

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHRISTINE VARAD,)	
)	C.A. No. 06 CA 11370 MLW
Plaintiff,)	
v.)	
)	
REED ELSEVIER INC. d/b/a/ Lexis Nexis)	
Corporation, Lexis Nexis Accurint,)	
)	
Defendant.)	

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

Defendant Reed Elsevier Incorporated (“Reed”) hereby opposes plaintiff Christine Varad’s (“Plaintiff” or “Varad”) Motion for Summary Judgment (“Motion”). Although there has been no discovery yet, a reported decision of this Court reveals that Plaintiff, after twice failing the Massachusetts bar examination, sued the Chairman of the Board of Bar Examiners, claiming failure to accommodate an alleged handwriting disability. This Court’s summary judgment dismissal was affirmed by the First Circuit, and the Supreme Court denied Plaintiff’s petition for certiorari. Varad v. Barshak, 261 F.Supp.2d 47 (D. Mass. 2003), aff’d, 93 Fed. Appx. 255 (1st Cir.), cert. denied, 543 U.S. 873 (2004). In the current action, however, Plaintiff seeks to blame Reed for her non-admission to the bar. Plaintiff contends that Reed provided to the Massachusetts bar admission authorities and to her employer, F&W Publishing (“F&W”), information that incorrectly stated that she had an address in South Dakota in 1992. Plaintiff alleges the 1992 address defamed her, causing “lost professional licensing opportunities” and loss of a job opportunity at F&W in 2006. Complaint, at p.4. In addition to defamation, Plaintiff contends Reed is liable under the Fair Credit Reporting Act, 15 U.S.C. s 1681 et seq. (“FCRA”) and Mass. Gen. Laws c. 93A.

As shown below, Plaintiff's motion for summary judgment is groundless. The Motion is not supported by admissible facts or documents, and should be denied for that reason alone. Alternatively, even if the Court were to consider the fatally defective Motion at this early stage—with Reed's motion to dismiss and substitute Seisint Inc. still pending, no disclosures under Fed. R. Civ. P. 26(a) having been made and no discovery having occurred—the Motion must be denied. The FCRA is inapplicable, as Reed did not function as a "consumer reporting agency" within the meaning of the statute. Plaintiff's defamation claim fails because the allegedly false statement—a 1992 address—is not defamatory and, in any case, Plaintiff has not shown as a matter of law that the statement was the proximate cause of any harm. Chapter 93A relief is unavailable because Plaintiff did not send Reed a demand letter as required by the statute and, in any case, has not established as a matter of law unfair or deceptive conduct by Reed. At a minimum, there are numerous issues of fact that preclude summary judgment in favor of Plaintiff, and discovery is necessary to determine all relevant facts. See Defendant's Motion For Discovery Pursuant to Fed. R. Civ. P. 56(f), filed herewith.

PROCEDURAL BACKGROUND

Plaintiff commenced this action on August 8, 2006. On October 10, 2006, in conjunction with its answer to the complaint, Reed moved to dismiss the complaint against it, and instead substitute Seisint, the entity that Reed believes is the proper defendant in this litigation.¹ Prior to the Court determining the threshold issue of the proper defendant and without any discovery taking place, on October 30, 2006, Plaintiff moved for summary judgment on all claims.

¹ Reed moved to dismiss and substitute because Seisint is the owner of Accurant, the information database at issue, and Seisint, not Reed, has been the only entity that has corresponded with Plaintiff. Despite pointing out these facts to Plaintiff and offering to simply substitute Seisint for Reed, Plaintiff has refused to assent to the substitution.

FACTS

Seisint is a provider of information management products and services. See Second Affidavit of John M. Byrne (“Byrne 2d Aff.”), ¶ 2. Seisint owns Accurint, a service and database of information that provides identity validation and verification. Id. In early 2006, Seisint received a request from its customer, Gall & Gall Company, Inc. (“Gall & Gall”), to provide identification verification information concerning Plaintiff. Id. ¶ 3. In response to Gall & Gall’s request, Seisint provided Gall & Gall with information from its Accurint database regarding Plaintiff, which information pertained solely to verification of her identity – name, current and prior address information, date of birth, partially masked social security number, and possibly telephone number information. Id. Seisint did not provide any other information to Gall & Gall concerning Plaintiff. Id. ¶ 4.

In April 2006 Plaintiff contacted Seisint, claiming that certain address information that was provided to Gall & Gall from Seisint’s Accurint database was incorrect. Id. ¶ 5 and Exhibit A thereto (April 20, 2006 letter to Plaintiff). In response, Seisint requested that Plaintiff fill out a form specifying the allegedly incorrect information, so that Seisint could attempt to provide her with the source of the information. Id. ¶ 6. After making inquiry, Seisint determined, and informed Plaintiff, that the address information she was disputing was provided to Seisint by one or more of the three national credit reporting agencies, and gave her the contact information for each of those agencies. Id. ¶ 7 and Exhibit B thereto (May 23, 2006 letter to Plaintiff). Seisint then urged Plaintiff to contact those agencies and correct the information at the source, as Seisint could not change such information. Id. ¶ 8.

