IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 07-80031-CIV-MIDDLEBROOKS/JOHNSON

MICHAEL YOUNG,

Plaintiff,

v.

REED ELSEVIER, INC., SEISINT, INC., CITIBANK, FEDERAL SAVINGS BANK, CITIBANK (WEST), FSB, CITIMORTGAGE, INC., and TRANS UNION, LLC,

Defendants.
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MEMORANDUM OF LAW IN OPPOSITION TO TRANS UNION, LLC'S PARTIAL MOTION TO DISMISS COUNT FOR INJUNCTION

Plaintiff, MICHAEL L. YOUNG ("YOUNG"), files this his Memorandum of Law in Opposition to TRANS UNION, LLC's ("TRANS UNION") Motion to Dismiss Count VI of YOUNG'S Amended Complaint requesting temporary and permanent injunctions against TRANS UNION, and states:

Summary of Facts of the Case

Defendants, REED ELSEVIER, INC. d/b/a LEXIS-NEXIS and SEISINT, INC. d/b/a ACCURINT (collectively, ACCURINT) provide data regarding individuals to its clients through a business named Accurint. ACCURINT was grossly negligent in including in its database as it pertains to YOUNG information relating to the bankruptcy of another individual named Michael Young, thereby, indicating YOUNG was in bankruptcy. YOUNG has never filed bankruptcy. Though the Michael Young who actually filed bankruptcy has the same first and last name, he has a different middle initial (YOUNG'S middle initial is "L," whereas bankrupt Michael

Young's middle initial is "J"), a completely different social security number, he is married (YOUNG is single and his ex-wife's name is different from that of the bankruptcy debtor's wife), and he filed bankruptcy in Ohio (YOUNG lives in Florida and has never lived in Ohio). Thus, even a cursory review by ACCURINT of the data on bankrupt Michael Young would have indicated he was not YOUNG and the information should not have been associated with YOUNG. Despite this, TRANS UNION published a report(s) to CITIBANK, FEDERAL SAVINGS BANK, CITIBANK (WEST), FSB, CITIMORTGAGE, INC. (collectively, "CITIBANK") indicating that YOUNG had filed bankruptcy.[1] CITIBANK froze YOUNG'S equity line, causing checks to bounce. CITIBANK then advised TRANS UNION that YOUNG's CITIBANK equity line was in bankruptcy. TRANS UNION then stated that YOUNG's CITIBANK equity line was in bankruptcy in credit reports it prepared.

Prior to filing this action, YOUNG wrote to ACCURINT on two occasions requesting that the information regarding the bankrupt Michael Young be removed from its database as it relates to YOUNG. He was advised that ACCURINT does not verify the accuracy of information in its database and has no mechanism to correct inaccurate information in its database. After YOUNG filed the original complaint in this action on November 21, 2006, despite previously stating their was no mechanism to do so, ACCURINT did finally remove the reference to the bankruptcy of Michael J. Young in its database as it pertains to YOUNG on

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[1] ACCURINT prepares and publishes reports of varying detail to its customers. One form of the report would have indicated that YOUNG filed bankruptcy but also have included all the details regarding the actual bankruptcy filer. Other forms of reports would only indicate that YOUNG had filed bankruptcy. YOUNG will seek to discover the exact form of the report published to CITIBANK.

November 30, 2006.

YOUNG disputed the erroneous reporting of the bankruptcy in correspondence to TRANSUNION dated November 25, 2005, December 30, 2005, March 5, 2006, April 15, 2006, April 29, 2006, June 19, 2006, and September 4, 2006. TRANSUNION continued to report that YOUNG'S CitiBank equity line account was in bankruptcy and maintained on several occasions that it had reverified that status with CITIBANK. This was true even though YOUNG furnished to TRANS UNION a copy of correspondence from CITIBANK stating that it had frozen YOUNG'S equity line by mistake. TRANS UNION refused to accept this correspondence.[2]

In this action, YOUNG has brought claims under the Fair Credit Reporting Act ("FCRA") against CITIBANK, FEDERAL SAVINGS BANK, CITIBANK (WEST), FSB, CITIMORTGAGE, INC. (collectively, "CITIBANK") and against TRANSUNION and claims for libel and under Florida's Unfair and Deceptive Practices act against ACCURINT. TRANS UNION'S Motion to Dismiss is directed to Count VI of his Amended Complaint, wherein YOUNG "respectfully requests the Court to enter a temporary and permanent injunction enjoining TRANS UNION from further publication of any kind which in any way reflects that Plaintiff has previously filed a bankruptcy petition."

