IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 04-RB-1384 (CBS)

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
SHANE PAUL,
STEVEN BUSSONE,
DALE STEWART,
KENNETH HINZMAN and
WILLIAM MECK, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

USIS COMMERCIAL SERVICES, INC., /d/b/a DAC Services, an Oklahoma corporation,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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1. INTRODUCTION
    1. Statement of the Case

The Plaintiffs bring several claims against the Defendant USIS for violations of the consumer protections provided by the Fair Credit Reporting Act (FCRA). The FCRA governs the activities of "consumer reporting agencies" such as motor carriers and USIS regarding the acquisition and sale of reports containing information about consumers. USIS purchases Termination Record forms authored in part by motor carriers which contain statements that purport to report on the employment histories of drivers. USIS then sells employment history reports containing those statements to motor carriers doing background checks on driver applicants. The named Plaintiffs and the class they seek to represent are all professional drivers

who have been the subjects of these reports. The Plaintiff Owner Operator Independent Driver Association (OOIDA) is a trade association that represents the interests of professional drivers on a wide range of state and federal issues. OOIDA is acting in a representative capacity in this proceeding. Plaintiffs claim the motor carriers are "consumer reporting agencies" and their Termination Record forms are "consumer reports." Plaintiffs claim the employment history reports sold by USIS are also "consumer reports." Plaintiffs claim that both these reports routinely received and sold by USIS contain one or more ambiguous phrases, which render the reports "inaccurate."

The Plaintiffs claim that USIS has violated the FCRA in four interrelated ways:

1. Its unlawful receipt of Termination Record forms without the permission of the drivers who are the subjects of those reports (¶ 39-41). *USIS argues that Termination Record forms are excepted from the definition of "consumer report."*
2. Its acquisition of "inaccurate" Termination Record forms (that it designed), thereby taking an "adverse action" triggering a duty to provide copies of the Termination Record forms to drivers, which it failed to do (¶ 43-44). *USIS argues that receipt of Termination Record forms is not "adverse action."*
3. Its sale of "inaccurate" employment history reports, thereby taking "adverse actions" triggering a duty to provide copies of the employment history reports to drivers, which it failed to do (¶ 42). *USIS does not address this claim in its motion to dismiss.*
4. Its sale of employment history reports which, by virtue of the system it designed

and implemented, assuredly contain ambiguous and therefore "inaccurate" statements. It thus failed to "follow reasonable procedures to assure maximum possible accuracy" (¶ 46). *USIS does not address this claim in its motion to dismiss.*

Plaintiffs seek declaratory and injunctive relief plus compensatory and punitive damages for injuries sustained as a result of USIS' design and implementation of a system that assuredly results in inaccurate consumer reports about drivers, and for failing, after notice of systemic inaccuracy, to address the problem. Concurrently, Plaintiffs seek restitution of USIS' ill-gotten profits generated from the sale of inaccurate consumer reports in violation of the FCRA.

2. Applicable Legal Standard For Motions to Dismiss

"A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted."[1] In ruling on a motion to dismiss, courts are to "accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the non-moving party" and dismissal is proper "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief."[2] "The issue in reviewing the sufficiency of the complaint is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his or her claim."[3] "Granting a motion to dismiss is 'a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of

[1] *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004)(*quoting Lone Star Indus., Inc. v. Horman Family Trust,* 960 F.2d 917, 920 (10th Cir. 2000).

[2] *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000).

pleading but also to protect the interests of justice.'"[4] USIS' motion to dismiss falls far short of establishing "that the (Plaintiffs) can prove no set of facts in support of the claims;" thus it has failed to establish that it is entitled to a dismissal of any portion of the Plaintiffs' complaint.

2. ARGUMENT
    1. This Court Has Inherent Authority to Provide Equitable Relief
        1. The Court's Inherent Equitable Authority Wasn't Constrained By FCRA

[3] *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[4] *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir.1989).

"It is axiomatic that courts retain a broad discretion to determine whether in particular circumstances equity jurisdiction may be invoked."[5] "[T]he Court may go beyond its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances."[6] "[T]he comprehensiveness of [the Court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[7] The Supreme Court later expanded on this principle: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'"[8] Several circuit courts have specifically identified restitution as one of those remedies district courts may fashion for violations of the Federal Trade Commission Act.[9]

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[5] *Henson v. Hoth*, 258 F.Supp. 33, 35 (D. Colo.1966).

[6] *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

[7] *Atchison, Topeka and Sante Fe Railway Company v. Lennen*, 732 F.2d 1495, 1507 (10th Cir.1984)(*quoting Porter*, 328 U.S. at 398).

[8] *Mitchell v. Robert DeMario Jewelery, Inc.*, 361 U.S. 288, 291092 (1960) *(quoting Clark v. Smith*, 38 U.S. 195, 203 (1839)).

[9] *Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989) (upholding the district court's order of restitution against defendants for violations of the FTC Act.); *World Travel Vacation Brokers*, 861 F.2d 1020, 1031 (7th Cir. 1988) (approving district court's freeze of defendant's assets to preserve an appropriate remedy of restitution) *See also F.T.C. v. Pantron I Corp., et al*, 33 F.3d 1088, 1102 (9th Cir.1994).

