UNITED STATES DISTRICT COURT
NORTH DISTRICT OF ILLINOIS
EASTERN DIVISION

CLARKE CRIDDELL, Plaintiff, vs. TRANS UNION, LLC; EXPERIAN INFORMATION SOLUTIONS, INC.; EQUIFAX INFORMATION SYSTEMS, LLC; ASSET ACCEPTANCE, LLC; COLLECTION SYSTEMS, INC.; NCO FINANCIAL SYSTEM, INC.; TORRES CREDIT SERVICES, INC.; DSNB/MACY'S; HARVARD COLLECTION SERVICES, INC.; POPULAR MORTGAGE SERVICING, INC.; AMERICAN EXPRESS; CHASE/BANK ONE; FIFTH THIRD HOLDINGS, LLC/BANK; 1ST CONTINENTAL MORTGAGE/CREDIT PLUS; PLAZA ASSOCIATES; MARKOFF & KRASKY, LLC; CREDIT BUREAU DEPA/BANK ONE; and LEXIS NEXUS aka REED ELSEVIER GROUP, PLC, Defendants.	)	Case No.: 09CV6235

MEMORANDUM IN SUPPORT OF DEFENDANT TORRES CREDIT SERVICES, INC.'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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STATEMENT OF FACTS

The Plaintiff has sued Defendant Torres Credit Services, Inc. ("TCS") and others, alleging a variety of misdeeds with respect to credit reporting and collection of the Plaintiff's debts. The Plaintiff has now filed three Complaints in this matter: an original Complaint filed on October 6, 2009, a First Amended Complaint filed two days later on October 8, 2009, and a Second Amended Complaint filed on November 20, 2009.[1] The averments directed toward TCS have been repeated verbatim in each of the Plaintiff's three pleadings, despite the fact that the Plaintiff has now had two opportunities to revise the allegations against TCS made in his original pleading.[2]

There are four paragraphs in the Second Amended Complaint directed toward TCS. In Paragraph 12, the Plaintiff asserts that TCS is a "debt collector" as defined in the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq. (*See* Second Amended Complaint, ¶ 12.) TCS is, in fact, in the business of debt collection. Paragraph 12 of the Second Amended Complaint further avers that TCS is a "reseller" of credit information within the meaning of the Fair

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[1]Newly revised Fed. R. Civ. P. 15(a)(1)(A) permits a party to amend his or her pleading once as a matter of course within 21 days after serving it. The Plaintiff availed himself of his one amendment of right by filing his First Amended Complaint on October 8, 2009. The Plaintiff was then relegated to filing further amendments only by written consent of the other parties, or by leave of court. *See* Fed. R. Civ. P. 15(a)(2). On November 17, 2009, the Plaintiff obtained leave of court to file his Second Amended Complaint. The Plaintiff filed his Second Amended Complaint three days later.

[2]The Plaintiff's two Amended Complaints against TCS are futile repleadings as a matter of law, because they simply restate verbatim the same facts respecting TCS as were set forth in the original Complaint, and restate verbatim the same claims which, for the reasons discussed herein, do not set forth a valid theory of liability. *See Duthie v. Matria Healthcare, Inc.*, 254 F.R.D. 90 (N.D. Ill. 2008). The Plaintiff is apparently requesting a *fourth* opportunity to plead a valid theory of action against TCS through his Objection/Response to Defendant Torres Credit Services' Motion to Dismiss, filed on December 1, 2009. Although courts generally should freely grant leave to amend when justice so requires, *see* Fed. R. Civ. P. 15(a)(2), the demonstrated futility of the Plaintiff's repetitive pleadings precludes further leave to amend. *See Duthie*, 254 F.R.D. at 94.

Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. (*Id.*) The plain language of the FCRA reveals that TCS is not a "reseller." Finally, Paragraph 12 of the Second Amended Complaint asserts that TCS is a "furnisher" of information within the ambit of the FCRA. TCS does, in fact, furnish information to consumer reporting agencies. (*Id.*) However, as discussed below, the Second Amended Complaint fails to state a cognizable claim against TCS as a furnisher of information because there is no private right of action based upon the Plaintiff's allegations. Neither Paragraph 12 nor any other part of the Second Amended Complaint alleges that TCS is a "consumer reporting agency." In fact, TCS is not a consumer reporting agency. The three other paragraphs directed toward TCS attempt to set forth substantive claims against this Defendant.