YOUNG has suffered damages including, but not limited to, impairment of credit,

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[2] TRANS UNIONS'S maintaining that CITIBANK reverified the bankruptcy status of the equity line to TRANS UNION when CITIBANK was, at the same time, admitting to YOUNG it made a mistake is certainly odd. Clearly, one of two possibilities exists: TRANS UNION is mistaken (or worse) when it states that CITIBANK reverified the bankruptcy status of the equity line, or one division of CITIBANK was admitting its mistake to YOUNG while another division of CITIBANK was reverifying the bankruptcy status to TRANS UNION.

abstention from applying for credit and ensuing lost economic and investment opportunities, pecuniary loss, emotional distress, mental anguish, embarrassment, humiliation, damage to his reputation and credit standing and other losses that are continuing in nature. By example, YOUNG was questioned about the bankruptcy on his credit report by his employer causing him great embarrassment. YOUNG also has a history that can be documented of buying and selling homes at a profit. Due to the actions of Defendants and ensuing impairment to his creditworthiness, he was prevented from engaging in this investment program during a portion of the one of the greatest, if not the greatest, periods of appreciation in residential real estate prices in Palm Beach County. The frustration of writing seven (7) letters to TRANS UNION, all to no avail, alone is enough to cause great emotional distress. YOUNG will continue to suffer damages if he does not receive injunctive relief.

TRANS UNION'S Motion to Dismiss

TRANS UNION, in reliance on Washington v. CSC Credit Servs., Inc., 199 F.3d 263, 268 (5th Cir. 2000) and other cases, has filed a Motion to Dismiss YOUNG'S request for injunctive relief. Therein, TRANS UNION, argues that the omission in FCRA of a specific provision affording the court jurisdiction to grant an injunction in favor of a private party along with the grant of the power to enforce the FCRA to the Federal Trade Commission ("FTC") is indicative of Congress' purported intent that private parties not be able to seek a court-ordered injunction of a violation of the FCRA.

Legal Analysis and Argument: The Court has Equity Power to Enjoin Violations of Federal law. The Court Should Not Engage in a Narrow Reading of the FCRA to Defeat its Injunctive Power. Rather, the FCRA, a Remedial Act, Should be Liberally Construed

YOUNG respectfully suggests that the decisions cited by TRANS UNION, while admittedly being in the majority,[3] were wrongly decided and do not properly apply the United States Supreme Court's holding that "[a]bsent the **clearest command to the contrary from Congress**, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." Califano v. Yamaski, 442 US 682, 705, 99 S.Ct. 2545, 61 L.Ed 2d 176 (1979) (emphasis added). In Yamaski, the Secretary of Health, Education, and Welfare (the "Secretary") sought recoupment of claimed overpayments of old age and disabled social security benefits in excess of legal monthly entitlements from future distributions to the beneficiaries. Lower courts had required the secretary to give such beneficiaries the opportunity to request hearings prior to initiation of the proposed recoupment procedures and enjoined the recoupment pending same.

Before the Supreme Court, the Secretary contended that the District Courts erred in granting injunctive relief arguing that the grant of jurisdiction found in Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which speaks only of the power of District Courts to enter a judgment "affirming, modifying, or reversing the decision of the Secretary," does not encompass equitable relief. The Supreme Court held that the Secretary's "reading of the statute [was] too grudging," Id., finding that "[n]othing in either in the language or the legislative

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[3] It does not appear that the Eleventh Circuit has ruled on whether private parties can seek an injunction of violations of the FCRA.

history of § 205(g) indicates that Congress intended to preclude injunctive relief in § 205(g) suits." Id. (citing Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946) (courts could enjoin violation of Emergency Price Control Act under its inherent equitable powers even though no specific provision for injunction in the act); and Scripps-Howard Radio v. FCC, 316 U.S. 4, 9-11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942) (courts have authority to stay orders pending appeal relating to Communications Act of 1934).