Use of these equitable powers also relieves the court of considerable burdens that it would otherwise face. In order for Plaintiffs to completely and effectively vindicate their rights under the FCRA without access to injunctive relief, this case would have to be re-filed each year. Collateral estoppel would apply on the issue of liability, but damages and, for new drivers, membership in the class, would have to be litigated in each subsequent case with attendant burdens upon the Court. An injunction that vindicates each class member's individual FCRA rights is necessary to provide complete relief to Plaintiffs and to achieve finality of this dispute. Defendant's bold assertion that the Court may not use its inherent equitable authority to restrain it from future violations or to secure restitution of ill-gotten gains from past wrongdoing must be rejected.

2. Congress Did Not Restrict The Power to Seek Injunctive Relief to The FTC

Defendant argues that (1) since "15 U.S.C.§1861s(a) [sic] expressly grants the FTC [Federal Trade Commission] the right to seek injunctive relief" in public enforcement actions, and (2) since the FCRA is silent respecting the right of individuals to seek injunctive relief in private enforcement actions, Congress could not have intended to allow private litigants to obtain injunctive relief. (Def. Brf. at 4.) However, the assertions that 15 U.S.C.§1681s(a) contains an *explicit* grant of authority to the FTC to seek injunctive relief in FCRA cases, and that Congress was otherwise *silent* with respect to private enforcement remedies, are simply incorrect.

An examination of Section 1681s(a) discloses no explicit grant of authority to the FTC to seek injunctive relief. The FTC has such authority under its own enabling statute, not under Section 1681s(a). Defendant's argument that the Court should attach importance to the fact that

Congress was silent on the subject of injunctive relief in private enforcement actions *at the same time* it granted explicit authority to the FTC has no persuasive force unless the silence and the explicit grant took place under the *same* statute.

Congress was not silent with respect to private enforcement matters. Under 15 U.S.C. § 1681s(a)(1), violations of the FCRA "shall constitute an unfair or deceptive act or practice in violation of Section 5(a) of the Federal Trade Commission Act ... and shall be subject to enforcement ... under Section 5(b) thereof...." The FTC's authority to bring civil actions to enforce orders respecting unfair or deceptive acts or practices is set forth in 15 U.S.C. § 57b. Subsection (e) of that section specifically provides that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." Congress could not have spoken more plainly. The authority of the FTC to enforce the Federal Trade Commission Act was never intended to curtail other State or Federal private rights of action or remedies including private enforcement actions under the FCRA. Where Congress intended to restrict rights and remedies under the FCRA it has done so directly.[10]

The notion that Congress had some carefully crafted scheme to reserve injunctive relief exclusively to public enforcement actions by the FTC is also seriously undercut by 15 U.S.C.§1681s(b)(1)-(6). There the responsibility for public enforcement under the FCRA is spread out over six separate departments and agencies in addition to the FTC, including the Secretary of Transportation in cases dealing with motor carriers subject to the jurisdiction of the

[10] See e.g.15 U.S.C. § 1681s-2(d) and the recently enacted Fair and Accurate Credit Transactions Act of 2003, Pub.L. 108-159, 117 Stat. 1952, 1989 (2003).

Surface Transportation Board. As with the FTC, the FCRA does not establish the authority of these departments and agencies to seek injunctive relief. If such authority exists it resides in the individual department or agency's enabling legislation. This defusion of authority respecting public enforcement of the FCRA discloses no consistent pattern authorizing federal agencies to seek injunctive relief in public enforcement actions and certainly no basis to imply that Congress intended to withhold such authority from private litigants.

The Fifth Circuit's decision in *Washington*[11] upon which the Defendant relies does not control this Court, was wrongly decided and, in any event, is readily distinguishable. In *Washington* the Fifth Circuit acknowledged that federal courts retain their equitable power to issue injunctions "absent the clearest command to the contrary."[12] The Fifth Circuit erroneously concluded that the FCRA "expressly grants the power to obtain injunctive relief to the FTC. *See id* §1681s(a)." For reasons discussed above, the factual predicate for the Fifth Circuit's decision (an explicit grant of injunctive authority to the FTC under FCRA) is simply not there. Further, the Fifth Circuit completely ignored both the preservation of private rights and remedies under 15 U.S.C.§ 57b(e) and the fact that public enforcement under the FCRA was spread out over several separate departments and agencies each with their own separately drawn enforcement authority. FCRA's public enforcement structure leaves no basis to conclude that Congress intended to create a uniform public enforcement scheme with respect to injunctive relief or otherwise.

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[11] *Washingon v. CSC Credit Services Tax*, 199 F.3d 263 (5th Cir. 2000).

[12] *Id*. 199 F.3d at 268 (*quoting Sierra Club v. F.D.I.C.*, 992 F.2d 545, 548 (5th Cir. 1993) *quoting Califano v Yamasaki,* 442 U.S. 682, 705 (1979)).