Additionally, because Seisint’s contract with Gall & Gall explicitly specifies that Gall & Gall is not permitted to use Accurint information for purposes that fall within the purview of the

Fair Credit Reporting Act (as Plaintiff was alleging), Seisint contacted Gall & Gall to confirm that the information it supplied to Gall & Gall regarding Plaintiff was used in accordance with their contract. Id. ¶ 9 and Exhibit C thereto (contract between Seisint and Gall & Gall). Seisint's audit of Gall & Gall confirmed that the information it provided to Gall & Gall about Plaintiff was identification information only, and further that Gall & Gall used that information for verification purposes only, and for no other purpose. Id. ¶ 10. Seisint also informed Plaintiff of the results of its audit of Gall & Gall. Id. ¶ 11 and Exhibit D thereto (June 20, 2006 letter to Plaintiff).

Despite Seisint's efforts to respond to and aid Plaintiff, on June 3, 2006, Plaintiff sent a letter to Seisint at its corporate headquarters in Boca Raton, Florida, contending that Seisint's claim that it is not a consumer reporting agency is an unfair and deceptive act under c. 93A. Byrne 2d Aff. ¶ 12 and Exhibit E thereto (June 3, 2006 letter from Plaintiff to Seisint). In response, Seisint again explained that it is not a consumer reporting agency, and that it does not correct information it obtains from third parties – but rather simply gathers and reports the information it receives. Id. ¶ 12 and Exhibit D thereto. Seisint again urged Plaintiff to contact the source of the information to correct it. Id. Plaintiff has apparently failed to do so.

From April 2006 through the filing of the lawsuit, the only correspondence regarding Plaintiff's claims was between Plaintiff and Seisint. Affidavit of Henry Z. Horbaczewski (“Horbaczewski Aff.”) ¶ 3; Byrne 2d Aff. ¶ 13. Reed is a separate legal entity from Seisint. Horbaczewski Aff. ¶ 2. Reed has never received from Plaintiff a demand letter pursuant to M.G.L. c. 93A or any other correspondence. Id. ¶ 3. Furthermore, Seisint, not Reed, is the owner of Accurint. Affidavit of John M. Byrne (“Byrne Aff.”) ¶ 3 [docket entry 6].

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. McCarthy v. Northwest Airlines, 56 F.3d 313, 314 (1st Cir. 1995). A “genuine issue” for summary judgment purposes exists when there is evidence that “a reasonable jury drawing favorable inferences” could resolve it in favor of the non-moving party. Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 32 (1st Cir. 2000) citing Smith v. F.W. Morsely & Co., 76 F.3d 413, 427 (1st Cir. 1996). In deciding summary judgment, the Court must weigh all evidence in favor of, and resolve all doubts in favor of, the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In doing so, the court “will not consider ‘conclusory allegations, improbable inferences and unsupported speculation.’” Nolan v. Krajcik, 384 F. Supp. 2d 447, 457 (D. Mass. 2005). Only when the movant successfully demonstrates that no issue of material fact exists will the burden shift to the non-movant. See Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986).

II. PLAINTIFF’S MOTION IS FATALLY DEFECTIVE BECAUSE SHE CITES TO “FACTS” WHICH ARE NOT SUPPORTED BY THE RECORD AND SHE RELIES UPON INADMISSIBLE EVIDENCE, UNAUTHENTICATED DOCUMENTS AND HEARSAY, ALL OF WHICH CANNOT BE CONSIDERED FOR SUMMARY JUDGMENT PURPOSES AND MUST BE STRIKEN.

A. Plaintiff Cannot Rely on “Facts” that Are Not Supported by the Record.

As a threshold matter, Plaintiff’s Motion must be denied because it fails to comply with Local Rule 56.1, as her statement of facts is replete with “facts” that are not supported by citations to evidence. See L.R. 56.1 (failure to include a concise statement of material facts of record with supporting references is grounds for denial of the motion); see also Dale v. H.B. Smith Co., Inc., 910 F. Supp. 14, 20-21 (D. Mass. 1995)(denying motion for summary judgment for failure to comply with Local Rule 56.1, finding that most of the cited facts were unsupported

and argumentative); Shabazz v. Cole, 69 F. Supp. 2d 177, 185 (D. Mass. 1999). A concise statement of material facts goes to the heart of summary judgment, in that it allows the opponent to respond to allegations head-on; therefore strict adherence to L.R. 56.1 is required. Dale, 910 F. Supp. at 21. “It is a bedrock rule of civil litigation that a party who has exercised due diligence is entitled to be apprised of his opponent’s theory of the case, and that rule has particular force in the summary judgment milieu.” Id.

