under those circumstances. *Id.*

Both before and after *Safeco*, multiple federal courts have had the opportunity to construe the meaning of FCRA section 1681e(b) and found a CRA's responsibilities under that section to be unambiguous. *See Bryant*, 689 F.2d at 78*;* *Dalton*, 257 F.3d at 415; *Philbin*, 101 F.3d at 963-66; *Guimond*, 45 F.3d at 1332-34. Unlike FCRA section 1681m, which was deemed ambiguous by *Safeco* in setting

forth the duties of insurance companies to provide adverse action notification upon an "increase" of rates for new customers, FCRA section 1681e(b) is not ambiguous and there is a wealth of judicial guidance concerning its application.

[Q]uite unlike *Safeco*, where the statute at issue was "less-than-pellucid" and there was a "dearth of guidance," the statutory text at issue here has a plain and clearly ascertainable meaning. Section 1681e(b) requires that a consumer reporting agency follow reasonable procedures to "assure maximum possible accuracy of the information." *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 436-37 (E.D. Pa. 2010) (denying motion to dismiss willfulness claim in FCRA section 1681e(b) claim); *see also Starkey v. Experian Information Solutions, Inc.*, No. 8:13-cv-00059-JLS-RNB, 2014 WL 3809196, at *4-5 (C.D. Cal. Jan. 8, 2014) (allowing both negligent and willful violations of FCRA section 1681e(b) to proceed to a jury); *DiRosa v. Equifax Information Services LLC, et al.*, No. 8:13-cv-00131-JLS-AN (Dkt. No. 31) (C.D. Ca. Jan. 21 2014) (same); *see also Campbell v. Experian Info. Solutions, Inc.*, No. 08-4217, 2009 WL 3834125, at *9 (W.D. Mo. Nov. 13, 2009) (denying CRA's motion for summary judgment on FCRA 1681e(b) willfulness claim); *see also Price v. Trans Union, LLC*, 737 F. Supp. 2d 281, 289-90 (E.D. Pa. 2010) (finding that "§ 1681e(b) does not contain any statutory text that 'is less than pellucid and which has not been construed in detail by the Courts of Appeals'"; permitting willful violation to proceed to jury trial).

Further, although the Court in *Safeco* describes recklessness as an "objective" standard, that finding is entirely consistent with previous U.S. Supreme Court pronouncements in similar contexts which have emphasized that "recklessness" determinations are fact-bound inquiries that must typically be answered by a jury. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521 (1991) (In defamation cases, "the evidence creates a jury question whether [defendant] published the statements with knowledge or reckless disregard."); *Time, Inc. v. Hill*, 385 U.S. 374, 394 (1967) ("Where either result finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood."); *Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 420-21 (1941) (In fraud case, "[t]he question of respondent's recklessness was thus submitted to the jury and we think properly so.").

Indeed, in FCRA jurisprudence, courts are legion in concluding that willfulness is ill-suited to be determined as a matter of law, roundly agreeing that, because it questions one's state of mind, it is best left to the jury. *See Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) (collecting cases). *See also Hammer v. JP's Sw. Foods, L.L.C.*, 739 F. Supp. 2d 1155, 1167 (W.D. Mo. 2010) (reaching same conclusion, and collecting cases); *Miller v. Johnson & Johnson et al.*, 80 F. Supp. 3d 1284, 1296 (M.D. Fla. 2015) (refusing to grant summary judgment because willfulness is a fact-intensive determination for the

jury); *Manuel v. Wells Fargo Bank, N.A.*, ___ F. Supp. 3d ___, 2015 WL 4994538, at *18 (E.D. Va. Aug. 19, 2015) (same); *Cowley v. Burger King Corp.*, No. 07-21772-CIV, 2008 WL 8910653, at *4 (S.D. Fla. May 23, 2008) (same).

In the case at bar, Lexis does not even make a *Safeco* reasonable reading safe harbor defense, and cannot make one now for the first time. *Sykes v. Anderson*, 625 F.3d 294, 304 (6th Cir. 2010) (issues not raised prior to submission of the case to the jury are waived).

Here, the same evidence which was sufficient for the jury to find a negligent violation of the FCRA also constituted sufficient evidence of a willful violation. For example, Smith presented evidence of Lexis's intentionally-adopted practice of not requiring employers to provide consumers' middle name, and not using middle names to resolve mismatches between criminal records and Lexis's information about consumers who are the subject of its reports. Tr., RE 48, PageID ## 739-42, 754-55. This evidence, along with the other evidence discussed above, presented sufficient evidence for the jury to find that Lexis's non-compliance was willful.

