

No. 23-721

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Khalilah Suluki,

Plaintiff-Appellant,

v.

Credit One Bank, NA,

Defendant-Appellee,

Capital One Bank, NA, Comenity Capital
Bank,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

Hon. Sidney H. Stein, U.S. District Judge

Case No. 21-cv-1156

Brief of *Amici Curiae*
Consumer Financial Protection Bureau
and Federal Trade Commission
in Support of Plaintiff-Appellant

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INTEREST OF *AMICI CURIAE*

To ensure fair and accurate credit reporting, the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, imposes various requirements that consumer reporting agencies and the companies that provide those agencies information about consumers, known as furnishers, must follow. As relevant here, under Section 1681s-2(b) of the FCRA, when a consumer disputes the completeness or accuracy of information in her credit report with a consumer reporting agency and the agency forwards the dispute to the furnisher, the furnisher must conduct an investigation to determine whether the disputed information can be verified and cease reporting any information that cannot be verified.

The Consumer Financial Protection Bureau (CFPB or Bureau) has exclusive rule-writing authority for most provisions of the FCRA. 15 U.S.C. § 1681s(e). The Bureau interprets and, along with various other federal and state regulators, enforces the law's requirements. *Id.* § 1681s(a)-(c). Those requirements include the provisions in Section 1681s-2(b) that require furnishers to investigate disputes submitted by consumers and to cease reporting any information that cannot be verified.

The Federal Trade Commission (FTC) has been charged by Congress with protecting consumers from deceptive or unfair trade practices. *Id.*

§ 45(a). As part of that mission, the Commission has long played a key role in the implementation, enforcement, and interpretation of the FCRA. A violation of the FCRA “constitute[s] an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act.” *Id.* § 1681s(a)(1). And the FCRA grants the Commission “such procedural, investigative, and enforcement powers ... as though the applicable terms and conditions of the Federal Trade Commission Act were part of [the FCRA].” *Id.*

This case involves the scope of furnishers’ duties under the provisions of the FCRA that allow consumers to dispute information on their credit reports that they believe is inaccurate or incomplete. Given their role in administering and enforcing the FCRA, *amici* have a substantial interest in clarifying the governing legal standards. Here, the district court granted summary judgment for the Defendant, Credit One Bank, NA, holding that the Plaintiff, Khalilah Suluki, was unable to prove that a reasonable investigation of her credit dispute would have shown that information in her credit report was inaccurate. But furnishers are also required to remove disputed credit information when it is *unverifiable*, and the district court lost sight of this key principle. Because the district court held Suluki to an improper burden, its ruling on this issue should be reversed.

STATEMENT

A. Consumer Credit Reporting

Consumer credit reporting plays an important role in the lives of American consumers. The consumer credit reporting ecosystem includes: (1) consumer reporting agencies,¹ which compile reports on consumers and make them available to lenders, insurers, employers, landlords, and other users, and (2) furnishers, which provide information about consumers to consumer reporting agencies. *See* CFPB, *Annual Report of Credit and Consumer Reporting Complaints* 5 (Jan. 2022) (2021 FCRA Report);² *see generally* CFPB, *Key Dimensions and Processes in the U.S. Credit Reporting System* (Dec. 2012) (providing an overview of how the consumer credit reporting ecosystem operates and the participants involved).³ The three largest consumer reporting agencies are Equifax, Experian, and TransUnion. 2021 FCRA Report at 5. These companies maintain files on

¹ Consumer reporting agencies are sometimes referred to informally as credit reporting agencies. The terms are used interchangeably in this brief.

² Available at https://files.consumerfinance.gov/f/documents/cfpb_fcra-611-e_report_2022-01.pdf.

³ Available at https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

over 200 million Americans. *Id.* More than 15,000 furnishers provide these companies information about consumers. *Id.* at 5–6.