The *Washington* case is also distinguishable. Even if one assumes that *Washington* was correctly decided with respect to matters subject to enforcement by the FTC, there is considerable doubt as to whether public enforcement of the violations alleged in the present case would be addressed under the Federal Trade Commission Act. This case involves motor carriers who are subject to the jurisdiction of the Surface Transportation Board under Subtitle IV of Title 49, U.S. Code. Although we know of no reported decisions under 15 U.S.C.§1681s(b)(4), a credible argument can be made that public enforcement of the FCRA violations alleged here rests with the Secretary of Transportation not the FTC. Thus, even if *Washington* was correctly decided based upon authority granted to the FTC under its own enabling statute, that holding would have no applicability here where public enforcement responsibilities arguably lie with the Secretary of Transportation acting under Title 49, U.S. Code rather than under the FTC Act.

The motion to dismiss the claims for injunctive and declarative relief should be denied.

3. Courts Retain Authority to Issue Declaratory Judgments Under the FCRA

USIS' argues that because injunctive relief is not available to private claimants under the FCRA, declaratory judgment relief is also not available. For the reasons stated above that this Court has power to grant injunctive relief under the FCRA it also has power to grant declaratory relief. USIS again relies upon the *Washington* case for its argument. It is useful to recall that the *Washington* case was decided in the context of a challenge to a class certification. The court tied injunctive and declaratory judgment relief together because F.R.Civ.P. Rule 23(b)(2) does. It then relied upon the tie between them to decide that, in that context, a declaratory judgment was simply a way for citizens to do indirectly what it had declared citizens could not do directly.

Thus, if its conclusion regarding the power of courts to provide injunctive relief falls, so also does this conclusion regarding a declaration of rights.

The federal declaratory judgment statute "vests the federal courts with power and competence to issue a declaration of rights."[13] "[T]he question of whether this power should be exercised in a particular case is vested in the sound discretion of the district courts."[14] There is nothing within this statute excluding from its operation controversies arising from the actions of consumer reporting agencies operating under the FCRA. The argument that declaratory relief will not resolve the entire controversy presented to the court, a premature argument at best, is no reason to withhold such relief with respect to that portion of the controversy where it will be effective.

2. Count II Sets Forth a Good Cause of Action for Both the Unlawful Procurement and Use of Consumer Reports

Generally, USIS argues that portions of Count II of the complaint should be dismissed because: a) Termination Record forms report only on "transactions or experiences" between motor carriers and drivers, and are therefore not "consumer reports;" b) motor carriers submitting Termination Record forms are not "consumer reporting agencies;" and c) the receipt of a Termination Record form by USIS is not an "adverse action."

First, the allegations of the complaint, if proved, support the conclusions that: a) Termination Record forms are "consumer reports;" b) motor carriers submitting Termination

[13] *St. Paul Fire and Marine Insurance v. Runyon*, 53 F.3d 1167, 1169 (10th Cir.1995).
[14] *Id.*

Record forms are "consumer reporting agencies;" and c) receipt of a Termination Record form by USIS is an "adverse action." Second, by asserting that the Termination Record forms are the property of the motor carriers, by implication, USIS has admitted the fundamental factual basis for Count II, that motor carriers are "consumer reporting agencies."

1. Termination Record forms Are "Consumer Reports" Within the Meaning of the FCRA, and Motor Carriers Are "Consumer Reporting Agencies."

The lynch pin of the USIS argument is set forth in its brief as follows: "This claim... is entirely dependent upon the forms being 'consumer reports'...." It then argues simply that "motor carriers are not CRAs because they are not disseminating consumer reports."

However, because the statutory definitions of "consumer reports" and "consumer reporting agencies" are mutual referential, these two phrases must be interpreted together. When this is undertaken, USIS' simplistic argument fails.

Per 15 U.S.C. § 1681a(d), a "consumer report" is "any... communication of any information by a **consumer reporting agency** bearing on a consumer's... character, general reputation, personal characteristics, or mode of living which is... expected to be used or collected... for the purpose of serving as a factor in establishing the consumer's eligibility for... employment purposes...." (Emphasis added.) Per 15 U.S.C. § 1681a(f) a "consumer reporting agency" is "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... information on consumers for the purpose of furnishing **consumer reports** to third parties, and... uses any means of interstate

commerce....” (Emphasis added.) In the *Greenway v. Information Dynamics* case,[15] the Court stated: “When these two sections... are read together, as the Act indicates they must be, the result is clear: When an agency disseminates information bearing on any of the seven characteristics of a consumer... to a third party, and the agency knows or expects that it will be used... (for employment purposes), then that information is a ‘consumer report’ and its originator is a ‘consumer reporting agency.’”

The allegations found in the complaint at paragraphs 17 to 22, 41 to 44, and 50 to 53 both generally and specifically allege the elements that will support the conclusion that Termination Record forms are “consumer reports” and that motor carriers are “consumer reporting agencies.” The following matters have been well pled:

1. Motor carriers in the regular conduct of their business, through USIS, make statements to other motor carriers about the characteristics of drivers for the purpose of informing hiring decisions by prospective employers (¶ 17, 18, 41).
2. USIS initiated and participated in the design of a standardized process through which motor carriers make “canned” statements about drivers (¶ 17).
3. The systemized “canned” statements by motor carriers have a bearing on the drivers’ suitability for employment (¶ 18).
4. The receipt of statements from motor carriers and their resale are both for “employment purposes” (¶ 17, 18, 42).
5. The “canned” statements included statements about the interactions of drivers with persons other than the motor carriers making the statements (¶ 19, 20, 21).
6. USIS receives “canned” statements from motor carriers without first receiving permission to do so from the drivers who are their subjects (¶ 44, 52).
7. The “canned” statements are ill-defined, ambiguous and are used inconsistently by various motor carriers; they are therefore inaccurate (¶ 19, 20, 22, 49, 50).
8. USIS purchases canned inaccurate statements from the motor carriers (¶ 18, 40).