Further, as the court below noted, CRAs may be found to "act willfully in connection with a particular transaction." Order on Rule 50(a), RE 54, PageID ## 1031-32 (citing *Seamans*, 744 F.3d at 868). In addition to evidence regarding Lexis's general practices and procedures, Smith also presented evidence that Lexis had clear evidence of a discrepancy between the Florida convictions it reported and

the information already in its possession about Plaintiff – specifically, the middle name information it obtained from Equifax. Tr., RE 48, Page ID ## 759-62.

In sum, the willfulness issue here was a jury question, and there was more than sufficient evidence at trial on which a reasonable jury could base a finding for Plaintiff on his claim of a willful violation of FCRA section 1681e(b). This Court made no error and Lexis is not entitled to judgment as a matter of law.

C. Plaintiff Presented Sufficient Evidence Supporting The Jury's Award of Actual Damages

Sixth Circuit precedent clearly establishes that an FCRA plaintiff need only provide some evidence of a "causal link" between a violation of the statute and the claimed actual damages. *Bach v. First Union Nat'l Bank*, 149 Fed. App'x 354, 361 (6th Cir. 2005) (*Bach I*). The determination of whether such a causal link exists involves weighing evidence and evaluating the credibility of witnesses, and thus a determination to be made by jury. *Rhinehimer*, 787 F.3d at 804. Furthermore, "[a]n injured person's testimony alone may suffice to establish damages for emotion distress" if the person testimony provides "sufficient detail." *Bach I*, 149 Fed. App'x at 361.

Here, Smith presented substantial evidence of a causal link between Lexis's inaccurate reporting and his emotional distress damages. Smith and his wife testified at length and in detail regarding the impact of Defendant's inaccurate report. This testimony "reasonably and sufficiently explains the circumstances" of Smith's

injury, and provided a strong basis for the jury to conclude that Smith suffered emotional distress, and that Lexis's inaccurate report was the cause.

1. Emotional Distress Damages

The testimony of Smith and his wife was detailed and uncontradicted, and consistent with the record evidence in the case. Tr., RE 47, PageID ## 584, 586-87, 590-91, 598, 600-03, 642, 656-58, 661, 664-66; Trial Exs. 1-7, App. ## 013-036. This testimony established Smith's claim for emotional distress. Furthermore and contrary to Lexis's assertion, Smith's testimony and the testimony of his wife, along with the supporting record evidence, is more than legally sufficient to established emotional distress damages.

Widely-adopted authority on the standard for FCRA actual damages makes clear that consumer-plaintiffs may sufficiently establish the existence of these damages through their own testimony, without needing any corroborating testimony or medical or psychological evidence. *Cortez*, 617 F.3d at 720. In *Cortez*, the plaintiff testified that "she suffered severe anxiety, fear, distress, and embarrassment" as a result of the inaccurate information contained on her report. *Id.* at 719. This testimony, corroborated by the plaintiff's daughter, was sufficient to send the case to the jury, and to support the jury's award of $50,000 in actual damages. *Cortez*, 617 F.3d at 719-20.

The Sixth Circuit took the same approach in *Bach I,* 149 Fed. App'x at 361. In *Bach,* the plaintiff alleged that she was denied a mortgage as a result of FCRA violations explained she felt "'desperate,' 'ashamed,' 'embarrassed,' and 'damn mad'" as a result. *Id.* at 361. Far from finding that such testimony was insufficient as a matter of law, as Lexis suggests, the Sixth Circuit affirmed that this testimony was, by itself, sufficient evidence that she was entitled to actual damages for emotional distress, and upheld the jury's $400,000 award. *Id.* at 361-62.

In the case at bar, there was absolutely no basis either factually or legally for the District Court to have taken the emotional distress determination away from the jury.

2. Harm To Reputation

A consumer litigant's right to recover for harm to one's reputation and good name under the FCRA when a consumer reporting agency sells a consumer with false information about that individual is well settled. As the U.S. Supreme Court explained in the context of a defamation suit brought by a business owner against a consumer reporting agency:

> Petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the [credit reporting agency] and its specific business audience. This particular interest warrants no special protection when-as in this case-the speech is wholly false and clearly damaging to the victim's business reputation. . . .There is simply no credible argument that this type of credit reporting requires special protection . . . . It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others.

> Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. . . . We conclude that permitting recovery of **presumed and punitive damages** in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761-63 (1985) (citations omitted) (emphasis added).

Consistent with the Supreme Court's holding in *Dun & Bradstreet*, courts have regularly affirmed that a consumer may recover for harm to his or her credit reputation and good name as part of a claim for "actual damages" under the FCRA. *See Dalton v. Capital Associated Industries, Inc.*, 257 F.3d 409, 418-419 (4th Cir. 2001) ("[Plaintiff] alleges that he suffered . . . loss of reputation as a result of the false report. Damages for such injuries are recoverable under FCRA."); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983) ("Even where no pecuniary or out-of-pocket loss has been shown, the FCRA permits recovery for . . . injury to one's reputation . . ."); *Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) (reputational harm included in actual damages).