The reports compiled by consumer reporting agencies are used to make decisions that affect every facet of consumers’ lives. Lenders use credit reports, also referred to as consumer reports,⁴ when determining whether to extend credit and on what terms. *Id.* at 5. Landlords use these reports when deciding whether to rent housing to prospective tenants. *Id.* And employers use these reports to determine whether a job applicant should be hired. *Id.* Given how important these decisions are to consumers, it is critical that the information contained in credit reports is correct and that consumers can identify and dispute any inaccuracies.

However, credit reports frequently contain errors. By one estimate, one in five Americans has a verified error on at least one credit report. *See* FTC, *Report to Congress Under Section 319 of the Fair and Accurate*

⁴ The term “credit report” is used throughout this brief to have the same meaning as the term “consumer report” as defined at 15 U.S.C. § 1681a(d). *See* CFPB, *Annual Report of Credit and Consumer Reporting Complaints* 7.n4 (Jan. 2023) (2022 FCRA Report), https://files.consumerfinance.gov/f/documents/cfpb_fcra-611-e_report_2023-01.pdf (explaining that the term “[c]redit report[.]” is a “popular term” for “consumer report[.]”).

Credit Transactions Act of 2003 i-ii (2015);⁵ see also Liane Fiano, CFPB, *Common errors people find on their credit report—and how to get them fixed* (Feb. 5, 2019).⁶ Another study found that more than one-third of consumers were able to identify at least one error in their credit reports. See Syed Ejaz, Consumer Reports, *A Broken System: How the Credit Reporting System Fails Consumers and What to Do About It* 4 (2021);⁷ see also Michael Lerner, *More Than One-Third of Consumers Found Errors in Their Credit Reports, Investigation Finds*, Wash. Post (July 14, 2021).⁸

Given this error rate, it is unsurprising that consumers frequently complain about the consumer credit reporting system. Last year, the CFPB received nearly one million consumer complaints related to credit

⁵ Available at <https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf>.

⁶ Available at <https://www.consumerfinance.gov/about-us/blog/common-errors-credit-report-and-how-get-them-fixed/>.

⁷ Available at <https://advocacy.consumerreports.org/wp-content/uploads/2021/06/A-Broken-System-How-the-Credit-Reporting-System-Fails-Consumers-and-What-to-Do-About-It.pdf>.

⁸ Available at <https://www.washingtonpost.com/business/2021/07/14/more-than-one-third-consumers-found-errors-their-credit-reports-investigation-finds/>.

reporting. *See* CFPB, *Consumer Response Annual Report* 11 (Mar. 2023).⁹ The number of complaints the CFPB receives related to credit reporting is also dramatically increasing. Complaints related to credit reporting have more than tripled in the last two years. *Compare id.* (showing about 1 million complaints in 2022) *with* CFPB, *Consumer Response Annual Report* 9 (Mar. 2021) (showing about 300,000 complaints in 2020);¹⁰ *see also* 2022 FCRA Report at 11-12 (noting that “consumer reporting complaint volume [has] increased substantially” and citing data);¹¹ FTC, *Consumer Sentinel Network: Databook 2022* 85 (Feb. 2023) (showing that consumer complaints related to “Credit Bureaus, Information Furnishers, and Report Users” more than doubled between 2020 and 2022).¹²

Consumers routinely submit complaints related to the credit reporting system “when their attempts to correct inaccurate information go unanswered” or when they are “frustrated by a dispute process that has not

⁹ Available at https://files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf.

¹⁰ Available at https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.

¹¹ Available at https://files.consumerfinance.gov/f/documents/cfpb_fcra-611-e_report_2023-01.pdf.

¹² Available at https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf.

worked for them.” 2022 FCRA Report at 35. For example, many complaints come from “[i]dentity theft victims” who “hav[e] to traverse a lengthy back-and-forth process” to correct inaccurate information in their credit reports. *Id.* at 36. The CFPB’s analyses of these complaints indicate that many consumers “giv[e] up” before “their issues [are] resolved.” *Id.*

B. The Fair Credit Reporting Act

“The FCRA seeks to ensure ‘fair and accurate credit reporting.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016) (quoting 15 U.S.C. § 1681(a)(1)). It was enacted by Congress to “prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report.” S. Rep. No. 91-517, at 1 (1969); *see also Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 444 (2d Cir. 2015) (“The FCRA was enacted in 1970 amidst concerns about the accuracy of information disseminated by credit reporting agencies.”).

