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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

CHRISTINE BAKER,

Plaintiff,

vs.

TRANS UNION LLC, EQUIFAX
INFORMATION SERVICES LLC,
EXPERIAN INFORMATION
SOLUTIONS, INC., NCO
FINANCIAL SYSTEMS, INC.,
DANA CAPITAL GROUP, DANA
SMITH, MUTUAL BENEFIT
FUNDING, ANTHONY PADUANO,
VINCENT SANFILIPPO

Defendants.

Case No. CV 07 08032-JAT

Assigned to the Honorable James A. Teilborg

**DEFENDANT TRANS UNION LLC'S REPLY
BRIEF IN SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO RULE 12(b)(6)
OF THE FEDERAL RULES OF CIVIL
PROCEDURE**

ORAL ARGUMENT REQUESTED

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The majority of Plaintiff's Opposition to Trans Union's Motion to Dismiss
4 concerns immaterial allegations unrelated to her First Amended Complaint ("FAC"), her
5 comments about numerous entities unrelated to this matter, and her ongoing career of
6 litigation, in which she claims, "she will expand her efforts to convince her readers and
7 clients that there is nothing wrong with defaulting on unsecured debts and walking away
8 from over-mortgaged homes and gas guzzlers worth less than the balance on the loan."
9 (Opp. 2:23-26.) However, none of Plaintiff's spurious allegations can conceal this lawsuit's
10 lack of substance.

11 As detailed below, Plaintiff has failed to state a claim for relief, and her FAC
12 against Trans Union should be dismissed with prejudice.

13 **II. NONE OF THE EXHIBITS REFERRED TO IN PLAINTIFF'S OPPOSITION**
14 **SHOULD BE CONSIDERED**

15 None of the exhibits filed in support of Plaintiff's Opposition have been
16 authenticated and most of the documents constitute inadmissible hearsay. Therefore, the
17 Court should disregard all 20 exhibits referred to in Plaintiff's Opposition.

18 Moreover, Trans Union has filed a Motion to Dismiss, not a motion for
19 summary judgment. Plaintiff's Opposition to Trans Union's Motion to Dismiss should
20 therefore be limited to the allegations of Plaintiff's FAC and not on purported extrinsic
21 "evidence." On a motion to dismiss a complaint, the court should consider nothing except
22 the challenged pleading, and should not consider the plaintiff's affidavits. *Holmberg v.*
23 *Williamson* (S.D.N.Y. 1955) 135 F.Supp. 493, 495 ("Insofar as the motion to dismiss the
24 complaint is concerned, the Court will consider nothing but the complaint and will disregard
25 the affidavits which have been filed").

26 A complaint cannot be modified by a party's affidavit or by papers filed in
27 response to a dispositive motion to dismiss. *Brownstone Inv. Group, LLC. v. Levey*
28 (S.D.N.Y. 2007) 468 F.Supp.2d 654. In *Brownstone Inv. Group, LLC.*, the Court noted, "In

1 response to the motions to dismiss brought by Naylor and Stephen Lowey [third party
2 defendants], Levey [third party claimant] has submitted a number of documents, including
3 an affidavit by Levey dated February 22, 2006 and several attached exhibits. . . . A good
4 deal of the argument in Levey's opposition briefs is based on references to these documents.
5 But, a complaint cannot be modified by a party's affidavit or by papers filed in response to a
6 dispositive motion to dismiss” *Id.* at 660.

7 All exhibits and other material outside the FAC that Plaintiff refers to in her
8 Opposition should be disregarded. However, even if the Court were to review this extrinsic
9 material, Plaintiff’s FAC still fails as a matter of law.

10 **III. TRANS UNION’S RESPONSES TO PLAINTIFF’S REQUESTS FOR**
11 **ADMISSIONS WERE TIMELY SERVED**

12 On page 4, lines 2-10 of her Opposition, Plaintiff argues that Trans Union
13 failed to timely respond to Baker’s Request for Admissions served on April 19, 2008, and
14 that the Requests are therefore deemed admitted. Plaintiff argues that Trans Union did not
15 serve its Responses until May 22, 2008. Plaintiff’s argument lacks merit.

