No. 16-1091

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEFFREY BRILL,
Plaintiff - Appellant,

v.

TRANS UNION LLC,
Defendant - Appellee.

On appeal from the U.S. District Court for the Western District of Wisconsin
(Hon. Stephen L. Crocker, U.S. Magistrate Judge)

APPELLANT'S OPENING BRIEF

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Appellate Court No: 16-1091

Short Caption: Brill v. TransUnion

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Jeffrey Brill

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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INTRODUCTION

In the modern U.S. economy, a good credit report is essential to consumers seeking credit cards, car loans, home loans, rental housing, bank accounts, insurance, employment, and more. At the heart of the credit reporting system, and thus of critical importance to the economic lives of hundreds of millions of Americans on whom credit files are maintained, are the three major consumer reporting agencies, Equifax, Experian, and Trans Union.[1] When these agencies' credit reports about an individual contain inaccurate information, that individual can face serious economic consequences. To mitigate the risk of inaccurate and detrimental reporting, Congress included in the Fair Credit Reporting Act (FCRA) the requirement that consumer reporting agencies "conduct a reasonable reinvestigation" of disputed information in a consumer's credit report. 15 U.S.C. § 1681i(a)(1)(A).

Defendant Trans Union reported that plaintiff Jeffrey Brill owed a delinquent debt on a car lease. Brill disputed the debt and provided Trans Union with documentation strongly suggesting that his signature on the lease had been forged by his ex-girlfriend. By way of "reinvestigation," Trans Union sent an

[1] *See* Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* 2-3 (2012), *at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf (hereinafter "CFPB, *Key Dimensions*").

automated query to the company that had provided the disputed information, asking it to confirm its original report. Trans Union did not forward Brill's documentation to the company, ask about the company's identity verification procedures, or consider the documentation independently. The company confirmed the debt, and Trans Union refused to remove it. As a result, Brill struggled with the economic consequences of his tarnished credit report for over a year.

Brill sued Trans Union under the FCRA. The district court dismissed, holding as a matter of law that Trans Union had no legal duty to do more than it did to resolve the dispute. A2. But this Court has held that the question whether a reinvestigation is reasonable is one for the trier of fact, and under this Court's test for what constitutes a reasonable reinvestigation, a jury could easily find that what Trans Union did here did not comply with the FCRA.

This Court should reverse the dismissal of Brill's complaint.

REQUEST FOR ORAL ARGUMENT

Appellant Jeffrey Brill respectfully requests oral argument in light of the importance of the issue presented to consumers' ability to obtain correction of inaccurate credit reports. Additionally, the district court's error in this case illustrates the need for this Court's careful guidance on the proper application of the FCRA's requirement that consumer reporting agencies reinvestigate disputed information. *See* 15 U.S.C. § 1681i(a)(1).

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because the action arose under a law of the United States (the FCRA), and pursuant to 15 U.S.C. § 1681p (additional FCRA jurisdictional provision).

The district court's final judgment was entered by a magistrate judge. Both parties gave written consent to adjudication by the magistrate via local forms dated July 20, 2015 (for the defendant) and July 21, 2015 (for the plaintiff). Pursuant to the instructions on these forms, the parties submitted them by email. *See* Docs. 6-1, 9 (parties' jurisdictional memoranda to this Court). Therefore the magistrate had authority to enter a final judgment, *see* 28 U.S.C. § 636(c)(1) & (3), and that judgment was appealable to this Court under 28 U.S.C. § 1291.

The appeal was timely noticed on January 14, 2016, A30-31, within thirty days after the entry of judgment on December 16, 2015, *see* Fed. R. App. P. 4(a)(1)(A); A35 (docket entries for judgment and notice of appeal).

ISSUE PRESENTED

> The Fair Credit Reporting Act requires that a consumer reporting agency "conduct a reasonable reinvestigation" of disputed information in a consumer's file when the consumer notifies the agency of the dispute. Did the district court err in holding that, when a consumer disputes the factual basis of a debt reported in the consumer's file with a consumer reporting agency, the submission of an automated query to the supposed creditor complies with the statute as a matter of law?

STATEMENT OF THE CASE

This case arises from consumer reporting agency Trans Union's failure to reinvestigate a debt it reported on plaintiff Jeffrey Brill's credit report after Brill disputed the debt because his signature on the relevant document had been forged. On this appeal from a dismissal for failure to state a claim, the following account reflects the facts as alleged, viewed in the light most favorable to the plaintiff. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010).

In May 2009, Brill leased a car jointly with his then-girlfriend Kelly Pfeifer from Smart Motors Toyota in Madison, Wisconsin. A3; A21. The lease was immediately assigned to Toyota Motor Credit Corporation ("Toyota"). *Id.* Brill and Pfeifer subsequently lost contact with each other, and Pfeifer kept the car. A3; A22. Brill did not sign any documents to extend the lease. *Id.* Nonetheless, after the original lease term ended in May 2012, Trans Union reported that Brill had an account with Toyota and was delinquent in making payments on that account. A3-4; A24; A28.