Paragraph 58 alleges that TCS willfully and negligently failed to validate the Plaintiff's debt and continued to report that debt to a consumer reporting agency, in violation of the FDCPA. (*Id.*, ¶ 58.) Nowhere, however, does the Second Amended Complaint allege that the Plaintiff disputed the debt in writing, or identify the debt or account which TCS allegedly failed to validate. Several debts of the Plaintiff's had been placed with TCS for collection. Given these facts, under the applicable section of the FDCPA, TCS was not required to validate a debt, and TCS is not liable under the FDCPA as a matter of law. Insofar as Paragraph 58 can be read to allege FCRA liability based upon TCS's status as a furnisher of information, the FCRA clearly provides that no private right of action exists for a claim like the Plaintiff's.

Paragraph 59 of the Second Amended Complaint alleges that TCS wrongfully "re-aged" the Plaintiff's accounts by "updating" the date of the last activity on the accounts "in hopes of keeping negative information on an account longer" than permitted by the FCRA. (*Id.*, ¶ 59.) This claim

fails as a matter of law because the section of the FCRA upon which the Plaintiff's claim is based applies solely to consumer reporting agencies.

Paragraph 60 avers that TCS wrongfully obtained the Plaintiff's credit report in violation of the FCRA. (*Id.*, ¶ 60.) This claim fails as a matter of law because the section of the FCRA upon which the claim is based applies exclusively to consumer reporting agencies.

Because, as demonstrated below, the Second Amended Complaint fails to set forth any claims against TCS upon which relief can be granted, the Court should grant TCS's motion to dismiss.

ARGUMENT

I. STANDARDS GOVERNING MOTION TO DISMISS.

In order to survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bissessur v. Indiana University Board of Trustees*, 581 F.3d 599 (7th Cir. 2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1949. The plausibility standard does not impose a requirement of probability, but asks for more than a sheer possibility that the defendant has acted unlawfully. *Id.* To survive a motion to dismiss, the complaint must state sufficient facts to raise the plaintiff's right to relief above the level of speculation. *Bissessur*, 581 F.3d at 602. While the complaint need not contain detailed factual allegations, the plaintiff is obligated to provide the factual grounds of his or her entitlement to relief. *Id.* A formulaic recitation of a cause of action's

elements is insufficient. *Id.*; *Iqbal*, 129 S. Ct. at 1949 (pleading that offer labels and conclusions, or formulaic recitation of elements of cause of action, will not do).

In the present case, not only does the Second Amended Complaint fatally misstate the TCS's status with respect to the alleged activities, but the substantive claims directed toward TCS do nothing but recite the elements of the causes of action asserted under the FDCPA and the FCRA, without providing any factual grounds for such relief. (*See* Second Amended Complaint, ¶¶ 58-60.) Moreover, because most of the claims directed against TCS in the Second Amended Complaint cannot, as a matter of law, be brought against a debt collection agency, there is *no* possibility, not even a sheer possibility which is insufficient to survive a motion to dismiss, that TCS is liable for the misconduct alleged. Accordingly, under the foregoing standards, the Second Amended Complaint fails to state claims upon which relief can be granted against TCS, and the Court should grant TCS's motion to dismiss.

II. TCS IS NEITHER A CONSUMER REPORTING AGENCY NOR A RESELLER OF CONSUMER CREDIT INFORMATION.

The FCRA defines a "consumer reporting agency" and a "reseller" as follows:

§ 1681a. Definitions; rules of construction

* * *

(d) Consumer report.

(1) In general.

The term "consumer report" means any written, oral, or other communication of any information *by a consumer reporting agency* bearing on a consumer's credit worthiness, 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) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) Exclusions.

Except as provided in paragraph (3), *the term "consumer report" does not include*--

(A) subject to section 1681s-3 of this title, any--

(i) *report containing information solely as to transactions or experiences between the consumer and the person making the report*;

* * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit 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.