To help prevent inaccurate credit reporting, the FCRA allows a consumer to dispute with any consumer reporting agency “the completeness or accuracy of any item of information contained in [their credit] file.” 15 U.S.C. § 1681i(a)(1)(A). After receiving notice of a dispute, the consumer reporting agency “shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is

inaccurate.” *Id.* As part of its reinvestigation, the consumer reporting agency is required to “provide notification of the dispute to any person who provided any item of information in dispute,” i.e., the furnisher. *Id.* § 1681i(a)(2)(A).

When a furnisher receives notice of a dispute from a consumer reporting agency, it is required to “conduct an investigation with respect to the disputed information” and “report the results of the investigation to the consumer reporting agency.” *Id.* § 1681s-2(b)(1)(A), (C). The furnisher’s investigation must be “reasonable.” *E.g., Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1302 (11th Cir. 2016) (collecting cases). If the furnisher finds any information disputed by the consumer “to be inaccurate or incomplete” or if the information “cannot be verified,” the furnisher must, “as appropriate, based on the results of the reinvestigation promptly” either “modify,” “delete,” or “permanently block the reporting of” that information. 15 U.S.C. § 1681s-2(b)(1)(E). Likewise, if, after the consumer reporting agency’s investigation, “an item of the information is found to be inaccurate or incomplete or cannot be verified,” the consumer reporting agency is required 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)(i).

C. Facts

Plaintiff Khalilah Suluki contends that her mother opened multiple credit card accounts in her name without her knowledge or permission. Decision & Order at 1, ECF No. 85, *Suluki v. Credit One Bank, NA*, No. 21-cv-1156 (S.D.N.Y) (Order). She discovered these purportedly fraudulent accounts when, after she was denied a lease on an apartment, she requested her credit file from the three major consumer reporting agencies. *Id.* at 2, 4-5. Suluki then repeatedly disputed the accounts with those agencies, which forwarded her disputes to the banks that issued the disputed credit card accounts. *Id.* Those banks include Defendant Credit One Bank, NA. *Id.* at 1.

In addition to disputing the Credit One credit card account through the consumer reporting agencies, Suluki also called Credit One and conveyed “that her mother had opened the account in her name without permission.” *Id.* at 4. She later submitted an affidavit to Credit One “affirming that she had never applied for the credit card and identify[ing] her mother as the person who did so without her consent or knowledge.” *Id.* (quotation omitted). Indeed, Suluki’s mother called Credit One and confirmed that she had opened the account but claimed that she did so with her daughter’s cooperation and permission. *Id.* at 4.

Credit One then investigated this dispute over whether Suluki's mother had Suluki's permission to open the credit card account. It confirmed that the name and address in its files matched the name and address Suluki provided with her dispute. *Id.* at 5. It also checked a public database to confirm that the address and telephone number used to open the account were linked to the name under which the account was opened. *Id.* Credit One then reported back to the consumer reporting agencies that it had verified that Suluki was the accountholder who owed the credit card debt. *See* Def.'s Resp. to Pl.'s Statement of Undisputed Facts, ECF No. 71, *Suluki v. Credit One Bank, NA*, No. 21-cv-1156 (S.D.N.Y).

D. Procedural History

Suluki brought suit alleging that Credit One violated Section 1681s-2(b)(1) by failing to conduct a reasonable investigation into her dispute and failing to modify, delete, or permanently block any information that it found to be inaccurate or incomplete or that it could not verify.

The parties filed cross-motions for summary judgment. Suluki sought summary judgment that Credit One's report that she was liable for the disputed credit card account was not accurate; that Credit One's investigations into her disputes were unreasonable; and that Credit One failed to properly report the results of its investigations back to the

consumer reporting agencies. *See* Order at 6. Credit One sought summary judgment that its investigations were reasonable and, even if they were not, no reasonable investigation would have concluded that Suluki was not the accountholder. *See id.* at 10.