In this case, instead of providing a separate, concise statement of undisputed material facts as required, Plaintiff simply provides several pages of purported “facts” in her memorandum, which (in addition to being inadmissible, see §§ IIB & C below), are, in large part, not supported with citations to evidence. For example,² in discussing the information (an address) that Plaintiff alleges defamed her, Plaintiff states:

On April 5, 2006, Gall and Gall Company responded by provided a second “Applicant Screening Report” on the Plaintiff to F&W Publishing, Adams Media and sent a copy of this second report to Plaintiff by registered mail. The second report was identical to the first with the exception the former address history information provided by Lexis Nexis Accurint database was omitted and replaced with the results of a federal Social Security database search. That search was misleading as to address history for the reason that Social Security does not collect address information from periods of federal employment, unemployment and/or self-employment. Multiple omissions of valid address history information regarding citizens are common in that database. It is rarely utilized to attempt to verify an employee’s address history for the [sic] reason. See: Exhibit 5, 2nd Gall and Gall “Applicant Screening Report” to F&W Publishing, Adams Media.

Plaintiff’s Memorandum (“Plaintiff’s Mem.”) p. 6-7. This paragraph is devoid of any citations for Plaintiff’s assertions that (i) address history information was provided by Lexis Nexis Accurint to Gall & Gall, (ii) Gall & Gall provided a second report to F&W, (iii) the second report was replaced with the results of a federal search, (iv) the federal search was “misleading.”

² Plaintiff’s “statement of facts” is replete with other instances of unsupported facts. See Plaintiff’s Mem. pp. 5-10. For brevity purposes, only a few instances are highlighted in this Opposition.

(v) multiple omissions regarding valid address history are common in the federal database; and
 (vi) that the federal database is rarely utilized to attempt to verify an employee's address history.
See id. Furthermore, Plaintiff's lone citation at the end of the paragraph to Exhibit 5 (the purported "2nd Gall and Gall report") is inaccurate, as it does not support any of these statements, nor does it support her apparent extrapolation that information in the second report was replaced with the results of a federal search, because both Exhibit 5 and Exhibit 2 (the Gall & Gall reports) simply have sections entitled "address source manager," and it is not ascertainable from either of these Exhibits what information, if any, was "replaced" or from what source the information was provided.

In addition to these citation-free facts, Plaintiff's statement of facts also contains conclusory, argumentative assertions that cannot properly be considered at summary judgment. See Dale, 910 F. Supp. at 20; Ahmed v. Berkshire Medical Center, Inc., No. 98-1496, 1999 U.S. App. LEXIS 24961 at * 1 (1st Cir., Oct. 5 1999)(legal conclusions or speculative assertions did not satisfy summary judgment standard and were properly stricken). For example, in discussing her decision to send a 93A demand letter, Plaintiff states:

Left with no other possible option to protect, her name, reputation and personal identity from continued defamation and related harms from persistent Lexis Nexis Accurint dissemination of false address history information in connection with her name, social security number and birth date, [as advertised via the Lexis Nexis Accurint web site, providing data to state and federal government agencies, insurance companies, state and federal law enforcement representatives, legal, academic and health care professionals, the banking industry and the debt collection industry and even routinely private, unpublicized medical record information. See: Exhibit 15, Lexis Nexis Accurint Web site pages], Plaintiff was forced to draft a M.G.L. c. 93A demand letter...

Plaintiff's Mem. p. 9. In this paragraph, Plaintiff has *concluded* that the defendant (i) has continually defamed her, (ii) inflicted other "related harms" and (iii) has continued to disseminate false address history, presumably to the various entities cited, such as insurance

companies, the banking industry, state and federal law enforcement representatives etc. Putting aside the fact that there is no evidence that Reed has provided *any* information to these entities regarding Plaintiff, these statements are conclusory and argumentative (not to mention disputed), and are not proper as “facts” for summary judgment. See Dale, 910 F. Supp. at 20 (denial of summary judgment for failure to comply with L.R. 56.1 was proper based, in part, on fact that several paragraphs of the party’s facts were argumentative); Ahmed, 1999 U.S. App. LEXIS 24961 at *1. Even if the Court were to indulge Plaintiff with some latitude due to the fact that she is pro se, Reed cannot properly defend itself against Plaintiff’s citation-free allegations and conclusory and argumentative statements. See id. As such, Plaintiff’s Motion should be denied.

B. Plaintiff Cannot Support her Motion with Documents That Have Not Been Authenticated and/or Contain Hearsay.

Plaintiff’s Motion should likewise be denied because it fails to comply with Fed. R. Civ. P. 56(e), as *none* of the documents upon which she relies have been authenticated, and most contain inadmissible hearsay. Other than an exception for affidavits, in order for evidence to be considered at summary judgment, it must be admissible at trial. Goguen v. Textron, Inc., 234 F.R.D. 13, 16 (D. Mass. 2006). “In order to be admissible at trial, a document must be authenticated. Generally, authentication requires competent testimony concerning the document.” Id. Furthermore, “[h]earsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.” Garside v. Osco Drug, Inc., 895 F. 2d 46, 50 (1st Cir. 1990). Here, Plaintiff has not even attempted to authenticate any of the documents she relies upon, nor has she attempted to address the fact that these documents are filled with inadmissible hearsay.