[15]399 F.Supp. 1092 (D. Ariz. 1974)

9. USIS then resells as "consumer reports" the inaccurate statements to prospective employers (¶ 17, 18, 19, 42).
10. The sale of inaccurate "consumer reports" by USIS constitutes "adverse action" (¶ 42).
11. USIS, through its sales of inaccurate statements, takes "adverse action" without first discharging its duties to provide notice to the drivers adversely affected thereby (¶ 42, 43, 53).
12. USIS has not, after notice of inconsistent usage, undertaken to discipline motor carriers in the use of its forms, or otherwise undertaken to assure consistent use of terms in its forms (¶ 51).

Because a Court passing on a motion to dismiss must accept as true the factual allegations of the complaint, and because the factual criteria for these categories are clearly and precisely set forth in the statute, those allegations of the complaint are sufficient in and of themselves to defeat this portion of USIS' argument in support of its motion to dismiss.

Further, the statutory criteria for both "consumer reports" and "consumer reporting agencies" include a number of inter-related factual matters inappropriate for resolution through a motion to dismiss. Factual issues raised by an assertion that a communication is a "consumer report" include the following: "communication," "information, bearing on ....," "use or expectations of use," "factor," "eligibility," "employment purpose." Factual issues raised by an assertion that a communicator is a "consumer reporting agency" include the following: "compensation," "regularity," "assembling or evaluating," "purpose," and "third parties." The detailed allegations of the complaint touch on all of these. These allegations, if proved, establish all of the elements necessary to conclude that a submission by a motor carrier of Termination Record forms to USIS is the communication of a "consumer report" by a "consumer reporting agency." That these are issues either for the jury, or for F.R.Civ.P. Rule 50 or 56 motions, is

evident from Tenth Circuit cases dealing with statutory definitions.[16] On the basis of these allegations, this portion of USIS' argument in support of its motion to dismiss should be rejected.

2. The "Transactions or Experiences" Exception to "Consumer Reports" Does Not Apply to Termination Record Forms

USIS argues that Termination Record forms fall within the "transactions or experiences" exclusion, a subset of the set of communications that would otherwise be "consumer reports." It is noteworthy that USIS does not dispute that, but for the application of the exclusion, Termination Record forms are "consumer reports." USIS relies entirely upon the application of the exclusion. Further, through its argument that motor carriers are merely "furnishers of information,"[17] it relies upon this same exclusion for its argument that motor carriers are not "consumer reporting agencies." Therefore, if the "transactions or experiences" exclusion does not apply, USIS' arguments re both "consumer reports" and "consumer reporting agencies" must be rejected.

The criteria for a "transactions or experiences" report are factual, not legal, in nature. 15

[16]*Cassara v. DAC Services*, 276 F.3d 1210 (10th Cir. 2002); *Elliot v. Turner Construction Co.*, 2004 WL 1879946 (10th Cir. (Colo)); and *Public Service Co. of Colorado v. National Labor Relations Bd.*, 271 F.3d 1213 (10th Cir. 2001).

[17]Note that this descriptor begs the question: furnisher of what information? Does it reference information about transactions or experiences with the reporter, or information about transactions or experiences with others?

U.S.C. § 1681a(d)(2)(A)(i) excludes from the set of communications that are "consumer reports" those "containing information solely as to transactions or experiences between the consumer (driver) and the person making the report (motor carrier)." The factual issues for this subset are found in the following language from the statute: "solely as to," "transactions or experiences," and "between consumer and the person making the report." If Termination Record forms deal with other matters, or are not about "transactions or experiences," or are about interactions between the driver and others, then they are not excluded from the set of "consumer reports."

The USIS brief cites to nothing in the pleadings that supports the application of the exclusionary language. While it characterizes Termination Record forms as being solely about transactions or experiences between drivers and motor carriers, it (appropriately for a motion to dismiss) presents no sample of a Termination Record form to the court. USIS appropriately acknowledges (at page 10 of its brief) that the pleadings allege that Termination Record forms deal with, among other things, a) driving record, b) company policies, and c) complaints about drivers (Complaint ¶ 20). However, this court has no basis before it for concluding that the Termination Record forms report *solely* about: a) driving events involving only the driver and the motor carrier, b) policies only about a driver's interactions with the motor carrier,[18] or c) complaints about the driver only by other employees of the motor carrier. Driving events (not before this Court) frequently do not involve the reporting motor carrier; they often involve the public. If cargo is affected by a driving event, it involves the shipper. Company policies (not