The holdings of the numerous circuit courts cited above further verifies the specific intentions of Congress in passing the FCRA:

> [T]he trend toward computerization of billings and the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal "blips" and key-punch holes in a stolid and unthinking machine **which can literally ruin his reputation** without cause, and make him **unemployable** or

> uninsurable, as well as deny him the opportunity to obtain a mortgage to buy a home. We are not nearly as much concerned over the possible mistaken turn-down of a consumer for a luxury item as we are over the possible **destruction of his good name** without his knowledge and without reason.

116 Cong. Rec. 36570 (1970) (Representative Sullivan speaking) (emphasis added). *See also Bryant v. TRW, Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (In relying on Congressional record above "We have no doubt from this record that plaintiff offered proofs from which the jury could properly have found that defendant's failure in timely fashion to use "reasonable procedures to assure maximum possible accuracy" occasioned damage to plaintiff's name and consequent anguish and humiliation.").

Indeed, the jury instructions in the case, to which Lexis agreed, sets out harm to reputation as a separate category of damages from economic loss and emotional distress:

> Under the FCRA, a plaintiff may recover "actual damages," which has a special meaning. "Actual damages" are meant to fairly compensate an aggrieved person, and can consist of one or more of the following:
>
> 1. **Economic Loss.** This type of actual damages may consist of lost wages or benefits or out-of-pocket monetary losses.
> 2. **Harm to Reputation.** This type of actual damages consists of harm to the plaintiff's credit rating, credit reputation and/or good name.
> 3. **Emotional Distress.** This type of actual damages consists of any humiliation, embarrassment, mental anguish and/or stress-related suffering experienced by the plaintiff as a result of the defendant's failure to comply with the FCRA.

Jury Instruction No. 23, RE 37, PageID # 226. Neither of Lexis's oral Rule 50(a) motions during trial addressed the separate category of damages for harm to Plaintiff's reputation as a result of the inaccurate background report. Tr, RE 48, PageID ## 820-23, 875-76. Defendant has thus waived this issue. *Sykes*, 625 F.3d at 304.

Furthermore, even if properly raised, Smith presented sufficient evidence, including extrinsic evidence, of actual damages in the form of harm to reputation to reach a jury on this issue. *See Armstrong v. Shirvell*, 596 Fed. App'x 433, 448 (6th Cir. 2015) (plaintiff's testimony regarding the ways his professional reputation suffered due to defendant's actions was sufficient evidence for the jury to find harm to reputation). He presented evidence that he has no criminal record of any type, but Lexis's report associated him with a repeat felon from Florida and/or Alabama who was convicted for fraud-related crimes. Tr., RE 47, PageID ## 581, 584, 593-97; Trial Ex. 3, App. ## 016-025.

Smith's prospective employer considered the false report, and thus rejected his employment application for a merchandiser job. Tr., RE 47, PageID ## 591-92, 626; Trial Ex. 5, App. # 031. The employer's customers found out and one of them called Smith his "favorite felon" in front of approximately 20 people. Tr., RE 47, PageID ## 604, 607-08. This type of reputational harm was considered defamation per se at common law, and is clearly harmful to one's good name. This evidence

alone was enough to submit the case to the jury; and this evidence alone could support a verdict of $75,000.

D. The Jury's Punitive Damages Award Was Constitutionally Appropriate

The U.S. Supreme Court has held, there is no mathematical formula or "bright line ratio that a punitive damages award cannot exceed." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). The Court has provided three "guideposts" in assessing punitive damages: (1) the reasonableness of the punitive damages in relation to the reprehensibility of defendant's actions; (2) the disparity between the punitive damages awarded and the compensatory damages awarded (the "ratio"), and (3) the difference between the punitive damages awarded by the jury and civil penalties authorized in comparative cases. *Id.* at 418 (*citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)).[3] Those guideposts, when properly applied to the case at bar, result in the conclusion that the punitive damages verdict was constitutionally appropriate.

[3] It is worth noting that in its history, the High Court has overturned only two punitive damages verdicts because of their size – *Gore* and *State Farm*, *supra*. *See Saunders v. Equifax Info. Servs., LLC*, 469 F. Supp. 2d 343, 349 n.7 (E.D. Va. 2007). Those cases are very different from the case at bar, as discussed below, with punitive damages more than 140 times the compensatory damages awards. Neither the U.S. Supreme Court nor Congress via legislation has ever limited punitive damages under the FCRA.

