

Original

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**FILED
IN CLERKS OFFICE**

Civil Docket No.: 06 CA 1137 MLW P 12: 59

U.S. DISTRICT COURT
DISTRICT OF MASS.

Christine Varad,
Plaintiff,

v.

Reed Elsevier Incorporated,
d.b.a. LexisNexis, LexisNexis Risk &
Information Analytics Group, Inc.,
Defendant.

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR A SUMMARY JUDGMENT**

Now comes the plaintiff, Christine Varad, and notices her opposition to defendant

Reed Elsevier, Inc., d.b.a. LexisNexis, LexisNexis Risk & Information Analytics Group,

Christine Varad v. Reed Elsevier Incorporated

Inc., motion for the grant of a summary judgment in its favor pursuant to F.R.Civ.P. 56.

Doc. 73

SUMMARY JUDGMENT STANDARD

"The role of summary judgment is "to pierce the pleadings and to access the proof in order to see whether there is a genuine need for trial." Mesnick v. General Electric Co., 950 F.2d 816, 822 (1st Cir. 1991) (quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). The burden is upon the moving party to show, based upon the pleadings, discovery, and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

Once the moving party had satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 (1986). A genuine issue is one "that a reasonable jury could resolve ... in favor the nonmoving party." United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992). A fact is material "when [it] has the potential to change the outcome of the suit under the governing law if found favorably to the nonmovant." Parrilla-Burgos v. Hernandez-Rivera, 108 F.3d 445, 448

(1st Cir.) (quoting *Martinez v. Colon*, 54 F.3d 980, 984 (1st Cir. 1995)). The court must view the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in that parties favor. *O'Conner v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993). See: *Wallis v. City of Worcester*, CV No. 11318, 2007 U.S. Dist. LEXIS 15332 (2007).

ARGUMENT

Part I

Reed Elsevier Inc. is doing business as Reed Elsevier Group. Reed Elsevier Group is doing business using the trade name of LexisNexis. LexisNexis is doing business as LexisNexis Risk & Information Analytics Group, Inc. Seisint, Inc. is a corporate member of the LexisNexis Risk & Information Analytics Group. Reed Elsevier, Inc. as LexisNexis holds itself out to the general public as being so structured and connected on its LexisNexis web site. See: Tab 1, Exhibits A-D. LexisNexis holds itself out to the general public on that web site as being fully responsible for the actions its "Seisint unit" or Seisint, Inc. See: Tab 1, Exhibit C.

On March 9, 2005, LexisNexis announced that it had identified incidents of fraudulent access to the databases of its Seisint unit. LexisNexis considered individuals were adversely affected on a nationwide basis and specifically estimated three thousand nine hundred and fifty three individuals in the state of Massachusetts were affected. Plaintiff is a resident of the state of Massachusetts. Seisint, Inc.'s product database, Accurint™ is known to have report false information concerning the Plaintiff. Defendant's information database products Accurint™, Securint™, RiskWise®, PeopleWise® and Banko® are linked, and as such, contain and report similar data, in this case false and defamatory data, to third parties such as lawyers, financial services,

insurance companies, telecommunications and retail businesses, the Federal Government and law enforcement agencies. See: Tab 1, Exhibit C.

Plaintiff is being defamed broadly to lawyers, financial services, insurance companies, telecommunications and retail businesses, the Federal Government and law enforcement agencies and others accessing those databases either directly or through the access of third parties and not simply and solely defamed as to the management and employees of F& W Publishing, Adams Media of Avon, Massachusetts. Tab 1, Exhibits A - D.

Documents from the LexisNexis web site containing admissible evidentiary admissions made by the defendant are contained in Tab 1, Exhibits A - D. Based on this admissible evidence a jury could find that in favor of the Plaintiff, that (1) Reed Elsevier, Inc. is doing business as LexisNexis and (2) that LexisNexis is responsible for the acts of Seisint, Inc. in regard the Accurint™ database.

