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

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

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SUPPLEMENTAL STATEMENT OF JURISDICTION

Defendant-Appellant/Cross-Appellee LexisNexis Screening Solutions, Inc. ("LexisNexis") agrees with Plaintiff-Appellee/Cross-Appellant David Alan Smith's ("Smith") that this Court has jurisdiction to address LexisNexis' Appeal and Smith's Cross-Appeal, and incorporates by reference the Statement of Jurisdiction set forth in LexisNexis' First Brief.

Based on District Court proceedings subsequent to the filing of LexisNexis' First Brief, LexisNexis supplements the Statement of Jurisdiction in its First Brief as follows: On January 21, 2016, the District Court entered a Final Order Regarding Attorney Fees and Costs. (Final Order, RE 79, PageID ##1558-1563). On February 19, 2016, the District Court entered an Order of Judgment in favor of Smith "in the amount of $75,000, for damages related to a negligent violation of 15 U.S.C. [§] 1681e(b)"; "in the amount of $150,000, for punitive damages related to a willful violation of 15 U.S.C. [§] 1681e(b)"; and "in the amount of $161,994.87, for attorney fees and costs pursuant to 15 U.S.C. [§] 1681n and 15 U.S.C. [§] 1681o." (Order of Judgment, RE 80, PageID ## 1564-1565).

STATEMENT OF ISSUES

1. With respect to LexisNexis' Appeal, LexisNexis incorporates by reference the Statement of Issues in its First Brief.

2. With respect to Smith's Cross-Appeal, whether the District Court properly granted in part LexisNexis' motion for a new trial and/or remittitur, finding that the jury's punitive damages award of $300,000 was excessive and ordering that the punitive damages award be reduced.

STATEMENT OF THE CASE

LexisNexis incorporates the Statement of the Case in its First Brief.

ARGUMENT

Section 1681e(b) of the Fair Credit Reporting Act ("FCRA") leaves much unanswered, in large part due to the absence of any definition for the terms "reasonable procedures" and "maximum possible accuracy." Attempting to fill some of this vacuum, courts have held — uniformly — that § 1681e(b) is not a strict liability statute.[1] *See, e.g.*, *Nelski v. Trans Union, LLC*, 86 F. App'x 840, 844 (6th Cir. 2004) ("Although a showing of inaccuracy is an essential element of a claim under § 1681e(b), the FCRA does not impose strict liability for incorrect information appearing on an agency's credit reports."); *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 971 (7th Cir. 2004) ("FCRA is not a strict liability statute."); *Dalton v. Capital Ass'n. Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001) ("FCRA does not impose strict liability on [CRAs] for inaccuracies in reporting."). Courts also have held that § 1681e(b) does not require a consumer reporting agency ("CRA") to examine a report for anomalous information and, if such information is found, to conduct an investigation. *Sarver*, 390 F.3d at 972 (a requirement "that each computer-generated report be examined for anomalous information and, if it is found, an investigation be launched," would *not* "be

[1] Despite courts uniformly holding that the FCRA is not a strict liability statute, the Amicus Brief submitted by the Electronic Privacy Information Center (EPIC) expressly argues that "[CRAs] should be strictly liable" for "inaccurate or erroneous consumer reports." (EPIC Amicus Br. 15-20). Such an argument is not supported by the FCRA generally, and § 1681e(b) specifically, and has been rejected by courts.

reasonable given the enormous volume of information [a CRA] processes daily"). Smith's arguments conflict with these governing legal principles and place all CRAs in peril for liability for any conceivable or remotely possible error in a criminal record or credit history report.

The critical uncontroverted trial evidence in this case is that: (a) LexisNexis provided criminal record information for "David Smith" with a specific birth date, as requested by its customer[2]; and (b) LexisNexis had no prior case where an inaccurate criminal report was caused by a middle name not being required in the information provided by a customer.

Smith's arguments are a *post hoc* explanation of how LexisNexis could have avoided David Oscar Smith's criminal record appearing on the report. However, the reasonableness of a CRA's procedures must be determined at the time the report is prepared, not through the benefit of hindsight. Further, Smith's arguments that: (a) the CRA must search, electronically and physically, all criminal record sources, and (b) undertake an investigation of any anomalous information that a search produces, will make criminal and credit record reports cost-prohibitive. Smith's arguments equate to a strict liability interpretation and

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[2] Great Lakes contracted with LexisNexis to provide a criminal background report and asked that LexisNexis provide criminal records for "David Smith" with a date of birth of March 12, 1965, and a Social Security number (court records, however, did not include Social Security number). The report that LexisNexis provided to Great Lakes contained information precisely including those name and date of birth identifiers.

application of § 1681e(b) because they eliminate the element of reasonableness. Indeed, that Smith is arguing for strict liability is confirmed by his statement that what "caused [LexisNexis] to misattribute the information is irrelevant." (Second Br. 46 n.7).

LexisNexis followed reasonable procedures to assure maximum possible accuracy. For that reason, the verdict and the District Court's conclusion that the verdict was supported by sufficient evidence are wrong as a matter of law.

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

Smith incorrectly argues that "the reasonableness of a company's procedures presents factual questions not suitable for judgment as a matter of law." (Second Br. 13). To the contrary — and as one of the cases Smith cites makes clear — where the record evidence establishes that the reasonableness of the procedures is beyond question, it should be decided as a matter of law. *Sarver*, 390 F.3d at 971 (holding "as a matter of law [that] there is nothing in this record to show that [the CRA's] procedures are unreasonable"). Because Smith failed to meet his burden of proving that LexisNexis negligently or willfully failed to follow reasonable procedures, judgment as a matter of law is appropriate.

A. Smith's Arguments Are Based On Overstatements And/Or Misstatements Of The Trial Evidence

The uncontroverted trial evidence in this case establishes that:

(1) LexisNexis knew of its obligations under the FCRA (Tr., RE 48, PageID # 736);

(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 0.2% for all criminal background reports, meaning that 99.8% of LexisNexis' criminal background reports never were even disputed[3] (Tr., RE 48, PageID ## 856-57; Tr., RE 49, PageID # 921).

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[3] Smith's statement that LexisNexis "admitted at trial" that the 0.2% dispute rate "does not demonstrate that [LexisNexis] has a high accuracy rate" (Second Br. 17) is an overstatement unsupported by the trial evidence. The testimony Smith cites (Tr., RE 48, PageID # 871) is:

Q. But the lack of dispute simply doesn't tell us whether someone knew or didn't know how to dispute, we just know that there was a lack of dispute?
A. That would be fair, yes.
. . .

(First Br. 25-26).

Significantly, there is *no trial 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. (First Br. 26, 32). Indeed, Smith has not — and cannot — identify a prior instance of a problem *caused by* a failure to require a middle name or by not performing a comparative analysis between credit information and criminal record information.

Instead, Smith claims that LexisNexis' "assertion . . . is disingenuous and contradicted by the trial record." (Second Br. 18). Smith repeatedly — and wrongly — argues that he "presented evidence" that LexisNexis had "substantial" and "robust notice" of the "exact inaccuracy at issue in this case" — *i.e.*, an inaccuracy "stemming from failure to use all available personal identifying information." (Second Br. 8, 17-18, 20, 33, 45-46). In doing so, Smith comingles unrelated statistics and generally misstates the trial evidence. Accordingly, his repeated unsupported argument that LexisNexis had "notice" of the "exact inaccuracy at issue in this case" is wrong.