1. The Punitive Damages Verdict Here Is Reasonably Related To The Reprehensibility Of Defendant's Conduct

As far as fair credit reporting cases are concerned, Lexis's conduct here was highly reprehensible. Lexis has been on notice from multiple federal courts and agency of its unambiguous responsibility under FCRA section 1681e(b) to assure the maximum possible accuracy of records it reports, including the use of maximum available personal identifying information. *See Bryant*, 689 F.2d at 78*; Dalton*, 257 F.3d at 415; *Philbin*, 101 F.3d at 963-66; *Guimond*, 45 F.3d at 1332-34; *Fed. Trade Comm'n v. TRW*, 784 F. Supp. at 362-63. The case law makes clear that there is a "dramatic" difference between mere "accuracy" and "maximum possible accuracy," and that there are "inherent dangers in including any information in a credit report that the credit reporting agency cannot confirm is related to a particular consumer." *Cortez*, 617 F.3d at 709-710.

Lexis has also had warning in the form of at least hundreds of disputes from consumers asserting that it misreported another person's crimes on the consumer's employment background report, and multiple lawsuits by consumers making claims identical to Smith's: that Lexis misattributed a criminal record belonging to a different person on their consumer report sold to a third party, because it failed to use all available personal identifying information. Trial Exs. 10-13, App. ## 046-071; Tr., RE 48, PageID ## 764-69, 868-71.

Lexis's conduct clearly demonstrates that it does not take any of these warnings seriously. Lexis knows that complete public records include additional information such as full middle names and social security numbers, which it regularly obtains from other CRAs like Equifax. Tr., RE 48, PageID ## 747, 759-62. But as a matter of policy and practice, Lexis never requires employers to provide the middle name of consumers who are the subject of a background check, and fails to obtain the complete records of criminal records which contain more identifying information, and never uses social security numbers to search for records in its criminal records databases even though social security numbers are sometimes available. Tr., RE 48, PageID ## 739-42, 754-55, 806-09. Further, Lexis has no special accuracy-assuring procedures for consumers with very common names. *Id.* at 748, 754, 769-70.

Here, in keeping with these policies, Lexis failed to obtain the record from the Florida Department of Law Enforcement containing the true criminal defendant's full name and last four digits of his social security number, which were available on the public record completely different from Plaintiff's. *Id.* at. PageID ## 740-49; Trial Ex. 8, App. ## 037-040. Lexis failed to require Smith's employer to supply his full middle name in order to provide a consumer report, and did not use Smith's social security number to search its database. Tr., RE 48, PageID ## 7490-54, 805-07. Smith's injuries were, in the words of the District Court, "easily preventable,"

yet Lexis did nothing to address these known deficiencies. Order on Rule 50(a), RE 54, PageID # 1035.

Lexis's conduct satisfies the U.S. Supreme Court's "reprehensibility" standard, and the $300,000 punitive damages award is certainly reasonable in that light. If this punishment, miniscule in comparison to the worth of Lexis's parent company, is considered unreasonable in relation to Lexis's reprehensible conduct, then it is difficult to imagine what consumer reporting agency conduct is reprehensible. It would also be scary to imagine, without proper punishment, what false criminal information Lexis would sell about people in order to minimize the costs of its statutory duty to assure the maximum possibly accuracy of its reports.

The circumstances of *State Farm*, a bad faith insurance claim matter stemming from a fatal car accident, led the Court to discuss five factors as to "reprehensibility" (the first guidepost) that are not always a meaningful match to FCRA consumer cases. *See Saunders v. Equifax Info. Servs., LLC*, 469 F. Supp. 2d at 351 (discussing *State Farm* in FCRA punitive damages case, refusing to remit 80:1 ratio of punitive to compensatory damages, and explaining why reprehensibility factors are not a good guide for FCRA cases), *aff'd* 526 F.3d 142 (4th Cir. 2008).[4]

[4] The *State Farm* considerations for reprehensibility were: (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct showed an indifference to or a reckless disregard of the health and/or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct

Specifically, the first two of the *State Farm* reprehensibility factors should be given less weight in consumer actions since FCRA actions will never involve physical injury of the type in *State Farm*. *Id*. *See also Kemp v. American Telephone & Telegraph Co.*, 393 F.3d 1354, 1363 (11th Cir. 2004) (upholding district court's finding that first two factors of *State Farm* reprehensibility analysis did not apply to consumer overcharging case).

Additionally, the final factor can also be discounted since malice is not necessary in FCRA cases to recover punitive damages. *See Saunders*, 469 F. Supp. 2d at 351. *See also Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 294 (5th Cir. 1993); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) ("Malice or evil motive need not be established for a punitive damages award [in FCRA cases], but the violation must have been willful") (citation omitted).