Part II

The Defendant's database system published information concerning the Plaintiff in an employment background check report to Gall & Gall Company that was false and defamatory. See: Tab 2, Exhibit 1. Gall & Gall Company requested and received from Reed a background check report that contained patently false address history information and a comprehensive, national, criminal background check report. Gall & Gall Company then republished that report which contained that false data concerning Plaintiff to Plaintiff's employer, F & W Publishing, Adams Media. F&W Publishing utilized the report to evaluate Plaintiff's character and specifically her character for truthfulness concerning her application for employment.

A. Whether or not that the data published in the background check report defamed and damaged Varad is a jury issue.

Courts have determined the following concerning defamation in Massachusetts,

"In Massachusetts, defamation has been defined as "the intentional or reckless publication, without privilege to do so, of a false statement of fact which causes damage to the plaintiff's reputation." *Elicer v. Toys "R" Us, Inc.*, 130 F. Supp. 2d 307, 310 (D. Mass. 2001) (citing *Correllas v. Viveiros*, 410 Mass. 314, 572 N.E.2d 7, 10 (Mass. 1991)) Typically, the statement must "discredit the plaintiff in the minds of any considerable and respectable segment in the community." *Draghetti v. Chmielewski*, 416 Mass. 808, 626 N.E.2d 862, 866 (Mass. 1994) (citations and internal quotation marks omitted). See: Fuentes v. Hampden County Sheriff's Department, 2003 U.S. Dist. LEXIS 25565, 177 L.R.R.M. 2929 (2003), "In short, an invasion of the plaintiff's interest in his reputation and good name." See: *Prosser and Keeton, Law of Torts, 5th Ed., West Pub. Corp.*; 286 Mass. 258 at 262, 190 N.E. 542 at 543 (1934).

The background check data was first reported by LexisNexis to Gall and Gall Company. Gall & Gall Company then republished it to Plaintiff's employer, F & W Publishing, Adams Media. The report contained patently false address history data and a comprehensive, national criminal background check report. The publication of false address history data caused immediate damage to Varad's reputation. The reports discredited Varad's character and her character for truthfulness concerning her interview responses detailing her address history and the information she submitted on her application for employment. The damage to her reputation was immediate upon the publication of the report containing the false data to her employer. No additional proof of damage from that incident is necessary or material to show defamation of Varad's character by libel. "*Libel consists of publication of defamatory matter by written or printed words. J. Nolan, 37 Mass. Practice Series, § 99, at 119 (Supp. 1981). Private persons may recover for libel without proof of intent but merely on proof of publication of any matter considered libel per se or on proof of the negligent publication of a defamatory falsehood. See: Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330

N.E. 2nd 161 (1975)." See: In re: Pereira, 44 B.R. 248, at 252, Bkrtcy. Mass. 1884 (1984).

The defamation damage adversely affected Varad's reputation and not merely her ability to be employed by F&W Publishing, Adams Media. Varad has offered admissible, uncontested proof that Reed published false data and information in a background check report it provided to Gall & Gall Company; and that such report was re-published by Gall & Gall Company to F&W Publishing, Adams Media concerning Varad's application for employment. The severity or the weight of the damage caused to Varad's reputation and good name by Reed's publication of the false and defamatory data in that background check report it provided is a material issue of fact appropriately determined by a jury.

Whether or not F&W Publishing, Adams Media opted to retain Varad as an employee after considering the defamatory information contained in the background check report is immaterial and not an issue that has the potential to change the outcome of this action under governing defamation law. Reed's contention that if F&W Publishing, Adams Media did not subsequently terminate Varad or refuse to hire her for additional employment then Varad was not defamed and/or damaged by its actions is simply false and immaterial and cannot be utilized form a legitimate issue that will affect the outcome of this action. Reed's actions defaming Varad were complete upon publication of the false data to Gall & Gall Company and subsequently republished to Varad's employer, F&W Publishing, Adams Media.. The damage to Varad's reputation and good name in an employment setting was immediate and that damage is not properly quantified or measured by her employer's subsequent actions toward her.