The cases cited by TRANS UNION do not cite any portion of the legislative history of FCRA which suggests that Congress intended courts to lose their equity power to enjoin a violation of a federal act. Nor is their any specific prohibition in the FCRA on the use of this power. Rather, these courts surmise what Congress intended by an omission, based on a narrow reading of the FCRA's jurisdictional provisions, combined with a grant of power to enforce the FCRA to the FTC.[4]

Section 1681p of the FCRA titled, in pertinent part, " Jurisdiction of the courts" refers to actions seeking to enforce "any liability" under FCRA. The cases cited by TRANS UNION interpret this provision narrowly, seemingly, based on the titles of sections 1681n and 1681o of the FCRA: "civil liability for willful noncompliance" and "civil liability for negligent noncompliance," respectively, and the reference therein to damages. However, nowhere is the term "liability" specifically defined in the FCRA and Black's Law Dictionary states that "the word is a broad legal term, of the most comprehensive significance ...it has been defined to mean: condition which creates a duty to perform an act immediately or in the future ... the state

[4] Other agencies also have a role in enforcing the FCRA.

of one who is bound in the law to do something which may be enforced by action." Black's Law Dictionary 473 (5th ed. 1983).

Moreover, as explained in Guimond v. Trans Union Credit Information Co., 45 F.3d 1329, 1333 (9th Cir. 1995):

> The FCRA was the product of congressional concern over abuses in the credit reporting industry. St. Paul Guardian Insurance Co. v. Johnson, 884 F.2d 881, 883 (5th Cir.1989). The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them, Kates v. Croker National Bank, 776 F.2d 1396, 1397 (9th Cir.1985); see also St. Paul, 884 F.2d at 883 (citing Pinner v. Schmidt, 805 F.2d 1258, 1261 (5th Cir.1986), cert. denied, 483 U.S. 1022, 107 S.Ct. 3267, 97 L.Ed.2d 766 (1987), and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner. St. Paul, 884 F.2d at 883 (citing Hovater v. Equifax. Inc., 823 F.2d 413, 417 (11th Cir.), cert. denied, 484 U.S. 977, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987)). the FCRA should be interpreted broadly to accomplish it remedial purposes.

Guimond, supra at 1333; see also, Jones v. Federated Financial Reserve Corp., 144 F.3d 961 (9th Cir. 1998); Lewis v. Professional Electronic Network, 190 F. Supp. 2d 1049, 1056 (S.D. Ohio 2002) (the Fair Credit Reporting Act is remedial legislation, which is to be liberally construed in favor of consumers).

Particularly when a court is construing the FCRA liberally as it should, an omission, even in combination with a specific grant of power to the FTC, does not equate to "a clear command to the contrary" as required by Yamaksi in order to defeat a court's exercise of its equity power to enjoin a violation fo federal law. TRANS UNIONS's argument in its Motion to Dismiss that "if congress had intended to give private plaintiffs the right to seek injunctive relief for noncompliance with the FCRA, it would have expressly created an equitable remedy under Sections 1681n and 16810," Motion to Dismiss, P. 2, misses the mark. The issue is not whether

Congress intended to **create** an equitable remedy but whether Congress intended to **eliminate** a court's equity power to enjoin violation of a federal law.[5]

The well-reasoned decision in Andrews v. Trans Union Corp., 7 F. Supp.2d 1056 (C.D. CA 1998) rev'd in part and affm'd in part on other grounds, Andrews v. TRW, Inc.,225 F.3d 1063 (9th Cir. 2000) judgment (of 9th Cir.) rev'd on other grounds, 534 U.S. 19, 122 S. Ct. 441, 15 L.Ed. 2d 339 (2001), applying Yamaksi, supra, held that "the FCRA contains no "clear command" that injunctive relief is unavailable; consequently, it is available." Id. at 1084, n.33; see also Wenger v. Trans Union Corp., No. 95-6445 (C.D.Cal. Nov. 14, 1995) (unpublished).[6] The court, finding no need to address the question of whether the FCRA allowed injunctive relief on behalf of the public at large, limited its decision to injunctive relief to a plaintiff on his or her own behalf. Indeed, in reality, the FTC, is unlikely to become involved in violation of the FTC which affects only an individual.