Toyota refused to provide Brill with a copy of any documents purporting to extend the lease in May 2012. A22. Brill obtained a copy of a later lease extension document from May 2013 with a signature purporting to be his, but the signature is a forgery. A3; A22-A23. Brill believes that Pfeifer, who also appears to have

signed the document in her own name, forged Brill's signature as a joint lessee. A22-23.

Brill alerted both Toyota and Trans Union to the forgery when he learned of it in 2014. A3; A23-A24. In conjunction with his dispute, Brill provided Trans Union with a sample of his true signature on the original 2009 lease agreement for comparison with the 2013 lease document and pointed out that — unlike the phony signature on latter document — he always signs his name using his middle initial. A3; A6 n.5; A25. Brill also directed Trans Union's attention to four other respects in which the real 2009 and fake 2013 signatures clearly differed. A25. Brill suggested to Trans Union that the employees or agents of Toyota who dealt with Pfeifer on the lease extension might have helpful information about the disputed lease document. A26.

Consumer reporting agencies commonly communicate with creditors electronically via automated consumer dispute verifications (ACDVs). CFPB, *Key Dimensions*, *supra* note 1, at 32. One court has described the process in this way:

> An ACDV is a form used by consumer reporting agencies to verify the accuracy of a disputed account. Once a consumer disputes an entry in her credit report, consumer reporting agencies forward an ACDV describing the dispute to the original source. The original source verifies the disputed information by checking a box on the ACDV form indicating the adverse account is accurate.

Dixon-Rollins v. Experian Info. Solutions, Inc., 2010 WL 3749454, at *1 n.2 (E.D. Pa. Sept. 23, 2010).

Here, Trans Union's investigation consisted solely of sending an ACDV to Toyota to verify the debt and accepting its response without question. A4 & n.2; A26. Trans Union therefore continued to report that Brill owed a debt to Toyota. A4; A24.

The inaccurate blemish on Brill's credit report hindered his ability to obtain credit. As a result, Brill received less favorable interest rates and made larger down payments than he otherwise would have, spent additional time and resources to obtain credit, and had a business credit account closed. A27. These struggles and Brill's state of uncertainty as to his ability to obtain credit in the future caused him to suffer substantial stress and humiliation. A27-28.

In May 2015, Brill sued Trans Union for violating the FCRA by failing to conduct a reasonable reinvestigation of the disputed information. A13.[2] After Trans Union moved to dismiss for failure to state a claim, Brill filed an amended complaint, which is the operative complaint here. A20.

Trans Union filed another motion to dismiss for failure to state a claim, which the district court granted. A2. The court recited the framework for FCRA reinvestigation claims that this Court prescribed in *Henson v. CSC Credit Services*,

[2] Brill also sued Toyota in February 2015. That case reached a confidential settlement in May 2015. *See* Docket, *Brill v. Toyota Motor Credit Corp.*, No. 3:15cv00068 (W.D. Wisc.).

29 F.3d 280 (7th Cir. 1994). A5. Under *Henson*, a consumer reporting agency's duty to go beyond the original source of disputed information in reinvestigating a dispute turns on whether the consumer has "alerted the reporting agency to the possibility that the source may be unreliable" (or the reporting agency knows of the unreliability), and whether the cost to the consumer reporting agency of verifying the disputed information outweighs the "the possible harm inaccurately reported information may cause the consumer." 29 F.3d at 287.

Instead of applying that framework — or permitting a jury to do so — the court concluded that Brill's claim failed as a matter of law because, in the district court's view, the dispute was not one that could have been resolved through reasonable reinvestigation. A8. The court reached this conclusion because "even if Trans Union were to have performed its own handwriting analysis and decided that *it* believed Brill's explanation, Trans Union had no authority to cancel [Toyota]'s lease or otherwise to relieve Brill of his obligation to [Toyota]. That was the prerogative of [Toyota] or a court." A9. Brill cited several cases in which courts required consumer reporting agencies to conduct a reinvestigation that included more than confirming information with the creditor, A10-11, but the court distinguished these cases on the ground that, according to the court, the consumer reporting agency in each case on which Brill relied "had the means to correct the inaccuracies at issue by providing more complete information to the creditor."

A11. Here, by contrast, "Trans Union did not have a duty to reinvestigate because it did not have the authority to determine whether the credit agreement was valid or the signature was a forgery." *Id.*

The court also believed, based on a non-precedential order of this Court, *see* 7th Cir. R. 32.1, that expert handwriting analysis was categorically too expensive to be required as part of a reinvestigation. A8. The court did not consider methods of reinvestigation other than expert analysis, even though Brill had pointed out that Trans Union itself "easily could have discovered the forgery by comparing the 2013 lease extension with his handwriting samples," A8, and Brill's complaint mentioned the possibility that Toyota employees involved in executing the lease extension might have been able to help resolve the dispute, A26.