The court held that the issue of whether Credit One's reporting was accurate could not be resolved at summary judgment. It explained that, while the evidence consistently points to Suluki's mother having opened the credit card account in Suluki's name, whether she did so "without Suluki's blessing ... is a question of fact in genuine dispute." *Id.* at 7. The court also held that the issue of whether Credit One's investigation was reasonable could not be resolved at summary judgment. *See id.* at 10 ("There remains a factual dispute about the adequacy of the steps taken by Credit One to investigate Suluki's claims."). Nonetheless, the court granted summary judgment to Credit One on the basis that Suluki could not show she sustained any damages. *See id.* at 10-14.

The court determined Suluki was not entitled to actual damages because any damages Suluki suffered from the account appearing on her credit report were not caused by Credit One's allegedly unreasonable investigation. *Id.* at 11. According to the court, that was because no reasonable investigation would have revealed that the account resulted

from identity theft, and thus Credit One would not have had to correct the reported information even if it had conducted a reasonable investigation. *See id.* (“[E]ven if the inaccuracy of the reporting led to damages to [Suluki], if there is no genuine issue of material fact as to whether a reasonable investigation would have revealed that [Credit One] reported inaccurate information, then there is no causal connection between the unreasonableness of [Credit One]’s investigation and the inaccuracy that caused [Suluki] damages.” (quotation omitted)).

Assessing the evidence, the court concluded that “[t]here is no alternative investigation that would have allowed Credit One to determine that Suluki did not give her mother permission to open the account,” and thus there was no causal relationship between any shortcomings in the investigation and any damages incurred. *Id.* at 12. The court also found that Suluki was not entitled to statutory or punitive damages because, in its view, she had not proffered any evidence that Credit One violated the law knowingly or recklessly. *See id.* at 13-14.

Suluki then filed this appeal.

SUMMARY OF ARGUMENT

The district court’s ruling that Suluki could not prove actual damages was mistaken and should be reversed. The court failed to consider the

possibility that Credit One had not verified Suluki's debt and thus should have removed it from her credit report. If Suluki had made that showing at trial, she well could have been entitled to damages. But the district court's summary judgment ruling wrongly denied her that opportunity.

Under Section 1681s-2(b) of the FCRA, when a furnisher receives a consumer dispute forwarded by a consumer reporting agency, the furnisher must conduct an investigation to determine whether the disputed information can be verified. If the evidence available to the furnisher is inconclusive—i.e., if the investigation is unable to determine whether the disputed information is accurate or not—then the FCRA does not allow a furnisher to report back to the consumer reporting agency that its investigation verified the accuracy of that information. Even if no reasonable investigation could have conclusively determined that the information was *false*, the fact remains that the information has not been verified and must be handled accordingly.

In particular, Section 1681s-2(b)(1)(E) provides that when disputed information “is found to be inaccurate or incomplete or cannot be verified,” the furnisher must, “as appropriate,” delete, modify, or permanently cease reporting the disputed information. The appropriate response is the one that will ensure that the furnisher does not continue to report any of the

information that the consumer has disputed unless that information is verifiably accurate. Thus, any information that cannot be verified should be deleted from the data that the furnisher submits to consumer reporting agencies. That approach is consistent with the statutory scheme and longstanding agency guidance.

The district court failed to recognize that a furnisher is required to delete any unverifiable information, which led to a flawed holding that Suluki cannot show that she sustained any damages attributable to Credit One's handling of her dispute. If Credit One did not have sufficient evidence to show that the disputed information was true yet reported that its investigation verified the accuracy of the disputed information and continued to report that information, then Suluki could have sustained damages as a result of its improper continued reporting of the disputed information. This Court should therefore reverse the district court's conclusion that, as a matter of law, Suluki could not prevail on her Section 1681s-2(b) claim because no reasonable investigation could have uncovered evidence showing that the disputed information was inaccurate.