Defendant Reed invites this Court to conclude that submitting false data on a background check report concerning an employment or professional licensing applicant will not function to defame and damage that applicant. That kind of facile and opportunistic reasoning is not fair or sound. When an employer or a state licensing board has specifically requested and paid for a background check report on a particular applicant in order to verify that applicant's general character and his character for truthfulness concerning his application data, a of background check report containing data discrepancies and disagreements with the application data creates the impression that the applicant has intentionally omitted requested information on his application. That impression is defamatory and it can profoundly and irreparably damages his reputation with that employer or licensing board. Many employers and state bar board consider an applicant that intentionally omits relevant, material information which the employment or professional licensing application has requested be provided as is equivalent to intentionally submitting an application containing intentional falsehoods.

Reed damaged Varad's reputation and good name by creating the impression that Varad unethically omitted requested information and data on her employment and bar applications by publishing background check reports that contained false address history data and along with a comprehensive criminal background check. While address history data might be said to simply identify an individual, a concurrent national criminal background check is unquestionably intended to elicit personal and invasive information. A criminal history check is never necessary to merely identify an individual. It is data intended to report comprehensively on that individual's personal character for honesty

and truthfulness, or lack thereof, by providing a detailed search for information concerning any criminal activity he may have engaged in any point in his life.

B. Whether or not the Defendant negligently published false data concerning the Plaintiff to a third party without determining the truth or accuracy of the data prior to that publication is a genuine issue of material fact to be determined by a jury.

Part I

Whether or not the Defendant negligently published data and information concerning Varad that was utilized by third parties to evaluate Varad's character and character for truthfulness and honesty on employment applications and professional licensing applications is genuine issue of material fact to be determined by a jury.

"Summary judgment is generally disfavored where knowledge or state of mind is at issue." Quincy Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81, 469 N.E.2d 797 (1984).

See: Wallis v. City of Worcester, Civil Action No. 03-11318-FDS, 2007 U.S. Dist.

LEXIS 15332.

Reed negligently breached its duty to Varad to report background check data and information concerning her that it had determined to a reasonable certainty was accurate and truthful. *"In particular, as will be seen, we hold that a plaintiff who is not a public officer or a public figure may recover for damages in an action for libel by proof of negligence in the publishing of the libel by the defendant, its agents or servants, even though the libel occurred in the reporting of an event of public or general concern."* See: Stone v. Essex County Newspapers, Inc., 367 Mass. 849, at 851, 330 N.E. 2nd 161 (1975).

LexisNexis maintains a policy concerning verification of the accuracy of the data to be disseminated to third parties from its database system entitled, "LexisNexis® Data Privacy Policy." See: Tab 1, Exhibit 1, pages 1 and 3. Admission/Defendant Reed. That policy is intended to cover "personally identifiable information received by LexisNexis, a division of Reed Elsevier, Inc. from its data suppliers, and which is distributed on the LexisNexis services." See: Tab 1, Exhibit 1, page 1 at ¶1.

LexisNexis further states that it, "adheres to the principals contained in within its own data privacy policy," and that it, "recognizes that statutes such as the Driver's Privacy Protection Act (federal and state) and the Gramm-Leach-Bliley Act regulate some of the personally identifiable information distributed on the LexisNexis services" and further, that it, "diligently complies with the requirements of these laws." See: Tab 1, Exhibit 1, page 1 at ¶1 -3. The LexisNexis Data Privacy Policy does not recognize any responsibility to comply with the regulations of the Fair Credit Reporting Act.