For example, Smith argues that "the 20,000 disputes per year that [LexisNexis] stipulated to . . . show that [LexisNexis] is on notice that its reports

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> [B]ut I'd like to think that if we produced the report on a consumer that contained inaccurate information, they would make us aware of that.

contain inaccuracies stemming from failure to use all available personal identifying information to match consumers to information on a consumer report." (Second Br. 17-18). Contrary to Smith's assertion, the actual trial evidence is:

- In 2012 — the year LexisNexis prepared Smith's criminal background report — LexisNexis sold approximately 10 million criminal background reports and had a dispute rate of only 0.2%, meaning that in 2012, there would have been approximately 20,000 disputes. (Tr., RE 48, PageID ## 731-732, 856-857; Tr., RE 49, PageID # 921).
- The 20,000 disputes cover *any and all* possible reasons that a consumer may dispute a criminal background report (*e.g.* that a criminal record was reported as a felony when it was actually a misdemeanor or that a criminal record should not have been included because it occurred beyond the reportable time allowed under state law) and are *not* limited to disputes alleging that another person's criminal record (with the same first name, last name, and date of birth) was placed on the consumer's report. (Tr., RE 48, PageID ## 856).
- The fact that a criminal background report is disputed *does not* mean that the dispute was meritorious or that there was anything inaccurate in the report. (Tr., RE 48, PageID # 857).

Likewise, Smith asks the Court to conclude that LexisNexis' procedures were unreasonable because there were "nearly eight hundred [disputes] in only four states" in which LexisNexis responded by removing a criminal record from a criminal background report. (Second Br. 45-46). Smith claims that "[e]ach of these cases is not merely a dispute, which may or may not be meritorious" but that "[t]hese cases represent an admission by [LexisNexis] that its reporting was inaccurate and *had to be corrected* hundreds of times because it misattributed

criminal records on a disputing consumer's report." (Second Br. 45-46). Contrary to Smith's assertion, the actual trial evidence is:

- During an approximate five-year period from 2009 to 2014, LexisNexis prepared approximately 24 million criminal background reports nationally. (Tr., RE 48, PageID ## 764-769, 797-798; Trial Exs. 10-13, App. ## 046-071).
- During that time period, there were approximately 768 "mixed file" disputes, meaning a consumer claimed that LexisNexis created a report that contained a criminal record which pertained to another person, in Michigan, Virginia, Georgia, and Texas, where LexisNexis responded by removing the record from the report. (Tr., RE 48, PageID ## 764-769; Trial Exs. 10-13, App. ## 046-071).
- Extrapolating these numbers nationwide for the same five-year time period means that there would have been approximately 9,600 "mixed file" disputes where LexisNexis responded by removing the record from the criminal background report, or 0.04% of the 24 million reports prepared.
- The fact that a criminal background report is disputed *does not* mean that the dispute was meritorious or that there was anything inaccurate in the report. (Tr., RE 48, PageID # 857). There is no trial evidence *why* LexisNexis responded by removing the record in the 768 "mixed file" disputes and there is no evidence that LexisNexis removed the record because of some inaccuracy. (Tr., RE 48, PageID ## 798-799). For example, if LexisNexis is unable to reach a conclusion as to the accuracy of the disputed criminal record within 30 days of the dispute, LexisNexis is required under the FCRA to remove the criminal record. (Tr., RE 48, PageID ## 800-802).
- There is no trial evidence that any of these "mixed file" disputes were caused by LexisNexis' procedure of requesting, but not requiring, a middle name, or by LexisNexis not performing a comparative analysis between credit information and criminal record information within the criminal background report.

Smith's misstatement of the trial evidence is not limited to his claim that LexisNexis had "notice" of the alleged unreasonable procedures in this case. In

addition, Smith argues that LexisNexis' procedures were unreasonable because "it is [LexisNexis'] practice never to use social security numbers to search its [national criminal database]" "even though social security numbers are sometimes linked with particular crimes housed in that database" and that LexisNexis "did not use Smith's . . . social security number" in this case. (Second Br. 4, 15, 34, 37, 45). Contrary to Smith's assertion, the actual trial evidence is:

- LexisNexis does not require a Social Security number to run a criminal background check by searching its national criminal database because Social Security numbers rarely are included in criminal records; however, LexisNexis does request that the employer provide a Social Security number. (Tr., RE 48, PageID ## 774, 815-16).
- If the employer provides a Social Security number, LexisNexis "will certainly use" the Social Security number in "the search against the [national criminal] database." (Tr., RE 48, PageID ## 815-816).
- LexisNexis *did* use Smith's Social Security number when searching the national criminal database, but because 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, LexisNexis could not exclude the criminal records as a match based on Smith's Social Security number. (Tr., RE 48, Page ID ## 746, 780-81, 789).

Smith claims that LexisNexis' procedures were unreasonable because LexisNexis "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" and that LexisNexis "never obtains these full records." (Second Br. 3, 6, 14, 17). Contrary to Smith's assertion, the actual trial evidence is:

- The record from the Florida Department of Law Enforcement is not a "public record"; rather, the Florida Department of Law Enforcement is a secondary source, a "repository of criminal history information." Florida Department of Law Enforcement, Criminal History Information, https://web.fdle.state.fl.us/search/app/default?0 (last visited March 28, 2016).

- The criminal history search information from the Florida Department of Law Enforcement that Smith claims is the "best public record" specifically states that it "does not warrant that these records are comprehensive or accurate, only that this record contains all information on the subject that the Department has received." (Trial Ex. 8, App. # 039).

- Contrary to Smith's assertion, the "best public record" of a crime is the primary source — the court itself — here, the Bay County, Florida Circuit and County Courts, which LexisNexis used in preparing Smith's criminal background report.

- Counsel for Smith requested that the Florida Department of Law Enforcement run a criminal history search on David Oscar Lee Smith on or about March 18, 2014 — more than 15 months after LexisNexis prepared Smith's criminal background report. (Tr., RE 48, PageID ## 782-783; Trial Ex. 8, App. ## 037-040). There is no trial evidence as to what information may have been included in a criminal history search for David Smith born on March 12, 1965 — the search Great Lakes asked LexisNexis to perform — if conducted on or about December 12, 2012. (Tr., RE 48, PageID ## 783-84).

- LexisNexis *does* search the Florida Department of Law Enforcement for criminal records "hundreds of times each day" when "that particular search type or product is part of the package requested from a customer."[4] (Tr., RE 48, PageID # 785).

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[4] As detailed in LexisNexis' First Brief (First Br. 6-10), LexisNexis can create a criminal background report in one of two ways — by county or by database — depending on the particular product or package purchased by the customer (*i.e.*, the employer). (Tr., RE 48, PageID ## 742, 844-47). If the employer purchases a criminal background report by database — as Great Lakes did here — LexisNexis searches its national database, which contains criminal records LexisNexis has collected by purchasing bulk data files

Thus, unless Smith is arguing that LexisNexis' use of the national database to prepare a criminal background report is *itself* unreasonable — *i.e.* strict liability any time a CRA prepares a criminal background report by searching a national database based on raw criminal data (rather than preparing a criminal background report by county) and the report contains an inaccuracy — Smith's repeated claim that LexisNexis' procedures were unreasonable because it failed to obtain information from the Florida Department of Law Enforcement is truly a red herring.

Viewing the actual trial evidence — rather than Smith's overstatements and misstatements of the trial evidence — in a light most favorable to Smith, such evidence does not support the jury's verdict that LexisNexis failed to follow reasonable procedures.

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containing raw criminal data from court systems and various government agencies, for matches between the identifiers LexisNexis has received from the employer with the information appearing in the criminal records. (Tr., RE 48, PageID ## 739-41, 777, 847). Criminal history information from the Florida Department of Law Enforcement does not appear in LexisNexis' national database because the Florida Department of Law Enforcement does not make raw criminal data available to CRAs like LexisNexis to purchase. (Tr., RE 48, PageID # 782). If, however, Great Lakes had specifically requested a criminal background report by county to include Bay County, Florida, LexisNexis would have searched the Florida Department of Law Enforcement records. (Tr., RE 48, PageID # 785). Requiring a CRA to search all criminal record sources every time it prepares a criminal background report — as argued by Smith — would be cost-prohibitive and unreasonable.