* * *

(u) Reseller

The term "reseller" *means a consumer reporting agency* that–

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer *for purposes of furnishing such information to any third party*, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

* * *

15 U.S.C. § 1681a. (Emphasis added.)

Thus, a "reseller" must be a "consumer reporting agency". An entity is a consumer reporting agency only if it regularly collects information for the purpose of furnishing consumer reports to third parties. TCS is not a consumer reporting agency, and, therefore, cannot be reseller. Because a consumer reporting agency is a firm that is in the business of assembling and evaluating consumer credit information, an entity that does no more than receive and transmit information identifying a particular debt is not a "consumer reporting agency" within the meaning of the FCRA. *DiGianni v. Stern's*, 26 F.3d 346, 349 (2d Cir.), *cert. denied*, 513 U.S. 897 (1994). Indeed, the FCRA exempts from the definition of a consumer reporting agency an entity which reports solely as to transactions between the consumer and the entity making the report. *DiGianni*, 26 F.3d at 349; *see also Jolly v. Academy Collection Service, Inc.*, 400 F. Supp. 2d 851 (M.D.N.C. 2005) (companies that report information based on their own experience with a consumer are not credit reporting agencies within the FCRA). Thus, a debt collection agency, whose business is to collect bad accounts and not to assemble or to evaluate consumer credit information, is not a "consumer reporting agency." *Mitchell v. Surety Acceptance Corp.*, 838 F. Supp. 497, 499 (D. Colo. 1993). For the same reason, a debt collection agency cannot be a "reseller" under the FCRA. *See Miller v. Wolpoff & Abramson, LLP*, 309 Fed. Appx. 40, 2009 WL 270034 (7th Cir. 2009).[3]

[3]Incongruously with the Plaintiff's allegations, the consequence of classification as a "reseller" under the FCRA is not to impose special or additional requirements but to *relieve* the reseller of certain requirements otherwise imposed on consumer reporting agencies, such as the general reinvestigation requirement. *See* 15 U.S.C. § 1681i(f).

In the case at bar, TCS is not a consumer reporting agency,[4] and cannot be a reseller of consumer credit information. Consequently, and as further discussed below, the causes of action which the Plaintiff attempts to set forth in Paragraphs 59 and 60 of the Second Amended Complaint fail to state a claim against TCS upon which relief can be granted. Accordingly, the Court should grant TCS's motion to dismiss.

III. PARAGRAPH 58 OF THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Pursuant to the FDCPA, a debt collector is required to validate the debt at issue, subject to specified conditions:

> **§ 1692g. Validation of debts**
>
> (a) Notice of debt; contents
>
> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing–
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) *a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector*;

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[4]Indeed, the Plaintiff has nowhere alleged that TCS is a consumer reporting agency, an allegation crucial to his causes of action in Paragraphs 59 and 60 of the Second Amended Complaint. For the reasons discussed above, even if the Plaintiff had alleged that TCS is a consumer reporting agency, as a matter of law TCS cannot occupy that status.

(4) *a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt*, or any portion thereof, is disputed, *the debt collector will obtain verification* of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

* * *

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, *the debt collector shall cease collection of the debt*, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

* * *

15 U.S.C. § 1692g. (Emphasis added.)

In the case at bar, the Plaintiff's purported first cause of action against TCS alleges that the Defendant failed to validate the Plaintiff's debt, in violation of subsection (b) of § 1692g. (*See* Second Amended Complaint, ¶ 58.) It is clear that, in order to trigger a debt collector's obligation to validate a debt, the consumer must furnish the debt collector with *written* notice of the dispute. *See Jolly v. Shapiro*, 237 F. Supp. 2d 888 (N.D. Ill. 2002); *McCabe v. Crawford & Co.*, 210 F.R.D. 631 (N.D. Ill. 2002); *Cortright v. Thompson*, 812 F. Supp. 772 (N.D. Ill. 1992). A debt collection agency has two options upon receiving a written request for validation of a debt. *Jang v. A.M. Miller*

& Associates, 122 F.3d 480 (7th Cir. 1997). The agency may provide the requested validation and continue the debt collection activities, or the agency may cease the collection activities. *Id.* at 483.

The Second Amended Complaint contains no allegations that the Plaintiff furnished TCS with written notice of a dispute. Therefore, under the terms of 15 U.S.C. § 1692g, TCS was not required to validate the Plaintiff's accounts. Pursuant to the FDCPA, those debts were presumed valid. *See* 15 U.S.C. § 1692g(a)(3). Accordingly, TCS could not have committed a violation by continuing to report them as valid. Moreover, not only has the Plaintiff failed to allege that he provided TCS with written notice of his dispute, so as to trigger the Defendant's duty to validate the debts, but the Second Amended Complaint does not identify the alleged debts or accounts to which his allegations refer. Several of the Plaintiff's debts were placed with TCS for collection. The Plaintiff's failure to identify the debts upon which he bases his allegations of a lack of validation by TCS precludes liability under the FDCPA.