It is important to note at this juncture that the Gramm-Leach-Bliley Act. 15 U.S.C. subsection I, § 6805, Enforcement, specifically does not apply to regulate publishing companies such as Reed Elsevier, Inc., d.b.a LexisNexis. The Gramm-Leach-Bliley Act regulates specifically national banks, federal credit unions, securities dealers and brokers, investment companies, state insurance agencies, and other financial institutions. The issue of whether or not it is an unfair and deceptive act in violation of M.G.L. c. 93A, § 9 and the standard of FTC v. Sperry & Hutchinson Co., 405 U.S. 233, n.5(1972) for Reed Elsevier, Inc. d.b.a. LexisNexis to hold itself out the general public as regulated by Gramm-Leach-Bliley Act in spite of the fact that it is not one of the specifically listed regulated entity types is a genuine material fact issue for a jury.

In addition, the Drivers Privacy Protection Act, 18 U.S.C. § 2721 et seq. specifically regulates dissemination of data by state departments of motor vehicles and, yet again, that statute has no application to regulate dissemination of data by a publishing company such as Reed Elsevier, Inc. d.b.a. LexisNexis.

The "LexisNexis® Data Privacy Policy" See: Tab 1, Exhibit 1, page 3, Admission/Defendant Reed, explains that it is LexisNexis's policy to secure the accuracy of the data it provides to third parties by reviewing the supplier of the data and not the accuracy of the data itself. LexisNexis claims to review the supplier's data collection practices and policies, reviews the supplier's business practices, reviews the financial condition of the supplier and reviews the types of data the supplier sells but it does not review the data itself for accuracy. Whether or not this adequately and reasonably protects the public against harm by defamation is another genuine issue of material fact for a jury. *However, the reasonableness of Daus-Haberle's actions in this matter is a question properly reserved for the jury. Pucci v. Amherst Restaurant Enterprises, Inc., 33 Mass. App. Ct. 779, 785, 605 N.E.2d 309 (1992), citing Irwin v. Ware, 392 Mass. 745, 757, 467 N.E.2d 1292 (1984). ("Questions of negligence and causation are usually ones of fact for determination by a jury, not a judge.") See: Mario Romero v. Peter Daus-Haberle dba Daus-Haberle Woodwork, 94-0090-E, 1995 Mass. Super. LEXIS 489 (1995)*

The LexisNexis data privacy policy also claims to inform an individual upon written request about the "nature" of the public records, non-public information and publicly available information that it is making available in connection with his or her name by way its products and services. Varad made such a written request to James Swift, Operations Manager at LexisNexis, by letters dated April 17, 2006, April 30, 2006

and June 3, 2006. See: Tab 2, Exhibit B, page 2, 5, 8-9. LexisNexis failed to respond by complying with its own policy concerning by making available to Varad the data and information it retains in connection with her name as required by its own policy in ¶ 4, page 3 and ¶ 12, page 7. LexisNexis negligently failed to comply with its own data privacy policy and the requirements set forth by the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.

Part II

A jury could find in Varad favor concerning the material, fact issue of whether or not Reed Elsevier, Inc. d.b.a. LexisNexis, knew or should have known that Gall & Gall was using the data it obtained from LexisNexis to provide background check reports to employers to be used in employment settings for the purposes of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d)(1)(B), to evaluate the character of employees. And a jury could find in Varad's favor concerning the material fact issue of whether or not Reed Elsevier, Inc. d.b.a. LexisNexis, knew or should have known that Gall & Gall provided background check reports to Varad's employer, F&W Publishing, Adams Media, for the purpose of assessing her general reputation, her character for honesty by way of a national criminal background report and her character of truthfulness by an address history report.

Proof of this material fact is found in "Defendant's Statement of Undisputed Facts," at Tab 5, Deposition of Steven Gall, page 16, line 5. Mr. Gall states concerning his contract with the Defendant "Allows us to use it for employment purposes." Mr. Gall states that he believes that his contract allows him to use LexisNexis database for employment purposes.