16 Pursuant to the Federal Rules of Civil Procedure, Rule 6(d): “When a party
17 may or must act within a specified time after service and service is made under Rule
18 5(b)(2)(C), (D), (E), or (F), three days are added after the period would otherwise expire
19 under Rule 6(a).” Plaintiff’s Requests were served by mail pursuant to Rule 5(b)(2)(C).
20 Therefore, Trans Union’s deadline to respond was May 22, 2008, and its response was
21 timely.

22 **IV. PLAINTIFF’S FIRST AMENDED COMPLAINT FAILS TO STATE A**
23 **CLAIM UPON WHICH RELIEF CAN BE GRANTED**

24 **A. Plaintiff’s Claim for “Blocking” Her Credit Information (FCRA § 1681g)**
25 **Fails**

26 In her Opposition, Plaintiff argues that Trans Union prevented her from
27 obtaining information at the myFICO.com website. (Plt. Oppo., 5-6:11-28.) However, she
28 does not contend that myFICO.com is a Trans Union website. Plaintiff actually admits that

1 Trans Union had informed her that myFICO is serviced by Equifax and that she would be
2 able to obtain her credit report through Trans Union's website. (Plt. Oppo., 5:13-16.)

3 More importantly, although she complains about having to go to Trans
4 Union's website at <http://disclosure.transunion.com> to view a free copy of her credit report,
5 Plaintiff does not allege that she was refused a free copy of her credit report. Her only
6 allegation is that the website where she was able to obtain her credit report is actually owned
7 by TrueCredit, not Trans Union. However, whether Trans Union owns TrueCredit is
8 irrelevant since she was able to obtain her credit report free of charge as indicated in Trans
9 Union's consumer disclosure, "To view a free copy of your full, updated credit file, go to
10 our website <http://disclosure.transunion.com>." (Plt. Oppo., 5:2-3.) Plaintiff was able to
11 obtain a free credit report as indicated by Exhibit 14, which states, "Your free updated
12 Personal Credit Report is moments away!"

13 Although Plaintiff argues "It is IMPOSSIBLE to determine what causes low
14 FICO scores without analyzing the myFICO reports and score factors," (Plt. Oppo., 6:6-7)
15 Plaintiff cannot credibly allege that Trans Union could block Plaintiff's myFICO reports.
16 Trans Union has no control over a website that it does not service or own, nor does Plaintiff
17 allege such control. Therefore, Plaintiff's claim against Trans Union for violation of FCRA
18 Section 1681g is meritless and should be dismissed with prejudice.

19 **B. Plaintiff's Permissible Purpose Claim (FCRA § 1681b) Fails Because The**
20 **FAC Concedes A Permissible Purpose and Her Claim Is Time-Barred**

21 Plaintiff's Opposition does nothing to avoid her own dispositive allegations
22 that Dana Capital obtained her report when she "applied ... for a mortgage" in 2004 and
23 March 2007 (FAC at ¶s 16, 22, 26), and that NCO Financial Systems obtained her report
24 "apparently for the purpose of collecting a debt" (*Id.* at ¶ 36) – both of which are
25 permissible purposes under the FCRA.

1 1. **Plaintiff's FAC Concedes that Dana Capital's Access to Her Credit**
2 **Report Was for a Permissible Purpose and the Claim Is Time-**
3 **Barred**

4 Since Plaintiff admits that she did apply for mortgage in 2004 (FAC, ¶¶ 22,
5 26), the disclosure of her credit file was indisputably for a permissible purpose. Also, her
6 complaint for the disclosure of her credit file relating to this mortgage application is barred
7 by the statute of limitations.

8 An FCRA plaintiff cannot rely upon events that she knew of more than two
9 years before she filed her Complaint. Section 1681p of the FCRA provides:

10 An action to enforce any liability created under this
11 subchapter may be brought... not later than the earlier of –

12 (1) 2 years after the date of discovery by the plaintiff of the
13 violation that is the basis for such liability; or

14 (2) 5 years after the date on which the violation that is the
15 basis for such liability occurs.

16 Plaintiff argues that she sent a 13-page mailing to Trans Union regarding Dana
17 Capital's denial of any relationship with "Mortgage Center," which was received on
18 February 17, 2005. (Plt. Oppo., 7:13-14.) However, Plaintiff did not file her original
19 complaint until June 15, 2007. Therefore, all allegations relating to events that occurred
20 prior to June 15, 2005, are time-barred.