ARGUMENT

I. The FCRA requires a furnisher to conduct an investigation to determine whether disputed information can be verified.

The FCRA specifies several actions that a furnisher must take after being notified of a dispute by a consumer reporting agency. Namely, the furnisher must “conduct an investigation with respect to the disputed information,” including by “review[ing] all relevant information” that the consumer reporting agency passed along. 15 U.S.C. § 1681s-2(b)(1)(A), (B). Then the furnisher must “report the results of the investigation to the consumer reporting agency.” *Id.* § 1681s-2(b)(1)(C). And if the furnisher’s investigation determines that the disputed information is “inaccurate or incomplete or cannot be verified,” the furnisher must, “as appropriate, based on the results of the reinvestigation” either “modify” the disputed information, “delete” the disputed information, or “permanently block the reporting of” the disputed information. *Id.* § 1681s-2(b)(1)(E).

Under this statutory framework, a furnisher must conduct an investigation to determine whether the information disputed by the consumer can be verified. When a furnisher investigates a consumer dispute, there are three possible outcomes: first, the furnisher could “verif[y]” the accuracy of the of the disputed information; second, it could determine that the disputed information is “inaccurate or incomplete”; or,

third, it could determine that the information “cannot be verified.” *Id.*; see also *Hinkle*, 827 F.3d at 1302 (“Section 1681s-2(b) contemplates three potential ending points to reinvestigation: verification of accuracy, a determination of inaccuracy or incompleteness, or a determination that the information ‘cannot be verified.’” (quoting 15 U.S.C. § 1681s-2(b)(1)(E))).

The first possible outcome (verification of the disputed information) requires the furnisher to affirmatively establish the accuracy of the information it reported about the consumer. In other words, to properly report information as “verified,” the furnisher must have “sufficient evidence to support the conclusion that the information was true.” *Id.* at 1303. If the furnisher does not already have such evidence, it must “seek out and obtain” it before reporting that the information is “verified.” *Id.* at 1303; see also *Black’s Law Dictionary* (11th ed. 2019) (defining “verify” as “[t]o prove to be true; to confirm or establish the truth or truthfulness of; to authenticate”). For example, when a consumer disputes that she owes a debt, the furnisher may review “account-level documentation,” *Hinkle*, 827 F.3d at 1304-05, “such as applications, agreements, billing statements, promissory notes, notices, correspondence, payment checks, payment histories, or other evidence of indebtedness,” to determine whether the consumer agreed to pay the debt, *id.* at 1298 (quotation omitted). What a

furnisher must do to verify the accuracy of disputed information “will be more or less intensive depending on what evidence the furnisher already possesses.” *Id.* at 1303. Ultimately, whether a furnisher’s investigation sufficiently established the truth of the disputed information “is a factual question” that “will normally be reserved for trial.” *Id.* (citing *Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir. 2005)).

The second possible outcome of an investigation is that the furnisher may determine that the disputed information is “inaccurate or incomplete.” *See* 15 U.S.C. § 1681s-2(b)(1)(E). In that instance, the furnisher must correct the reported information to make it accurate. *See id.*

Finally, the third possible outcome is that the disputed information “cannot be verified.” *Id.* Importantly, a furnisher’s inability to conclusively determine that the disputed information is inaccurate does not mean that the furnisher is permitted to report back to the consumer reporting agency that its investigation verified the accuracy of that information. Instead, if the evidence available to the furnisher is insufficient to establish the truth or falsity of the disputed information, then, under the statutory framework, the furnisher must report that its investigation concluded that the disputed information “cannot be verified.” *Id.* A furnisher could conclude that disputed information cannot be verified “if [it] determine[s] that the

evidence necessary to verify [the] disputed information either does not exist or is too burdensome to acquire.” *Hinkle*, 827 F.3d at 1303. Reporting information as unverified does not mean that the investigation conclusively determined that the disputed information is false. It simply means that the furnisher was unable to confirm that the disputed information was true.

