IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 17-11447

RICHARD ALEXANDER WILLIAMS,
Plaintiff-Appellee,

v.

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,
Defendant-Appellant.

ON APPEAL FROM THE UNITES STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Case No. 1:13-cv-00222-MW-GRJ
The Honorable Mark E. Walker

PLAINTIFF'S-APPELLEE'S ANSWER BRIEF

Barry S. Balmuth, B.C.S.
Barry S. Balmuth, P.A.
2505 Burns Road
Palm Beach Gardens, FL 33410
Tel: (561) 242-9400
balmuthlaw@alumni.emory.edu

Michael Massey, L.L.M.
Massey & Duffy, PLLC
855 E. University Avenue
Gainesville, FL 32601
Tel: (352) 505-8900
Massey@352law.com

Counsel for Plaintiff-Appellee

Richard Alexander Williams V. First Advantage Background Services, Corp., NO. 17-11447

CERTIFICATE OF INTERESTED PERSONS

Pursuant to FRAP 26.1 and the rules of this Court, Plaintiff-Appellee submits the following Certificate of Interested Persons:

Balmuth, Barry S. (Counsel for Plaintiff-Appellee)

Barry S. Balmuth, PA (Counsel for Plaintiff-Appellee)

Appellant Background Services Corp. (Defendant-Appellant)

Appellant Corporation

Levenson, Jules A. (Counsel for Defendant-Appellant)

Massey, Michael O. (Counsel for Plaintiff-Appellee)

Massey & Duffy, PLLC (Counsel for Plaintiff-Appellee)

Honorable Judge Mark Walker (District Court Judge)

Piskorski, Thomas J. (Counsel for Defendant-Appellant)

Poonolly, Megan H. (Counsel for Defendant-Appellant)

Seyfarth Shaw LLP (Counsel for Defendant-Appellant)

Smith, Frederick T. (Counsel for Defendant-Appellant)

STG-Fairway Acquisitions, Inc.

STG-Fairway U.S., LLC

Torres, Jason M. (Counsel for Defendant-Appellant)

Turner, Joseph (Counsel for Defendant-Appellant)

Richard Alexander Williams V. First Advantage Background Services, Corp.,
NO. 17-11447

Williams, Richard A. (Plaintiff-Appellee)

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee believes oral argument is unnecessary. The law is clearly established and the jury's verdict is well supported by record facts as articulated by the District Court's 60-page detailed Order Denying Motion for Judgment as a Matter of Law or New Trial.

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APPELLEE'S STATEMENT OF THE ISSUES

1. Whether the evidence of reckless disregard of the requirements of the FCRA, when viewed in the light most favorable to Williams,[1] presented a sufficient disagreement as to require its submission to a jury.

2. Whether the District Court, as part of its 60-page detailed Order, properly upheld as constitutional the jury's punitive award.

3. Whether the evidence of any reputational harm, when viewed in the light most favorable to Williams, presented a sufficient disagreement as to require its submission to a jury.

[1] The Appellee, Richard Williams, will be referred to as Richard Williams or Williams. Ricky Williams will be referred to as Ricky Williams or Ricky.

APPELLEE'S STATEMENT OF THE CASE

I. Statement Of Facts

A. Appellant's Business, Policies, And Procedures

Most of First Advantage Background Services Corp.'s ("Appellant") criminal background searches are run through its National Criminal File, a self-maintained database of criminal records. DE:202, 464-65. If an employer orders a background search, Appellant runs the consumer's[2] identifying information through an automated search of that database. *Supplemental Appendix* Nancy Alt Deposition (played at trial), 35-37; Plaintiff's Trial Exhibit 53 (the "Adjudication Model"). Then, Appellant's Records Adjudication Team "adjudicates" that application by reviewing any "hits" to determine whether they can be matched with the consumer. *Id.*

Regarding people with last names that are not common, Appellant will include a criminal record in a consumer's background report if that record contains two "identifiers." Alt Deposition, 35-37. For example, the criminal records may contain first-and-last name (which counts as one identifier), social security number ("SSN"), driver's license number, date of birth, address, etc. *Id.*

[2] The "consumer" is the Fair Credit Reporting Act term for the person applying for employment.

As to people with common last names (such as Williams), Appellant claims it includes a criminal record in the criminal-background report if that record contains three matching "identifiers" (as opposed to two). DE:201, 314-15. In reality, Appellant does not require a third identifier because a supervisor can simply approve the record and note that additional attempts were made to identify a third identifier. *Id.* Moreover, as shown by the facts of this case, the requirement of a supervisor's approval to include a record based on two identifiers is violated or rubber stamped.[3]

Moreover, nicknames (such as Ricky for Richard in this case) are included as a match according to Appellant's "Fuzzy Logic" procedures for matching one of the two identifiers. Alt Deposition, 36; DE:202, 517. The use of nicknames as a matching identifier occurs even when the consumer has a common name. Alt Deposition, 36; DE:202, 517.

After only two identifiers are matched, one of which may simply be a nickname and common last name, Appellant attributes the criminal records to the consumer. DE:200, 124. Then, Appellant applies the employer's hiring criteria to

[3] William's expert, Evan Hendricks, testified, in Plaintiff's case in chief that, based on his review, supervisors' approval for a match based on two-identifiers was not obtained in the preparation of either report prepared about Williams, this was not rebutted in First Advantage's case. DE:201, 315. Alternatively, if obtained, supervisor's approval is, seemingly, akin to a rubber stamp.

"adjudicate" whether the consumer is "eligible" or "ineligible" for the employment the consumer seeks. *Id.* Appellant's eligibility decision is then immediately communicated to the consumer's potential employer, along with the criminal record it attributed to the consumer. *Id.*

1. *Appellant Emphasizes Quick Turnaround Times, Speed, And High Volume*

Appellant touts its "[i]ndustry-leading turnaround times . . . ." DE:201, 256; Plaintiff's Trial Exhibit 58. It markets to employers that do not wish to have "hiring delays." *Id.* Appellant only charges approximately $11 to $12 for each background report, DE:200, 93-94, and "delivered" over 23 million "background screenings" in 2013. DE:257.

At the time the subject reports were prepared, Appellant had a performance based "benchmark" for its employees of a "touch" (activity) every 2 minutes. DE:201, 259. Its employees who were part of Appellant's Public Records Retrieval Team electronically verified with courts the existence of records found in the National Criminal File that an adjudicator was contemplating matching with a consumer. *Id*. at 260. On occasions, these employees also searched for records at courthouses where that could not be done electronically and obtained physical court records after there was a dispute, *Id*. at 263-64. This team had a benchmark equal to a retrieval of one public record every 3 minutes. *Id* at 259.

2. *The Dispute Process Does Not Remedy The Harm To Consumers Done By Recklessly Performed Initial Reports of Ineligibility*

Appellant instantly provides its reports of the criminal records matches to potential employers electronically - but only via U.S. Mail to consumers. DE:171; 200, 95-96 and 124-25, 165. Within these reports, Appellant has already adjudicated the employee either eligible or ineligible for the employment sought.