In support of her summary judgment papers, Plaintiff attaches 15 documents as exhibits. Leaving aside the sole affidavit (which will be addressed below), none of the other 14 exhibits have been authenticated, and thus cannot be considered for summary judgment. See Goguen,

234 F.R.D. at 16 (“Each document submitted in support of summary judgment must either be properly authenticated, or must be self authenticating under the Federal Rules.”)³ Furthermore, Plaintiff’s exhibits are fraught with inadmissible hearsay.

For example, Plaintiff attaches as Exhibit 1 what she describes as “F&W Publications, Adams Media Application for Employment.” However, there is no testimony from anyone that this document is an accurate copy of the employment application that F&W received from the Plaintiff. To the contrary, Plaintiff admits that she has “omitted ab initio pages 7, 11, 12 and 13” of the application, and a cursory review of the document reveals that it has been heavily redacted, and refers to a resume that has not been provided. See Plaintiff’s Exhibit 1. Furthermore, to the extent that Plaintiff is relying on the application for the truth of the statements made in it by F&W – for example, regarding F&W’s use of a “consumer reporting agency” (see Plaintiff’s Mem. p. 5) – such statements are inadmissible hearsay. See Articulate Systems, Inc. v. Apple Computer, Inc., 53 F. Supp. 2d 62, 75 (D. Mass. 2006).⁴

Plaintiff also attaches what she claims are two “applicant screening reports” from Gall & Gall (Exhibits 2 & 5), yet there is no testimony from Gall & Gall that these reports are their business records, nor is there any testimony that these reports contain any information provided to them by Reed or Seisint. In fact, Plaintiff admits that Exhibit 2 is only “a partial copy” of a Gall & Gall report. See Plaintiff’s Mem. p. 6. As such, Plaintiff’s reliance on these reports for her contention that the defendant provided incorrect information about the Plaintiff is misplaced.

Plaintiff also provides several pages of printouts from Accurint’s website, but yet again, there is no testimony to authenticate these printouts. Moreover, because Plaintiff is seeking to

³ Nor are any of the 14 Exhibits self-authenticating under the Federal Rules. See Fed. R. Evid. 902.

⁴ The application has internal inconsistencies as well. For example, page 9 of the application is dated 1/23/06, while page 8 is dated 11/23/06 (just a few weeks ago). This inconsistency is yet an additional reason why the application cannot be relied upon for summary judgment.

use statements made on Accurint's website to support her claim that Reed provided "incorrect address information" about Plaintiff to various entities listed on the website, the statements are inadmissible hearsay. See e.g. Articulate Systems, 53 F. Supp. 2d at 75 (articles in trade press were hearsay and could not be considered for summary judgment).⁵

The remaining exhibits are emails or letters purportedly authored by parties and non-parties. The non-party correspondence is inadmissible, as Plaintiff has not offered any evidence to authenticate the correspondence or to overcome the fact that the correspondence itself contains hearsay. For example, Exhibit 3 is an email purportedly authored by an employee of F&W "admitting" that the addresses in the Gall & Gall report may not be accurate, and Exhibit 6 is a purported letter from Gall & Gall identifying "Accurint" as providing the "Address Source Manager" information. In addition to being unauthenticated, because Plaintiff seeks to use this correspondence for the truth of the statements therein, it is inadmissible hearsay. See Scott v. Macy's East Inc., 2002 U.S. Dist. LEXIS 21035 at * 6 (D. Mass., Oct. 31, 2002) (statement of third party relayed to plaintiff through another party is inadmissible hearsay).

The party correspondence is likewise inadmissible. To begin with, Plaintiff has failed to authenticate the letters she authored. See Goguen, 234 F.R.D. at 17 (striking defendant's Annual Report from consideration for summary judgment because defendant failed to submit testimony from any witness to authenticate it). However, even if she had authenticated her letters, the letters are filled with conclusory, argumentative statements that are not based on evidence in the record. For example, Exhibit 4 is a letter from Plaintiff to a "Gall & Gall Associate" alleging that the report provided to F&W contains "patently false assertions regarding my residential address information from 1989 to the present in violation of the Fair Credit Reporting Act." This

⁵ Because Accurint is not owned by Reed (Byrne Aff. ¶ 3), any statements on Accurint's website are not an admission by Reed, and thus do not invoke any hearsay exceptions.

conclusory, self-serving statement is not properly admissible for summary judgment purposes. See Hoffman v. Applicator Sales and Service, Inc., 439 F.3d 9, 13 (1st Cir. 2006)(affirming district court's decision to strike a summary judgment exhibit that was not properly authenticated and that was based on data that had not been authenticated or presented in the summary judgment record). Furthermore, the letters from the Accurint consumer inquiry department or John M. Byrne are not admissible as to Reed because, as attested to by John Byrne, the letters were from Seisint, a legal entity separate and apart from Reed, who is not presently a party to this litigation. See Byrne Aff. ¶¶ 6-8.