When a furnisher is unable to determine whether the disputed information is true, the FCRA does not allow it to report back to the consumer reporting agency that its investigation verified the accuracy of that information. That basic principle is illustrated by two court of appeals decisions. First, in *Johnson v. MBNA America Bank, NA*, 357 F.3d 426 (4th Cir. 2004), a consumer disputed whether she was liable for an outstanding credit card balance on an account opened by her husband. She claimed she was only an authorized user on the account, not a co-obligor. In conducting its investigation, the issuing bank looked at information that showed, for example, that “the name and address” provided by the consumer with her dispute “were the same as the name and address” in its files, and that the consumer’s name was listed on billing statements. *Johnson*, 357 F.3d at 431. But, the court explained, “this evidence is equally consistent with” the consumer’s claim that she was only an authorized user. *Id.* The fact that “the original account application was no longer in [the bank]’s possession,”

and therefore the bank could not conclusively determine whether the consumer was a co-obligor on the account, did not change the court's calculus. *Id.* at 432. Given the bank's inability to adduce evidence establishing that the consumer owed the account, it should "have at least informed the credit reporting agencies that [it] could not conclusively verify that [the consumer] was a co-obligor." *Id.*

Second, in *Hinkle*, a consumer disputed whether she owed a balance on a T-Mobile account, claiming the account in question was not hers. The furnisher, a third-party debt buyer, "confirm[ed] that the identifying information possessed by the CRAs was the same as the identifying information contained in its internal data files" but obtained no "account-level documentation" or any other information that would suggest that the debt belonged to that particular consumer. 827 F.3d at 1305. The Eleventh Circuit held that a jury could find that this investigation was insufficient to verify the debt. In particular, the court held that "[a] jury could find that the documentation [the furnisher] reviewed was insufficient to prove that the ... accounts belonged to [the consumer] and that [the furnisher] therefore had a duty to report the accounts as 'cannot be verified.'" *Id.* (quoting 15 U.S.C. § 1681s-2(b)(1)(E)).

Likewise, here, whether Credit One violated Section 1681s-2(b) in reporting the disputed account as “verified” “will turn on whether [Credit One] acquired sufficient evidence to support the conclusion that” Suluki’s mother opened the account in Suluki’s name with her permission and therefore Suluki was liable for the credit card debt. *Hinkle*, 827 F.3d at 1303. If Credit One did not acquire sufficient evidence to support that conclusion, then Credit One should have reported that it could not verify the account.

Any other approach would turn the statute on its head. Section 1681s-2(b) places the burden squarely on the furnisher to “conduct an investigation” and to determine whether the accuracy of the disputed information “can[] be verified.” If a furnisher could report that disputed information was “verified” so long as the available evidence is inconclusive, that would “shift the burden” to the consumer to prove that the information is inaccurate—something consumers may often not be in a position to do. *Hinkle*, 827 F.3d at 1306. For instance, consumers who claim to be the victims of identity theft or mistaken identity would be forced to prove a negative, i.e., that they did not open a particular account. “[N]othing in the FCRA” supports that outcome. *Id.* And that outcome would make little

sense given that “the furnisher is in a far better position than the alleged debtor to confirm the actual owner of the account.” *Id.*

Nor are furnishers unduly burdened by the requirement to have sufficient evidence before they can report disputed information as “verified.” If the evidence on hand is insufficient to confirm that the disputed information is accurate, the furnisher can seek additional evidence. But it need not dig further if there is no additional evidence the furnisher could get or if getting it would be unduly burdensome. *Id.* at 1303. In that circumstance, it can satisfy its FCRA obligations by reporting that the disputed information “cannot be verified” and appropriately updating its reporting.

II. A furnisher must delete any information that cannot be verified.

When a furnisher is unable to verify the disputed information, the appropriate response will be to delete the unverifiable information from the data that the furnisher reports to consumer reporting agencies. Section 1681s-2(b)(1)(E) states that “if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified,” the furnisher must, “as appropriate, based on the results of the reinvestigation” either “modify that item of information,” “delete that item of information,” or “permanently block the reporting of that item of

information.” The “appropriate” response is the one that will ensure that the furnisher does not continue to report the disputed information unless it is verifiably accurate and “may vary depending on the nature of the disputed information.” *Hinkle*, 827 F.3d at 1304. So, for example, if a furnisher is unable to verify that a consumer missed a payment, then it may be appropriate for the furnisher to delete any mentions of the missed payment while continuing to report other information about the account. But “when a furnisher is unable to verify the identity of an alleged debtor,” there is no way for the furnisher to continue reporting the disputed debt in a manner that is verifiably accurate. Accordingly, “the appropriate response” is to delete it entirely from the information that is furnished. *Id.*