Consumers have the opportunity to dispute erroneous information but it can take up to thirty days for Appellant to investigate a dispute. If, after an investigation, Appellant agrees that the information is erroneous, Appellant will remove the record from the report and apply what it calls a "case block" so that the same exact disputed record is not erroneously matched at a later date. DE:201, 308. The "case block" does nothing to prevent the consumer from being matched again with the same criminal – it only relates to the exact record that Appellant already erroneously matched with the consumer. *Id.*

Although the Fair Credit Reporting Act ("FCRA") gives consumer reporting agencies ("CRAs") like Appellant up to thirty (30) days to investigate a dispute, the dispute process is no substitute for having an accurate report in the first place. Particularly for low-wage and unskilled positions, by the time Appellant fixes the errors, the potential employers likely have moved on to the next applicant. DE:200, 127; Alt Deposition, 14. Thus, removing errors in a background report is of little

practical value to these employees in obtaining the job before the employer moves on to another employee, as they did twice to Williams. *Id.* Moreover, as discussed *infra*, unlike other industry standard procedures, the "case block" does nothing to prevent rematches with the same criminal – which is what happened to Williams.

Appellant blames its faulty background checks in part on the false notion that the underlying criminal records typically only have names and dates of birth – that is completely untrue.[4] In addition to name and date of birth, actual court criminal records often contain address and heights of the accused. DE:201, 266, 290, 303; Plaintiff's Trial Exhibits 4 and 12. In fact, this occurred twice as to Richard Williams.

3. *Appellant Consciously Decided To Limit The Use Of Its "Enhanced" Common Name Procedure*

Persons with common last names are particularly at risk of being confused with others with the same or, given the use of nicknames to match consumers with records, similar, names. Appellant knew the risks of mismatching a consumer with a common name to someone else's records. DE:201, 318. This knowledge is

[4] Appellant's expert incorrectly testified that criminal records only contain names and dates of birth. Moreover, though contained in the actual public records, height was not listed in either of the reports prepared about Williams. Plaintiff's Trial Exhibits 2 and 10. No address for Ricky Williams was listed in the Rent-A-Center report and the address for Ricky Williams listed in the Winn-Dixie report varied from what was listed both in the actual criminal record and the address for Ricky Williams (the Broward County jail) on the FDOC website Appellant reviewed. DE:201, 266, 290, 303; Plaintiff's Exhibits 2 and 10.

evidenced by what it describes in its Brief as an "enhanced" common name procedure: if it matches a common-named consumer to a criminal record in its National Criminal File but the record indicates a different address (or no address) than that provided by the consumer, Appellant is "supposed…to use Experian and develop some address history information" relating to the consumer. DE:201, 318, 320. However, at trial Appellant's corporate representative, Vice-President Matthew O'Connor, described this procedure as a "recommended guideline." DE:210, 320. Moreover, Appellant has made the conscious decision to limit the number of adjudicators preparing background reports who can actually employ this procedure.

Obviously, if a consumer has never lived anywhere near the place where the crimes or alleged crimes occurred, it is less likely the criminal record is a proper match to that consumer. DE:202, 482-83. Nonetheless, despite knowing of the importance of address histories, Appellant purchased a license from Experian which only allows a limited number of its adjudicators to obtain them. *Id.* As a result, when making determinations regarding a consumer with a common name, Appellant oftentimes purposely denies its adjudicators the ability to run an address history to determine if they have a correct match to a criminal record. *Id.*

Limiting Experian or some other address history database was a business decision to reduce costs. Appellant's Vice-President O'Connor did not deny the

cost savings associated with limiting the number of adjudicators who could obtain an Experian address history. *Id.* He claimed ignorance regarding the details about the savings provided by this limited license agreement with Experian. *Id*. at 483. Even without Experian, the same address information was readily available to Appellant at the time it prepared the Rent-A-Center report by using an "Accurint" address history product report from an affiliated Lexis Nexis company. DE:201, 376.[5]

4. *Appellant Knew Of But Refused To Account For Repeat Offenders And Has No System To Prevent Persons From Being Repeatedly Matched With A Criminal*

Appellant was well aware that criminals can often times be repeat offenders. DE:201, 305-306 (O'Connor studied recidivism as part of the curriculum in obtaining his degree in legal studies); Supplemental Appendix, Theresa Preg Deposition (hereinafter, "Preg Deposition) (played at trial), 71-76 (Appellant Vice President Theresa Preg reviewed public and private studies on recidivism). Additionally, as in this case, either from its National Criminal File and/or verifying the existence of public criminal records, Appellant has the opportunity to see if the

[5] Lexis Nexis Screening Solutions, Inc. prepared the first background report which is the subject of this case. Appellant acquired Lexis Nexis Screening Solutions, Inc. on February 28, 2013. DE 200; 92. In doing so, it absorbed all Lexis Nexis Screening Solutions, Inc.'s liabilities. *Id*.

criminal has been a repeat offender. *Id.* It even learned when preparing a report for Rent-A-Center that Ricky Williams was a repeat offender. *Id.*

Despite knowledge of recidivism, Appellant does not consider the potential that a criminal may be a repeat offender in matching a consumer with criminal records. Preg Deposition, 76. A consumer can be re-matched with the same criminal in the future if the criminal commits additional crimes. *Id*; DE: 201, 309-311. Additionally, criminal records may not be included in a background report but might be in a future report because the employers' criteria varies,[6] or, as in this case, for an unknown reason an existing criminal record does not appear in a prior background report.[7] Thus, Appellant has no system to stop a consumer which has two identifiers (here name and date of birth) in common with a criminal from being repeatedly matched with that criminal's records which were not successfully disputed based on a prior report. DE:201, 309-311.

Williams's expert Evan Hendricks, who has over 40 years of experience in the consumer reporting industry, testified about the difference between Appellant's ineffective "case blocking" procedure and "cross-blocking" (or "flagging")

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[6] One employer might request that certain types of crimes be included where as another might not. DE:201, 269.

[7] Ricky Williams's 2004 conviction for battery on a pregnant woman should have been, but was not, included in the 2012 Rent-A-Center background report. Appellant was never able to explain this. DE: 201, 270-272.

procedures. DE:201, 358-60. "Cross-blocking" or "flagging" procedures are industry standards used by credit reporting agencies to block any and all erroneous records of one individual (the criminal) from being matched with the consumer a second time. *Id.* Had Appellant implemented these simple industry standard procedures, common named individuals (such as Williams) would not again be matched with their criminal counterparts. *Id.*

5. *Appellant Has No Procedure To Prevent A Consumer's Social Security Number From Being Improperly Inserted In A Background Report*

Appellant erroneously placed a portion of Richard Williams's SSN in the portion of the background report to Rent-A-Center containing Ricky Williams's criminal records even though the SSN was not actually used in matching him to that record. DE:201, 267-68. Thus, Appellant falsely made it appear to Rent-A-Center that it used the SSN in making the match between Williams and that criminal record. *Id.* at 349. Appellant had no specific procedures to prevent this from occurring. *Id*. at 268-69.