21 As to Plaintiff's mortgage application of March 2007, Plaintiff again tries to
22 sidestep the issue by arguing that her mortgage application was not with Dana Capital. That
23 argument does not change the analysis, however, because Plaintiff admits that "Dana
24 Capital's account was utilized" when she applied for the mortgage. (FAC at ¶ 16, "When
25 [she] applied with 'Trinity Financial' for a mortgage in 3/07 ... Dana Capital's account was
26 utilized to obtain her credit reports from reseller NCO."). As detailed in Trans Union's
27 Motion, once a permissible purpose is established, the FCRA "does not require that
28 consumers expressly approve each request for a report." *Sterigopoulous & Castro v. First*

1 *Midwest Bancorp* (7th Cir. 2005) 427 F. 3d 1043, 1046-1047. An agent of a party with a
2 permissible purpose is likewise permitted to obtain a consumer report on behalf of its
3 principal in connection with that purpose. *Weidman v. Federal Home Loan Mortgage Corp.*
4 (E.D. Pa. 2004) 338 F. Supp. 2d 571, 577. Plaintiff admits in her Opposition that Trinity
5 Financial is part of Dana Capital. (Plt. Oppo., 9:13-14.)

6 Additionally, although Plaintiff complains about the disclosure of her credit
7 report for an allegedly impermissible use, Trans Union had advised Plaintiff that she could
8 put a freeze on her credit report to keep any creditor from accessing her report. However,
9 Plaintiff was not interested in this procedure. [Plt. Oppo., 8:2-3]

10 Therefore, Dana Capital's accesses to Plaintiff's credit report in 2004 and
11 2007 were for permissible purposes, and the 2004 access is time-barred.

12 **2. Plaintiff's FAC Concedes that NCO's Access to Her Credit Report**
13 **Was for a Permissible Purpose**

14 On pages 10-11 of Plaintiff's Opposition, beginning with line 17, Plaintiff
15 argues that Trans Union is liable for NCO's access to her credit report on June 17, 2005.
16 However, Plaintiff admits that NCO Financial Systems obtained her credit report
17 "apparently for the purpose of collecting a debt." (FAC, ¶ 36.) Plaintiff argues, "It is not
18 Baker's duty to establish that NCO did not have a permissible purpose." (Plt. Oppo., 11:3.)
19 Plaintiff is mistaken. She is the plaintiff and has the burden of proof. She also
20 conspicuously fails to deny that the debt existed.

21 This debt presumptively did exist since she makes a point of not paying her
22 bills. She alleges in her Opposition, "She [Plaintiff] recently stopped paying her credit cards
23 when creditors sue her, the credit bureaus will certainly be named as responsible parties as
24 they substantially contributed to Baker's financial problems." (Plt. Oppo., 2:18-19.) It is
25 also worthy to note that Plaintiff filed for bankruptcy in August 2005. (FAC, ¶s 40, 41.)
26 Thus, Plaintiff has not alleged that the debt was inaccurate. NCO's access to her credit
27 report was therefore for a permissible purpose.

1 Plaintiff's claim for violation of FCRA section 1681b fails, and should be
2 dismissed with prejudice as to Trans Union.

3 C. **Plaintiff Has Not Alleged A Claim For Failure To Maintain Reasonable**
4 **Procedures To Avoid Permissible Purpose Violations (FCRA § 1681e(a))**

5 As set forth above, Plaintiff has not alleged an FCRA section 1681b violation.
6 Therefore, Plaintiff cannot state a claim for failure to prevent violations of Section 1681b,
7 and her Section 1681e(a) claim against Trans Union should likewise be dismissed with
8 prejudice.

9 D. **Plaintiff's Unreasonable Procedures Claim (FCRA § 1681e(b)) Fails**
10 **Because She Has Not Identified An Unreasonable Procedure**

11 Specifically, to prevail on her claim that Trans Union violated Section
12 1681e(b) of the FCRA, Plaintiff must allege and prove:

13 (1) An inaccuracy existed on her credit report. *See Guimond*, 45 F. 3d at
14 1333.