That is because the framework set forth in Section 1681s-2(b) “is designed not only to exclude false information from credit reports, but also to prevent the reporting of unverifiable information.” *Id.* at 1304. Any interpretation of a furnisher’s obligations under Section 1681s-2(b)(1)(E) that allows the furnisher to continue reporting unverifiable information would effectively rewrite that section to state only that a furnisher must delete, modify, or cease reporting information that is inaccurate or incomplete. And that would nullify the section’s express requirement that a furnisher take action when information “cannot be verified.” *See id.* at 1304

& n.9 (holding that allowing a furnisher to continue reporting information about a debt where the debtor's identity cannot be verified would "render meaningless the 'cannot be verified option' in § 1681s-2(b)(1)(E)").

This approach is also consistent with the statute read holistically, as other provisions in the FCRA indicate that the appropriate response when disputed information cannot be verified is to delete that information. In particular, Section 1681i outlines consumer reporting agencies' responsibilities in responding to consumers' disputes and, like Section 1681s-2(b), provides that when a disputed "item of the information is found to be inaccurate or incomplete or cannot be verified," the consumer reporting agency must "delete" or "modify" it "as appropriate, based on the results of the reinvestigation." 15 U.S.C. § 1681i(a)(5)(A). Section 1681i goes on to provide that, "[f]ollowing any *deletion* of information which is found to be inaccurate or whose accuracy can no longer be verified," the consumer reporting agency must in some circumstances notify certain people who previously received a report with the now-deleted information. That provision thus contemplates that when information "can no longer be verified," the proper response is to "delet[e]" it. *See Hinkle*, 827 F.3d at 1304 (citing the "parallel structure of ... 1681i" as

evidence that section 1681s-2(b) should be read to require furnishers to delete any unverifiable information).

Finally, this approach is also consistent with longstanding guidance proffered by staff of the FTC. A report that FTC staff published in 2011 to summarize interpretations they had developed over decades of administering the FCRA specifies that, under Section 1681s-2(b), “[u]nless the furnisher is able to confirm the disputed item of information, it must cease reporting it.” FTC, *40 years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* 96 (July 2011).¹³

In sum, when a consumer reporting agency forwards a consumer’s dispute to the furnisher that provided the disputed information, the furnisher is required to conduct a reasonable investigation. If the disputed information cannot be verified, the furnisher must delete the disputed information from the data that it furnishes to consumer reporting agencies. Here, the district court’s analysis entirely disregarded a furnisher’s obligation to delete unverifiable information. It assumed that if the

¹³ Available at <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf>.

furnisher was unable to conclusively determine that the disputed information was inaccurate or incomplete, then it was appropriate for the furnisher to report that its investigation verified the disputed information and for the furnisher to continue reporting the unverifiable information. *See* Order at 12. But that is not what the statute says. If the disputed information cannot be verified, the furnisher must delete that information. And, here, as set forth below, the district court's failure to recognize that aspect of a furnisher's obligations under the FCRA led it to erroneously hold that any problems with how Credit One responded to her dispute could not have caused Suluki any compensable damages.

III. The district court's failure to recognize that Credit One was required to delete unverified information resulted in a flawed holding that Suluki could not show actual damages.

The district court erred in holding that Suluki cannot show that any deficiencies in how Credit One responded to her dispute caused her actual damages. If the information uncovered in Credit One's investigation was insufficient to verify that Suluki was the account holder who owed the outstanding credit card debt, then the FCRA required Credit One to delete that debt from its reporting. And, if, as Suluki alleges, Credit One's failure to cease reporting the unverified debt led to her being denied credit, then she may have suffered actual damages for which Credit One would be liable.