SUMMARY OF ARGUMENT

The Fair Credit Reporting Act (FCRA) requires that a consumer reporting agency "conduct a reasonable reinvestigation" when a consumer disputes an item on his or her credit report. 15 U.S.C. § 1681i(a)(1)(A). The importance of a meaningful reinvestigation is underscored by the FCRA's structure and purpose: Congress meant for consumer reporting agencies to sort out inaccuracies so that consumers like Brill would not have their credit undermined by inaccurate reports. Accordingly, this Court has explained that where a consumer's dispute calls into question the reliability of information reported by a consumer reporting agency,

simply sending an automated dispute query to the creditor and relying on its response may not be sufficient to constitute a reasonable reinvestigation. Rather, it is up to a jury to balance the harm to the consumer of the erroneous report against the cost to the consumer reporting agency of further investigation in order to determine whether the reinvestigation was reasonable. Applying these standards, this Court and other courts of appeals have upheld determinations that a pro forma automated query to the alleged creditor is insufficient to constitute a reasonable reinvestigation and reversed decisions holding the contrary as a matter of law.

Here, a jury could easily find that Trans Union did not conduct a reasonable reinvestigation in this case and therefore violated the FCRA. As a threshold matter, in disputing the debt with Trans Union, Brill called the reliability of Toyota's information into question by providing specific information regarding his signature and its characteristics. Next, if the erroneous report regarding a debt that Brill did not owe was not corrected, the harms that Brill faced were obvious: less favorable terms of credit, outright denials of credit, anxiety and stress, and the financial losses associated with these outcomes. Indeed, he suffered each of these harms.

On the other side of the balance, the district court overstated the cost to Trans Union of verifying the debt. The district court assumed that reinvestigation required hiring a handwriting expert and that such a step was necessarily too costly. Both conclusions are erroneous and result from the district court's

improperly resolving factual questions on a motion to dismiss. This Court has not categorically ruled out handwriting analysis as a method of reinvestigation. In any event, Trans Union's reinvestigation could have proceeded by any of several methods. Brill has a strong case to make to a jury that his real signature on the 2009 lease and the phony signature on the 2013 extension are so dissimilar on their face that Trans Union could have resolved the dispute without incurring any cost at all: All it needed to do was look at the documents. But the district court's ruling as a matter of law denied Brill the opportunity to make that case. Other possible avenues for reinvestigation included speaking to the alleged creditor or its employees about who actually signed the lease papers and ascertaining whether the alleged creditor's procedures for identity verification were sufficient to screen out forgeries of the type that occurred here. The course that was not open to Trans Union was to ask Toyota to rubber-stamp its initial report and call that a "reinvestigation."

In dismissing the case, the district court mistakenly characterized Brill's dispute as a legal rather than factual one. In fact, Brill asked Trans Union to correct a mistake based on the answer to a simple factual question: Did Brill sign the lease renewal or was his signature forged? If correcting errors arising from obvious forgeries is beyond the reach of the dispute process, then the rights provided by the FCRA would mean very little and the consumer reporting agency's role would be

reduced to that of a scribe — in contravention of the FCRA's purpose to ensure that "consumer reporting agencies exercise their grave responsibilities with fairness [and] impartiality." 15 U.S.C. § 1681(a)(4). To protect consumers and give meaning to the congressional command that consumer reporting agencies "conduct a reasonable reinvestigation" of information in credit reports disputed by consumers, this Court should reverse the dismissal of Brill's complaint.

STANDARD OF REVIEW

A dismissal for failure to state a claim is reviewed de novo, with the plaintiff's factual allegations presumed to be true. *Bonte*, 624 F.3d at 463. A court must deny a motion to dismiss if the complaint alleges sufficient facts to state a claim to relief that is plausible on its face. *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826 (7th Cir. 2015). The court may not disregard non-conclusory factual allegations just because it views them as unlikely. *Id.* at 827.

ARGUMENT

I. UNDER THE FCRA, PRIMARY RESPONSIBILITY FOR THE ACCURACY OF CREDIT REPORTS LIES WITH CONSUMER REPORTING AGENCIES.

The consumer reporting system "enables creditors and other providers of consumer services to pool information about their respective customers and use that pooled information to inform their credit and other risk decisions about new applicants and existing customers." CFPB, *Key Dimensions*, *supra* note 1, at 7.

This system includes credit files on over 200 million adults and provides information on more than 1 billion consumer credit accounts monthly. *Id.* at 3. At the "hub" of that system are the three major consumer reporting agencies: Equifax, Experian, and Trans Union. *Id.* at 2.

The information that consumer reporting agencies provide through credit reports is essential to most Americans' economic lives. *See id.* Most decisions whether to grant a person credit, such as through a mortgage, auto loan, student loan, or credit card, are based on information from credit reports. *Id.* Credit reports also affect other critical decisions that affect consumers, including eligibility for rental housing, insurance, and employment. *Id.*

Because of the many consequential uses of a consumer's credit report, the effects of erroneous information in that report can significantly impair a person's ability to engage in basic transactions that can determine her ability to succeed economically. Accordingly, when a consumer discovers an inaccuracy in her credit file, correcting it is crucial.