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

Under the United States Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, a willful violation of the FCRA occurs only where a CRA acts with "reckless disregard," which means, under an "objective standard," the CRA's actions carry "an unjustifiably high risk of harm that is either known or so obvious that it should be known." 551 U.S. 47, 60, 68-69 (2007). As LexisNexis established in its First Brief, there is no evidence of reckless disregard by LexisNexis. Indeed, there is *no trial evidence* that LexisNexis' procedure of requesting, but not requiring, a middle name or that not performing a comparative analysis between credit information and criminal record information *ever* resulted in an inaccurate criminal background report prior to Smith's report. Moreover, once LexisNexis was made aware of the potentially inaccurate information in Smith's report, it promptly investigated based on the new information it received from Smith, corrected the error, and issued a revised report. Accordingly, there is no legally defensible basis for a jury to conclude that LexisNexis' actions carried "an unjustifiably high risk of harm that is either known or so obvious that it should be known," and judgment as a matter of law is appropriate. *Id.*

Smith cites no decision finding a willful violation of the FCRA under similar circumstances. Nor does he address the decisions cited in LexisNexis' First Brief

holding no willful violation as a matter of law under circumstances similar to those in this case.[5] (First Br. 27-28, citing cases).

Instead, Smith argues that there is "sufficient evidence of a willful violation" based on LexisNexis' "intentionally-adopted practice of not requiring employers to provide consumers' middle name" and because LexisNexis "had clear evidence of a discrepancy between the Florida convictions it reported and . . . the middle name information it obtained from Equifax." (Second Br. 25-26). Smith's arguments are belied by the trial evidence and apposite case law.

First, there is no trial 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. That fact alone means "no reasonable jury could conclude that [LexisNexis] acted willfully in violating § 1681e(b)." *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); *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

[5] Smith's argument that "willfulness is ill-suited to be determined as a matter of law" (Second Br. 24) ignores the decisions — many cited by LexisNexis in its First Brief — deciding the issue of FCRA willfulness as a matter of law. (First Br. 27-28, citing cases).

evidence of willful noncompliance with § 1681e(b)" because "one instance . . . falls short of evidence of a willful violation").

Second, as to Smith's argument that LexisNexis willfully failed to follow reasonable procedures because it did not investigate and resolve the "discrepancy between the Florida convictions it reported and . . . the middle name information it obtained from Equifax," no court has required a CRA to engage in such internal investigation and analysis. To the contrary, courts have rejected Smith's 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) ("Such 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.). Thus, Smith did not meet his burden of proving that LexisNexis willfully violated the FCRA.

C. Smith Did Not Meet His Burden Of Proving That LexisNexis' Negligently Failed To Follow Reasonable Procedures

Smith does not — and cannot — dispute that the FCRA is not a strict liability statute. Indeed, the FCRA specifically contemplates that mistakes will occur, especially given the "complexity" and "volume of information involved." *Sarver*, 390 F.3d at 972. And contrary to Smith's position, just because a mistake occurs in a criminal background report, it does not follow that the procedures used by the CRA necessarily were unreasonable — that would be strict liability. *See id.* (recognizing that "a mistake does not render the procedures unreasonable").

Similarly, Smith's *post hoc* explanation of how LexisNexis could have prevented David Oscar Smith's criminal record from appearing on David Smith's report does not mean LexisNexis' procedures were unreasonable. Rather, § 1681e(b) requires LexisNexis to exercise "reasonable care," which "is determined by reference to what a reasonably prudent person would do under the circumstances." *Nelski*, 86 F. App'x at 844. Because Smith did not present sufficient evidence to prove LexisNexis negligently failed to follow reasonable procedures, judgment as a matter of law is appropriate.

Smith does not counter the trial evidence establishing that the procedures LexisNexis used in matching and reporting the criminal history records in Smith's report met or exceeded industry standards — *i.e.*, what other reasonably prudent CRAs do under these circumstances. (First Br. 31); *Nelski*, 86 F. App'x at 846

(finding evidence that procedures meet industry standards to be relevant in determining whether procedures are reasonable). Instead, Smith sweepingly argues that LexisNexis' procedures were unreasonable because LexisNexis "and the rest of the consumer reporting industry have been on notice about the problem of 'mixing' one consumer's information with that of another (usually a person with some similar identifying information)," citing consent orders entered in the 1990s. (Second Br. 18). Significantly, each consent order Smith cites was for settlement purposes only — there was no judgment, finding, or admission of liability. [6] Moreover, Smith's argument equals a strict liability interpretation of § 1681e(b) —

[6] The EPIC Amicus Brief refers to several anecdotal sources that did not result in a judgment, finding, or admission of liability, and that do not support the conclusion that LexisNexis negligently or willfully failed to follow reasonable procedures in this case. (EPIC Amicus Br. 10-12). For example, the Amicus Brief repeatedly cites to an article from the National Consumer Law Center titled "Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses ("Broken Records"), which, in turn, cites to "The Case of Catherine Taylor, Arkansas: Mismatched Report." (EPIC Amicus Br. 6, 8-10). However, the docket for *Catherine Taylor v. Equifax Information Services LLC*, Case No. 4:06-cv-00496-GTE in the Eastern District of Arkansas, shows that the case was dismissed based on a notice of settlement/resolution — there was no judgment, finding, or admission of liability, meaning the cited information is based on the plaintiff's *allegations* in the case. Similarly, the Amicus Brief relies on *Smith v. E-Backgroundchecks.com, Inc.*, 81 F. Supp. 3d 1342 (N.D. Ga. 2015) as "another similar case [where] a company furnished a report to an employer that contained significant mismatch errors" (EPIC Amicus Br. 12), but EPIC fails to inform that a jury in *Smith* issued a verdict finding no § 1681e(b) violation because the CRA *did not* negligently or willfully fail to follow reasonable procedures to assure the maximum possible accuracy of the information on the report. *Smith v. E-Backgroundchecks.com, Inc.*, No. 1:13-cv-02658 (N.D. Ga. June 9, 2015), ECF No. 85.

i.e., because all CRAs are "on notice about the problem of 'mixing' one consumer's information with that of another," if any "mixing" occurs in a criminal background report, it necessarily means that the procedures used by the CRA were unreasonable, regardless of the actual cause of the mixed information. That is not the law.

Further, Smith's argument that the procedures LexisNexis used in matching and reporting the criminal record on Smith's report were unreasonable based on a consent order entered October 29, 2015 — nearly three years *after* LexisNexis prepared Smith's report — reflects the same type of *post hoc* analysis that permeates Smith's Second Brief. The reasonableness of a CRA's procedures must be determined at the time the report is prepared, not after years of subsequent experience and the benefit of hindsight. It remains uncontroverted that at the time LexisNexis prepared Smith's report, there was no evidence that its procedure of requesting, but not requiring, a middle name had ever resulted in an inaccurate criminal report.

Smith argues that LexisNexis was negligent because it did not use the information it received from Equifax — identifying Smith as "Dave A. Smith" — to investigate before including the criminal record information for "David Oscar Smith" in the report it provided to Great Lakes. (Second Br. 15). In other words, Smith claims negligence because LexisNexis was obligated to perform an

investigation into and analysis of credit information and criminal record information. The Seventh Circuit has rejected this very argument, holding that a requirement "that each computer-generated report be examined for anomalous information and, if it is found, an investigation be launched," is *not* reasonable. *Sarver*, 390 F.3d at 972. In addition, the trial evidence establishes that LexisNexis' policy of relying only on information it receives directly from the customer or the consumer in preparing criminal background reports makes good sense because many Equifax reports contain multiple names, meaning discrepancies are common, and a requirement that LexisNexis investigate each one would be unreasonable. (Tr., RE 48, PageID ## 761, 787-88).