Plaintiff has failed to put before this Court any admissible documentary evidence to support her Motion. To the contrary, her "evidence" is unauthenticated and replete with inadmissible hearsay and therefore must be stricken. Without admissible evidence to support her claims, Plaintiff's Motion must be denied.

C. Plaintiff's Attestations To Facts that Are Based Upon "Information and Belief" Are Not Admissible at Summary Judgment.

Other than the above documents, the only testimony offered to support her summary judgment papers is Plaintiff's own affidavit. In order to be admissible for summary judgment, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); see also Goguen, 234 F.R.D. at 16. "The object of Rule 56(e) is not to replace conclusory allegations of the complaint with conclusory allegations of an affidavit." Ahmed, 1999 U.S. App. LEXIS 24961 at *1.

Seven paragraphs in Plaintiff's affidavit are not based upon personal knowledge, but merely asserted "upon information and belief" or upon "belief". See Varad Affidavit, ¶¶ 3-7,8, 10. Such testimony is patently inadmissible at summary judgment. See National Tower LLC v.

Plainville Zoning Board of Appeals, 297 F. 3d 14, 24 (1st Cir. 2002)(qualification that “I am informed and believe” would make statements inadmissible to support summary judgment). Particularly concerning, for example, are Plaintiff’s claims that (upon information and belief) Reed provided “defamatory and libelous” address history information to the Massachusetts and Maine Board of Bar Examiners, and that such information has adversely affected her ability “to earn a living in [her] chosen profession.” See Varad Affidavit ¶¶ 8, 10. Despite the seriousness of these allegations, there is not a scintilla of evidence in the record to support her claim that *any* information was *ever* provided to the Massachusetts and/or Maine Board of Bar Examiners by Reed (or any entity associated with Reed), nor is there any evidence that if such information was provided, it was defamatory or libelous, or that it impacted in any way her ability to practice law. In fact, the only evidence that Reed is aware of regarding Plaintiff’s ability to practice her chosen profession (law) is that Plaintiff failed the Massachusetts bar exam twice, thus preventing her from practicing law in Massachusetts. See Varad, 261 F. Supp. 2d at 48 (“in July of 2001 and February of 2002 she [Varad] took the examination for admission to the bar of the Commonwealth of Massachusetts; she failed both exams.”).

Furthermore, Plaintiff’s affidavit is replete with conclusory statements that are based on inadmissible evidence. For example, Plaintiff states that based on the “assertions” on the Accurint web site, she “formed a belief” that “Lexis Nexis Accurint reported the same false, misleading and libelous address information and data concerning my address history was reported [sic] to government agencies and law enforcement and court representatives of the State of Massachusetts....” Varad Affidavit ¶¶ 4-7. These statements are wholly unsupported and conclusory, and are inadmissible at summary judgment. See e.g. Ahmed, 1999 U.S. App. LEXIS 24961 at *1 (noting plaintiff’s insistence that he has “personal and sensory knowledge” of all of

the recited facts did not overcome their conclusory or hearsay nature).

In conclusion, Plaintiff has completely ignored the Federal Rules of Civil Procedure and Evidence and has failed to provide this Court with any credible, admissible evidence to support her summary judgment motion. Having failed to do so, her Motion must be denied.

III. ALTERNATIVELY, PLAINTIFF'S MOTION FAILS TO ESTABLISH THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND THAT SHE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. Plaintiff's Evidence Does Not Establish that Seisint⁶ Was Functioning as a "Consumer Reporting Agency," as Defined by 15 U.S.C. § 1681a(f), by Providing Name and Address Data to Gall & Gall to Verify Plaintiff's Identity.

The evidence at best reveals that Gall & Gall used the name and address data in the "address source manager" report provided by Seisint in its Accurint service to verify Plaintiff's identity, and then obtained other information regarding Plaintiff from other sources for purposes of conducting a background check for a prospective employer. See Byrne 2d Aff. ¶¶ 3-4, 9-10. As demonstrated below, Seisint was not functioning as a "consumer reporting agency," as defined by section 603(f) of the FCRA, 15 U.S.C. § 1681a(f), by providing name and address data regarding Plaintiff to Gall & Gall to verify her identity.⁷ Rather, Seisint provided this information to enable Gall & Gall to determine whether the person seeking employment was in fact the person she claimed to be – a purpose not covered by the FCRA. Id.

⁶ In this section, Reed makes its opposition on behalf of Seisint, the only entity that provided the allegedly incorrect information to Gall & Gall. As Reed set forth in its Motion to Substitute Seisint and Dismiss Reed [Docket Entry 4], Seisint is a separate legal entity from Reed (Byrne Aff. ¶¶ 6), Seisint, not Reed, owns the Accurint database (Id. ¶ 3), and Seisint – not Reed – provided information to Gall & Gall and corresponded with Plaintiff (Id. ¶ 7-8). Accordingly, Plaintiff's Motion against Reed should be denied on these facts alone.