The FCRA reflects Congress's recognition of the importance to consumers of accurate credit reporting. Specifically, Congress found that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," and that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with

fairness, impartiality, and a respect for the consumer's right to privacy," 15 U.S.C. § 1681(a)(3)-(4). Therefore, Congress enacted the FCRA "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." *Id.* § 1681(b); *see also Pinner v. Schmidt*, 805 F.2d 1258, 1261 (5th Cir. 1986) ("The legislative history of the FCRA indicates that its purpose is to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance, or employment.").

Under the FCRA, consumer reporting agencies must "conduct a reasonable reinvestigation" regarding disputed information. Specifically,

> if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file . . . .

15 U.S.C. § 1681i(a)(1)(A). Additionally, in conducting the reinvestigation, "the consumer reporting agency shall review and consider all relevant information

submitted by the consumer . . . with respect to such disputed information." *Id.* § 1681i(a)(4).

After reinvestigation, "if . . . an item of the information [disputed by a consumer] is found to be inaccurate or incomplete or cannot be verified," the consumer reporting agency has a statutory obligation to "promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation." *Id.* § 1681i(a)(5)(A). Thus, once the reinvestigation requirement has been triggered, the default rule is that the disputed information must be deleted or modified unless it can be verified — that is, the statute requires the consumer reporting agency to give the benefit of the doubt to the consumer. Consumers may enforce these statutory requirements via civil actions. *See id.* §§ 1681n, 1681o, 1681p.

Other provisions of the FCRA underscore the central role of the consumer reporting agency in ensuring that the credit reporting system is fair to consumers. For instance, a consumer reporting agency must not only investigate disputes but also use appropriate procedures in assembling credit reports to begin with. In "prepar[ing] a consumer report," a consumer reporting agency must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b). This

duty, like the reinvestigation duty at issue in this case, is privately enforceable. *See id.* §§ 1681n, 1681o, 1681p.

Thus, the consumer reporting agency is at the heart of both the congressional purpose behind the FCRA and the enforceable rights Congress provided to consumers under that statute. *See generally Cushman v. Trans Union Corp.*, 115 F.3d 220, 223 (3d Cir. 1997) ("In the FCRA, Congress has recognized the crucial role that consumer reporting agencies play in collecting and transmitting consumer credit information, and the detrimental effects inaccurate information can visit upon both the individual consumer and the nation's economy as a whole." (citation and internal quotation marks omitted)). And one of the most critical duties of a consumer reporting agency is to "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate." 15 U.S.C. § 1681i(a)(1)(A).

II. WHEN A CONSUMER DISPUTES THE RELIABILITY OF THE SOURCE OF CREDIT INFORMATION, A REASONABLE REINVESTIGATION OFTEN REQUIRES MORE THAN PARROTING THE ORIGINAL SOURCE.

As noted, consumer reporting agencies often investigate disputes by sending an automated query (the ACDV) to the source of the information in dispute. However, as this Court explained in *Henson v. CSC Credit Services*, 29 F.3d 280 (7th Cir. 1994), a "reasonable reinvestigation" may require more than reconfirming disputed information with the original source of that information. "Whether the credit reporting agency has a duty to go beyond the original source will depend, in

part, on whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable. The credit reporting agency's duty will also depend on the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer." *Id.* at 287. Whether a reinvestigation is reasonable is a question of fact to be determined at trial. *Id.*

Henson reversed the dismissal of an FCRA claim by a person erroneously identified as a judgment debtor. A state court had mistakenly noted a judgment on its docket when no such judgment had been rendered, and Trans Union had reported the debt based on the docket. *Id.* at 285. This Court remanded the FCRA case for a determination whether the error had been brought to Trans Union's attention; if it had, the Court instructed that the trier of fact should determine whether Trans Union's reinvestigation was reasonable. *Id.* at 287.

The result in *Henson* illustrates that the "possibility that the source may be unreliable" can refer to unreliability with respect to the particular item disputed, even where the source is generally considered reliable. *Id.*; *accord Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997). In *Henson*, the disputed report derived from a state court docket. *Henson* did not suggest that state court dockets are unreliable in general. In fact, the Court, in a portion of its opinion addressing the consumer reporting agency's separate duty to ensure maximum

possible accuracy of credit reports as an initial matter under 15 U.S.C. § 1681e(b), noted that relying on the docket to begin with was reasonable. 29 F.3d at 286. In reversing the dismissal of the reinvestigation claim, *Henson* explained that even if a consumer reporting agency's reliance on a creditor may be reasonable as an initial matter, "[a] credit reporting agency that has been notified of potentially inaccurate information in a consumer's credit report is in a very different position than one who has no such notice," because with notice the agency "can target its resources in a more efficient manner and conduct a more thorough investigation." *Id.* at 286-87.