Moreover, Smith's argument places a CRA like LexisNexis in an impossible position. A CRA is in the business of reporting information that exists in various information databases *based on the identifiers it receives from its customers*. Here, Great Lakes requested that LexisNexis provide criminal records for "David Smith" with a date of birth of March 12, 1965, and a Social Security number (however, court records did not include Social Security number). That is precisely what LexisNexis provided. Yet Smith suggests that LexisNexis should second-guess the information provided by customers and conduct analyses and investigations on information responsive to the customer's request before providing the customer with the criminal background report. Smith's argument is cost-prohibitive because

it would "require [CRAs] to engage in background research which would substantially increase the cost of their services" and "[i]n turn, they would be forced to pass on the increased costs to their customers and ultimately to the individual customer." *Sarver*, 390 F.3d at 972 (quoting *Henson*, 29 F.3d at 285) (rejecting similar argument and stating that "[t]he increased cost to [the CRA] to examine each [report] individually would be enormous").

Smith argues that LexisNexis negligently failed to follow reasonable procedures because it did "not maintain any different procedures for assembling background reports on consumers with common names." (Second Br. 15). Smith does not cite any case — because there is none — holding that a CRA's procedures were *per se* unreasonable because it did not have separate, additional procedures for addressing common names, and there is also no trial evidence that any other CRA maintains different procedures for running a criminal background report on an individual with a "common name." The uncontroverted trial evidence is that LexisNexis uses all of the information provided by employers to run criminal background reports[7] and 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,

[7] Smith's claim that "LexisNexis never uses social security numbers to search its national database of criminal records" is contradicted by the trial evidence. (Tr., RE 48, PageID ## 815-816) (LexisNexis "will certainly use" the Social Security number if provided by the employer "to search against the [national criminal] database.").

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, 815). LexisNexis' procedures are not only designed to assure maximum possible accuracy, they demonstrably result in overwhelmingly accurate reports: only 2 in 1,000 consumers (0.2%) contended that LexisNexis made an error of some type on their criminal background reports. (Tr., RE 48, PageID ## 856-57; Tr., RE 49, PageID # 921). In fact, out of the more than 125,000 individuals in the United States with the name "David Smith," LexisNexis' search of its national criminal database identified only one David Smith born on March 12, 1965, with a criminal record. (Tr., RE 47, PageID ## 578, 613-14). This vividly demonstrates the accuracy quality of using date of birth rather than a middle name or initial. That Smith's criminal background report included a criminal record for a David Smith born on March 12, 1965, that was not Smith does not mean that LexisNexis' procedures were unreasonable. *See Sarver*, 390 F.3d at 972 (recognizing that "a mistake does not render the procedures unreasonable"). Accordingly, judgment as a matter of law is appropriate.

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

"The FCRA does not presume damages; instead, [Smith] must affirmatively prove that [he] is entitled to damages." *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (finding, as a matter of law, that

plaintiff failed to present sufficient evidence of actual damages). Here, the jury awarded Smith $75,000 in compensatory damages, which includes $2,640 in lost wages and $72,360 for emotional distress/harm to reputation. Judgment as a matter of law is appropriate because Smith did not present evidence sufficient to support such an award for his purported emotional distress/harm to reputation.

1. Smith Did Not Present Sufficient Evidence Of Emotional Distress

Under certain circumstances, "[a]n injured person's testimony alone may suffice to establish damages for emotional distress." *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 361 (6th Cir. 2005) ("*Bach I*"). But because emotional distress is easy to manufacture and "is easily susceptible to fictitious and trivial claims," *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 503 (4th Cir. 2007), if testimony is the only evidence of emotional distress, the plaintiff must "reasonably and sufficiently explain[] the circumstances surrounding" his emotional distress and may "not rely on mere conclusory statements" regarding the alleged emotional distress. *Bach I*, 149 F. App'x at 361.

As LexisNexis demonstrated in its First Brief, Smith has not met the "high threshold for proof of damages for emotional distress" under the FCRA because the evidence Smith presented for emotional distress is nothing more than conclusory statements. (First Br. 34-36, citing cases). In response, Smith argues — again in conclusory fashion — that he and his wife's testimony was "detailed

and uncontradicted" and "is more than legally sufficient to established[*sic*] emotional distress damages."[8] (Second Br. 27). In support of his argument, Smith cites *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010). Rather than help Smith, *Cortez* actually supports LexisNexis. In *Cortez*, the plaintiff testified that she "suffered severe anxiety, fear, distress, and embarrassment" as a result of inaccurate information on her credit report identifying her as a potential terrorist and the two year ordeal to get the terrorist alert removed (during which time the CRA initially refused to acknowledge that the terrorist alert even existed and then led her to believe it had removed the alert when it had not). *Id.* at 697-701, 719. Smith fails to note that in *Cortez*, the inaccurate terrorist alert caused the plaintiff to lose weight and interfered with her ability to sleep to such an extent that she needed to take medication. *Id.* at 701, 719. In addition, the plaintiff's daughter corroborated the plaintiff's testimony regarding her emotional distress and further testified that the plaintiff was under such extreme stress that she cried every time she spoke to her daughter during the two-year ordeal. *Id.* Even with this evidence of emotional distress — far more significant than any evidence Smith presented —

[8] Smith also claims that he and his wife's testimony was "consistent with the record evidence in this case," but does not explain what "record evidence" he is referring to, (Second Br. 27); Smith presented no evidence that he ever visited a doctor, was prescribed or took medication, or experienced any physical symptoms related to his alleged emotional distress.

the court found a compensatory damages award of $50,000 — $25,000 less than the jury awarded Smith — to be "exceedingly generous." *Id.* at 719.

In contrast, Smith and his wife testified generally that Smith was depressed and stressed 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 for six weeks from December 17, 2012 to January 29, 2013.[9] (Tr., RE 47, PageID ## 642, 665-66). Smith presented no evidence that he ever visited a doctor, was prescribed or took medication, or experienced any physical symptoms (*e.g.*, weight loss, loss of sleep) related to his alleged emotional distress. His "evidence" of emotional distress is generalized, conclusory statements, which is 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) (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.

[9] Smith's wife testified that she believes they may have missed a mortgage payment during this time, but there is no trial evidence that they actually did. (Tr., RE 47, PageID # 664).

17, 2013) (finding 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). Accordingly, judgment as a matter of law is appropriate.

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

a. The Insufficiency Of Smith's Evidence Of Harm To His Reputation Is Properly Before The Court

Smith argues that LexisNexis has "waived" its right to challenge the sufficiency of evidence of harm to reputation because LexisNexis did not "address[] the separate category of damages for harm to [Smith's] reputation" in its oral Rule 50(a) motions during trial. (Second Br. 31). Smith is wrong for several reasons.

First, and as Smith's own cited decision recognizes, "Rule 50 is not rigidly applied." *Sykes v. Anderson*, 625 F.3d 294, 304 (6th Cir. 2010). Rather, the purposes of Federal Rule of Civil Procedure 50 are served, and the issue is properly before the Court, where, as here, both the opposing party and district court were on notice of the challenged issue. *Bach I*, 149 F. App'x at 360. It cannot be disputed that Smith was on notice that LexisNexis' oral Rule 50(a) motion challenging the sufficiency of evidence for emotional distress included

harm to reputation. Indeed, in responding to LexisNexis' Federal Rule of Civil Procedure 50(a) oral motion, Smith argued that there was "more than enough information to go to the jury" based in part on the evidence that "[Smith] was called a felon when he's not," which is his sole evidence in support of his alleged harm to reputation. (Tr., RE 48, PageID ## 825-826).