Moreover, the U.S. Supreme Court stated that the reprehensibility considerations are not a mandatory checklist that must be satisfied in full, but that the absence of all five factors renders a punitive damages award "suspect," although

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was an isolated incident or repetitious; and (5) whether the harm resulted from intentional malice, trickery, deceit or a mere accident. *See State Farm*, 538 U.S. at 418.

not necessarily unconstitutional. *State Farm*, 538 U.S. at 418. Nevertheless, the evidence of record clearly satisfies the factors applicable to the case at bar.

First, the harm here was neither purely "economic" nor "physical"; a major part of the harm was reputational and emotional in nature. Second, this was not a case that involved the "health or safety of others." Third, Smith was "financially vulnerable." Smith's testimony and that of his wife made clear that their precarious financial position relied upon Smith's ability to work. Tr., RE 47, PageID ## 657-58, 670. Fourth, Lexis suggests that it did not engage in repeated conduct, but rather asserts that situations like Smith's are isolated incidents of inaccurate information, but this claim is belied by the evidence of prior similar disputes and resulting corrections of record. Trial Exs. 10-13, App. ## 046-071; Tr., RE 48, PageID ## 764-69, 868-71. As discussed above, Lexis's standard practice, affecting thousands of consumer job applicants across the country, is to never require employers to provide a middle name in order to purchase a background check, never use middle name information obtained from Equifax in order to resolve discrepancies in information, never to use social security numbers to search its database of criminal records, and to eschew the complete public records, such as those from the Florida Department of Law Enforcement, in favor of cheaper, incomplete records. In sum, the reprehensibility guidepost is satisfied.

2. The Ratio Here Was Constitutionally Appropriate

The 4:1 ratio between punitive and actual damages awarded by the jury here is constitutionally appropriate. Multiple cases decided after *Gore* have upheld ratios much greater than 4:1. Indeed, the Fourth Circuit upheld a punitive-compensatory damage ratio of 80:1 in a comprehensive and well-reasoned decision in an FCRA case, following defendant's motion for a constitutional reduction, just like Lexis's present motion here. *See Saunders v. Equifax Information Services, LLC*, 526 F.3d 142 (4th Cir. 2008). But that is only one example, out of many:

- 125,000:1 ratio proper. *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008) (affirming punitive damages award of $125,000 accompanying nominal damages of $1);

- 75:1 ratio proper. *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 233-37 (3d Cir. 2005) (upholding punitive damage award of $150,000 in insurer's bad faith case involving property damage where compensatory damages were $2,000).

- 1,500:1 ratio proper. *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 802-803 (8th Cir. 2004) (upholding $6,000,000 arbitration award in FDCPA case of $4,000 in damages).

By contrast, the only two cases where the U.S. Supreme Court overturned punitive damage awards *because of their size* are materially different. *Gore* had a verdict of $4,000 in compensatory damages and $2,000,000 in punitive damages, and *State Farm* had a verdict of $2.6 million in compensatory damages and $145 million in punitive damages. Thus the ratios of punitive to compensatory damages

in both of those cases, which the U.S. Supreme Court found to be offensive, were 500:1 and 145:1, respectively. *See Saunders* 469 F. Supp. 2d at 349 n. 7. Here, the punitive to compensatory damages ratio is on the low end of the single-digit (less than 10:1) ratio that *State Farm* suggests is appropriate.

Lexis's citation to the Sixth Circuit's reduction of the punitive damages award in *Bach* is unavailing. *Bach v. First Union Nat'l Bank*, 486 F.3d 150 (6th Cir. 2005) (*Bach II*). The *Bach* court dealt with a significantly different situation, where the jury originally award $400,000 in compensatory damages and over $2.2 million in punitive damages. Of particular concern to the Sixth Circuit was the fact that the bank's conduct was "blameworthy" but not particularly "reprehensible." *Id.* at 155. Notably, the disputed account at issue had been fraudulently opened by the plaintiff's granddaughter, but the plaintiff had repeatedly refused to file a police report or complete a fraud affidavit. *Bach I*, 149 Fed. App'x at 356-57. The bank's actions were thus based in part upon false information provided by a third party.

By contrast, the jury in this case awarded comparably modest punitive damages of $300,000 in light of Lexis's wide-reaching conduct, which was not based upon any misinformation by Smith or any third party, unlike the bank's conduct in *Bach*. The *Saunders* court aptly explained that a significant reduction is not well suited for cases where the actual damages are not exceedingly high, such as the $75,000 compensatory damages award here, which is less than 20% of the

compensatory damage award in *Bach*. *See Saunders*, 469 F. Supp. 2d at 353-56 (E.D. Va. 2007) (distinguishing *Bach II*). The jury's punitive damages award here was based upon substantial evidence that Lexis's conduct met the second reprehensibility factor, repeated conduct.