Henson also made clear that the "reinvestigation" requirement in some circumstances demands that a consumer reporting agency "verify the accuracy of its initial source of information" by "go[ing] beyond the original source." *Id.* Other courts of appeals agree. *See Cushman*, 115 F.3d at 225 ("The 'grave responsibilit[y]' imposed by § 1681i(a) must consist of something more than merely parroting information received from other sources." (quoting 15 U.S.C. § 1681(a)(4)); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) ("In a reinvestigation of the accuracy of credit reports, a credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers."); *cf. Bryant v. TRW, Inc.*, 689 F.2d 72, 78 (6th Cir. 1982) ("[W]e hold that a consumer reporting agency does not necessarily comply with [the duty to

follow reasonable procedures to assure maximum possible accuracy in credit reporting, 15 U.S.C. § 1681e(b)] by simply reporting in an accurate manner the information it receives from creditors."). Trans Union's persistent failures in this regard have caused one court to label Trans Union a "repeat FCRA offender" in holding that an award of punitive damages against it for failure to reinvestigate was warranted. *Dixon-Rollins v. Experian Info. Sols. et al.*, 2010 WL 3749454, at *10 (E.D. Pa. Sept. 23, 2010) ("Trans Union's refusal to modify its reinvestigation procedures and insistence on mimicking the original sources' responses supports the conclusion that punitive damages are necessary to deter future violations.").

Reinvestigations of fraud, in particular, are unlikely to be reasonable if they involve only the original source of disputed information. For instance, in *Cushman v. Trans Union*, after someone fraudulently obtained three credit cards in Jennifer Cushman's name and ran up $2400 in balances, Cushman alerted Trans Union about the fraud. 115 F.3d at 222. Cushman provided less information than Brill gave Trans Union in this case: All she did was "notif[y] [Trans Union] that she had not applied for or used the three credit cards in question, and suggested that a third party had fraudulently applied for and obtained the cards." *Id.* Trans Union's reinvestigation consisted of confirming the debts with the credit card companies and asking if Cushman had opened a fraud investigation (she hadn't). *Id.* Trans Union was unable to contact one of the credit card companies, so Trans Union

deleted that account from Cushman's report. *Id.* The other two companies reported that Cushman's "verifying information" (such as name, address, and social security number) was correct, so Trans Union refused to delete those accounts from the credit report. *Id.*

Relying on *Henson* among other authorities, the Third Circuit rejected Trans Union's argument that "it is never required to go beyond the original source in ascertaining whether the information is accurate." *Id.* at 224. The court observed that such a reading of the duty to reinvestigate would render the reinvestigation requirement of § 1681i duplicative of the initial investigation requirement of § 1681e(b). *Id.* at 225. Instead, the Third Circuit adopted this Court's balancing approach from *Henson*. *Id.* at 225-26. Applying that framework, the court held that the district court had erred in granting judgment for Trans Union because a "reasonable jury . . . could have concluded that after [Trans Union] was alerted to the accusation that the accounts were obtained fraudulently, and then confronted with the credit grantors' reiteration of the inaccurate information, [Trans Union] should have known that the credit grantors were 'unreliable' to the extent that they had not been informed of the fraud." *Id.* at 226.

Similarly, *Stevenson v. TRW Inc.* involved a credit report reflecting debts that did not belong to the plaintiff — some belonged to a person with the same name as the plaintiff and others had been incurred fraudulently by the plaintiff's

estranged son using the plaintiff's social security number. 987 F.2d at 290-91. The consumer reporting agency's reinvestigation consisted of sending the creditors automated inquiries about the disputed accounts; the responses prompted the consumer reporting agency to remove some but not all of the disputed information. *Id.* at 291, 293. Noting that § 1681i uses mandatory language and "places the burden of investigation squarely on" the consumer reporting agency, the Fifth Circuit upheld the district court's finding that TRW had violated § 1681i and rejected the credit bureau's argument that its only obligation was to publish the consumer's statement of his position at the end of the credit report and that the consumer was otherwise left to resolve the dispute with the creditor on his own. *Id.* at 293.

Johnson v. MBNA America Bank, NA, 357 F.3d 426 (4th Cir. 2004), another case in which the wrong person had been identified as responsible for an account, considered the reinvestigation duty of a furnisher of credit information, which the court found analogous to the duty of the consumer reporting agency. MBNA had issued a credit card to Linda Johnson's husband. After he filed for bankruptcy, MBNA claimed that Johnson was a co-obligor on the account even though she was only an authorized user. *Id.* at 428-29. Because MBNA subsequently confirmed the debt after several consumer reporting agencies reported Johnson's dispute to MBNA, *see id.* at 429, Johnson sued MBNA for violating its duty, as a furnisher of

credit information, to investigate, *see* 15 U.S.C. § 1681s-2(b). Citing this Court's decision in *Henson* and finding that the furnisher's and consumer reporting agency's duties to investigate required the same analysis, *see* 357 F.3d at 432-33, the Fourth Circuit affirmed a jury verdict in favor of Johnson, *id.* at 429-33. Based on the plain meaning of the word "investigation" — "'[a] detailed inquiry or systematic examination,'" *id.* at 430 (quoting American Heritage Dictionary 920 (4th ed. 2000)) — the court held that the FCRA imposes more than a "minimal duty on creditors to briefly review their records to determine whether the disputed information is correct"; rather, "careful inquiry" is required. *Id.* Moreover, "[i]t would make little sense to conclude that, in creating a system intended to give consumers a means to dispute — and, ultimately, correct — inaccurate information on their credit reports, Congress used the term 'investigation' to include superficial, *un*reasonable inquiries." *Id.* at 430-31. The court held that the evidence supported the jury's verdict because MBNA did no more than confirm its computer system's records of Johnson's name, address and account status despite being notified of the specific nature of Johnson's dispute. *Id.* at 431.