[18]The very systemic ambiguity that is the basis for the Plaintiffs' allegations that the USIS system assuredly produces "inaccurate" statements, prevents this Court from now concluding anything about the scope of interactions labeled in Termination Record forms as

before this Court) cover many interactions other than those between the driver and the motor carrier; they cover relations between drivers and the public and shippers. Complaints, if by shippers (not before this Court), are not transactions or experiences of the motor carrier with the driver. Unlike a retail store reporting to a credit bureau that a customer's check bounced, motor carriers, when describing driver-related events are almost always reporting on interactions of drivers with others. Either a shipper's load was picked up late, or not. Either the delivery was late, or not. Either the load was delivered where intended, or not. Either the shipper's load was in good condition, or not. While some portions of a Termination Record form may be only about "transactions or experiences" of a motor carrier with a driver, there is no basis in the pleadings for this Court to conclude now that any portion of the reports are "solely" of that nature. Much less is there a basis to conclude that the Termination Record forms in their entirety are "solely" of that nature. That being the case, there is no basis in the pleadings to conclude that the "transactions or experiences" exclusion from the category of "consumer reports" applies to Termination Record forms. Therefore USIS' argument premised upon the "transactions or experiences" exclusion must be rejected.

3. Case Cited by USIS re the "Transactions and Experiences" Exclusion Do Not Support Its Argument

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"company policy violation."

The cases relied upon by USIS do not address the matter at hand. With regard to the argument about whether Termination Record forms are "consumer reports," in the *Hodge v. Texaco, Inc.* case,[19] the subject communication was by a drug lab to an employer. There the lab tested the plaintiff's sample and therefore had a "transaction or experience" with the plaintiff; therefore its lab report was not a "consumer report." But here we are addressing communications by employers to USIS about many things, some of which are not relations between the motor carrier and the driver. For example, if a shipper complains about a driver to a motor carrier, that complaint to the motor carrier would be analogous to the lab report to the employer in the *Hodge* case. But the employer's re-publishing of the shipper's complaint would not be the motor carrier's report about a "transaction or experience" between the motor carrier and the driver. This same comment is applicable to the *Salazar v. Golden State Warriors* case.[20]

4. Motor Carriers Are "Consumer Reporting Agencies"

With regard to the argument about whether motor carriers are "consumer reporting agencies," it is noteworthy that the Department of Transportation has concluded that motor carriers are "consumer reporting agencies." On March 30, 2004, the DOT published its *Final Rule re Safety Performance History of New Drivers.*[21] At page 16703, it stated:

> (5) *An identification, to the extent practicable, of all Federal rules which may duplicate, overlap, or conflict with the rule.* The... [FCRA] specifies procedures that must be followed by consumer reporting agencies when providing consumer reports. **Motor carriers and their agents are consumer reporting agencies when providing information on drivers' safety records to prospective motor carrier employers, as**

[19]975 F.2d 1093 (5th Cir. 1992).

[20]124 F.Supp. 1155 (N.D. Cal. 2000).

[21]69 Fed.Reg. 16684 to 16722.

> **required by this rule**. FCRA specifically authorizes the provision of information "for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." [15 U.S.C. 1681a(h)]. The purpose of this rule is therefore consistent with the FCRA. Furthermore, the rule is drafted following the model of the FCRA.... (Emphasis added.)

If motor carriers, when communicating about driver safety records, are "consumer reporting agencies," then those communications are "consumer reports." Then so also are Termination Record forms.

5. Cases Cited by USIS re "Consumer Reporting Agencies" Do Not Support its Argument

Turning to the cases relied upon by USIS for its argument that motor carriers are not "consumer reporting agencies," they revisit the issue of whether Termination Record forms come within the exception to what are otherwise "consumer reports." But the cited cases are of no use. All we know about the substance of what was communicated to the consumer reporting agency in the case of *Rush v. Macy's New York, Inc.,*[22] is found in these quotes from the opinion: Macy's "did no more than furnish information to a credit reporting agency.... The information that Macy's provided to CBI was such a (consumer) report, based solely on its own credit records of store transaction...." It is not possible to draw an analogy between this and a report by a previous employer to the effect that a driver "violated company policy," or had an "unsatisfactory driving record," or was the subject of "excessive complaints." It therefore provides no guidance here.

The citation to the *Rice v. Montgomery Ward & Co., Inc.*[23] is puzzling. The facts bear no

[22] 775 F.2d 1554 (11th Cir. (Fla.),1985)

[23] 450 F.Supp. 668 (D.C.N.C. 1978)

relation to those presented here.[24]

In the case of *Todd v. Associated Credit Bureau Services, Inc.*,[25] the court described the relationship between Todd and the defendants in terms of disclosing "only their personal experiences in dealing with the Todds" re "delinquent accounts payable." The creditor-debtor relationship described in the *Todd* case is not analogous to that of a employing motor carrier to a driver. The case is therefore of no guidance here.

[24]The court there described the case as follows: "The underlying cause of action in this case arises under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. ss 1691-1691e, out of a refusal by defendant, Montgomery Ward and Co., Inc. (Wards) to grant credit to the plaintiff."