15 (2) Her credit report was inaccurate as a result of unreasonable procedures
16 on the part of Trans Union. *Hauser v. Equifax, Inc.*, 602 F. 2d 811, 814-815 (8th Cir. 1979).

17 (3) The unreasonably inaccurate credit report proximately caused her
18 cognizable harm. *Crabill v. Trans Union LLC*, 259 F. 3d 662, 664 (7th Cir. 2001).

19 On pages 11-12, beginning at line 10 of her Opposition, Plaintiff alleges that
20 for many years, Trans Union kept a separate file with Plaintiff's oldest account, the JC
21 Penney account, opened in 1988. However, Plaintiff does not allege any inaccuracy
22 allegedly being reported on two credit files. Plaintiff also does not allege that she ever
23 notified Trans Union to merge the two files. Also, as indicated below, any claim beyond the
24 two-year statute of limitations is time barred.

25 As to the issue of Trans Union's alleged failure to report Plaintiff's
26 bankruptcy, Trans Union does not and is not required to report all bankruptcy information.
27 *See Troye v. Trans Union LLC*, Case No. CV 05-1684-PHX-ROS (Trans Union's Motion to
28 Dismiss, Exhibit 4). Moreover, an inquiry for a preapproved credit offer is a "promotional

1 inquiry” that has no impact on a credit score. Also, Plaintiff would have been denied the
2 Chase credit card anyway since she admits that the bankruptcy was the cause of the decline
3 for a Chase credit card. Thus, Plaintiff suffered no damages caused by Trans Union.

4 On pages 12-13, beginning at line 24, Plaintiff argues that Trans Union
5 reported Union Bank and Capital One accounts as “unrated.” This allegation is not made in
6 Plaintiff’s FAC and therefore is immaterial to this lawsuit. However, even if the Court were
7 to consider this argument, Plaintiff does not allege that she was damaged as result of
8 reporting the account as “unrated.” Plaintiff does not allege that reporting the accounts as
9 “unrated” lowered her FICO score or that she was denied credit as a result. As indicated
10 below, Trans Union followed reasonable procedures and deleted the “unrated” accounts.
11 Also, any cause of action based on the Union Bank account which she alleges that she
12 disputed on August 5, 2003, is time-barred in any event.

13 Therefore, Plaintiff’s Section 1681e(b) claim fails and should be dismissed
14 with prejudice as to Trans Union.

15 E. **Plaintiff’s Claim that Trans Union Failed to Provide A Complete and**
16 **Correct Consumer Report After Receiving Factual Disputes (FCRA §**
17 **1681i) Fails Because She Has Not Alleged An Inaccuracy, A Dispute, Or**
18 **Damages**

19 15 U.S.C. section 1681i(a)(1)(A) (“Reinvestigation of Disputed Information”)
20 provides in pertinent part as follows:

21 “Subject to subsection (f) of this section, if the completeness or
22 accuracy of any item of information contained in a consumer's
23 file at a consumer reporting agency is disputed by the consumer
24 **and the consumer notifies the agency directly, or indirectly**
25 **through a reseller, of such dispute,** the agency shall, free of
26 charge, conduct a reasonable reinvestigation to determine
27 whether the disputed information is inaccurate and record the
28 current status of the disputed information, **or delete the item**
from the file in accordance with paragraph (5), before the end
of the 30-day period beginning on the date on which the agency
receives the notice of the dispute from the consumer or reseller.”
[Emphasis added.]

1 Here, Plaintiff does not allege that she ever notified Trans Union that her
2 credit report was inaccurate because it failed to merge her two credit files, report her
3 bankruptcy filing, or otherwise. Thus, there was no obligation to reinvestigate because
4 nothing was disputed. Plaintiff also concedes that she did file for bankruptcy. (FAC, ¶¶ 40,
5 41.) As to the Union Bank and Capital One accounts, Plaintiff admits that Trans Union
6 deleted these accounts. (Plt. Oppo, 13:5-8.)