Finally, *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986), involved a consumer reporting agency's duty to reinvestigate after a consumer alleged that his credit account with his employer had been loaded with fictitious charges by a co-worker with a grudge against him. *Id.* at 1260-61. The Fifth Circuit upheld the

jury's verdict for the consumer on a § 1681i claim because the consumer reporting agency, despite learning of the dispute between the consumer and his co-worker, contacted only the co-worker. *Id.* at 1262.

The lesson from these cases (two of which explicitly applied this Court's approach in *Henson*) is that when a consumer alleges that charges are fraudulent or do not belong to her, a proper "reinvestigation" often means more than just rechecking the same information received from the original source, and the reasonableness of the reinvestigation is a question for the jury, not a question resolvable as a matter of law on a motion to dismiss. Because Trans Union here did no more "reinvestigating" than the consumer reporting agencies in *Cushman*, *Stevenson*, *Johnson*, and *Pinner*, Brill's claim should not have been dismissed as a matter of law.

III. A JURY COULD FIND THAT TRANS UNION'S REINVESTIGATION WAS NOT REASONABLE.

A. Brill's Dispute Called Toyota's Reliability Into Question, The Risk Of Harm To Brill Was Clear, And The Cost Of Reinvestigation Was Low.

Under *Henson*, a jury could easily find that Trans Union's sending an automated query to Toyota was not a "reasonable reinvestigation" of Brill's dispute. As a threshold matter, Brill's dispute "alerted the reporting agency to the possibility that the source may be unreliable." *Henson,* 29 F.3d at 287. Brill explained that Toyota's information was unreliable because Brill's signature on the

lease renewal with Toyota had been forged. Brill not only "alerted" Trans Union to the "possibility" that Toyota's information "may be unreliable," but also provided a handwriting exemplar and specific information about his signature (the use of the middle initial) that cast doubt on the signature on the lease renewal. Brill thus went above and beyond what *Henson* required him to do to call into question Toyota's reliability as a furnisher of information in this instance.

Under the *Henson* balancing test, "the possible harm inaccurately reported information may cause the consumer" far outweighed "the cost of verifying the accuracy of the source." *Id.* The possible harms to Brill of the inaccurate information were foreseeable: less favorable terms of credit, outright denials of credit, anxiety and stress, and the financial losses associated with these outcomes. Unsurprisingly, Brill suffered each of these harms. A27-28. Whereas the risk to Brill of erroneous information was high, the cost to Trans Union of verifying the report's accuracy was low. The district court focused on only one possible means of investigation — hiring a handwriting expert — and dismissed that option as both unreasonably costly and insufficiently reliable, A8; A9 n.5, even though Brill had pointed out that Trans Union could have discovered the forgery by examining the documents itself, A8, and suggested that Toyota employees involved in executing the lease extension might have been able to help resolve the dispute, A26.

The court's brief analysis on the cost to Trans Union is infused with erroneous assumptions or factual determinations inappropriate at the motion-to-dismiss stage. First, the district court's concern about the burdensomeness of expert handwriting analysis depended on a pre-2007 non-precedential opinion that may not be cited to this Court. A8 (relying on *Bagby v. Experian Info. Solutions, Inc.*, 162 Fed. App'x 600, 607 (7th Cir. 2006)); *see* 7th Cir. R. 32.1. That case is in any event distinguishable because the plaintiff there had not offered any evidence to show that the credit bureau's sources of information were unreliable. There is no per se rule against handwriting analysis; indeed, a categorical approach to methods of reinvestigation would be inconsistent with the flexible balancing test that this Court has prescribed. *Henson*, 29 F.3d at 287. Moreover, the balancing test is to be applied by the jury as the trier of fact. *See id.* The district court erred in making factual assumptions at the pleading stage about how costly or burdensome expert analysis would have been.

Second, the district court based its low opinion of the reliability of handwriting analysis on an evidentiary ruling in a criminal case suggesting (according to the district court) that "the entire field of handwriting analysis rests on a shaky foundation that relies on inadequately tested principles." A9 n.5. Whether or not that characterization is fair as a matter of evidence, the FCRA requires a "reasonable reinvestigation," not proof of a debt's invalidity beyond a

reasonable doubt. The district court cited no authority for the proposition that a consumer reporting agency's reinvestigation could rely only on evidence admissible in a criminal trial. Indeed, importing the rules of evidence into FCRA reinvestigations would make little sense, as so much of the information on which a consumer reporting agency relies is necessarily hearsay.