Reed has failed to provide a copy of its contract with Gall & Gall Company and failed to provide admissible, non-hearsay documentary evidence to prove that any other database system other than the Accurint™ database system was utilized to compile the report concerning Varad. Varad contacted Steven Gall by letter on April 3, 2006. She asked Gall to provide her with "the names of each and every database utilized in your report" concerning her background check. See: Tab 2, Exhibit B, page 1. Mr. Gall responded to Varad's request to be provided with information concerning each and every database utilized in his report by pointing specifically to the Accurint™ database on April 5, 2006, See: Tab 2, Exhibit B, page 2. Gall did not name any additional database systems as a source of data in the Varad report and there is no admissible evidence in the record to prove that any other database system was employed by Gall & Gall Company to compile a background report on Varad. LexisNexis failed to comply with 15 U.S.C 1681g(a)(2) by providing the sources of the data utilized in the background report after being asked by Varad in her letters dated April 17, 2006, April 30, 2006 and June 3, 2006. See: Tab 2, Exhibit B, page 2, 5, 8-9. Reed's failure to fulfill its responsibilities pursuant to 15 U.S.C 1681g(a)(2) and also Fed. R. Civ. P. 26 should not be rewarded by establishing this disputed issue of material fact in its favor for the purpose of granting a summary judgment.

A jury could find in Varad's favor concerning the material issue of fact that no additional databases other than the Accurint™ were accessed to compile the report Gall & Gall Company made on Varad. And, in the absence of any admissible evidence to the contrary, a jury could find in Varad's favor that all of the data on the background check

report concerning Varad, the criminal background report and the address history report were generated solely by the Accurint™ database system.

A motion for a summary judgment must be denied where a material fact with the potential to affect the outcome of the litigation cannot be determined as a matter of law from the factual evidence submitted with the motions. *"A fact is material "when it has the potential to change the outcome of the suit under the governing law if found favorably to the nonmovant." Parrilla-Burgos v. Hernandez-Rivera, 108 F.3d 445, 448 (1st Cir.) (quoting Martinez v. Colon, 54 F.3d 980, 984 (1st Cir.) (quoting Martinez v. Colon, 54 F.3d 980, 984 (1st Cir. 1995). LexisNexis has failed to provide admissible, uncontested documentary evidence that any other database system was accessed or utilized to compile the comprehensive background check report on Varad. A summary judgment on this contested material issue should not issue. This is another genuine issue of material fact that is appropriately determined by a jury.*

C. Whether or not the testimony of witnesses concerning these issues is credible is an issue for a jury.

Reed and the Maine Board of Bar Examiners have submitted exhibits containing multiple instances of inadmissible hearsay, by way of affidavit and otherwise. The credibility of that testimonial evidence and the weight that evidence should be afforded is a genuine issue of material fact to be determined by a jury. *"In the Barbed Wire Patent Case and those like it, it is improper to grant summary judgment without the factfinder's assessment of the credibility of the witnesses and the character of the documentary evidence."* and *"They rely primarily on the doctrine set forth in Washburn & Moen Mfg. Co. v. Beat-Em-All Barbed Wire Co., 143 U.S. 275, 12 S. Ct. 443, 36 L. Ed. 154 (1892)*

("Barbed Wire Patent Case"), *and more recently invoked in the Federal Circuit's opinion in Woodland Trust v. Flowertree Nursery, Inc., 148 F.3d 1368, 1998 WL 385665 (Fed. Cir. 1998), that oral testimony by an interested party must be corroborated.*