6. *Appellant Prepares Thousands Of Erroneous Background Reports, Thereby Diminishing Consumers' Job Prospects*

In post-recession America between 2009 and 2013, Appellant had to revise 14,346 background reports due to errors. Brief at Page 7; DE:171, 10-11. Between 2010 and 2013, Appellant revised 13,392 background reports relating to consumers applying for a job whose reports contained a public record in his or her report

belonging to another individual, DE:200, 93—94; DE:171, 11, amounting to a .38% inaccuracy rate nationwide for "not me" or "not mine" errors. DE:200, 95, DE:171, 11.

However, this .38% figure only includes corrections to reports based on consumer disputes where the consumer complained that a "public record contained in their background report belonged to another individual" – the actual number including people that never filed a formal complaint is higher. DE:200, 94. At a minimum and based on Appellant's own self reporting, its error rate is .38% (double that of some others, as discussed *infra*). *Id.* Appellant's error rates for Florida are even worse, averaging .51%. DE:200, 95. Again, this only accounts for people that formally complained to Appellant. *Id.* Moreover, these error rates relate to all consumers, including those with unique names which would be harder to mismatch.

Despite these deficiencies, Appellant's website claims its reports are prepared with "precision and insight" using a "[v]ast solution suite of intelligently packaged data." DE:201, 257; Plaintiff's Trial Exhibit 58. Appellant never introduced any evidence regarding its error rates for persons with common names.

B. Appellant Twice Mismatched Richard Williams With The Background Of The Same Criminal

After graduating with his bachelor's degree in criminology, Williams applied in February 2012 for an Account Representative position at a Rent-A-

Center store in Chiefland, a small Florida town where he had lived his entire life.[8] DE:199, 26, 34; DE:200, 95. As part of that application process, Williams agreed to undergo a drug test (which he passed) and a criminal-background check. DE:200, 116.

Rent-A-Center hired Lexis Nexis Screening Solutions, Inc., — which has since been acquired by Appellant — to perform these types of background checks and "adjudicate" applicants. DE:200, 93-96. As a part of its background check, Appellant searched the National Criminal File and conducted a public-record search in Levy County. DE:201, 260, 263. Although the Levy County public-record search came back clean, the National Criminal File search "matched" Richard Williams with a 2009 charge for the sale-of-cocaine record from Palm Beach County for "Ricky" Williams based on his name and date of birth. DE:201, 260-62. Appellant verified that those records existed and that the information was "complete" by obtaining an electronic report from the Clerk of the Palm Beach County court records. DE:201, 261. Appellant learned from these electronic records that Ricky Williams had been charged with six crimes in Palm Beach County and found guilty in four of them with a bench warrant having been issued

[8] Chiefland had 2,245 residents in 2010 according to the Census. *See* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk

in two cases relating to the 2009 sale of cocaine. Id. at 261. Plaintiff's Trial Exhibit 32.

Despite the fact that Palm Beach County is approximately 300 miles from Chiefland and Williams has always lived in Chiefland, DE:201, 378, Williams was deemed ineligible for employment by Rent-A-Center pursuant to its hiring criteria, DE:200, 125. Critically, although Appellant acknowledged that "Richard Williams" is a common name, it did not match Williams with Ricky Williams's record based on three identifiers or obtain supervisor approval to include it in the report, DE:201, 315,[9] nor did it obtain an address history even though there was no address match. DE: 201. 319-21. Thus, it violated several of its own procedures. *Id*.

Appellant then sent the report (and adjudication of ineligibility) to Rent-A-Center, DE:200, 96, and notified Williams that it was reporting the cocaine record to Rent-A-Center, DE:200, 117-18. Appalled, Williams disputed the cocaine record and, in support, provided his SSN and a copy of his driver's license. DE:200, 126. Appellant then reopened the investigation and obtained hard copies of the underlying court records. Williams's dispute was resolved in his favor based on the difference between the 6'2" height listed on "Ricky" Williams's court records and the 5'10" height listed on Williams's driver's license. DE:201, 264 -

[9] That there are no matches based on three identifiers is uncontested.

65. That reinvestigation also revealed that "Ricky" Williams's listed address was in Boynton Beach, Florida - not Chiefland, Florida. DE:201, 265 - 66. Appellant removed this criminal record from Williams's report. *Id.* Unfortunately, that resolution was too late for Williams - Rent-A-Center had already moved on and hired somebody else for the position. DE:200, 127.

Williams continued applying for a multitude of jobs. DE:200, 135. Williams was eventually hired as a 911 dispatcher at the Levy County Sheriff's Office. *Id.* Contrary to Appellant's assertion, the record reflects that he obtained this employment because his father was known by people in the sheriff's department as a coach in Chiefland. DE:200, 170. While in the academy, however, the communications supervisor informed Williams that he "wasn't meeting requirements" and he resigned. DE:200, 136. Williams later obtained a part-time job at a Kangaroo gas station in Williston, Florida—which is quite some distance from Chiefland—but left that job because too much of his pay was being spent on commuting to work. DE:200, 137—38. Neither the Levy County Sheriff's Office nor Kangaroo retained Appellant to run their criminal-background checks, nor did they erroneously match him with Ricky Williams. *Id.*

In early 2013, Williams applied for and received a conditional offer of employment to work at a Gainesville, Florida Winn-Dixie store as a liquor store associate. DE:199, 35. As with the Rent-A-Center report, Appellant was engaged

to conduct a criminal-background check. In Williams's words, it "happened again." DE:200, 141. Appellant ran a National Criminal File search, yet this time it matched Williams with Broward County records for a conviction for burglary and aggravated battery on a pregnant woman, records for the same Ricky Williams with which Richard Williams was previously erroneously matched. DE:199, 4. The match was again made in violation of Appellant's procedures based only on two identifiers: last name and nickname, and date of birth, *Id*., and without a supervisor's approval. DE 210, 315 Appellant also again failed to obtain an address history although there was no address match in violation of its allegedly "enhanced" procedures. DE:201, 319-21.