Last and most important, the district court erred in focusing exclusively on the hiring of a handwriting expert in considering the cost to Trans Union. Brill is not claiming that hiring a handwriting expert was the only available means of reinvestigation. The significance of the handwriting information Brill provided — including the distinctive middle initial that Brill always uses but that the signature on the Toyota document lacked — is not that it triggered a particular *method* of reinvestigation. Rather, it triggered a certain *depth* of reinvestigation, one that went beyond reliance on Toyota's response to the automated query. Hiring a handwriting expert was one option. Another was to call Toyota to determine which employee negotiated the extension of the car lease at issue and whether that person dealt with Pfeifer, Brill, or both. Trans Union also could have sought to ascertain whether Toyota's procedures for verifying identity were sufficient to avert the type of fraud Brill was claiming. Finally, and most inexpensively, Trans Union could have looked at the handwriting, recognized that in light of the obviously inconsistent signatures it could not verify that Brill owed the debt, and deleted that

information in accordance with the FCRA. 15 U.S.C. § 1681i(a)(5)(A); *accord Stevenson*, 987 F.2d at 293 (stressing that "§ 1681i(a) requires prompt deletion if the disputed information is inaccurate or *unverifiable*").

That last possibility — that a lay opinion could have resolved the dispute — made dismissal as a matter of law particularly inappropriate here, because the susceptibility of the dueling signatures to lay analysis is quintessentially a question of fact reserved for the jury in applying this Court's balancing test. *Henson*, 29 F.3d at 287. The district court noted Brill's suggestion that a direct comparison would have "easily" revealed the forgery, but the court nonetheless proceeded as if expert analysis were the only option. A8. In fact, had the case proceeded, Brill would have introduced the signatures on the 2009 lease and the 2013 forgery. The jury would then have been in a position to compare them and to judge whether the obvious discrepancies between the two would have enabled Trans Union to resolve the dispute in the least expensive manner possible: by looking at the documents.

The several reasonable avenues for reinvestigation show that a jury could have readily found that the cost to Trans Union of verifying Toyota's information was far outweighed, in the *Henson* balancing test, by the harm Brill could be expected to suffer (and in fact did suffer) as a result of the erroneous information Trans Union reported.

B. The District Court Erred In Relying On Cases In Which Reinvestigation Could Not Have Resolved The Dispute.

In reaching a result contrary to that dictated by *Henson*, the district court relied on two decisions from other courts of appeals holding that, in particular circumstances, consumer reporting agencies did not have duty to reinvestigate at all. *See* A9 (citing *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876 (9th Cir. 2010), and *DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008)). As an initial matter, it is this Court's balancing framework in *Henson* that controls, not the decisions from other circuits. In any event, the two cases on which the district court relied do not support Trans Union's position.

In *DeAndrade*, a homeowner purchased new windows from a contractor who was also responsible for arranging mortgage financing for the purchase. 523 F.3d at 63. The homeowner signed financing papers in connection with this arrangement and then began receiving bills from KeyBank. *Id.* After nearly two years of making payments, the homeowner disavowed the arrangement, stopped paying the mortgage, and sued KeyBank claiming that the contractor lacked authority to set up the mortgage on the homeowner's behalf. *Id.* 63-64. KeyBank reported the mortgage as delinquent to Trans Union, which reported it as such. *Id.* at 64. The homeowner disputed the debt with Trans Union and, when Trans Union did not change the credit report, sued for failure to reinvestigate under the FCRA. *Id.*

The First Circuit affirmed judgment in favor of Trans Union on the ground that the homeowner did not raise a type of dispute that Trans Union had an obligation to reinvestigate. *Id.* at 68-69. The court explained that in "determin[ing] whether a consumer has identified a factual inaccuracy on his or her credit report that would activate § 1681i's reinvestigation requirement, '[t]he decisive inquiry' is whether the defendant credit bureau could have uncovered the inaccuracy 'if it had reasonably reinvestigated the matter.'" *Id.* at 68 (quoting *Cushman*, 115 F.3d at 226). That test was not satisfied in *DeAndrade*, the First Circuit held:

> [T]here is no dispute that DeAndrade received windows financed by a mortgage on his home; what DeAndrade is attacking is the mortgage's validity. Whether the mortgage is valid turns on questions that can only be resolved by a court of law, such as whether DeAndrade ratified the loan. This is not a factual inaccuracy that could have been uncovered by a reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA.

Id. at 68.

Here, unlike in *DeAndrade*, Trans Union *could* have uncovered the inaccuracy if it had reasonably reinvestigated the matter. The dispute about whether Brill signed the lease extension is quintessentially factual, not legal. The answer turns not on the definition of "ratification" or any other legal standard but on a straightforward historical question: Who signed the lease extension — Jeffrey Brill or somebody else? As courts of appeals have repeatedly held regarding similar disputes, this type of factual question can be resolved through

reinvestigation. *See supra* Part II (discussing *Cushman*, *Stevenson*, *Johnson*, and *Pinner*). Therefore the outcome dictated under this Court's *Henson* case and the persuasive decisions of the Third, Fourth, and Fifth Circuits is in accord with the First Circuit's approach.