Second, Smith's waiver argument ignores that LexisNexis' Federal Rule of Civil Procedure 50(a) motion was not limited to the oral statements made during trial. To the contrary, the District Court took the oral motion "under advisement" and directed LexisNexis to "file a brief in support of [its] oral motion." (Tr., RE 48, PageID ## 827, 877; Tr., RE 50, PageID ## 999). Per the District Court's directive, LexisNexis submitted a memorandum of law in support of its Federal Rule of Civil Procedure 50(a) motion, arguing that the jury's compensatory damages award "for emotional distress (which includes mental suffering and harm to reputation)" was not supported by sufficient evidence. (Memo., RE 40, PageID ## 266, 268-270). More specifically, LexisNexis argued that Smith did not present sufficient evidence to support the jury's compensatory damages award because "[Smith's] statement that a customer called him his 'favorite felon,' even if true, does not support a claim for harm to reputation." (Memo., RE 40, PageID # 270); *see Bach I*, 149 F. App'x at 360 (rejecting argument that defendant waived its right to seek judgment as a matter of law on issue of actual damages where both court

and plaintiff were on notice that defendant contended that plaintiff failed to present sufficient evidence of actual damages); *Chain v. Tropodyne Corp.*, Nos. 99-6268, 99-6269, 2000 WL 1888719, at *3 (6th Cir. Dec. 20, 2000) (considering both oral Rule 50(a) motion and written brief filed at district court's request in support of Rule 50(a) motion to conclude that issue of the sufficiency of the evidence as to damages was properly preserved for appeal because plaintiff and court were on notice of the issue, which satisfied the purposes of Rule 50); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988) (finding that purposes of Rule 50 had been served, and thus technical non-compliance with Rule 50 would be overlooked, where both court and opposing party were on notice of movant's challenge to the sufficiency of the evidence). Because both Smith and the District Court were on notice that LexisNexis' Rule 50(a) motion for judgment as a matter of law included a challenge to the sufficiency of the evidence of harm to Smith's reputation, there is no waiver issue.

b. Smith's Purported Evidence Of Harm To Reputation Is Insufficient To Support The Compensatory Damages Award

Smith's repeated insistence that a consumer *may* recover for harm to reputation as part of a claim for actual damages under the FCRA misses the point. (Second Br. 28-31). Simply because a consumer "may recover" for harm to reputation does not mean that Smith presented evidence sufficient to justify such a

recovery for himself. And because damages for emotional distress and damages for harm to reputation "are based on entirely different evidentiary foundations," Smith's evidence of harm to reputation "must rest upon some extrinsic evidence, not just upon [his] opinion." *Boris v. Choicepoint Servs.*, 249 F. Supp. 2d 851, 861 (W.D. Ky. 2003).

Smith concedes that the only "evidence" of harm to his reputation is: (1) his opinion that Great Lakes management "doesn't trust [him] in the same way that the Tassons [the company acquired by Great Lakes] did" because Great Lakes "considered the false report" and "rejected his employment application for a merchandiser job," and (2) Great Lakes' "customers found out [about the criminal background report] and one of them called Smith his 'favorite felon' in front of approximately 20 people." (Second Br. 31); (TR, RE 47, PageID ## 604, 607-608). Smith claims "[t]his evidence alone was enough to submit the case to the jury; and this evidence alone could support a verdict of $75,000." (Second Br. 31-32). Smith is wrong.

To start, the fact that Great Lakes "considered the false report" does not evidence harm to Smith's reputation, especially given that Great Lakes hired Smith to his desired position as soon as the report was corrected. In addition, Smith's opinion that his new employer holds less trust in him based on criminal convictions

belonging to another David Smith is too vague, subjective and illogical to support damages for harm to reputation.[10] *See Boris*, 249 F. Supp. 2d at 861.

Likewise insufficient is Smith's testimony as to being called a customer's "favorite felon." Contrary to Smith's statement that "[t]he employer's customers found out" about the inaccurate criminal background report, the only trial evidence is that, on *one* occasion (date unknown), *one* unidentified owner of the Blue Link Party Store (unclear whether that is a customer or simply a store) referred to Smith as the owner's "favorite felon" (no evidence of how the owner learned of the information or how Smith responded). (Tr., Re 47, PageID # 607). Further, Smith incorrectly states that the comment was made "in front of approximately 20 people." (Second Br. 31). The actual trial evidence is only that "[t]here [were] 20 people in the party store." (Tr., RE 47, PageID # 607). There is no evidence that anyone other than Smith heard the comment. Moreover, even Smith admits that the comment "might have been a joke, might not have been." (Tr., RE 47, PageID # 607). Accordingly, Smith's sparse evidence is insufficient to support an award of damages for harm to reputation. *See Boris*, 249 F. Supp. 2d at 861.

The only case Smith cites in support of his argument for reputational harm is *Armstrong v. Shirvell*, 596 F. App'x 433 (6th Cir. 2015). (Second Br. 31-32).

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[10] No Great Lakes representative testified to holding less trust in Smith or that the inaccurate criminal background report had any impact on his/her opinion of Smith.

However, *Armstrong* is inapposite and Smith's reliance on it is misplaced. In *Armstrong* — a non-FCRA case — the court found the plaintiff presented sufficient evidence of harm to reputation where the defendant, after learning that the openly-gay plaintiff was elected president of the student council at the University of Michigan:

- posted comments on his Facebook page, including that plaintiff was "dangerous" and a "radical homosexual activist" "obsessed with imposing the radical homosexual agenda on the student body";
- created a blog accessible to the public, which purported to be a "watch site," featured a picture of plaintiff's face next to a swastika, discussed plaintiff's "character and his agenda," called plaintiff "a radical homosexual activist, racist, elitist, & liar," labeled plaintiff "a perverted homosexual exhibitionist," and claimed that plaintiff used his welcome to freshmen as "a thinly veiled attempt to cause sexually confused, and perhaps some impressionable, 17-and 18-year-olds to experiment sexually with members of their own gender";
- appeared on local television to rant about plaintiff, claiming that plaintiff held the presidential position in order to "promote special rights for homosexuals at the cost of . . . heterosexual students";
- appeared on national television to rant about plaintiff, calling plaintiff a "bigot" and stating that plaintiff was "acting like a gay Nazi";
- posted flyers around the University of Michigan campus and in students' mailboxes;
- marched up and down the street outside plaintiff's house, protesting, and followed plaintiff to campus events holding a sign that branded plaintiff a racist liar and advertised the blog; and
- made phone calls and left messages to then-Speaker Nancy Pelosi when plaintiff was working as an intern, accusing plaintiff of being a racist and having lied to minority students' faces.

Id. at 437-440, 448. In addition to the obvious reputational harm resulting from the above conduct, the plaintiff testified that he received negative emails and testified in detail about the ways in which his professional reputation suffered as a result of the defendant's statements. *Id.* at 448. The reputational harm evidence in *Armstrong* is a far cry from the purported evidence of harm to reputation presented by Smith.

II. The Punitive Damages Award Is Excessive And Should Be Reduced

If the Court concludes 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 FCRA provides for an award of punitive damages only after finding willful noncompliance with the statute). Even if the evidence could support a finding that LexisNexis willfully violated the FCRA, however, the $150,000 punitive damages award (reduced by the District Court from $300,000) is excessive and should be reduced.

As this Court has recognized, "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 punishment or deterrence." *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 154 (6th Cir. 2007) ("*Bach II*") (recognizing that the court "should assume that any compensatory damage award has sufficiently made a plaintiff whole for [his]

injuries"). However, "punitive damages . . . have upward limits imposed by the elementary notions of fairness contained in the Due Process Clause," and the punitive damages award in this case surpasses the constitutional limit and must be reduced. *See Bach I*, 149 F. App'x at 364 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003)).