[25]451 F.Supp. 447, 448 (D.C.Pa. 1977)

The *Laracuente v. Laracuente,*[26] case cited by USIS actually supports the position taken by the Plaintiffs here. In it the court ruled that the exclusion does not apply if the report includes information about interactions with others.[27]

6. USIS' Interpretation Makes the Category of "Consumer Reports" Superfluous

Fundamentally, USIS is arguing that anything stated by an employer about one of its employees, whether hearsay, or a description of the employee's interaction with one of the employer's business customers, is providing "information solely as to transactions or experiences between the consumer and the person making the report." To so interpret the exclusion is to have the exclusion eliminate the parent category to which the exclusion applies; in the employment context there would be nothing not within the exclusion. Such an interpretation renders the parent category superfluous and therefore must be rejected.

7. USIS Implicitly Admits That Motor Carriers Are "Consumer Reporting Agencies"

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[26] 252 N.J.Super. 384, 599 A.2d 968, (N.J.Super.L. 1991)

[27] "In the commentary on the Act the CFR provides examples of those entities excluded from the definition of consumer report including *retail store,* hospitals, banks, credit unions, and universities....(emphasis added). **However, the commentary does caution that the exemption no longer applies where reports include information beyond their own transactions or experiences with the consumer.**" *Laracuente* 599 A.2d at 970.

USIS, in its prefatory comments to its motion to dismiss, implicitly admits that motor carriers are "consumer reporting agencies."[28] Referring to Termination Record forms USIS states, "These forms are submitted by motor carriers who are USIS customers to a database maintained by USIS, **but owned by the customers**. The database can be accessed by other USIS motor carrier customers for use in the hiring process." (Emphasis added.) USIS characterizes itself as merely a bailee of statements about drivers, which statements are "owned" by previous employers. It presents itself as merely a filing cabinet where others store the records of their knowledge, beliefs and opinions. The Plaintiffs are not prepared at this time to accept this characterization as a true statement, but if it is, then every time USIS accesses its own database to consolidate dispersed records to make a salable employment history report to a prospective employer,[29] it is effecting a communication from a driver's previous employers (motor carriers) to itself of statements bearing on a driver's employability. This is a description of a "consumer report" by a "consumer reporting agency," with the "consumer report" being the "bailed" statements of the previous employers, who now, because they were compensated for "bailing" their statements with USIS, are in the role of "consumer reporting agencies."

For all of the above reasons, the Plaintiffs have stated a claim that USIS violated the FCRA[30] by receiving "consumer reports" for "employment purposes" without first obtaining

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[28]The Plaintiffs note that USIS' statements here are not within the pleadings and are therefore not appropriate for consideration in passing judgment on a motion to dismiss.

[29]Note that if USIS is accessing "bailed" statements "belonging" to others for a purpose not sanctioned by the Fair Credit Reporting Act, that access alone may be a communication in violation of its provisions.

[30]15 U.S.C. § 1681b(b).

permission from the drivers to receive them. USIS' motion to dismiss, to extent it is premised upon the propositions that Termination Record forms are not "consumer reports" and motor carriers are not "consumer reporting agencies" must be rejected.

8. USIS Misunderstands the "Adverse Action" Claims Being Made Against It.

USIS titles the section of its brief at page 12: "The Transmission of the Forms **to** USIS is Not an 'Adverse Action.'" (Emphasis added.) It then argues that Count II of the complaint should be dismissed because the submission of a Termination Record form to it is not an "adverse action" which triggers certain obligations under the FCRA. USIS' argument demonstrates that it does not understand the claims. The Plaintiffs do not only assert that the communication by a motor carrier who is a previous employer **to** USIS is an "adverse action;" the Plaintiffs also assert that the communication **from** USIS to a motor carrier who is a prospective employer is also an "adverse action" (¶ 42).

Within Count II of the complaint are three claims, thus the subtitle "UNLAWFUL PROCUREMENT AND USE...." The first claim is that USIS is liable for wrongfully receiving "consumer reports" (Termination Record forms) without the permission of drivers. The second is that USIS is liable for designing and then acquiring inaccurate Termination Record forms, which acquisition is an "adverse action," without providing copies of the Termination Record forms to drivers. The third claim is that USIS sold "consumer reports" (employment history reports which are bundled statements from Termination Record forms) to prospective employers without providing copies to drivers. What is common to these three claims is that they are all premised upon 15 U.S.C. § 1681b.

The first claim is premised upon § 1681b(b)(**1**)(A)(i) and § 1681b(b)(**2**) [a user of a consumer report for employment purposes is required to obtain the consumer's permission to receive it]; the validity of this claim is in no way affected by either the"adverse action" or the "accuracy" analyses.