⁷ Plaintiff also claims that Lexis Nexis Accurint provided a "national criminal history report" to Gall & Gall as well. This fact is disputed, as Seisint attests that the only information it provided to Gall & Gall was identity verification information regarding Plaintiff. See Byrne 2d Aff. ¶ 4. Accordingly, to the extent that a determination of whether Seisint (or Reed) acted as a consumer reporting agency turns on what information was provided to Gall & Gall, a disputed fact issue exists and summary judgment must be denied. Other factual disputes likewise mandate denial. For example, Plaintiff claims that she was never provided with "source information" regarding the allegedly incorrect addresses. See Plaintiff's Mem. p. 8. Seisint, however, provided Plaintiff with the names of 3 credit reporting agencies, stating that one or more of those agencies provided the allegedly incorrect address information to it. Byrne 2d Aff. ¶ 7. In light of these material, disputed facts, summary judgment must be denied.

The FCRA's definitions of the terms "consumer reporting agency" and "consumer report" are interrelated, each referring to and depending upon the other. See 15 U.S.C. §§ 1681a(d), 1681a(f). Consequently, Seisint cannot be deemed to be functioning as a consumer reporting agency unless the information in the "address source manager" report that it communicated to Gall and Gall Company was a consumer report.

The FCRA defines the term "consumer reporting agency" to mean any person which "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 USC § 1681a(f). However, to qualify as a "consumer report" under the FCRA, information (i) must "bear[] on" at least one of seven enumerated factors, and (ii) be "used or expected to be used or collected" for establishing a consumer's "eligibility" for credit, insurance, employment, or other "permissible purposes" authorized under the FCRA, and (iii) must be communicated by a consumer reporting agency. 15 U.S.C. § 1681a(d).

By definition, Seisint cannot be deemed to have functioned as a consumer reporting agency as alleged by Plaintiff because the information it communicated to Gall & Gall was not a consumer report. The identification information from Accurant that Seisint communicated to Gall & Gall to verify Plaintiff's identity was not a consumer report because such information does not bear upon one or more of the FCRA's enumerated factors, nor was it "used or expected to be used or collected" for one of the "permissible purposes" governed by the FCRA.

First, the information regarding Plaintiff that Seisint communicated to Gall & Gall for identity verification purposes (*i.e.*, her name, current and prior addresses, date of birth and partial social security number) did not meet the threshold requirement of a consumer report. As a matter of law, such identification information is not a consumer report because it does not bear

upon Plaintiff's "creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" – the enumerated factors in the FCRA. 15 U.S.C. § 1681a(d)(1). See, e.g., Dotzler v. Perot, 914 F. Supp. 328, 330-31 (E.D. Mo. 1996), aff'd, 124 F.3d 207 (8th Cir. 1997) (address updates furnished by a credit bureau containing only consumers' names, current addresses, former addresses, and, for some consumers, social security account numbers, was not a "consumer report" because it did not bear upon the FCRA's enumerated factors); see also Individual Reference Servs. Group v. FTC, 145 F. Supp.2d 6, 20 (D.D.C. 2001) (noting that the Federal Trade Commission, which is the federal agency primarily responsible for enforcing the FCRA, takes the position that a report consisting only of identification information typically printed at the top of a credit report "was not subject to the FCRA because it 'does not bear on the creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living, unless such terms are given an impermissibly broad reading'").

Even assuming *arguendo* that identification information may in some circumstances bear upon a person's creditworthiness or other FCRA enumerated factor, the "address source manager" report that Seisint furnishes to customers for identity verification purposes does not bear upon any of the enumerated factors for the persons whose identity is being authenticated. Determining the likelihood that someone is who they claim to be reveals virtually nothing about the "real" job applicant that would then be used to evaluate her fitness for the position to be filled. For example, the "real" applicant for employment may or may not be creditworthy or have a bad reputation, but the employer cannot proceed to even think about these issues until it determines whether the person applying for employment is in fact the person she claims to be.

Second, the identification information furnished by Seisint is not a consumer report

because it is neither collected nor expected to be used as a factor in making eligibility decisions. At the outset, Plaintiff has failed to cite to a single authority holding that detecting or screening out fraudsters from the employment application process constitutes an evaluation of a *bona fide* applicant's fitness or eligibility for employment. Nor, particularly in this era of identity theft and fraud, could she. Until the employer reasonably assures itself that the person with which the employer believes it is interacting is in fact the person she claims to be, the employer cannot proceed to evaluate the applicant's application and otherwise decide whether this "real person" is someone whom it wishes to consider for employment. Authenticating a person's identity is a prerequisite – but not equivalent to – determining that person's eligibility for employment.