LexisNexis and Smith both recognize that to "determin[e] whether a particular punitive damages award exceeds the boundaries of constitutional propriety," the Court must consider the following guideposts:

(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.[11]

State Farm, 538 U.S. at 418 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996)); *Bach II*, 486 F.3d at 153; (First Br. 38; Second Br. 32). As LexisNexis explained in its First Brief, application of these guideposts to the trial evidence in this case conclusively establishes that both the $300,000 punitive damages award by the jury and the $150,000 reduced punitive damages award entered by the

[11] Both Smith and LexisNexis acknowledge that the third guidepost is not applicable to this case because the FCRA does not include a limit on damages for civil actions brought under the statute by private citizens. *See Bach II*, 486 F.3d at 154 n.1; *Bach I*, 149 F. App'x at 367; *see also* (First Br. 43); (Second Br. 32-40, not addressing the third guidepost).

District Court are excessive.[12] Smith's position that "the punitive damages verdict was constitutionally appropriate" (Second Br. 32) ignores the trial evidence and applicable case law.

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. To determine the degree of reprehensibility of the defendant's misconduct, the Supreme Court has directed courts to consider whether:

(1) the harm caused was physical as opposed to economic;

(2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

(3) the target of the conduct had financial vulnerability;

(4) the conduct involved repeated actions or was an isolated incident; and

(5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419.

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[12] Smith suggests that the $300,000 punitive damages award would not look so excessive if it was compared "to the worth of [LexisNexis'] parent company" and that a reduced award "would not be 'punitive' at all for a company the size of [LexisNexis], with access to the resources of its parent." (Second Br. 35, 40). Smith's argument based on the alleged "worth" or revenue of LexisNexis' parent was stricken at trial (Tr., RE 48, PageID ## 732-735), and it remains unsupported and irrelevant here. *See Bach II*, 486 F.3d at 155 ("[A] defendant's wealth 'cannot justify an otherwise unconstitutional punitive damages award.") (citing *State Farm*, 538 U.S. at 427).

In its First Brief, LexisNexis analyzed each of the *State Farm* reprehensibility factors as applied to the trial evidence in this case, which established that, under this Court's precedent, LexisNexis' conduct was not reprehensible because only one of the five reprehensibility factors is present — Smith's financial vulnerability. (First Br. 39-41, citing cases).

In response, Smith ignores the *State Farm* reprehensibility factors, instead arguing generally that LexisNexis' conduct was "highly reprehensible" because — he claims — LexisNexis "had been on notice" of "claims identical to Smith's" but "[did] not take any of these warnings seriously." (Second Br. 33-35). Smith's argument is refuted by the actual trial evidence. Indeed, the uncontroverted trial evidence is that LexisNexis had *no* prior case where an erroneous criminal background report was caused by a middle name not being required or by not performing a comparative analysis and investigation between credit information and criminal record information. (*See supra* Section I.A.).

Similarly unsupported are Smith's claims that LexisNexis "fails to obtain the complete records of criminal records" from the Florida Department of Law Enforcement, "never uses social security numbers to search for records," and "did not use Smith's social security number to search its database." (Second Br. 34). As already discussed, the uncontroverted trial evidence establishes that: (1) the Florida Department of Law Enforcement does not contain the complete or best

public criminal record; (2) LexisNexis *does* obtain records from the Florida Department of Law Enforcement — in fact, "hundreds of times each day" — when "that particular search type or product is part of the package requested from a customer"; and (3) Great Lakes did not request or purchase the package that would result in a search of records from the Florida Department of Law Enforcement. (*See supra* Section I.A.). Also as already discussed, LexisNexis *does* use Social Security numbers to search its national criminal database and *did* use Smith's Social Security number to search the national criminal database in this case (but because 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, LexisNexis could not exclude the criminal records as a match based on Smith's Social Security number). (*See supra* Section I.A.).

Moreover, when LexisNexis was made aware of the potentially inapplicable information in Smith's criminal background report, it promptly conducted an investigation based on the new information it received from Smith, corrected the error, and issued a revised report. (Tr., RE 47, PageID ## 599, 602, 630-31). In sum, the uncontroverted trial evidence establishes that LexisNexis' conduct was not reprehensible.

When Smith finally mentions the five *State Farm* reprehensibility factors, he argues that they are not "a meaningful match to FCRA consumer cases" and, more specifically, that the first two factors "should be given less weight" and that the final factor should be "discounted." (Second Br. 35-36). Even if Smith believes that the *State Farm* factors are ill-suited to FCRA cases, this Court disagrees. Indeed, in evaluating the constitutionality of the punitive damages award in *Bach I* and *Bach II*, this Court applied the five-factor framework set forth in *State Farm*. *Bach I*, 149 F. App'x at 364; *Bach II*, 486 F.3d at 153.[13] Evaluating the *State Farm* reprehensibility factors here establishes that LexisNexis' conduct was not reprehensible:

(1) As this Court recognized in *Bach I*, the alleged FCRA violation in this case was "purely economic rather than physical." *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

[13] In addition, the decision on which Smith primarily relies in arguing that the Court should reject or discount the five-factor *State Farm* analysis — *Saunders v. Equifax Info. Servs.*, 469 F. Supp. 2d 343 (E.D. Va. 2007), *aff'd*, *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142 (4th Cir. 2008) — explicitly stated that this Court's "reasoning [in *Bach I*] appears to be soundly applicable to FCRA cases where *both* compensatory and punitive damages have been awarded by a jury" and distinguished the case before it on the basis that the plaintiff had not been awarded compensatory damages and had only been awarded low-end statutory damages. *Id.* at 354. Here, Smith was awarded both compensatory and punitive damages; consequently, the Court should follow its analysis of the five *State Farm* factors as it did in *Bach I*.

no physical injuries"). Although Smith attempts to argue that "the harm here was neither purely 'economic' nor 'physical'" because "a major part of the harm was reputational and emotional in nature," (Second Br. 37), this Court has explicitly rejected that argument, stating that 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 (citing *State Farm*, 538 U.S. at 426, where the plaintiffs were awarded $1 million for emotional distress, yet the Supreme Court concluded no physical injuries were present to satisfy the first factor).

(2) Smith concedes that the second indicator of reprehensibility is not met because LexisNexis' actions occurred in the economic realm and "this was not a case that involved the 'health or safety of others.'" (Second Br. 37); *Bach I*, 149 F. App'x at 365.

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

(4) The fourth factor is not met because there is no evidence of "similar reprehensible conduct" or that Smith's inaccurate report was anything other than a single isolated incident. *See Bach I*, 149 F. App'x at 365. Indeed, the uncontroverted trial evidence is that LexisNexis had *no* prior case where an erroneous criminal background report was caused by a middle name not being required or by not performing a comparative analysis and investigation between

credit information and criminal record information — the alleged unreasonable procedures resulting in Smith's report.

Smith argues that this factor is met based on "the evidence of prior similar disputes and resulting corrections of record." (Second Br. 37). However, as already discussed, (*see supra* Section I.A.), and as the District Court properly recognized, (Order, RE 70, PageID ## 1420-1421), the only evidence on this point is that there were approximately 768 disputes across four states over a five-year period in which consumers alleged that a criminal record belonging to another person appeared on their criminal background report and approximately eight to ten lawsuits against LexisNexis claiming that inaccurate information was placed on a consumer background report. There is no evidence that any of these disputes was meritorious. And even if there was one, there is no evidence that the misidentifications was caused by the purported unreasonable procedures here — failure to require a middle initial and failure to perform a comparative analysis and undertake an investigation of any anomalous information contained in a criminal background report. Accordingly, the fourth factor is not met.

Smith's argument that the Court should not consider whether any other dispute was caused by the same alleged unreasonable procedure at issue here because what "caused [LexisNexis] to misattribute the information is irrelevant," (Second Br. 46 n.7), conflicts with the Supreme Court's directive that in evaluating

the fourth reprehensibility factor, "courts must ensure the conduct in question replicates the prior transgressions." *State Farm*, 538 U.S. at 423 (stating that "[a] defendant's dissimilar acts . . . may not serve as the basis for punitive damages). Moreover, Smith's argument that there need not be a link between previous "mixed file" disputes and the alleged unreasonable procedures here is clearly a push for strict liability:[14] simply because LexisNexis has received "mixed file" disputes in the past (regardless of cause or merit), Smith argues that LexisNexis should be held liable — for both compensatory and punitive damages — based on any inaccurate criminal background report in the future (regardless of cause). Smith's argument flies in the face of the uniform case law stating that § 1681e(b) is *not* a strict liability statute and should be rejected.