Here, Smith's compensatory damages were only $75,000, not hundreds of thousands or millions of dollars, and there was non-economic injury that was difficult to determine. As described above, many other courts have found higher punitive damages ratios are acceptable under a constitutional analysis where the compensatory damages are lower. In a case with only $19,000 in compensatory damages, for example, the U.S. Supreme Court upheld a $2 million punitive damages verdict, a ratio of 105:1. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). A $75,000 punitive damages award (the size that Lexis seems to suggest) would not be "punitive" at all for a company the size of Lexis, with access to the resources of its parent Symphony Technology Group. Given the size of the compensatory damages award here, the reckless and reprehensible nature of Defendant's conduct, the fact that this is a consumer protection case under a remedial statute such as the FCRA, and Lexis's resources, the 4:1 ratio the jury awarded to Smith was appropriate.

E. The District Court Properly Rejected Lexis's Request For A New Trial

1. Standard of Review

A post-trial motion for a new trial pursuant to Fed. R. Civ. P. 59(a) "may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." Fed. R. Civ. P. 59(a)(1). As the U.S. Supreme Court has warned, however, a court can only grant a new trial in order to correct a "wrong" and when it "clearly appears that the jury ha[s] committed a gross error, or ha[s] acted from improper motives, or ha[s] given damages excessive in relation to the person or the injury . . . ." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996).

The denial of a motion for a new trial is reviewed under the abuse of discretion standard. *Decker v. GE Healthcare Inc.*, 770 F.3d 378, 388 (6th Cir. 2014). The district court's decision may only be reversed if the court of appeals reaches "'a definite and firm conviction that the trial court committed a clear error of judgment." *Barnes v. Owens-Corning Fiberglass Corp.*, 201 F.3d 815, 820 (6th Cir. 2000) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)).

2. The District Court's Denial Of Lexis's Request For A New Trial And/Or Remittitur Was Not An Abuse Of Discretion

Lexis's request for a new trial and/or remittitur of the compensatory damages did not meet the standard for granting a new trial at the trial court level, and does not come close to meeting the heightened standard on appeal. No such gross error, miscarriage of justice, or clear error of judgment occurred in the trial of this matter.

The award was supported by sufficient evidence, as discussed in detail above. *See* section II(C), *supra*. Moreover, recent FCRA verdicts for emotional distress alone (not also for lost wages or harm to reputation as in the case at bar) are consistent with the jury's verdict here. *Bach I*, 149 Fed. App'x at 362-63 (upheld jury award of $400,000 in compensatory damages for emotional pain and suffering, humiliation, lost credit opportunities and damage to plaintiff's reputation for creditworthiness, remanded punitive damage award of $2,628,600).[5]

The select cases from the 1980s and 1990s to which Lexis cites are not to the contrary. Decades-old verdicts in other cases provide no basis to overturn the

[5] *See also Sloan v. Equifax Information Services, LLC*, 510 F.3d 495, 504-07 (4th Cir. 2007) (recognizing the stress and worry imparted onto a marriage as a result of inaccurate credit reporting and affirming a joint emotional distress verdict of $245,000, remitted to $150,000); *Boris v. Choicepoint Servs., Inc.*, 249 F. Supp. 2d 851, 864-65 (W.D. Ky. 2003) ($100,000 in actual damages and $250,000 in punitive damages was held as appropriate under the FCRA); *see Cortez*, 617 F.3d at 720 ("A survey of the other, more recent FCRA cases of emotional distress awards suggests that approved awards more typically range between $20,000 and $75,000" for emotional distress alone).

District Court's decision not disturb this jury's determination. The jury's actual damages award was supported by the evidence in this case, and in line with more recent FCRA verdicts. The mathematical, week-by-week calculations Lexis offers are irrelevant and unpersuasive. Unliquidated actual damages such as those stemming from emotional distress and harm to reputation are not subject to determination by a fixed formula and are properly left to the jury. *Weaver v. Caldwell Tanks, Inc.*, 190 Fed. App'x 404, 414 (6th Cir. 2006); *see also Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 906 (6th Cir. 2004) ("Endeavoring to compare awards is difficult and often unfruitful, because the factual circumstances of each case differ so widely and because it places reviewing courts in the position of making awkward assessments of pain and suffering better left to a jury.").

The District Court was well within its discretion to deny Lexis's motion, and its ruling must be upheld.