Appellant verified that those records existed and that the information was "complete" by reviewing the Florida Department of Corrections ("FDOC") website.[10] DE:201, 289. That website noted that "Ricky" Williams was 6'2" tall. DE:201, 290; Plaintiff's Trial Exhibit 38. It also noted that "Ricky" Williams was incarcerated in the Broward County Jail. DE:202, 548; Plaintiff's Trial Exhibit 38. Nonetheless, Appellant adjudicated Richard Williams ineligible for employment pursuant to Winn-Dixie's hiring criteria. DE:200, 124-25. This is so even though Appellant's executives testified that a reasonable person, having all of the

[10] In its Brief, Appellant incorrectly refers to this as the Broward County Department of Corrections website.

information Appellant had in its possession at the time, would conclude with certainty that Richard Williams was not the person who committed burglary and aggravated battery on a pregnant woman. DE:201, 300. Appellant did not list the Broward County jail address in its background report to Winn-Dixie though Appellant's corporate representative admits the listing of such address might have led Winn-Dixie to conclude that Williams was not the Ricky Williams sitting in jail. DE:202, 480-81.

As with the Rent-A-Center report, Appellant sent the report (and adjudication of ineligibility) electronically to Winn-Dixie, DE:200, 98, and notified Williams via mail that it was reporting the records to Winn-Dixie, DE:200, 98-99. Williams again disputed the criminal records in the report, DE:200, 99, and Appellant again reopened the investigation. *Id.* After obtaining hard copies of the underlying court records which did contain Ricky Williams's SSN, Appellant discovered that "Ricky" Williams's SSN did not match Richard Williams. DE:201, 151. As a result, Appellant removed the records from Williams's report. *Id.* Yet again, that removal was too late; Winn-Dixie had already hired somebody else for the liquor store associate position. *Id.* Williams was eventually hired by Winn-Dixie approximately seven months later. DE:200, 164.

Even though Appellant's "recommended" "enhanced" procedure to obtain an address history would have applied in the preparation of both reports, DE:201,

319-21, as acknowledged at trial by O'Connor, Appellant twice made conscious decisions not to use Experian to obtain an address history in preparing the background reports relating to Richard Williams. DE: 202 at 483. Indeed, based on the agreement Appellant entered into with Experian limiting the number of adjudicators who could obtain an Experian address history, the adjudicator(s) preparing these background reports may not even have had the ability to obtain such a history. *Id*.

After Richard Williams disputed the background report Appellant prepared for Winn-Dixie, Appellant obtained a Lexis Nexis "Accurint" address history. DE:201, 321-24. That report indicated that Richard Williams continuously lived in Chiefland, Florida from June of 2000 and thereon. Plaintiff's Exhibit 6. That is 300 miles away from Palm Beach or Broward County, which is where the criminal activity listed on the records Williams was matched with occurred. O'Connor acknowledges that an Experian address history would show similar address results. DE:201, 324.

O'Connor also admitted that Appellant has no mechanism to prevent it from again matching Richard Williams with Ricky in the event Ricky commits another crime(s) in the future. DE:201, 309-311. It also has none to prevent Richard Williams from being matched to some other past crimes that have not appeared on the Rent-A-Center or Winn-Dixie reports. *Id.*

C. Williams Suffered Substantial Compensatory Damages

Since the verdict form did not contain any breakdown of the award of compensatory damages, Appellant speculates when it suggests the award can be specifically delineated. Appellant's breakdown of the jury award at page 11 of its Brief is incorrect. While Williams's counsel suggested that the jury award Williams $78,272 in lost wages through the time of trial, DE:202, 556 – 557, there was nothing stopping the jury from awarding more in lost wages given that Williams continues to earn less than he would have earned at Rent-A-Center. Regardless, Williams suffered both substantial economic distress and reputational damages.

1. *Williams Suffered Substantial Emotional Distress Damages*

Williams and his mother testified that losing the Rent-A-Center and Winn-Dixie positions left Williams feeling "horrible," wondering whether he would ever get a job, and caused headaches, loss of appetite, and insomnia. DE:200, 147-54, 241-44. Williams also testified that, although he obtained the 911-dispatcher position due to his father's good reputation, other employers such a Rent-A-Center blindly trusted the Appellant report's accuracy. DE:200, 150. Williams also suffered physical harm including loss of appetite, headaches he medicated, and insomnia. DE:200, 154; DE:201, 244. His mother also testified that Williams lost his appetite and had difficulty sleeping. DE:201, 244. As recognized by the

District Court, those harms, over time, can lead to serious physical and mental illness. DE:217, 47.

Further, losing the Rent-A-Center and Winn-Dixie employment opportunities affected his ability to obtain health insurance because it is either provided by an employer or has to be purchased from a person's wages. DE:200, 115 (discussing that the Rent-A-Center job paid $450 per week). Williams's mother testified that the erroneous reports "bothered him" and that it was a "rough" experience for him. DE:200, 243.

Williams's "emotional distress was palpable to any person in the courtroom." DE:217, 37. The District Court itself "saw the pain in Plaintiff's eyes. It saw the frustration. It saw the fear that this could happen again." *Id.* The District Court observed that the "jury enjoyed that opportunity as well, and the Court was able to observe their reaction first-hand. It was abundantly clear that Plaintiff's testimony had an impact on them." *Id.* ("and their award should not be disturbed").

2. *Williams Suffered Substantial Reputational Damages*

Williams's reputation is important to him, DE:200, 149, but Appellant labeled him as a criminal. Sylvia Bazan, the human resource person at Rent-A-Center, believed Appellant's report that he was a criminal and stated that if he "didn't do this stuff, it would have never come up in [his] record so [he] must have

done something wrong." *Id.* Also, the demeanor of the manager at Rent-A-Center changed after the criminal-background report was issued. DE:200, 150. That manager trusted its accuracy over Williams's word. *Id*.

Williams was gravely concerned that any prospective employer who used Appellant's services would blindly trust an erroneous report, thus leading that employer to "think that [he was] hiding something." DE:200, 148. He testified that "this keeps coming up and, you know, me having to sit and ask employers if they use this company." *Id.* Just the mere possibility that he could be dragged through this rigmarole again "ma[de] [him] cringe." DE:200, 149.

Williams also grew concerned he would be labeled a "criminal" (DE:200, 149). He also testified that the two individuals who had initially hired him at Rent-A-Center and Winn-Dixie told him that Appellant's reporting system was accurate and that they would need to move on to other applicants. (*Id.*)" DE:200, 149, 152.

Although Williams eventually obtained a full-time position with the Levy County Sheriff's Office, Williams did not get his job at the Sheriff's Office because of his own reputation, DE:200 , 170. Rather, it was because of his father's coaching job and his father's reputation. *Id*.

D. The Verdict's Punitive Damage Ratio, Including Attorneys' Fees, Is 6:1

Anticipating past and future attorneys' fee and costs, Appellant posted a bond in the total sum of $4.1 Million. DE:222 (purpose of amount of $4.1 million

bond is due to the future determination of any fees or costs assessed by the District Court, plus the jury's verdict). Estimated attorneys' fees relative to this case are approximately $500,000 based on the loadstar.[11] That results in a ratio of punitive damages to compensatory award of approximately 6:1, not 13.2:1.