Insofar as Paragraph 58 of the Second Amended Complaint attempts to allege that TCS violated the FCRA by continuing to furnish credit information[5] to consumer reporting agencies after allegedly failing to validate the Plaintiff's debts, such a claim is foreclosed by the express terms of the FCRA. The FCRA prohibits the furnishing of inaccurate information to consumer reporting agencies:

> **§ 1681s-2. Responsibilities of furnishers of information to consumer reporting agencies**
>
> (a) Duty of furnishers of information to provide accurate information

[5]Paragraph 12 of the Second Amended Complaint characterizes TCS as a "furnisher" of information within the meaning of the FCRA. However, the pleading does not thereafter explicitly posit a cause of action upon that antecedent allegation. Of the claims made in Paragraphs 58 through 60, only Paragraph 58 alleges anything akin to "furnisher" liability.

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if--

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

* * *

(2) Duty to correct and update information

A person who--

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate,

shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

* * *

15 U.S.C. § 1681s-2.

This statute further provides that a furnisher of information has a duty, under specified circumstances, to investigate disputed information:

> (b) Duties of furnishers of information upon notice of dispute
>
> (1) In general
>
> After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall--
> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
>
> (C) report the results of the investigation to the consumer reporting agency;
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
>
> (i) modify that item of information;
>
> (ii) delete that item of information; or
>
> (iii) permanently block the reporting of that item of information.
>
> * * *

Id.

The FCRA declares that there is *no* private cause of action for a violation of subsection (a) requiring the furnishing of accurate information:

> (c) Limitation on liability

> Except as provided in section 1681s(c)(1)(B) of this title, sections 1681n and 1681o [establishing civil liability for noncompliance] of this title *do not apply to any violation of--*
>
> (1) *subsection (a) of this section*, including any regulations issued thereunder;
>
> * * *
>
> (d) Limitation on enforcement
>
> *The provisions of law described in paragraphs (1) through (3) of subsection (c)* of this section (other than with respect to the exception described in paragraph (2) of subsection (c) of this section) *shall be enforced exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials identified in section 1681s of this title.*

Id. (emphasis added); *see also Nelson v. Equifax Information Services, LLC*, 522 F. Supp. 2d 1222 (C.D. Cal. 2007) (there is no private right of action for violation of FCRA's duty on furnishers of information to report accurate information to consumer reporting agencies).

In the present case, Paragraph 58 of the Second Amended Complaint might be read generously to allege that TCS failed to report accurate information in violation of the FCRA. As discussed above, however, there is no private right of action for such a violation. Paragraph 58 of the Second Amended Complaint does not bear a reading which includes allegations that TCS failed to investigate any disputed information pursuant to § 1681s-2(b), for which there *is* a private right of action. However, even assuming for the sake of argument that the Second Amended Complaint can be interpreted to include such allegations, the pleading sets forth no basis for such an action because the "notice" which triggers a furnisher's duty to investigate disputed information is notice *from a consumer reporting agency, not from the consumer directly. See* 15 U.S.C. §§ 1681s-2(b)(1); 1681i(a)(2); *Nelson*, 522 F. Supp. 2d at 1230 (debt collection agency's duty under FCRA, 15 U.S.C. § 1681s-2(b)(1), to reinvestigate disputed debt was never triggered, as required for liability to debtor

for alleged violation, when credit reporting agency failed to notify debt collection agency of dispute after debtor provided requisite notice to credit reporting agency, notwithstanding that debtor also sent copies of her letter directly to debt collection agency).

For all the foregoing reasons, Paragraph 58 of the Second Amended Complaint fails to state a claim against TCS upon which relief can be granted. Accordingly, the Court should grant TCS's motion to dismiss.