This analytical distinction is analogous to the difference between a college board testing service (i) determining that a high school student to whom it is administering a standardized college admission test is in fact who he claims to be and (ii) and evaluating his performance on the standardized college admission test. Determining that the student is who he claims to be does not constitute determining his test score or eligibility for admission to college. Until the college board testing service reasonably satisfies itself that the person with which it is interacting is not impersonating someone else, the college board testing service cannot proceed to score to the person for his performance on the standardized test. That is, authenticating a student's identity is a prerequisite – but not equivalent to – determining that person's eligibility for admission to college. By the same reasoning, authenticating a person's identity is not equivalent to determining that person's eligibility for employment. While determining a person's eligibility for employment is covered by the FCRA, authenticating that same person's identity is not.

Furthermore, the evidence in the record establishes that the "address source manager" report furnished by Seisint is neither collected nor expected to be used as a factor in making

eligibility decisions because Seisint takes steps to prohibit its customers from using the information for “permissible purposes” covered by the FCRA. As the Second Byrne Affidavit demonstrates, the identification information collected by Seisint in its Accurint service is provided to customers solely for use for purposes not covered by the FCRA. Byrne 2d Aff. ¶¶ 4, 9-10. And there is no evidence that the information in the “address source manager” report was used by Gall & Gall other than for its intended purpose. *Id.* ¶ 10. Consequently, the identification information furnished by Seisint is not collected, or expected to be used, or used as a factor in making eligibility decisions, is thus not a consumer report. *Id.* Therefore, Seisint cannot be deemed to be functioning as a consumer reporting agency.

An additional reason precludes summary judgment in Plaintiff’s favor at this time. To the extent that the information provided to Gall & Gall impacts the determination of whether Seisint (or Reed) is a consumer reporting agency, discovery from Gall & Gall is required. For example, Plaintiff argues that “Lexis Nexis Accurint provided (1) a national criminal history report and (2) a national address history report, at minimum [sic], on the Plaintiff from its Florida database to Gall & Gall Company in Ohio for final dissemination to the plaintiff’s employer, F & W Publishing; Adams Media in Massachusetts.” Plaintiff’s Mem. p. 12. However, it is disputed as to what information was provided to Gall & Gall, as well as what Gall & Gall did with such information. Seisint’s contract with Gall & Gall, for example, expressly prohibits the use of Seisint information for any FCRA purpose. Byrne 2d Aff. ¶ 9. Accordingly, discovery from Gall & Gall is necessary. To that end, Reed files contemporaneously herewith its Rule 56(f) motion and affidavit.

Plaintiff has failed to put forth sufficient evidence to prove that, as a matter of law, Seisint functioned as a consumer reporting agency. To the contrary, the evidence provided by

the defendant conclusively shows that Seisint did not function as such, and instead simply provided Gall & Gall with threshold identification information, a purpose not covered by the FCRA. However, should the Court delve into the factual issues regarding Seisint's conduct, (i) disputed, factual issues would still preclude summary judgment, and (ii) additional discovery would be necessary. For these reasons, Plaintiff's Motion must be denied.

B. Plaintiff Has Failed to Establish That She Was Defamed.

The record fails to establish the elements required to sustain a claim for defamation. A defamation plaintiff must show that the "defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss." Amrak Productions, Inc. v. Morton, 410 F.3d. 69, 72 (1st Cir. 2005). The threshold question of "whether a communication is reasonably susceptible of a defamatory meaning, is a question of law for the court." Id. (internal quotations omitted).

In the instant case, Plaintiff argues that by providing allegedly incorrect address information, the defendant somehow defamed her. As a threshold matter, the statements – assuming that Plaintiff had put forth admissible evidence that they were made by the defendant – simply are not defamatory. While acknowledging that the statements regarding her address history were not "inherently disparaging," Plaintiff argues that the address history is nonetheless defamatory because it caused her employer to determine that she had lied on her employment application. See Plaintiff's Mem. p. 16. Plaintiff's own evidence, however, completely contradicts any such conclusion. In Exhibit 1 – Plaintiff's purported employment application – the "residential history" section states "[a]ll applicants must account for the last 10 years." See Exhibit 1, p. 4. In doing so, Plaintiff lists only a single address (without providing any dates for that address). See id. However, the address which Plaintiff claims "defamed" her was more than

10 years old and thus would not have been included on Plaintiff's employment application. See Plaintiff's Exhibit 2 (Gall & Gall report) listing the South Dakota addresses in 1992; see also Plaintiff's Exhibit 4, Varad letter to Gall & Gall claiming that her Burlington, MA address from 1987-1991 was omitted in the report. Therefore, given that the "defamatory" addresses allegedly provided by the defendant did not contradict anything in Plaintiff's employment application (because only the past 10 years were to be listed), there is no way *any* inference could be made that such information would somehow cause F&W to conclude that Plaintiff had lied.

Varad further attests that "legitimate address history information such as my former marital address in Burlington, Massachusetts was missing from the Lexis Nexis Accurint address history report so that when I **truthfully** included that address information as requested...it appeared as though I was being untruthful regarding my address history...". Varad Aff. ¶ 2, emphasis added. There is simply no evidence – based on Plaintiff's own submissions – that she included her Burlington, MA address anywhere on her employment application. See Plaintiff's Exhibit 1. Despite this glaring inconsistency, Plaintiff still argues that she has been defamed.