III. The Jury's $300,000 Punitive Damages Verdict Did Not Offend The U.S. Constitution, And The District Court Erred In Reducing It

The jury's $300,000 punitive damages verdict here was not unconstitutionally excessive. A *de novo* review should lead to a reinstatement of the jury's verdict.[6]

[6] A district court's decision on the constitutionality of a jury's punitive damages award is reviewed *de novo*. *Bach II*, 486 F.3d at 153 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 436 (2001)).

The trial court found that a "2:1 ratio" of punitive to compensatory damages was "the outer bounds of what is constitutionally permissible in this case." Order Rule 50(b), RE 70, PageID # 1422. It stated that it was following this Circuit's decision in *Bach II*, 486 F.3d at 156-57. *Id.* at PageID # 1422-23. The trial court concluded that a reduction of punitive damages was appropriate in a case where reprehensibility is "low" and compensatory damages are "substantial." *Id.* at PageID # 1422.

This conclusion was in error. Lexis's reprehensibility here is not low. Moreover, the $75,000 compensatory damages award is not substantial. As a result, the jury's verdict here is constitutionally sound. *See State Farm*, 538 U.S. at 425 ("a punitive damages award four times greater than compensatory damages" – the jury's ratio here – "might be close to the line of constitutional impropriety.").

A. Lexis's Reprehensibility Here Was Not Low

The trial court considered the *State Farm* factors and found that only one reprehensibility factor existed in this case – the target of the conduct was financially vulnerable. Order on Rule 50(b), RE 70, PageID # 1419. It is true that Smith was financially vulnerable: even before Smith lost his job as a result of Lexis's inaccurate reporting, the Smith family was living on approximately $4,000 per month, which was barely enough to pay their bills. Tr., RE 47, PageID ## 657-58, 670.

A second *State Farm* factor, however, is also satisfied here – "whether the conduct involved repeated actions or was merely the result of an isolated instance." *Bach I*, 149 Fed. App'x at 365. The trial court misapplied this factor because it assumed that Smith had to show the exact same error committed a "widespread scale." Order on Rule 50(b), RE 70, PageID # 1420. The applicable standard does not require evidence that actions occurred on a "widespread scale" but only evidence of "repeated actions" as opposed to conduct which "was merely the result of an isolated instance." *Bach I*, 149 Fed. App'x at 365 (citing *State Farm*).

What happened to Smith was no isolated instance, and there was sufficient evidence of repeat actions. Smith presented evidence that Lexis repeatedly treated other consumers in the same way as Smith, by uniformly failing to require its employer-customers to provide middle names, never using the middles names already available from other sources, and always matching criminal records to consumers using *only* first name, last name and date of birth. *Id.* at PageID ## 740-49, 753-55, 769-70, 807-09. Given these uniform, consistently repeated procedures, Lexis inevitably misreported records about other consumers as well. Indeed, Smith presented evidence that in a substantial number of cases (nearly eight hundred in only four states), Lexis's own records showed that Lexis *agreed* with the disputing consumer's allegation that criminal record information appearing on the consumer's report was misattributed, *and removed the disputed information*. Trial Exs. 10-13,

App. ## 046-071. Each of these cases is not merely a dispute, which may or may not be meritorious. These cases represent an admission by Lexis that its reporting was inaccurate and *had to be corrected* hundreds of times because it misattributed criminal records on a disputing consumer's report.[7]

Moreover, the evaluation of reprehensibility for purposes of reviewing punitive damage awards is not restricted to a formulaic application of the five factors enumerated in *Gore* and *State Farm*. This Circuit has found that those factors are "important," *Bach I*, 149 Fed. App'x at 364, but they are not exclusive. The Supreme Court has never held that no other factor may be considered in assessing reprehensibility, and, indeed, has said that reprehensibility is a "guidepost," not an exclusive test. Indeed, the Court in *Gore* characterized the first guidepost as "circumstances ordinarily associated with" reprehensible behavior. 517 U.S. at 580.

Other Circuit Courts considering FCRA punitive damages awards have assessed reprehensibility less formulaically within the context of those cases. *See Cortez*, 617 F.3d at 723 (reprehensibility exists where CRA ignored the "overwhelming likelihood of liability" and failed to take "the utmost care in ensuring the information's accuracy – at the very least, comparing birth dates when they are

[7] For purposes of FCRA section 1681e(b), the category of missing personal information that caused Lexis to misattribute the information is irrelevant, in light of the plain "maximum possible accuracy" language of the statute and the longstanding administrative admonishment to use maximum personal identifying information in matching. *Fed. Trade Comm'n v. TRW*, 784 F. Supp. at 362-63.

available. . .") (citing and partially quoting *State Farm*, 538 U.S. at 419); *Saunders*, 526 F.3d at 153 (reprehensibility exists even if conduct is "not extraordinarily blameworthy" and even "a single factor" under *State Farm* "can provide justification for a substantial award of punitive damages.") (citing *Bach II*, 486 F.3d at 154, 157 and $400,000 award as substantial).