II. Procedural History

After the District Court granted partial summary judgment on some of Williams's claims, DE:123, the remaining claims - Count I for negligent and willful violations of 15 U.S.C. §1681e(b) and Count IV for negligent violation of 15 U.S.C. §1681k(a) - proceeded to a jury trial. The jury found in favor of Williams on Count I but not on County IV.[12] The District Court denied Appellant's Amended Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, and/or Remittitur ("JMOL") (DE:207). DE:217.

A. Until This Appeal, Appellant Disputed That It Even Acted Negligently

Prior to its Brief, Appellant adamantly denied making any mistakes and acting negligently. JMOL, DE:207. To this day, Appellant has not pointed to a

[11] The Court granted Plaintiff's Motion for Entitlement to Attorney's Fees, reserving ruling on the amount until the conclusion of this appeal. DE:216.

[12] The jury answered no to the question of whether Appellant negligently failed to send Williams notices at the time that it was reporting public record information about him to Rent-A-Center and Winn-Dixie and, therefore, did not answer the question of whether Appellant negligently failed to maintain strict procedures to ensure that the public record information contained in the reports was complete.

single policy regarding common name matches it has changed or other corrective action it has taken to prevent this type of error from continually occurring to thousands of people each year.

B. Appellant's JMOL Did Not Address Reputational Damages

Appellant's motion under Rule 50(a) of the FRCP claimed that there was insufficient evidence of reputational damages but reputational damages were never even mentioned in its JMOL. According to the JMOL, Appellant claimed that all of the compensatory award was only for emotional distress and lost wages: "[h]ere, Plaintiff's award in emotional distress damages—in excess of $170,000—cannot stand in light of the vague and conclusory testimony he propounded to support them." DE:208, 19; "[p]laintiff sought—and, it appears, the jury awarded—$78,272.00 in the form of lost wages." DE:208, 9. Thus, according to its JMOL, the $250,000 compensatory award was made up $78,272.00 in lost wages and the rest in emotional distress. However, Appellant now claims on appeal that at least some of $250,000 was actually reputational damages and challenges the entire award.

STANDARD OF REVIEW

Appellant chose not to appeal the District Court's Denial of its Motion for New Trial. Brief at 15. However, Appellant still requests a new trial in its Brief's Conclusion, at page 57. Thus, to the extent its appeal is interpreted as requesting a new trial, the "clear abuse of discretion" standard applies. *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524, 1528 (11th Cir.1993). Deference to the district court "is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed." *Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir.1987).

Motions for judgment as a matter of law are reviewed *de novo* but the evidence must be examined in the light most favorable to the non-moving party. *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir.2011). The inquiry is the same as a Rule 56 summary judgment motion: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538, n. 8 (11th Cir.1997).

Challenges to punitive damages are only reviewed *de novo* when constitutional issues are raised. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). Regarding any factual issues arising in that analysis, the evidence is viewed in "the light most favorable to the plaintiff."

Madeja v. MPB Corp., 149 N.H. 371, 378, 821 A.2d 1034 (2003); *Cooper*, *supra* at 433 (requiring de novo appellate review of exemplary damages because "the level of punitive damages is not really a `fact' `tried' by the jury").

If no constitutional issue is raised, the review of punitive damages is for abuse of discretion. *Cooper*, *supra* at 433; *Wolff v. Allstate Life Ins. Co.*, *supra* at 1528 (11th Cir.1993) (denial of a motion for new trial is reviewed for "a clear abuse of discretion."); *Rosenfield v. Wellington Leisure supra* at 1498 (11th Cir.1987) (deference to the district court "is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed").

SUMMARY OF ARGUMENT

The District Court's 60-page decision to uphold the jury's award should be affirmed for the following reasons:

1. Recklessness. There was ample evidence of Appellant's reckless disregard of the FCRA's requirement that it "follow reasonable procedures to assure maximum possible accuracy" of the information concerning Richard Williams in the background reports it prepared:

- Though acknowledging the risk of mismatching consumers with common names with criminal records that are not their own, Appellant's procedures were illusory. Specifically: (i) Appellant's "aspirations" to match consumers with common names based on three identifiers was not its actual implemented policy, even mismatching Williams twice based on two identifiers; and (ii) not all of the adjudicators had the ability to follow the "recommended" procedure of obtaining an Experian address history where there was a consumer with a common name and a lack of an address match.

- Ignoring what it knew was the risk of repeat criminal offenders, Appellant has not implemented industry standard "cross-blocking" or "flagging" procedures that block all records from one individual (the criminal) being matched with another (the consumer) more than once.

- These repeated errors are unsurprising given that Appellant hastily adjudicates persons as "eligible" or "ineligible" for a job with "[i]ndustry-leading turnaround times . . .. ." It promises cheap reports to reduce "hiring delays," knowing employers will rely on its hastily prepared reports and mooting any supposed dispute process.

- Appellant has no procedure to prevent SSNs from randomly appearing in its reports – such as its placement of a portion of Williams's SSN in the section of the report to Rent-A-Center containing Ricky Williams's criminal records. That unexplained "error" made it appear that Appellant matched those records based on Williams's SSN, when in fact it did not.

- The District Court did not manipulate Appellant's error rate. To the contrary, Appellant provides misleading statistics instead of focusing on its error for consumers with common names - something not provided.

2. The Due Process Clause. The District Court properly and painstakingly applied all the *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)* and *BMW of N. Am. v. Gore, 517 U.S. 559* (1996) factors in determining reprehensibility in a 60-page Order Denying Appellant's JMOL or Motion for a New Trial. DE:217. Moreover, the ratio of compensatory damages to punitive damages – which in this case is actually closer to 6:1 -- is nothing of the

type of a "breathtaking" award that courts have repeatedly struck down. It also pales in comparison to other awards that have been approved by the Eleventh Circuit.

3. Reputational Harm. There was ample evidence to require the issue of reputational harm to be submitted to the jury:

- Williams's reputation is important to him yet he was labeled by Appellant as a criminal.

- The demeanor of the representatives of Williams's prospective employers changed after they received the background reports on Williams.

ARGUMENT

I. There Was More Than Sufficient Evidence To Submit The Issue Of Whether Appellant Recklessly Disregarded Its FCRA Obligations To The Jury

There was more than sufficient evidence to submit the issue of recklessness to the jury when all the evidence is examined in the light most favorable to the non-moving party–Williams. An FCRA violation is willful if the defendant violates that statute with "reckless disregard" of its statutory obligations. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68—69 (2007); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1310 (11th Cir.2009). A violation is deemed reckless if, "objectively," it "entail[s] 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Safeco*, 551 U.S. at 68. Here, the

jury properly found that Appellant recklessly disregarded its obligation under Section 1681e(b) of the FCRA to follow "reasonable procedures to assure maximum possible accuracy" "whenever" it prepares a background report on a consumer.