See 15 U.S.C. § 1681o (holding that a creditor is liable for “any actual damages sustained by the consumer” as a result of any “negligent” violation of the FCRA).

The district court concluded that there is “a factual dispute about the adequacy of the steps taken by Credit One to investigate Suluki’s claims.” Order at 10. But the court nonetheless granted summary judgment to Credit One on the basis that Suluki could prevail only if she could establish actual damages that were “*attributable* to [Credit One]’s unreasonable investigation.” *Id.* at 11 (quoting *Okocha v. HSBC USA, N.A.*, No. 08-cv-8650, 2010 WL 5122614, at *5 (S.D.N.Y. Dec. 14, 2010)). And, the district court reasoned, to show that actual damages are attributable to the allegedly unreasonable investigation, Suluki would have to show that “a reasonable investigation would have revealed that [Credit One] reported inaccurate information.” *Id.* (quoting *Jackling v. HSBC Bank USA, N.A.*, No. 15-cv-6148, 2019 WL 162743, at *5 (W.D.N.Y. Jan. 10, 2019)). Because, in the district court’s view, “no alternative investigation ... would have allowed Credit One to determine that Suluki did not give her mother permission to open the account,” the district court concluded that Suluki could not, as a matter of law, show she suffered any damages *attributable* to deficiencies in Credit One’s investigation. *Id.* at 12.

This analysis is mistaken. If the furnisher does not have sufficient evidence to confirm that disputed information is accurate, it must report back to the consumer reporting agency that forwarded the dispute that the information could not “be verified” and delete it from the data it furnishes to consumer reporting agencies. 15 U.S.C. § 1681s-2(b)(1)(C), (E); *see also supra* Sections I-II. And, at that point, the consumer reporting agency would have to delete that unverified information from the consumer’s file. *See* 15 U.S.C. § 1681i(a)(5)(A); *see also Hinkle*, 827 F.3d at 1304 (“[W]hen a [consumer reporting agency] receives notice that an account is unverifiable, it must ‘promptly delete that item of information from the file of the consumer.’” (quoting 15 U.S.C. § 1681i(a)(5)(A))).

If a consumer can show that the continued inclusion of unverified information on her consumer report (that is, information that should have been deleted) caused her harm, she has established actual damages attributable to the furnisher’s failure to fulfill its obligations under Section 1681s-2(b). *See Johnson*, 357 F.3d at 432 (rejecting the argument that the consumer “failed to establish that [the furnisher]’s allegedly inadequate investigation was the proximate cause of her damages because there were no other records [the furnisher] could have examined that would have changed the results of its investigation,” given that the furnisher should

“have at least informed the credit reporting agencies that [it] could not conclusively verify” the debt). For that reason, the district court erred in holding that Suluki cannot, as a matter of law, show that she sustained actual damages attributable to Credit One’s alleged violations.

The district court cited a variety of authorities in support of its view that an FCRA plaintiff cannot prove damages without showing that a reasonable investigation would have conclusively determined that the disputed information was inaccurate. *See* Order at 10-11. But none of those cases considered or addressed what a furnisher would have to do if, after performing the required investigation, it could not verify the account. Thus, to the extent they suggest that a consumer cannot recover unless she can show that a reasonable investigation would have uncovered that the disputed information was inaccurate, they are unpersuasive. And, indeed, one of the cases the district court relied on, *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305 (11th Cir. 2018), expressly reaffirms a key principle advanced by the government *amici* here: “When a furnisher ... report[s] that the disputed information has been verified as accurate, the question of whether the furnisher behaved reasonably will turn on whether the furnisher acquired sufficient evidence to support the conclusion that the information

was true.” *Felts*, 893 F.3d at 1312 (quotation omitted). That is the core question this case presents.

CONCLUSION

For these reasons, this Court should reverse the district court’s conclusion that Credit One was entitled to summary judgment on Suluki’s § 1681s-2(b) claim because no reasonable investigation could have uncovered evidence showing that the disputed information was inaccurate.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1(c) because it contains 5,768 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

September 28, 2023

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