In this context, this Court may find that Lexis's reprehensibility in the case at bar is higher than that of the defendant in *Bach*. In *Bach*, the bank defendant was a victim of credit fraud apparently at the hands of the plaintiff's granddaughter. *Bach I*, 149 Fed. App'x at 356-57. The plaintiff refused to press charges or to complete a fraud affidavit. *Id.* The bank lost over $25,000 in one credit account, and reported that obligation as the grandmother's. *Id.*

By contrast, Smith here did not refuse to assist Lexis is correcting the problem. And Lexis did not lose anything and was not defrauded by any member of Smith family or by any third party. Lexis simply made a decision to cut certain corners in its data gathering and data matching procedures that made it easier for it to sell reports quickly to its clients. It made decisions that sacrificed accuracy for cost-savings, not merely with respect to reporting credit obligations, but in reporting highly offensive criminal history of job applicants to their potential employers.

Lexis's conduct here, when viewed in this context, is far more reprehensible than the bank's conduct in *Bach*. Lexis traffics in the reputations of ordinary people,

and it simply ignored the "overwhelming likelihood of liability," *State Farm*, 538 U.S. at 419, when it matched criminal records to Smith's background report by using only a very common first and last name and a date of birth.

The District Court therefore erred in concluding that Lexis's reprehensibility was low and reducing the jury's punitive damages award on that basis.

B. The $75,000 Compensatory Damages Award Is Not Substantial For Punitive Damages Purposes

The trial court also erred in assuming that the $75,000 in compensatory damages here was substantial in the same way as, for example, the $400,000 in compensatory damages in *Bach*. The other Sixth Circuit cases cited by the trial court also had much larger compensatory damages awards. Order on Rule 50(b), RE 70, PageID # 1422 (citing *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 489 (6th Cir. 2007) ($366,939 in compensatory damages) and *Clark v. Chrysler Corp.*, 436 F.3d 594, 606-09 (6th Cir. 2006) ($235,629 in compensatory damages)). Where the line is drawn between *substantial* and *insubstantial* is not apparent. But if punitive damages are to serve their intended purpose, the line must be closer to these other cases cited by the trial court than to the case at bar.

In each of these other cases (*Bach*, *Bridgeport Music* and *Clark v. Chrysler Corp.*), the reduced punitive damages were higher than what the jury here actually awarded in punitive damages. And the "substantial" actual damages awards cited

by the trial court in its opinion ($235,629; $366,939; $400,000) were themselves all much greater than the $150,000 punitive damages award that it approved.

Other circuit courts which have reduced punitive damages awards because the compensatory damages were high typically did so in case involving compensatory damages in the range of $300,000 to $4 million. *See Jurinko v. Medical Protective Co.*, 305 Fed. App'x 13, 28 (3d Cir. 2008) (noting that $1.6 million in compensatory damages is substantial, and collecting cases indicating that compensatory damages of $366,939, $600,000, $1.65 million, $2.3 million, $3.2 million, and over $4 million were sufficiently high to merit reduction in punitive damages); *Boerner v. Brown & Williamson Tobacco Co.* 394 F.3d 594, 603 (8th Cir. 2005) ($4 million compensatory damages award was substantial; contrasting case of $500,000 compensatory damages with another case where compensatory award was "'only $70,000'") (quoting *Morse v. Southern Union Co*., 174 F.3d 917, 925–26 (8th Cir. 1999)); *Turley v. ISG Lackawanna, Inc*., 774 F.3d 140, 165-66 (2d Cir. 2014) ($1.32 million in compensatory damages was substantial).

This Court should reinstate the jury's punitive damages verdict in this case and find that $75,000 in compensatory damages is not so substantial as to require a constitutional reduction of a $300,000 punitive damages award.

CONCLUSION

Lexis's appeal should be rejected in its entirety, and the jury's findings of liability, negligence, and willfulness upheld, as well as its award of compensatory damages. The District Court's denial of Lexis's request for a new trial should likewise be upheld.

The only portion of the District Court's judgment which should be disturbed on appeal is its reduction of the jury's reasonable and constitutionally permissible $300,000 punitive damages award.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,240 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/ John Soumilas
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Dated: February 22, 2016

CERTIFICATE OF SERVICE

I, certify that on February 22, 2016, I electronically filed the foregoing Second Brief of Plaintiff-Appellee/Cross-Appellant David Alan Smith with the Clerk of Court 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 for the purposes of this brief:

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