A. Appellant's Common Name Procedures Were Intentionally Illusory

In its Brief, Appellant relies heavily on its "enhanced" common name procedures. Clearly, Appellant knew of the potential for harm to those with common names caused by erroneously matching them with public records of another. Indeed, it even developed its common name procedures in acknowledgement of such. DE:201, 305-06, 318-19.

Despite this knowledge, Appellant's corporate representative admitted its "procedure" to match a consumer with records based on three, rather than two identifiers was "aspirational" and could be disregarded with a supervisor's approval – approval Appellant did not obtain, in violation of its own procedures, in this case, twice, proving that too was aspirational.[13] DE:201, 315, 374. Moreover,

[13] That other background reporting companies may match consumers based on two identifiers is not controlling. *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 732 (6th Cir.1980) ("Industry standards and customs are not entirely determinative of reasonableness because there may be instances where a whole industry has been negligent . . . ." (*citing Diebold Inc. v. Marshall*, 585 F.2d 1327, 1336 (6th Cir.1978)). Moreover, while the jury could certainly consider industry

rather than providing all adjudicators access to databases like Experian —which could be used to help distinguish one individual from another by comparing an address history with the address listed in criminal records— Appellant restricted that access to a limited number of adjudicators. DE:201, 317-18; 482-483. These were conscious decisions by Appellant, not the result of mere negligence.

Here, Appellant presented no evidence that it did anything more than matching Williams with Ricky William's records based on two identifiers. However, a superficial review is, by definition, not reasonable. *Johnson v. MBNA America Bank, NA*, 357 F.3d 426, 431 (4th Cir.2004) (superficial inquiry of dispute is not reasonable). Moreover, purposely limiting the information available to adjudicators warrants punitive damages. *Ballanger v. Ocwen*, No. 4:14-cv-00252 (S.D. Iowa September 27, 2017) (denying summary judgment regarding punitive damages when the "procedures limited [the] investigation solely to the ACDVs themselves and to SPS' computer system"*)*. The District Court found as much particularly given Appellant's failure to use Experian or other similar databases that were readily available for use. DE:217, 20-21; DE:202, 483.

As discussed in more detail *infra*, the cases Appellant cited do not help it. It cites *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir.2004) and

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standards, it bears repeating that Appellant does not employ cross-blocking or like procedures prevalent in the consumer reporting industry.

Childress v. Experian Info. Sols., Inc., 790 F.3d 745 (7th Cir.2015) for the proposition that the FCRA does not obligate it to review an Experian address history. Unlike in those cases, here it was Appellant's own procedures that obligated Appellant to review the Experian address history. Moreover, other courts have all also allowed a jury to consider whether a CRA acted in willful violation of the FCRA where it failed to consider readily accessible third-party data bases. *White v. Trans Union, LLC*, 462 F. Supp. 2d 1079 (C.D. Cal.2006) (denying motion to dismiss where Plaintiffs alleged that defendant failed to consider Pacer resulting in their credit reports inaccurately reporting discharge debt as due).

There is also no merit to Appellant's claim that the District Court engaged in supposition in suggesting that the limitations placed on the use of Experian were motivated by a desire to reduce cost and, therefore, increase profit.[14] However, a jury can make its decision on reasonable inferences from the evidence by applying its collective common sense and experience. Pattern Jury Instructions *3.3* ("In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions."). The jury could have reasonably inferred, based on their common sense and life experiences, that a license which allows for

[14] In addition, each address history undoubtedly came with a cost so, the fewer ordered, the more profit.

fewer users cost Appellant less than one which allows for more. This is particularly true when a cost saving motive is not denied by Appellant's corporate representative at trial.

Even assuming *arguendo* there was no profit incentive, Appellant has cited no authority for the proposition that the jury had to find that it was motivated by increased profit to find that it recklessly disregarded the inherent risks of producing inaccurate reports for consumers with common names. Moreover, the fact that Appellant's predecessor refused to even use the address history information available to for potentially free via Accurint (from a related company) is even more egregious.

Appellant argues that the limits on the numbers of adjudicators who can use Experian were established by its contract with Experian. However, there was no evidence that Appellant didn't have the ability to negotiate a contract with Experian to allow all adjudicators to obtain an address history or obtain an Accurint address from, at the time of the Rent-A-Center report, an affiliated company. DE:201, 376. Preg Deposition at Page 55, Lines 4-10; Plaintiff's Trial Exhibit 6.

Moreover, Appellant's twice making the conscious decision not to obtain an address history for Williams is related to its decision to obtain a limited license from Experian and not a mere coincidence. A reasonable inference is that

adjudicators preparing the background reports deliberately chose not to obtain an Experian address history on two separate occasions because they were not able to do so. Appellant's statement that it "unintentionally failed to follow its reasonable procedures," at page 24 of its Brief is simply not supported by the evidence because the decisions not to follow its procedures was deliberate.

The District Court properly found that Appellant's actions evidence willfulness. The fact that Appellant has procedures is irrelevant where there are significant limitations on following those procedures every time it prepares a background report. Otherwise, Section 1681e(b)'s reference to "whenever" would be rendered meaningless. Section 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy. . .), *Lee v. Sec. Check, LLC*, 3:09-CV-421-J-12TEM, 2010 WL 3075673, *12 (M.D. Fla. Aug. 5, 2010) ("[i]t is axiomatic that procedures must be reasonable with respect to the particular dispute presented. A credit reporting agency cannot rely on the fact that it established some procedures, but must prove by a preponderance of the evidence that such procedures are reasonable to address the specific dispute presented."); *Farmer v. Phillips Agency, Inc.*, 285 F.R.D. 688, 696 (N.D. Ga.2012) ("'[w]henever' [in 15 U.S.C. §1681k(a)(2)] means 'at any time,' *The Random House College Dictionary*, 1498 (rev. ed. 1982), or simply at every time").

As illustrated by the Accurint address history, an Experian address history would have shown that it was unlikely that Williams, who spent his whole life in Chiefland, committed crimes exclusively in Palm Beach and Broward counties, 300 miles away. At the very least, it should have given an adjudicator reason to do further investigating to achieve maximum possible accuracy.

B. Despite Knowing That Criminals Can Be Repeat Offenders, Appellant Refused To Implement Procedures Such As Cross-Blocking Which Would Prevent Mismatches With the Same Criminal From Being Repeated

Appellant's "case blocking" procedures were wholly inadequate. As the District Court observed, Appellant's emphasis on its case blocking procedure to avoid the repeated insertion of a successfully disputed record "misses the point." DE:217, 18. It is common knowledge that criminals often commit more than one crime. Indeed, Appellant's corporate representative agreed that "folks who commit crimes often commit other crimes". DE:201 at 305-6.

At the time of preparing the background report on Williams for Winn-Dixie, Appellant knew that Ricky Williams was a repeat offender. *Id.* at 261. Thus, it should come as no surprise that Ricky had been charged with or convicted of another crime of sufficient severity that, if linked to Richard Williams in a background report, would bar him from being employed by the recipient of that report. This case is the very definition of objectively incurring an unjustifiably

high risk of harm that is the standard for a reckless disregard of the FCRA established in *Safeco supra*.