The State of Maine contracted with LexisNexis to access the database service Accurint™ in order to "verify applicants" for admission to that state's bar admission testing program. See: Tab 3, Exhibit A, page 1. That contract is sufficient as admissible proof to show that the Maine Board of Bar Examiners bought and paid for the service of access to the Accurint™ database system. See: Tab 3, Exhibit A, page 1-7. It is not fair or reasonable to infer, in the absence of admissible documentary evidence to the contrary, conclude that the Board did not and does not utilize or access the Accurint™ database system to "verify applicants for bar examination" as claimed on the Board's application. See: Tab 3, Exhibit A, page 1. It is far more reasonable to infer that the Board does access the Accurint™ database system to verify bar examination applicants as stated on its application form, and further, that the Board accessed the Accurint™ database system to "verify" Varad's application for admission to the bar in the State of Maine. It is reasonable to infer that the Board received that very same false and defamatory data from the Accurint™ database system concerning Varad as did Gall & Gall Company and F&W Publishing, Adams Media. LexisNexis took no action, and in fact refused to take any action, to reinvestigate the accuracy of the address history data or to delete or correct the false and defamatory data retained concerning Varad within its database systems in direct and willful violation of its duties pursuant to 15 U.S.C. 1681i(a)(1)(A). See: Tab 2, Exhibit B, page 2, 5, 8-9 (Varad's notice of inaccurate data) and Tab 2, Exhibit B, page 4-

5,7-8 and 11-12, (LexisNexis response to Varad's request that false data be corrected or deleted for its database systems).

Inadmissible hearsay testimony by affidavit is all that is offered to this court by LexisNexis and the Maine Board of Bar Examiners to supported the contention that the Accurint database was not accessed by the Board to "verify" Varad's application for admission to the bar in the State of Maine. LexisNexis and the Maine Board of Bar have failed to provide any admissible documentary evidence or data to confirm thier contentions. But they have successfully obstructed and objected to any and all discovery attempts Varad made to obtain admissible evidence on this fact issue by way of subpoena. See: Tab 4, Exhibit A, page 1-2. The result is that this material fact issue remains unresolved by evidentiary means. A jury could find in Varad's favor concerning this issue of material fact where it could reasonably doubt the truthfulness of the proffered inadmissible hearsay evidence and in light of the very clear lack of admissible documentary evidence supporting the Defendant's claims.

When considering the credibility of a witness offering unsubstantiated hearsay evidence to support a claim, a judge or a jury might reasonably review other claims made by that witness for truthfulness. On May 15, 2006, Varad wrote to Cheryl Cutliffe, Executor Director of the Maine Board of Bar Examiners to put her on notice that the Accurint™ database was disseminating false address history data in connection with her name. See See: Tab 4, Exhibit A, page 3. Varad requested on opportunity to review for accuracy any data received by the Board pursuant to background checks. See See: Tab 4, Exhibit A, page 3-4. Ms. The bar application requires an accurate address history from applicants going as far back as 1980. See: Tab 4, Exhibit A, pages 5-8. Failure to provide

a complete and truthful address history is viewed as equivalent to submitting falsehoods on a bar application and may provide a basis for denial of admission. Ms. Cutliffe was aware that the Board maintained an active contract with the Accurint™ database system yet she remained deceptively and intentionally silent concerning that fact and she refused to enter any type reply to Varad's request in spite of having been directly asked to provide the information.

In February 2007, Varad participated in the Maine bar examination program using the disability accommodation of a court reporter to take down her verbal responses and submit them for grading in a completed Word document format. Cheryl Cutliffe admits that she tampered with Varad's test responses by deleting portions of them prior to submission for grading. See: Tab 4, Exhibit A, pages 9-10. Varad concluded that the disability accommodation provided her was compromised. She refused to participate in any additional testing under such unfair testing conditions. The Board then required that Varad fill out a new application for bar admission. Varad responded that under the circumstances she had no interest in submitting another application. She requested that the Board return the testing fee that it had already collected. Cheryl Cutliffe refused to return the testing fee and simply proceeded as though Varad had submitted a new, completed bar application and the new completed application for a disability accommodation concerning both days of testing. Cutliffe had not in truth ever received those documents from Varad. Yet Cutliffe was able to determine the disability accommodation for Varad without a written request for one and subsequently informed Varad of her decision. Varad did not and would not have agreed to again being tested under the unfair conditions posed by being forced to allow Cutliffe to tampering with her

testing responses prior to submission for grading. See: Tab 4, Exhibit A, pages 1-15. A jury could find that based on the above-cited facts that the credibility of the Maine Board of Bar Examiners as a witness was not credible and that hearsay testimony offered by the Board was not reliable. A grant of a summary judgment is improper without the jury's assessment of the credibility of interested witnesses such as the Maine Board of Bar Examiners who have offered only hearsay testimony to support a claim on a material fact issue.