The second and third claims (¶¶ 42 and 43 of the complaint) are premised upon § 1681b(b)(**3**) [a user of a consumer report may not take "adverse action" without first giving notice to the consumer]; the validity of these claims is implicated by both the"adverse action" and the "accuracy" analyses. Thus, if the court looks with favor upon USIS' "adverse action" argument, and dismisses only the "adverse action" through acquisition of Termination Record forms claim, the remaining claims in Count II of the complaint would not be affected. ¶ 42 is an allegation presenting the proposition that sales of employment history reports gleaned from its database are "adverse actions." ¶ 43 alleges that USIS' integration of the entire process from formulating statements about drivers to publishing them later, amounts to an "adverse action." This claim is premised upon the alleged failure to give notice before "adverse action" (before acquisition and before sale), and is in part premised upon the proposition that, because of its negligent design of its statement collection and reporting system, the USIS' Termination Record forms and employment history reports are assuredly inaccurate.[31] It is the inaccuracy that gives rise to the "adversity" of any action premised upon the Termination Record forms. Because USIS has only addressed the "adverse action through **acquisition** of Termination Record forms"

[31]Note that per *Cassara v. DAC Services*, 276 F.3d 1210, 1225 (10th Cir. 2002), the negligent design question is more fundamental, and therefore must be addressed before, the question of whether reports are accurate.

claim, only it will be addressed in this brief. If USIS addresses the "adverse action through **sale** of inaccurate employment history reports" claim in its reply brief, the Plaintiffs will seek leave to argue in response.

9. The Receipt of Termination Record Forms by USIS Without Complying with Disclosure Requirements Triggered by "Adverse Actions" Violates the FCRA.

The Plaintiffs rely, in the alternative, for their claims upon two definitions of "adverse action." Per 15 U.S.C. § 1681a(k)(1)(B)(**ii**), an "adverse action" is "...any decision for employment purposes that adversely affects any... prospective employee." According to 15 U.S.C. § 1681a(h), for "employment purposes" means "for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Putting these two definitions together, the first definition of "adverse action" upon which the Plaintiffs rely is "...any... (adverse evaluation of) a consumer... (that affects prospective) employment, promotion, reassignment, or retention..."

The second definition of "adverse action" upon which the Plaintiffs rely is "an action taken or determination that is... adverse to the interests of the consumer." (15 U.S.C. § 1681a(k)(1)(B)(**iv**)). Under either of these definitions, the concept of "adverse action" is to be broadly interpreted.[32]

If, as the Plaintiffs allege (and this Court for now must assume), USIS negligently designed its statement collection and reporting system (an "action taken") such that when it sells (another "action taken") any report using any of the phrases challenged in ¶ 20 of the complaint, thereby assuredly generating both "inaccurate" Termination Record forms and "inaccurate" employment

history reports, then every such report it has received or published is or was "adverse" to the "interests" of the drivers who were its subject. The ambiguity in a Termination Record form or employment history report alone burdens the driver's process of seeking employment. Because of the ambiguity, any prospective employer must spend additional time and effort to pass judgment upon that driver's employment application. That additional time and expense is a "transaction cost" not bourne by drivers without the ambiguity in the reports of their employment histories. That additional time and expense is a disadvantage to the driver in the labor market for drivers.

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[32]E.g. *Baynes v. Alltel Wireless of Alabama*, 322 F.Supp.2d 1307 (M.D. Alabama 2004)

It is important to note here that the "inaccuracy" in the employment history reports USIS published is rooted in the Termination Record forms it designed. "Inaccuracy" may be found if there is inconsistency in the use of the challenged phrases by various motor carriers submitting Termination Record forms to USIS.[33] At pages 1219 and 1220 of the *Cassara* decision, the Tenth Circuit stated that clear criteria are necessary for consistency, and consistency is necessary for accuracy. It stated at 1220, "Without consistency, the accuracy of the reporting is cast in doubt." Thus, at this stage of the proceedings, one must conclude that a finding of "adverse action" will be supported by a finding of "inaccuracy," which may be found if there is inconsistency in the use of Termination Record forms, which is a factual question which will be the subject of discovery and proof.

It is also important to note that allegations of a poor system design will support claims under the FCRA.[34] In this case, the Plaintiffs have effectively pled that the USIS system, its inputs, its operation, and its product are all in violation of the FCRA.

It is because the consistent use of routinized phrases is an important criteria for determining the "accuracy" of their use, and because USIS integrated the entire process from putting ambiguous words into the mouths of former employers to selling those same ambiguities to

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[33]Presentation of evidence of inconsistent use by various motor carriers will require production and analysis of the USIS database.

[34]Poor system design will support claims under the FCRA. See, e.g, *Cassara*, supra.; *McKeown v. Sears*, 2004 WL 1774816 (W.D.Wis.July 28, 2004); *Graham v. CSC Credit Services,* 306 F.Supp.2d 873 (D.Minn. 2004); and 16 C.F.R. Pt. 600, App., § 607(b)(3).

prospective employers, and because what goes in the USIS system is what comes out, that a claim of "adverse action" may be premised not just upon what the system puts out (sales), but upon the canned phrases the system draws in. Thus, under these allegations, taken for now as facts, the claim that the receipt by USIS of Termination Record forms containing any of the "inaccurate" phrases is "an action taken or determination that is... adverse to the interests of the consumer" and therefore an "adverse action," is sound, and not subject to attack by a motion to dismiss.

It follows that under 15 U.S.C. § 1681b(b)(3) the Plaintiffs have stated a claim that USIS violated the FCRA by not giving to drivers a copy of the Termination Record form before inputing it into the USIS database. Therefore, this court should reject this portion of USIS motion to dismiss.