Yet, in preparing the background report for Winn-Dixie, Appellant again matched Richard Williams with Ricky Williams. This is because, in addition to ignoring its own procedures, Appellant refused to institute "cross-blocking" or "flagging" procedures. DE:201, 358-60. Those procedures are common in the consumer reporting industry and block any and all erroneous records from one individual (the criminal) being matched with another (the consumer) again. *Id*. Although Appellant knows the risk common names present, it failed to implement a common industry standard that would have remedied the problem Williams and, likely, others who have more than once been mismatched with someone else , face. *Id.*

Williams's expert, Mr. Hendricks, testified that at least two credit reporting agencies use "cross-blocking" or "flagging" procedures and that there is no reason Appellant could not also implement it. DE:201, 372. He also testified that the Appellant has no like procedures, though they could have. *Id.*, 359 – 360. Appellant presented no evidence that it is unable to institute a like procedure. Rather, Appellant simply argues the FCRA doesn't require it to do so; but the jury's verdict inherently found to the contrary.

At the time of preparing the Winn-Dixie report, Appellant knew that: (i) there were two different people born on the same day with similar names – one who had repeatedly committed crimes in South Florida and one who lived in Levy County where there was no record of his having committed criminal activity; (ii) Ricky Williams stands 6'2" but Williams is 5'10" and the Florida Department of Correction website reviewed by Appellant showing the conviction for burglary and aggravated battery listed "offender" Ricky Williams at 6'2;" and (iii) Richard Williams provided a P.O. Box in Chiefland, Florida as a mailing address and was applying for a job in Gainesville, Florida some 300 miles away from where the FDOC website indicated Ricky was incarcerated ---the Broward County Jail. All of this institutional knowledge that Appellant had – that would have objectively led it to the inescapable conclusion that Williams did not burglarize and beat a pregnant woman – was ignored. Again, this is the very definition of recklessly incurring an unjustifiably high risk of harm to Williams.

To circumvent this evidence, Appellant argues for the first time in its Brief at page 28 that it has public policy concerns about a disparate impact on minorities if it assumes that an offender will recidivate. This is disingenuous and was never part of any trial testimony or trial argument. Cross-blocking Richard Williams and Ricky Williams's records or using some other similar technique would do nothing

to harm Ricky Williams as it would only apply when Williams applies for a job, not Ricky.

If Appellant was really concerned about a disparate impact to minority groups it wouldn't be reporting charges without convictions as it did in the background report to Rent-A-Center. Reporting arrests without convictions for employment purposes has a disparate impact on minority groups such as African-Americans and Hispanics because they are arrested at much higher rates than whites. *See* www.eeoc.gov/laws/guidance/arrest_conviction.cfm (in which the EEOC cautions against such a practice). This practice may also constitute discrimination. *Id*.

Ironically, Appellant's failure to use a cross-blocking type procedure resulted in a significant actual, rather than imagined, negative impact on at least one minority group member – Williams – who is an African-American, and perhaps many others.[15] Indeed, as the District Court stated assuming "Ricky" Williams persisted in his criminal endeavors,[16] Richard Williams could continue to be erroneously matched with him for eternity (or at least throughout his lifetime). DE:217, 19.

[15] *See* Williams's license, Exhibit 28.

[16] Ricky Williams was recently released from prison.

C. Appellant Favors Itself And Its Customers Instead Of "Consumers" By Implementing "Industry-Leading" Quick Turn Around Times And Using Fuzzy-Logic

Expert Hendricks opined that companies such as Appellant are motivated by the bottom line to emphasize speed and volume – something that makes them reluctant to take "a few extra steps" to slow down or make that process more expensive. *Id*, 361. He further testified that Appellant's procedures for using information they have gained do not comply with industry standards. *Id.* 388.

A jury could reasonably infer that Appellant's failure to use its own common name procedures or implement cross-blocking procedures was, at least in part, the result of Appellant's emphasis on maintaining its "[i]ndustry-leading turnaround times . . . ." and reducing "hiring delays." DE:201, 256, 360; Plaintiff's Trial Exhibit 58. Every time an employee has to perform another procedure, it takes time, and makes it less likely that the employee will meet his or her goals. A reasonable jury could conclude that Appellant's emphasis on speed and volume was part of the reason for the awful events that occurred to Richard Williams.

Moreover, there is no merit to Appellant's claims that its matching of first names based on nicknames prevents "potential underreporting of criminal records." Brief at page 4. Instead, the record shows that Appellant favors over reporting of false matches based in large part on the nicknames of people whom already have common last names. Recognizing such problems, some states even

legally require a third identifier before such a background match can be made. *See* Cal. Civ. Code § 1785.14. However, Appellant's policies and procedures go the opposite route by only requiring what amounts to less than two full identifiers, where one is a nickname and a common last name.

From the evidence that approximately 14,000 consumers were the victims of not-me errors by Appellant, a jury could infer that Appellant's procedures were not normally followed, were ineffective, not implemented, or some combination of the three.

D. Appellant Has No Procedure To Prevent The Improper Placement Of Social Security Numbers In Its Reports

As acknowledged by Appellant's corporate representative, "other than fingerprints," a SSN is the "most unique identifier" of a person. DE:201, 269. Thus, when Appellant incorrectly placed a portion of Richard Williams's SSN in the portion of the background report for Rent-A-Center containing Ricky Williams's records for a charge for the sale of cocaine, it made it impossible for Williams to convince his perspective employer's representatives that he was not Ricky Williams. The insertion of the SSN made it falsely appear that Williams had been matched with these records based on SSN. Yet, Appellant acknowledged at trial that it has no procedure to prevent this from occurring.

E. The District Court Did Not "Manipulate" Appellant's Error Rate

Appellant claims that "[t]he District Court manipulated statistics in attempting to distinguish *Smith*" when it stated that the error rate in this case is "approximately double that in *Smith*." n.11. of its Brief, *citing* DE:217, 23-24 n. 14. The District Court properly noted that the error rate (which was actually the dispute rate, not the lower error rate as discussed *infra*) in *Smith* was ".2% for *all* errors in criminal-background reports (that is, not just "not-me" or "not-mine" errors). *Id., citing Smith v. LexisNexis supra*. Appellant's error rate for "not-me" errors alone is .38% - which is nearly double the rate in *Smith*. Thus, there is no "manipulation". Appellant also fails to point out that the District Court noted that Appellant's Florida's error rate is .51%, which is more than 2.5 times that in *Smith.* DE:217, 23-24 n. 14.