IV. PARAGRAPH 59 OF THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Paragraph 59 of the Second Amended Complaint alleges that TCS wrongfully "re-aged" the Plaintiff's accounts by "updating" the date of the last activity on the accounts "in hopes of keeping negative information on an account longer" than permitted by the FCRA. (Second Amended Complaint, ¶ 59.) The Plaintiff avers that such conduct violates FCRA § 605(c) (15 U.S.C. § 1681c(c)). This claim fails as a matter of law because the section of the FCRA upon which the Plaintiff's claim is based applies solely to consumer reporting agencies.

15 U.S.C. § 1681c provides in relevant part:

> **§ 1681c. Requirements relating to information contained in consumer reports**
>
> (a) Information excluded from consumer reports
>
> Except as authorized under subsection (b) of this section [inapplicable under facts of case at bar], *no consumer reporting agency* may make any consumer report containing any of the following items of information:
>
> (1) Cases under Title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

(2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

* * *

(c) Running of reporting period

(1) In general.--The 7-year period referred to in paragraphs (4) and (6) of subsection (a) of this section shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

* * *

15 U.S.C. § 1681c. (Emphasis added.)

Thus, to the extent that § 1681c prohibits "re-aging" of a consumer's information for purposes of reporting such information, the prohibition applies solely to consumer reporting agencies, not to furnishers of information. TCS is not a consumer reporting agency. Accordingly, Paragraph 59 of the Second Amended Complaint fails to state a cause action upon which relief can be granted, and the Court should grant TCS's motion to dismiss.

V. PARAGRAPH 60 OF THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Plaintiff complains that TCS wrongfully obtained his credit report without the Plaintiff's permission, in violation of FCRA § 604 (15 U.S.C. § 1681b). (*See* Second Amended Complaint, § 60.) The Plaintiff asserts that this alleged conduct violated subsection (a)(3)(F) of the statute. (*Id.*) Section 1681b provides, in relevant part:

> **§ 1681b. Permissible purposes of consumer reports**
>
> (a) In general
>
> Subject to subsection (c) of this section, *any consumer reporting agency* may furnish a consumer report under the following circumstances and no other:
>
> (1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.
>
> (2) In accordance with the written instructions of the consumer to whom it relates.
>
> (3) To a person which it has reason to believe--
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> * * *
>
> (F) otherwise has a legitimate business need for the information--
>
> (i) in connection with a business transaction that is initiated by the consumer; or
>
> (ii) to review an account to determine whether the consumer continues to meet the terms of the account.
>
> * * *

15 U.S.C. § 1681b. (Emphasis added.)

In conformity with the express language of § 1681b(a), courts have held that a company which is not a consumer reporting agency cannot violate the provisions of the FCRA relating to the permissible purposes of consumer reports, including § 1681b. *See Belshaw v. Credit Bureau of Prescott*, 392 F. Supp. 1356 (D. Ariz. 1975). In fact, the United States Court of Appeals for the Seventh Circuit has held that, because the FCRA is clear that only a consumer reporting agency may be held liable with respect to the dissemination of a credit report, a claim that a creditor is liable for obtaining a credit report without the consumer's permission is a *frivolous lawsuit*, which may be dismissed on that basis alone. *See Frederick v. Marquette National Bank*, 911 F.2d 1 (7th Cir. 1990).[6] The *Frederick* court stated:

> The Act permits a consumer reporting agency to furnish a credit report to a person who the agency reasonably believes has "a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681b(3)(E). The district judge thought Marquette's need for a credit report on Frederick so plain, in light of Marquette's option to finance the purchase if Frederick failed to obtain financing herself, that he granted Marquette's motion to dismiss the complaint. We would be inclined to agree, although given some pause by Frederick's vigorous assertion-not tested by trial or pretrial discovery, because as we have said the complaint was dismissed on the defendant's motion-that Marquette told her from the start that it was not interested in financing any more purchases in the neighborhood of the apartment. The contract entitled Marquette, if Frederick failed to obtain financing, not only to finance the purchase itself but also to find someone else to finance it. The first option may have been excluded by Marquette's decision not to become more deeply involved in the neighborhood in question, but there is no suggestion that the second was; it remained alive, and would seem to have warranted Marquette in taking steps to discover whether Frederick was sufficiently credit-worthy to justify a search for an alternative mortgagee. The need was legitimate and connected with a business transaction with the consumer, and nothing more would seem to be required to bring Marquette's action within the protection of the statutory provision that we quoted.