The Ninth Circuit's decision in *Carvalho* does not counsel a different result. There, a patient disputed a debt to a medical provider based on the theory that the patient's insurance company had "wrongfully refused to pay" the bill, despite the undisputed fact that she agreed to be financially responsible for it. *Carvalho*, 629 F.3d at 882-83. The patient sued the three major consumer reporting agencies for failure to reinvestigate under the California analogue to the FCRA, and the Ninth Circuit affirmed judgment for the defendants. *Id.* at 889-92. The problem for the patient in *Carvalho*, as for the homeowner in *DeAndrade*, was that a consumer reporting agency "is not required as part of its reinvestigation duties to provide a legal opinion on the merits," *id.* at 892, of questions such as whether a third party had an obligation to pay the consumer's debt. Or, put in terms of the analysis in *DeAndrade*, the consumer reporting agencies could not have uncovered the inaccuracy through reinvestigation. Here, by contrast, Brill's report could have

been discovered through reinvestigation — a perusal of Brill's documentation would have sorted it out.[3]

The district court thought that *DeAndrade* and *Carvalho* were pertinent here because Trans Union had no power to negate Brill's alleged debt with Toyota. A9. That fact is beside the point. The plain language of the FCRA is unequivocal: "[I]f the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency . . . of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation." 15 U.S.C. § 1681i(a)(1)(A). The statute makes no mention of the reinvestigation's effect on the validity of the underlying debt. Thus, the fact that a consumer reporting agency has no power to void debts has not prevented courts from holding consumer reporting agencies to their duty to reinvestigate. *See Cushman*, 115 F.3d at 225-26; *Stevenson*, 987 F.2d at 293. The FCRA's primary focus on the activities and responsibilities of consumer reporting agencies, *see supra* Part I, buttresses the conclusion that the consumer reporting

[3] The district court's adjacent citation to *Wantz v. Experian Information Solutions*, 386 F.3d 829 (7th Cir. 2004), is misplaced for a more basic reason. There, the FCRA claim failed because the plaintiff had not put forth any evidence that he had suffered damages and because the consumer reporting agency did not disclose incorrect information. *See id.* at 834-35. Neither of those circumstances is present here.

agency's duty to reinvestigate exists independent of the reinvestigation's effect on the underlying debt.

Additionally, the FCRA's requirement that a consumer reporting agency delete or modify even *unverifiable* information, not just information that is found to be inaccurate, *see* 15 U.S.C. § 1681i(a)(5)(A), shows that the consumer reporting agency's duty depends on whether it can *verify* the debt, not whether it can *modify* the debt. More broadly, this "tie-goes-to-consumer" rule underscores the extent of congressional concern about unwarranted blemishes on consumer credit reports — a concern that counsels against a cramped reading of consumers' rights under the FCRA.

Under the district court's opinion, any forgery or deception, no matter how obvious it might be upon review, would lie beyond the duty of the consumer reporting agency to reinvestigate. The First and Ninth Circuit opinions in *DeAndrade* and *Carvelho* do not require such a result. If they did, they should be rejected as conflicting with this Court's *Henson* balancing test, as well as with Congress's intent to ensure that consumer reporting agencies meet "the needs of commerce for consumer credit . . . information in a manner which is fair and equitable to the consumer." *Id.* § 1681(b).

CONCLUSION

The dismissal of the complaint should be reversed.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 7,359 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Scott Michelman

CERTIFICATION REGARDING APPENDIX

I hereby certify that all of the materials required by parts (a) and (b) of Local Rule 30 are included in the attached appendix.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I hereby certify that on April 18, 2016, I electronically filed this brief and attached appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Scott Michelman

STATUTORY APPENDIX: Excerpts from the Fair Credit Reporting Act

15 U.S.C. § 1681:

(a) Accuracy and fairness of credit reporting.

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures. It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681e:

(b) Accuracy of report. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

15 U.S.C. § 1681i:

(a) Reinvestigations of disputed information

(1) Reinvestigation required.—

(A) In general.— Subject to subsection (f) of this section, if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the 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.

(B) Extension of period to reinvestigate.— Except as provided in subparagraph (C), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.

(C) Limitations on extension of period to reinvestigate.— Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt notice of dispute to furnisher of information.—

(A) In general.--Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice

shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.

(B) Provision of other information.— The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(3) Determination that dispute is frivolous or irrelevant.—

(A) In general.— Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

(B) Notice of determination.— Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency.

(C) Contents of notice.— A notice under subparagraph (B) shall include—

(i) the reasons for the determination under subparagraph (A); and
(ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(4) Consideration of consumer information.— In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.

(5) Treatment of inaccurate or unverifiable information.—

(A) In general.— If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall—

(i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and
(ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.

(B) Requirements relating to reinsertion of previously deleted material.—

(i) Certification of accuracy of information.— If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.
(ii) Notice to consumer.— If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.
(iii) Additional information.— As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion—

(I) a statement that the disputed information has been reinserted;
(II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of

information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and

(III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

(C) Procedures to prevent reappearance.— A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).

(D) Automated reinvestigation system.— Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.