(5) The fifth factor is not met because, even if the Court concludes that LexisNexis' conduct was negligent or reckless, there is no evidence that LexisNexis acted out of intentional malice, trickery, or deceit. *Bach I*, 149 F. App'x at 365-66.

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[14] Like Smith, the Amicus Brief submitted by EPIC is based on generalized information leading to its opinion that "[CRAs] routinely produce inaccurate reports" and that "[i]naccurate consumer reports are a widespread problem for American consumers." (EPIC Amicus Br. 4-7). Yet, just like Smith's arguments, EPIC's myopic portrait of the industry is void of any evidence or other depiction of a middle name not being required by a CRA or a CRA not performing a comparative analysis and investigation between credit information and criminal record information — the alleged unreasonable procedures at issue in this case.

Because only one of the five factors for reprehensibility is present, LexisNexis' conduct was not reprehensible under *State Farm*. *See Bach I*, 149 F. App'x at 365-66 (concluding that where only financial vulnerability factor was present, CRA's conduct was not reprehensible).

Despite the lack of evidence supporting reprehensibility, Smith asserts that if LexisNexis' conduct is not considered reprehensible, "it is difficult" and "would also be scary" to "imagine what consumer reporting agency conduct is reprehensible." (Second Br. 35). Smith's wild overstatement is defied by his repeated citation to *Cortez*, which provides an example of reprehensible conduct supporting punitive damages and powerfully shows that LexisNexis' conduct was *not* reprehensible. In *Cortez*, plaintiff Sandra Cortez, born in 1944, decided to buy a new car and obtain a vehicle loan through the dealership. 617 F.3d at 697-98. The dealership's finance manager obtained a credit report for Cortez from Trans Union that contained an alert indicating that Cortez was on a list compiled by the Treasury Department's Office of Foreign Assets Control, meaning she was designated as a potential terrorist or narcotics trafficker, and businesses in the United States are generally prohibited from extending credit to a person named on that list. *Id.* at 696-97. Cortez was forced to wait for several hours at the dealership while the finance manager checked with the FBI to determine whether Cortez was the individual listed in the alert, but was eventually able to purchase the

car. *Id.* at 698. Cortez's credit report contained identifying information about Cortez, including her name, Social Security number, birth date, current and former addresses, telephone number, and employer as well as the potential terrorist alert for the name "Cortes Quintero, Sandra" born in 1971. *Id.* at 699. For two years after the terrorist alert ordeal, Cortez repeatedly contacted Trans Union in an effort to correct her credit report, but Trans Union initially denied that her credit report contained the potential terrorist alerts. *Id.* At a certain point during the two year aftermath of her visit to the car dealership, Trans Union indicated to Cortez that it had removed the potential terrorist alert from her credit report. *Id.* at 700. One month later, however, and despite Trans Union's representations to the contrary, Cortez's credit report still had the potential terrorist alerts. *Id.* The two-year ordeal over the terrorist alerts caused Cortez to lose weight, interfered with her ability to sleep to such an extent that she was on medication, and reduced her to tears during every communication with her daughter. *Id.* at 701. The Third Circuit found Trans Union's conduct to be reprehensible and affirmed the district court's remitted punitive damages award of $100,000. *Id.* at 723-24. Smith cannot seriously equate this situation to that of Sandra Cortez to support a finding that LexisNexis' conduct was reprehensible.

Further, this Court's precedent establishes the high bar for finding reprehensible conduct under the FCRA. In *Bach*, the 77-year old plaintiff's

granddaughter fraudulently opened a bank account and credit cards in the plaintiff's name (the bank did not take any action to verify her identify in opening the credit cards), which the granddaughter caused to become overdrawn and for which she ran up a high balance that was never paid. 149 F. App'x at 356-57. The plaintiff sent the bank a letter to inform it that the accounts in her name were opened fraudulently and without her consent. *Id.* at 356. Over the next 18 months, the bank repeatedly sought to induce the plaintiff to pay off the outstanding debt on the account despite the fact that the plaintiff insisted that the account was not hers. *Id.* at 357. The bank also repeatedly reported unfavorable credit information regarding the plaintiff for nearly two years, causing her to be denied several mortgage loans and a credit card, "despite the fact that [bank] executives admitted at trial that they knew fraud had been committed." *Id.* As these facts illustrate, Smith's statement that LexisNexis' conduct "is far more reprehensible than the bank's conduct in *Bach*" is insupportable. (Second Br. 47). Even Smith recognizes that "[t]he *Bach* court dealt with a significantly different situation" — significantly *worse* — yet the *Bach* court concluded that the bank's conduct was "blameworthy" but not "particularly outrageous" or reprehensible and reduced the punitive damages award as excessive. *Bach II*, 486 F.3d at 154; (Second Br. 39).

Accordingly, LexisNexis' conduct was not reprehensible and the punitive damages award is excessive.

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

Punitive damages "must bear a reasonable relationship to compensatory damages." *Gore*, 517 U.S. at 580. As such, *State Farm* directs this Court to consider the ratio of actual harm suffered by Smith to the punitive damages award. *Bach I*, 149 F. App'x at 366. Doing so establishes 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.

The jury's punitive damages award of $300,000 is four times the size of the compensatory damages award, a ratio the Supreme Court has recognized as "close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425; *see Bach I*, 149 F. App'x at 366 (stating that 6.6:1 ratio of punitive to compensatory damages was "alarming"). Smith argues that the 4:1 ratio in this case is "constitutionally appropriate" because "[m]ultiple cases . . . have upheld ratios much greater than 4:1," citing a number of out-of-circuit cases affirming higher ratios. (Second Br. 38, citing cases). Unlike this case, however, each case Smith cites justified the higher ratio between punitive and compensatory damages based on the fact that only "nominal" compensatory damages were awarded. *See, e.g.*, *Saunders*, 526 F.3d at 154 (concluding $80,000 punitive damages award was not "grossly excessive" where jury awarded "nominal damages" of $1,000 for actual harm);

Abner v. Kan. City S. R.R., 513 F.3d 154, 165 (5th Cir. 2008) (affirming $125,000 in punitive damages in non-FCRA case where "nominal" $1 award for actual harm); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798, 802-03 (8th Cir. 2004) (upholding arbitrator award of $6,000,000 punitive damages award where arbitrator awarded only $1,000 in "actual damages").

In contrast, and as this Court has recognized, the $75,000 compensatory damages award to Smith is not "nominal." *See Arnold v. Wilder*, 657 F.3d 353, 372 (6th Cir. 2011) (recognizing that $57,400 in compensatory damages is "not a nominal amount"). And both the Supreme Court and this Court have recognized, where the "compensatory damages [award is] substantial, then 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 (reducing punitive damages to 1:1 ratio and recognizing the "general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances"; "[t]his is not the case, for example, where a particularly egregious act has resulted in only a small amount of economic damages").