Interestingly enough, Plaintiff's Motion is devoid of any evidence from F&W that (i) it concluded that she lied on her employment application (whether or not based on information from the defendant); and/or (ii) that it based its decision not to hire Plaintiff as a result of information it received from the defendant. To the contrary, Plaintiff's employment application undermines her claims because if F&W denied Plaintiff employment because of information it obtained from a consumer reporting agency, it was required to notify Plaintiff of such, including providing her with the name of the consumer reporting agency. See Plaintiff's Exhibit 1, pp. 9, 14. There is simply no evidence in the record to indicate that this was ever done.

Finally, assuming *arguendo* this Court finds that the statements at issue could be

reasonably susceptible to a defamatory meaning, then additional discovery is necessary. At a minimum, Reed would need to obtain discovery (i) from F&W as to its conclusions regarding Plaintiff's employment application and why she was not hired and/or terminated,⁸ (ii) from the Massachusetts and Maine Board of Bar Examiners to determine whether any information was ever provided to these associations from the defendant, as well as the reason for denying Plaintiff admission to the bar; (iii) from Gall & Gall regarding what information it received from the defendant and how such information was used; and (iv) from Varad, in order to test her allegations, including, for example, her statement that information sent to bar examiners by the defendant "adversely affect[ed] her ability to earn a living in [her] chosen profession."⁹

C. Plaintiff's Evidence Does Not Establish a Violation of M.G.L. c. 93A.

Although far from clear, Plaintiff's 93A claim appears to be premised on the allegation that Reed made misleading claims to her and to the general public that it does not function as a consumer reporting agency. See Plaintiff's Mem. pp. 19-20. Reed has never been served with a demand letter prior to the filing of this suit. Horbaczewski Aff. ¶ 3. Therefore, Plaintiff's purported 93A claim – which Reed contests – must be dismissed. See M.G.L. c. 93A §9(3)(thirty days prior to filing suit, a demand letter must be served on the defendant); City of Boston v. Aetna Life Ins. Co., 399 Mass. 569, 574, 506 N.E.2d 106, 109 (1987)(failure to allege sending of 93A demand letter is fatal); McMahon v. Digital Equipment Corp., 944 F. Supp. 70,

⁸ While Plaintiff appears to claim that she was not hired based on the address information, at various points throughout her papers she refers to F&W as "her employer." See Plaintiff's Exhibit 4, Mem. p.15.

⁹ If, as Plaintiff argues, Seisint were a "consumer reporting agency" governed by the FCRA, then Plaintiff's defamation/libel claim against Seisint fails because the FCRA bars "any action or proceeding in the nature of defamation . . . with respect to the reporting of information against any consumer reporting agency . . . based on information disclosed by a user of a consumer report to . . . a consumer against whom the user has taken adverse action . . . except as to false information furnished with malice or willful intent to injure such consumer." 15 USC § 1681h(e). In this case, Plaintiff has failed to put forth any evidence to indicate that Seisint's information was provided with malice or willful intent, and accordingly, her claim fails. See id.; see also Gibbs v. SLM Corp., 336 F. Supp. 2d 1, 12-13 (D. Mass. 2004) (dismissing state claims where there was no allegation that information was furnished with malice or willful intent); Richardson v. Fleet Bank of Massachusetts, 190 F. Supp. 2d 81, 90 (D. Mass. 2001)(same).

77 (D. Mass. 1996)(same). Reed does not have an address in Boca Raton, Florida (Byrne Aff. ¶ 8), Reed is a separate legal entity from Seisint, (Byrne Aff. ¶ 6, Horbaczewski Aff. ¶ 2), and the only entity that received or made communications with Plaintiff prior to the litigation was Seisint (Byrne Aff. ¶¶ 7-8, Horbaczewski Aff. ¶ 3). Therefore, Plaintiff's 93A claim must be dismissed.¹⁰

CONCLUSION

For the reasons stated herein, Plaintiff's Motion must be denied.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(E), Reed respectfully requests that this court schedule a hearing on Plaintiff's Motion, as it believes that oral argument will assist the court in rendering a fair decision.

REED ELSEVIER INC.
By its attorneys,

/s/ Kristin M. Cataldo
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Dated: December 12, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2006, I caused a copy of the foregoing to be served on the following by regular mail to Christine M. Varad, P.O. Box 583, Milton, MA 02186.

/s/ Kristin M. Cataldo
Kristin M. Cataldo

¹⁰ Plaintiff's summary judgment motion regarding c. 93A must be dismissed for the additional reason that the claim hinges solely on whether Reed is falsely claiming that it is not a consumer reporting agency. Because neither Reed nor Seisint is a consumer reporting agency under the FCRA (as discussed *infra* § III(A)), Plaintiff's 93A claim is groundless.