7 Therefore, Plaintiff's FCRA § 1681i claim fails.

8 **F. Plaintiff's Claim for Tortious Interference With Contractual Relations**
9 **Should Be Dismissed**

10 To bring a prima facie case of intentional interference with contractual
11 relations, the plaintiff must allege all of the following:

- 12 1. Existence of a valid contractual relationship;
- 13 2. Knowledge of the contractual relationship on the part of the interferer;
- 14 3. Intentional interference inducing or causing a breach;
- 15 4. Resultant damage to the party whose contractual relationship has been
16 disrupted; and
- 17 5. Improper action on the part of the interferer.

18 *Safeway Ins. Co. Inc. v. Guerrero*, 210 Ariz. 5, 10 (2005).

19 "The tort is intentional in the sense that [the defendant] must have intended to
20 interfere with the [plaintiff's] contract or have known that this result was substantially
21 certain to be produced by its conduct." *Snow v. W. Sav. & Loan Ass'n*, 152 Ariz. 27, 33, 730
22 P.2d 204, 211 (1986).

23 "However, proof that an actor intentionally induced a breach of contract is not
24 sufficient to establish that the actor's conduct was improper. Rather, 'there is a requirement
25 that the interference be both intentional and improper.' Restatement (Second) of Torts § 767
26 cmt. a (1979) (emphasis added). 'If the interferer is to be held liable for committing a
27 wrong, his liability must be based on more than the act of interference alone. Thus, there is
28 ordinarily no liability absent a showing that defendant's actions were improper as to motive

1 or means.' *Wagenseller*, 147 Ariz. at 388, 710 P.2d at 1043." *Safeway Ins. Co. Inc.*, 210
2 Ariz. at 11.

3 Plaintiff has not made any credible allegation of how Trans Union
4 intentionally tried to harm her. Plaintiff only alleges, "One can only conclude that Trans
5 Union was determined to destroy Baker." (Plt. Oppo., 14:28.) This allegation is rank
6 speculation. Plaintiff has not alleged how Trans Union would have benefited from allegedly
7 interfering with Plaintiff's contracts with her clients. Plaintiff also has not alleged Trans
8 Union's motive for allegedly engaging in such action. It was Plaintiff who interfered with
9 her own contracts by deciding to turn away from her own clients. Trans Union has no
10 control over Plaintiff's own actions.

11 Therefore, Plaintiff's claim for tortious inference with contractual relations
12 should be dismissed.

13 **V. CONCLUSION**

14 In light of the foregoing, Trans Union respectfully submits that Plaintiff's
15 FAC fails to state a claim for relief against Trans Union, and should be dismissed with
16 prejudice.

17 DATED: August 11, 2008

MUSICK, PEELER & GARRETT LLP

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within entitled action; my business address is 650 Town Center Drive, Suite 1200, Costa Mesa, California 92626-1925.

On August 11, 2008, I served the foregoing document(s) described as
**DEFENDANT TRANS UNION LLC'S REPLY TO PLAINTIFF'S
OPPOSITION TO TRANS UNION'S MOTION TO DISMISS** on the interested parties in this action as follows:

See Attached List

- ☐ **BY PERSONAL DELIVERY.** I delivered such envelope by hand to the offices of the addressee.
- ☐ **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Costa Mesa, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ **BY FACSIMILE TRANSMISSION.** I caused such document to be transmitted to the addressee(s) facsimile number(s) noted herein. I caused the machine to print a transmission record of the transmission. No errors were reported.
- ☐ **BY FEDERAL EXPRESS.** I caused such envelope to be deposited at the Federal Express office at Costa Mesa, California for guaranteed one/two day delivery with delivery charges prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery by Federal Express delivery service. Under that practice, it would be deposited with the delivery service on that same day with delivery charges thereon fully prepaid at Costa Mesa, California in the ordinary course of business for delivery to the addressee.
- ☒ **BY ECF.** I caused such documents to be e-filed with the Court which were then served via the ECF filing system.

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1 ☐ **BY EMAIL.** I emailed such documents to the addressees at their email
2 addresses on the attached list.

3 Executed on August 11, 2008, at Costa Mesa, California.

4 ☒ **(Federal)** I declare that I am employed in the office of a member of the bar of
5 this Court at whose direction the service was made. I declare under
6 penalty of perjury under the laws of the United States of America that
7 the foregoing is true and correct.

8 /s/ Lori Waters
9 Lori Waters, CCLS
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