Part III

The Fair Credit Reporting Act is applicable to the actions of the Reed Elsevier, Inc. d.b.a. LexisNexis in reporting data to third parties to be utilized for the purpose of evaluating Varad's character for honesty and truthfulness concerning applications for employment and professional licensing.

Gramm-Leach-Bliley Act. 15 U.S.C. subsection I, § 6805, Enforcement, specifically does not apply to regulate publishing companies such as Reed Elsevier, Inc. or LexisNexis. The Gramm-Leach-Bliley Act regulates specifically national banks, federal credit unions, securities dealers and brokers, investment companies, state insurance agencies, and other financial institutions. The Drivers Privacy Protection Act, 18 U.S.C. § 2721 et seq. specifically regulates dissemination of data by state departments of motor vehicles, and again, that statute has no application to regulate dissemination of data by a publishing company such as Reed Elsevier, Inc. d.b.a. LexisNexis.

Based on the fact that neither Gramm-Leach-Bliley Act. 15 U.S.C. subsection I, § 6805 nor the Drivers Privacy Protection Act, 18 U.S.C. § 2721 et seq. regulate publishing companies such as Reed Elsevier, Inc., d.b.a. LexisNexis, it is an unfair and deceptive business practice for LexisNexis to hold itself out to the general public as adhering to the regulations of statutes that donot in fact apply to regulate publishing companies that

disseminate electronically held data to third parties. See: Tab 1, Exhibit 1, pages 1- 3. A jury could find in favor of the Plaintiff that Reed Elsevier, Inc., d.b.a. LexisNexis violated M.G.L. 93A, § 9 and the federal standards as set forth in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972) by intentionally making such false claims in their data privacy policy that deceive and mislead the public into believing that it has statutory protections that it in truth does not possess concerning the acts of a publishing company.

The Fair Credit Reporting Act, 15, U.S.C. § 1681a(d)(1) defines the term "consumer report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, (1) credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for - (A) creditor or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes." And 15, U.S.C. § 1681a(f) defines the term, "consumer reporting agency" as "any person which for monetary fees, dues, or on a cooperative basis, 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, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." A jury could find in the Plaintiff's favor on the material issue that Reed Elsevier, Inc., d.b.a. LexisNexis acts as a consumer reporting agency for the purposes of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d)(1)(B), by providing consumer reports that bear on consumers' characters and

general reputations and which are to be used by third parties for employment related purposes.

Reed Elsevier, Inc. d.b.a. LexisNexis provided data from its Accurint™ unit and database to compile a report on Varad that was to be made available to its customer, Gall & Gall Company. Gall & Gall Company routinely provides such reports to its client employers, such as F&W Publishing, Adams Media, to be used for the purpose of evaluating the character and general reputation of prospective employees. F&W Publishing, Adams Media procured a consumer report from Gall & Gall Company that was compiled from data supplied by LexisNexis Accurint™ database and they used it to evaluate of her character and general reputation.