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[6]Given the clearly unfounded nature of the claims against TCS in the Second Amended Complaint, TCS anticipates filing a motion for sanctions pursuant to Fed. R. Civ. P. 11, based upon the costs incurred by TCS in having to respond to the Second Amended Complaint.

> But this we need not decide. *The statute is not even potentially applicable to Marquette. So far as pertains to this case, the statute imposes civil liability only for the dissemination of consumer credit reports* ***by consumer reporting agencies***, Ippolito v. WNS, Inc., 864 F.2d 440, 448 n. 8 (7th Cir.1988), *which Marquette National Bank is not.* This was not the district court's ground for dismissing the suit. But we can affirm on any ground fairly supported by the record. Klingman v. Levinson, 877 F.2d 1357, 1360 n. 3 (7th Cir.1989). Now it is true that this principle contains the sometimes unspoken qualification that the ground have been one urged by the appellee. Miller v. Civil City of South Bend, 904 F.2d 1081, 1103 (7th Cir.1990) (en banc) (concurring opinion). It would be reckless to affirm on a ground that the appellant had never had a chance to address because the appellee had failed to raise it. But there is an exception to the exception. If the waived ground makes the suit frivolous, the dismissal can be affirmed on that ground. Crowley Cutlery Co. v. United States, 849 F.2d 273, 276-77 (7th Cir.1988). *A frivolous suit does not invoke the jurisdiction of the federal courts, meaning: a frivolous suit, because it is a complete waste of judicial effort, can be dismissed even if the parties do not recognize its frivolousness.* ***When a statute expressly confines liability to X's and the defendant is a Y, the suit is frivolous.*** Rush v. Macy's New York, Inc., 775 F.2d 1554 (11th Cir.1985).
>
> The district court was right to dismiss the suit, but the dismissal should have been based on frivolousness.

Id. at 1-2. (Emphasis added.)

In the case at bar, the Plaintiff alleges exactly the same frivolous claim as that set forth by the plaintiff in *Frederick*, that an entity other than a consumer reporting agency is liable for obtaining the plaintiff's credit report without his permission.[7] Even apart from this fatal deficiency in the Plaintiff's claim, it is established in the Seventh Circuit that a debt collection agency has a legitimate

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[7]Indeed, the Plaintiff in the present case has stated the same type of frivolous claim in Paragraph 59 of the Second Amended Complaint, where he again made the defendant a Y, despite the fact that the statute expressly confines liability to Xs. The Plaintiff also obviously ignored the provisions of the FCRA in apparently seeking to attach liability to TCS for allegedly furnishing inaccurate information to a consumer reporting agency (*see* Second Amended Complaint, ¶ 58), given that the Act expressly and clearly prohibits a private right of action based upon such a violation. Although the Plaintiff is a pro se litigant, this pattern of making allegations which are expressly unsustainable even to the casual reader of the relevant statutes underscores the frivolous nature of all the Plaintiff's claims against TCS. It is clear that the Plaintiff read the statutes because he cited them in his pleading. He simply decided to ignore the parts he did not like, necessitating the time and expense of TCS's response.

purpose in obtaining a consumer's credit report, and does not violate the FCRA in doing so, when the agency has been engaged by the owner of the debt to collect that debt. *Miller*, 309 Fed. Appx. at 43. For all these reasons, Paragraph 60 of the Second Amended Complaint fails to state a claim upon which relief can be granted, and the Court should grant TCS's motion to dismiss.

CONCLUSION

For all the foregoing reasons, Defendant Torres Credit Services, Inc. respectfully requests that this Honorable Court grant its motion to dismiss the claims which the Plaintiff has attempted to set forth against this Defendant in the Second Amended Complaint.

Respectfully submitted,

Torres Credit Services, Inc.

By: /s/ Charles Rector, Esquire
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Attorney for Defendant Torres
Credit Services, Inc.

Date: December 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Memorandum in Support of Motion to Dismiss with the Clerk of the Court using the CM/ECF system on this 3rd day of December, 2009, which constitutes service on below counsel, registered filing users, pursuant to Fed. R. Civ. P. 5(b)(2)(D):

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I further certify that service of the foregoing Memorandum in Support of Motion to Dismiss was served on the Plaintiff via First Class Priority US Mail, postage prepaid on the 3rd day of December, 2009, properly addressed as follows:

Clark Criddell
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/s/ Charles Rector, Esquire