3. Plaintiffs Allege a Proper Claim for Unjust Enrichment and Restitution

Plaintiffs have established above that federal district courts have the authority to grant restitution under the exercise of its traditional equitable powers. Plaintiffs turn now to USIS' argument that a remedy for unjust enrichment and restitution cannot be maintained because Plaintiffs did not confer a benefit upon USIS, a requirement for restitution under some Colorado state cases. Plaintiffs claim for restitution, however, is not a state law claim. Plaintiffs rely upon a broader view of restitution in the federal courts to fashion equitable remedies to prevent USIS' unjust enrichment.

The equitable remedy of restitution, is "defined as that body of law in which (1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain

instead of plaintiff's loss, or (3) the court restores to plaintiff, in kind, his lost property or its proceeds."[35] (Emphasis added.) A claim for unjust enrichment can coexist with a claim sounding in tort, contract, or violation of law.[36] The equitable remedy of restitution, "flow[s] not from the plaintiff's proof of its injury or damage, but from its proof of the defendant's unjust enrichment or the need for deterrence. . ." [37] Plaintiffs' claim for restitution coexists with their statutory claims. It is based on USIS' unjust profiting from its sale of consumer reports that are a end product of multiple violations of the Fair Credit Reporting Act. Plaintiffs also believe that the deterrent effect of restitution is consistent with its request for declaratory and injunctive relief.

[35] *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 746 (D.C. Cir. 1995), quoting Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex.L.Rev. 1277, 1293 (1989) (emphasis in original).

[36] *U.S. v. Brown, et al*, 348 F.3d 1200, 1212 (10th Cir. 2003) *citing,* Restatement (Third) of Restitution and Unjust Enrichment § 13 cmt. a (Tentative Draft No. 1, 2001).

[37] *Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1205 (7th Cir. 1990).

USIS incorrectly argues that Plaintiffs must have conferred upon it a benefit in order to recover restitution. But, "[e]ven where the plaintiff ... has not suffered a loss or ... has not suffered a loss as great as the benefit received by the defendant[,] ... the defendant is compelled to surrender the benefit on the ground that he would be unjustly enriched if he were permitted to retain it, even though that enrichment is not at the expense or wholly at the expense of the plaintiff."[38] While Plaintiffs need not have conferred a benefit on USIS to be able to recover restitution, unjust enrichment can come from a party's violation of its duty to another[39] or the party's infringement of another person's interest.[40]

In this case Plaintiffs have alleged that USIS has violated several of its duties to the Plaintiff under the FCRA, and infringed on several of the rights of the Plaintiffs under the FCRA. The FCRA confers upon USIS "grave" responsibilities "with fairness, impartiality, and respect for the consumer's right to privacy." 15 U.S.C. 1681(a)(4). USIS is required to conduct its business "in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy,

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[38] *Skretvedt v. E.I. DuPont De Nemours* 372 F.3d 193, 214 (3d Cir. 2004) *quoting Restatement of Restitution* 160, cmt. d, at 643-44.

[39] *Skretvedt* 372 F.3d at 214 ("Thus, if the defendant has made a profit through the violation of a duty to the plaintiff to whom he is in a fiduciary relation, he can be compelled to surrender the profit to the plaintiff, although the profit was not made at the expense of the plaintiff..."); *Williams Electronics Games, Inc. v. Garrity* 366 F.3d 569, 577 (7th Cir. 2004) ("If as in this case the wrong consists of a breach of fiduciary obligation--the kind of breach traditionally actionable in suits in equity (the usual form that restitution takes is to impress a constructive trust on the profits of wrongdoing, with the defendant the trustee and the plaintiff, of course, the beneficiary.")

[40] American Law Institute, *Restatement of the Law 2d,* Tent. Draft 1, pp. 7-8 (April 5, 1983). Cited by approval in the concurrence of Judge Merritt. *Ricco v. Potter* 377 F.3d 599, 606 (6th Cir. 2004) (where the employer wrongfully denied an employee the benefit of family medical leave.)

relevancy, and proper utilization of such in accordance with the requirements of this subchapter." 15 U.S.C 1681 (b). If Plaintiffs properly alleged that USIS breached its duties to consumers under the FCRA, then Plaintiffs also properly alleged USIS' unjust enrichment, and a basis for restitution.

USIS incorrectly states that because Count's I and II cannot be maintained, neither can Plaintiffs' claim for unjust enrichment and restitution. First, Plaintiffs need not achieve declaratory or injunctive relief under Count 1 to obtain restitution. Second, as previously described, USIS only partially attacked Count 2. Even if USIS were to succeed in its attack on Counts 1 and 2, Plaintiffs' claim for restitution in its entirety survives on the other allegations of the complaint.

3. CONCLUSION

1. This Court has power, if circumstances warrant it, to provide injunctive relief, declarative relief, and restitution;
2. The Plaintiffs have adequately pled claims premised upon the propositions that:
    1. Termination Record forms are "consumer reports,"
    2. Motor carriers are "consumer reporting agencies,"
    3. The receipt by USIS of inaccurate Termination Record forms is "adverse action."

WHEREFORE, the Plaintiffs request that this Court deny USIS' MOTION TO DISMISS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 13th day of September 2004, the undersigned served a copy of PLAINTIFFS' BRIEF IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS via regular mail upon the persons listed below:

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