If a jury found in the Reed Elsevier, Inc., d.b.a. LexisNexis functioned as a consumer agency, then it could also find that Reed Elsevier, Inc., d.b.a. LexisNexis failed to comply with 15 U.S.C. 1681g(a)(parts 1-3(B)) and 1681g(c) concerning making response to Varad's requests for disclosure of the data file held in connection with her name. A jury could find that Varad had a statutory right pursuant to 15 U.S.C. 1681g(c)(1)(B)(iii) to dispute the information contained in her "file". A "file" is defined in 15 U.S.C. 1681a(g) as "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

A jury could find in Varad's favor concerning the material fact issue of whether or not Reed Elsevier, Inc, d.b.a. LexisNexis failed to comply with 15 U.S.C. 1681i et seq., and specifically, 15 U.S.C. 1681i(a)(1)(A) by refusing to conduct a reasonable reinvestigation to determine if the data contested in writing by Varad was inaccurate, and if determined inaccurate, to delete the data from its own databases within 30 days of

receipt of written notice by Varad disputing the data. Because Reed Elsevier, Inc, d.b.a. LexisNexis refused to correct the false and defamatory data concerning Varad within its own database systems, the defamation was and is allowed to continue unabated and the damage to Varad's reputation and good name also continues unabated.

Reed Elsevier, Inc, d.b.a. LexisNexis invites the court to conclude that it has no responsibility to correct any data in its databases concerning Varad, by claiming that the data can only be changed or corrected by the database that originally provided the data to their database systems. That reasoning is not supported by a review of 15 U.S.C. 1681i(a)(1)(A), which requires that Reed Elsevier, Inc, d.b.a. LexisNexis conduct an investigation of its own database systems within 30 days after receipt of notice by the consumer that data it reported is disputed and if established as incorrect, to correct the data or to delete the data from its own databases.

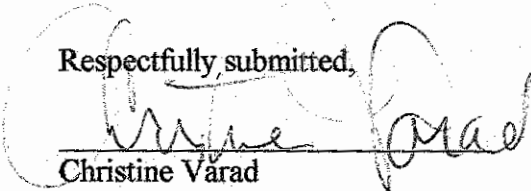
Varad made such a written request to James Swift, Operations Manager at LexisNexis, by letters dated April 17, 2006, April 30, 2006 and June 3, 2006. See: Tab 2, Exhibit B, page 2, 5, 8-9. LexisNexis declined to conduct an investigation of its own databases to determine if it was reporting false or incorrect data concerning Varad or to correct or delete any of the data in its database unless the original, undetermined data originator first changed the data within its database system. A jury could find that Reed failed to comply with its duties to Varad pursuant to 15 U.S.C. 1681i(a)(1)(A). A jury could also find in Varad's favor that Reed's refusal to investigate, correct and/or delete from its databases systems data concerning Varad after being notified that the such data was incorrect and defamatory resulted in unabated defamation existing on a continuous basis, causing continuous damage to her reputation and good name. A jury could find in

Varad's favor that the actions of Reed Elsevier, Inc. d.b.a. LexisNexis were willful and resulted in unabated defamation of Varad in employment and professional licensing settings in violation of 15 U.S.C. 1681i(a)(1)(A). See: Tab 2, Exhibit B, page 2, 5, 8-9 (Varad's notice of inaccurate data) and Tab 2, Exhibit B, page 4-5,7-8 and 11-12, (LexisNexis response to Varad's request that false data be corrected or deleted for its database systems).

CONCLUSION

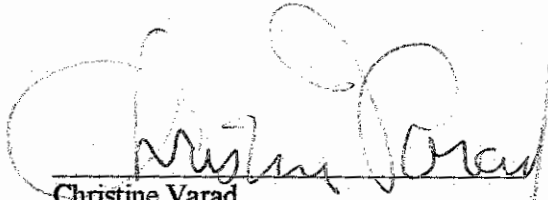
For all the above stated reasons, this Court should deny Defendant's motion for a summary judgment in its favor.

Respectfully submitted,


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781 534 8770

I certify that on the 11 th day of September 2007, I caused a copy of, "*PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR A SUMMARY JUDGMENT*," to be served by first class, postage prepaid mail on the attorney of record for (1) defendant Reed Elsevier, Incorporated, d.b.a. LexisNexis, *LexisNexis Risk & Information Analytics Group, Inc.* at the following addresses of record:

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