Further, and as set forth above, LexisNexis' conduct was "not particularly outrageous as judged by the reprehensibility factors set forth in *State Farm*." *Bach II*, 486 F.3d at 155. LexisNexis did not act with "reckless disregard for the health

and safety of others," engage in repeated instances of misconduct, or act with "intentional malice" — "[t]he absence of these factors substantially undercuts [Smith's] attempts to justify the size of the punitive damages award in this case." *Id.*

Moreover, the Court should be especially wary of excessive punitive damages awards when the compensatory damages award already includes a punitive component as is often the case with emotional distress awards. *See State Farm*, 538 U.S. at 426; *Bach I*, 149 F. App'x at 366. 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 awarded is appropriate." *Bach I*, 149 F. App'x at 366. Indeed, as the Supreme Court has observed:

> 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. Accordingly, the ratio of punitive to compensatory damages awarded in this case 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, and a ratio of 1:1 between compensatory and punitive damages is an appropriate result.[15]

III. The Compensatory Damages Award Is Excessive

"Compensatory 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). Therefore, a compensatory damages award is excessive and should be reduced if "it exceeds the maximum that a jury could reasonably find to be compensatory for [Smith's] loss." *Bach I*, 149 F. App'x at 362. The jury awarded Smith $75,000 in compensatory damages — $2,640 in lost wages and $72,360 for Smith's emotional distress allegedly caused by a report that was corrected within 4 weeks (25 days) of Smith disputing it.

Smith does not dispute that FCRA cases involving awards in excess of $25,000 for emotional distress 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. Indeed, each of the cases Smith cites (Second Br. 42, n.5) establishes this point. *See*, *e.g. Cortez*, 617

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[15] LexisNexis maintains its position that no punitive damage award is supportable, but argues that even if the Court finds a punitive damage award supportable, a 1:1 ratio between compensatory and punitive damages is the outermost limit of what is constitutionally appropriate in this action.

F.3d at 719-20 (affirming $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); *Sloane*, 510 F.3d at 503-07 (remitting compensatory damages award to $150,000 where plaintiff experienced anxiety, humiliation, anger, physical symptoms including insomnia, and contemplation of divorce for ***21-month*** period as a result of defendant's failure to correct credit errors caused by identity theft); *Bach I*, 149 F. App'x 361-63 (upholding $400,000 emotional distress award based on pain, suffering, humiliation and lost credit opportunities plaintiff experienced over ***1.5 years*** while defendant refused to correct inaccurate information on her credit report); *Boris*, 249 F. Supp. 2d at 855, 859-61 (finding it "plausible" that the jury could find emotional distress damages "as high as $75,000" based on plaintiff's worry, stress, anxiety, loss of sleep, and anger persisting over ***1.5 years*** due to continued inaccurate information on credit report). As his own cases vividly demonstrate, Smith's argument that "recent FCRA verdicts for emotional distress . . . are consistent with the jury's verdict here" is mistaken. (Second Br. 42-43).

And while Smith may believe that "[t]he mathematical, week-by-week calculations [LexisNexis] offers are irrelevant and unpersuasive," (Second Br. 43), they provide logical and analytical support that the District Court abused its discretion by failing to grant a new trial or remit the jury's compensatory damage award because Smith's emotional distress award of $72,360 is beyond the maximum damages that the jury reasonably could find to be compensatory for his loss.

IV. The District Court Correctly Concluded That The Jury's $300,000 Punitive Damages Award Was Excessive

Smith's argument that the District Court erred in reducing the jury's $300,000 punitive damages award essentially mirrors his argument in response to LexisNexis' argument 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 — namely, that "[LexisNexis'] reprehensibility here is not low" and "the $75,000 compensatory damages award is not substantial." (Second Br. 32-40, 43-49). Accordingly, LexisNexis incorporates the arguments from its First Brief at pages 37-46 and the arguments in Section II. above, which conclusively establish that the jury's $300,000 punitive damages award is excessive in light of the trial evidence, Supreme Court guideposts, and relevant case law.

Although LexisNexis' incorporated arguments fully address and respond to Smith's counterclaim, several of Smith's statements and arguments warrant additional comment.

Smith contends that the District Court erred in finding only one *State Farm* reprehensibility factor present— Smith's financial vulnerability — and that "[a] second *State Farm* factor . . . is also satisfied here — 'whether the conduct involved repeated actions or was merely the result of an isolated instance.'" (Second Br. 44-45). More specifically, Smith claims — without citation to authority — that this *State Farm* reprehensibility factor is satisfied based on LexisNexis' "uniform, consistently repeated procedures" and evidence that LexisNexis "treated other consumers in the same way as Smith," which, he claims without citing any evidence, "inevitably" caused "misreported records about other consumers as well." (Second Br. 45). This Court has rejected the same argument Smith advances. In *Bach I*, this Court explicitly rejected the argument that evidence of the CRA's uniform, consistently-applied "business policies" and that the CRA "treated [plaintiff's] situation in the same way it treated all of its clients" could satisfy this *State Farm* reprehensibility factor. 149 F. App'x at 365.

Smith asserts — wrongly — that the evidence of 768 "mixed file" disputes across four states over a five year period were "not merely a dispute, which may or may not be meritorious," but that they show LexisNexis "*agreed* with the disputing

consumer's allegation" and "represent an admission by [LexisNexis] that its reporting was inaccurate and *had to be corrected* hundreds of times because it misattributed criminal records on a disputing consumer's report." (Second Br. 45-46). These statements are flatly contradicted by the trial evidence. (*See supra* Section I.A.). Indeed, the uncontroverted trial evidence establishes that a disputed criminal background report *does not* mean that the dispute was meritorious or that there was anything inaccurate in the report. (*See supra* Section I.A.; Tr., RE 48, PageID # 857). More specifically, there is no trial evidence to suggest, as Smith claims, that LexisNexis removed any records because they were inaccurate; there is no trial evidence *why* LexisNexis responded by removing the record in the 768 "mixed file" disputes. (*See supra* Section I.A.; Tr., RE 48, PageID ## 798-800). For example, if LexisNexis is unable to reach a conclusion as to the accuracy of a disputed criminal record within 30 days of the dispute, LexisNexis is required under the FCRA to remove the criminal record (even though there was no conclusion on the merit of the dispute). (*See supra* Section I.A.; Tr., RE 48, PageID ## 800-802).

Further, even if these other disputes were meritorious, there is no trial evidence that any other inaccuracy was caused by LexisNexis' procedure of requesting, but not requiring, a middle name, or by LexisNexis not performing a comparative analysis between credit information and criminal record information

within the criminal background report — the alleged unreasonable procedures here. *See State Farm*, 538 U.S. at 422-23 (in considering the fourth reprehensibility factor, "courts must ensure the conduct in question replicates the prior transgressions" because "[a] defendant's dissimilar acts . . . may not serve as the basis for punitive damages) *Bach I*, 149 F. App'x at 365 (recognizing that the fourth *State Farm* reprehensibility factor is not met absent evidence that the CRA engaged in the same conduct that violated the FCRA in the past).

Smith's argument that his "$75,000 compensatory damages award is not substantial for punitive damages purposes" based on other "much larger compensatory damages awards" in non-FCRA cases (Second Br. 48-49) misses the mark. Because "[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, whether a particular compensatory damages award is "substantial" depends on the facts of this case and the actual harm suffered by Smith. Here, $72,360 of Smith's $75,000 compensatory damages award was for emotional distress Smith allegedly suffered during the 25 days it took LexisNexis to revise the report. Notably, Smith never visited a doctor, was prescribed or took medication, or experienced manifestations of any physical symptoms (*e.g.*, weight loss, loss of sleep) related to his alleged emotional distress. Given this undisputed trial evidence, and as the District Court properly recognized, the $75,000

compensatory damages award in this case was "certainly generous" and unquestionably included a punitive element, (Order, RE 70, PageID ## 1417, 1422), as is often the case where a significant portion of the compensatory damages award is for emotional distress. *Bach I*, 149 F. App'x at 366. "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 awarded is appropriate." *Id.* Accordingly, the District Court properly concluded that the jury's $300,000 punitive damages award was excessive.

CONCLUSION

For the reasons stated above and in LexisNexis' First Brief, 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 12,791 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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Date: March 28, 2016

CERTIFICATE OF SERVICE

I certify that on March 28, 2016, I electronically filed the foregoing Third Brief of Defendant-Appellant/Cross-Appellee LexisNexis Screening Solutions, Inc. 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:

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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
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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
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