Other courts have allowed injunctive relief or held that it is available under the FCRA. In Greenway v. Information Dynamics, Ltd., 399 F.Supp. 1092, 1096-97 (D.Ariz.1974) the court certified a class action on a claim for injunctive relief under the FCRA and granted preliminary

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[5] It is an irony worth noting that, in removing this action, TRANS UNION, undoubtedly, relied on the decision in Lockard v. Equifax, Inc.. 163 F.3d 1259 (11th Cir. 1998) wherein the Eleventh Circuit held that, even though the FCRA provides that an action under the FCRA can be brought in state court, because there was no specific prohibition on removal in the FCRA, removal was appropriate. If there is no specific prohibition on the granting of an injunction in the FCRA, why does the same logic not apply to allow the use of the court's equity power to grant injunctive relief?

[6] Summarized at Bumgardner v. Lite Cellular, Inc., 996 F. Supp. 525, 526 (E.D. VA. 1998).

injunctive relief. Greenway was affirmed on other grounds. 524 F.2d 1145 (9th Cir.1975) cert. denied 424 U.S. 936, 96 S.Ct. 1153, 47 L.Ed 2d 344 (1976). In that decision, the Ninth Circuit, while not addressing the appropriateness of injunctive relief with particularity, did "adopt the careful reasoning of Judge Copple." 524 F.2d 1146. Finally, the Seventh Circuit, albeit in dicta, suggested that injunctive relief is an available remedy under the FCRA. See, Craybill v. Trans Union, LLC, 259 F.3d 602, 664 (7th Cir. 2001) ("Without a causal relation between the violation of the statute and the loss of credit, or some other harm, a plaintiff cannot obtain an award of 'actual damages,'...which is one of the remedies under the Fair Credit Reporting Act. **It does not follow that Jerry cannot obtain any other remedy, such as an injunction."**)(emphasis added).

Conclusion

A blanket prohibition on the granting of an injunction could result in a endless cycle of repeated violations of the FCRA and ensuing actions for damages. This serves neither the ends of judicial economy nor common sense. This court has the equity power to enjoin a violation of Federal law particularly when it relates to a violation affecting only one consumer and there is no clear command in the FCRA to the contrary. For these reasons, the court should deny TRANS UNION' Partial Motion to Dismiss.

BARRY S. BALMUTH, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2007 I filed this **MEMORANDUM OF LAW IN OPPOSITION TO TRANSUNION, LLC'S PARTIAL MOTION TO DISMISS COUNT FOR INJUNCTION** through the CM/ECF filing system, which will cause a copy to be served on John R. Whittles, Esquire, Richman Greer Weil Brunbaugh Mirabito & Christensen, P.A., One Clearlake Centre, 250 Australian Avenue, Suite 1504, West Palm Beach, Florida, 33401; Ronald I. Raether, Jr. And Robert W. Kiefaber, Esquire, Faruki Ireland & Cox, P.L.L., 500 Courthouse Plaza, S.W. 10 North Ludlow Street, Dayton, Ohio, 45402; Franklin G. Cosmen, Jr., Esquire, Fowler White Burnett, 1395 Brickell Avenue, 14th Floor, Miami, Florida, 33131; and Trevor G. Hawes, Esquire, Hinshaw & Culbertson, LLP, 50 North Laura Street, Suite 4100, Jacksonville, Florida, 32202 and all other parties participating in the CM/ECF System, all served electronically.

/s/ Barry S. Balmuth
BARRY S. BALMUTH, ESQUIRE