Instead of being manipulative, the above analysis is very generous to Appellant because it does not account for the people that never formally disputed the mismatch. Also, because the .2% rate mentioned in *Smith* was the "dispute rate," the actual error rate in *Smith* is therefore lower than .2%; assuming the error rate was .2% in *Smith* is extremely generous to Appellant. Moreover, Appellant's rates provided at trial only include corrections to reports based on consumer disputes where the consumer reported it. DE:200, 94. Thus, the actual error rates

are much higher than .38 and .51 percent. This rate is also generous because it assumes that Appellant actually caught all the errors in its follow up investigation.

What is manipulative, however, is how Appellant continually maintains that its error rate is .38% without providing the actual error rates for reports relating to consumers with common names – which is at the core of this lawsuit. Given the sheer number of "not-me" or "not-mine" errors—errors where the records contained in the background report are not that of the job applicant—the jury could have reasonably inferred that many others have occurred.

F. The Case Law Cited By Appellant Is Inapplicable

Appellant cites the following cases but they are all distinguishable because they all involved only a single incident: *Smith v. LexisNexis Screening Solutions, Inc., 837 F.3d 604 (6th Cir.2016, LaGrassa v. Jack Gaughen, LLC,* No. 1:09-cv-0770, 2011 WL 1257384 (M.D. Pa. Mar. 11, 2011), *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409 (4th Cir.2001),[17] *Shannon v. Equifax Info. Services*, LLC, 764 F. Supp. 2d 714 (E.D. Pa.2011), *Khoury v. Ford Motor Credit Co.*, LLC, 13-11149, 2013 WL 6631471 (E.D. Mich. Dec. 17, 2013), and *Sarver*. All of these cases related to a single incident as opposed to the instant case which indisputably involved multiple instances of Appellant's misconduct. *LaGrassa*, 2011 WL

[17] *Dalton* also is also inapplicable because it inappropriately applied a subjective, rather than the objective standard required by *Safeco*, to determine willfulness. *Dalton*, supra at 418 (considering the defendant's "state of mind").

1257384, at *5; *Dalton*, 257 F.3d at 418 (holding that defendant did not act willfully because there was "no evidence that other consumers ha[d] lodged complaints similar to [the plaintiff's] against [the defendant]").

The Sixth Circuit in *Smith*, like other courts cited by Appellant, found that a "single mix-up" did not constitute a willful violation of the FCRA. Williams does not dispute that a single inaccuracy, by itself, does not necessarily amount to a willful FCRA violation; however, that premise is inapplicable here. Unlike *Smith*, this was not a single inaccuracy. In fact, it happened twice to Williams and happens to thousands of others each year. DE:200, 95. Appellant has cited no decisions in which a CRA took the same action twice, the second time when it objectively knew that action would result in the same error. Moreover, none of the cases cited by Appellant involved a CRA which limited and violated or disregarded its own procedures as well as industry standards as Appellant did.

Appellant also criticizes the District Court's 60-page order for not citing *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1336 (11th Cir.2015). However, in *Collins*, unlike here, the CRA was not put on notice of the significant potential of erroneously re-matching a consumer with criminal records as Appellant was here by virtue of Williams's successful dispute of the Rent-A-Center report. In *Collins*, the CRA had the consumer telling it that the information was erroneous and the furnisher telling it that it was correct. Here, Appellant is

both the CRA and, by virtue of its own National Criminal File, the furnisher of information and it should have objectively known with a certainty, at the time of the Winn-Dixie report, that it was preparing a false report.

The fact that Appellant had the information it gathered during Williams's dispute of the Rent-A-Center Report undercuts Appellant's argument that it didn't have as much information as a credit reporting agency; it had all of the information it needed to avoid an error. This is certainly true for the Winn-Dixie report. Whether the Appellant's adjudicator had access to this information is irrelevant under the *Safeco* objective standard. *Smith v. E-Backgroundchecks.com, Inc.*, 81 F. Supp.3d 1342, 1359 (N.D. Ga.2015) (summary judgment for CRA denied on issue of willful violation of 14 U.S.C. §1681e(b) where CRA did not use information it had in its possession to confirm whether criminal records matched consumer).

It also means Appellant had the ability to check a third identifier when it prepared the Winn-Dixie Report as it knew Williams's height from his dispute of the Rent-A-Center Report and could easily have determined Ricky Williams's height from even a momentary review of the FDOC website which Appellant claims its employee(s) did review to "verify" the existence of the conviction. Appellant's attempts to treat the fact that it made the same error twice as two independent events is disingenuous and was obviously not accepted by the jury.

Appellant also cites *Childress* however that decision involved the reporting of accurate information and is thus dissimilar to the instant case where Appellant repeatedly reported false information about Williams. Similarly, *Pedro v. Equifax, Inc.*, 2017 WL 3623926 (11th Cir.2017), which was filed by Appellant after its Brief on August 31, 2017, is also inapplicable. There, this Court held it was not objectively unreasonable for TransUnion to interpret the FCRA to allow it report truthful information about an account. *Id.* at 10.

II. The Punitive Damage Award Is Constitutional

The District Court properly applied the *State Farm* and *Gore* factors to the facts viewed in a light most favorable to Williams. Moreover, the ratio of compensatory damages to punitive damages demonstrates no constitutional conflict. Thus, the District Court's affirmance of those damages must be reviewed for an abuse of discretion.

A. The District Court Properly And Carefully Applied The *State Farm* And *Gore* Factors In A Thoughtful 60-Page Order

In assessing punitive damage awards, courts analyze the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm, supra* at 418. Because the third guidepost is of no utility in

FCRA cases, something Appellant agrees with, this District Court properly focused on the first two.

In making the reprehensibility determination per *State Farm*, courts weigh five factors – all discussed below. DE:217, 47. "Reprehensibility grows more likely as more factors are present." *Sepulved*a v. Burnside, 432 F. App'x 860, 865 (11th Cir.2011) (*citing State Farm*, supra at 419).

1. *The First Factor Weighs In Favor Of Williams Because The Harm Caused Was Both Physical And Economic*

As explained by the District Court, for consideration of the first reprehensibility factor, whether "the harm caused was physical as opposed to economic," *State Farm, Supra* at 419, the Eleventh Circuit held in *Goldsmith v. Bagby Elevator Co., Inc*., 513 F.3d 1261, 1283 (11th Cir.2008), that psychological harm suffices. DE: 217, 47 (*also citing Daugherty v. Ocwen Loan Serv., LLC.*, No. 5:14-cv-24506, 2016 WL 6656750, *3 (S.D. W. Va. Oct. 12, 2016) *reversed in part on other grounds Daugherty v. Ocwen Loan Servicing, LLC*, 16-2243, 2017 WL 3172422, (4th Cir. July 26, 2017)[18] (finding that the first prong weighed in the plaintiffs favor in an FCRA case due to the "emotional toll that [the defendant's] conduct inflicted upon him").

[18] Reducing ratio of punitive to compensatory damages to 98:1.

That District Court also found the fact that Williams "never sought treatment for his emotional turmoil holds little-to-no persuasive value." DE: 217, 47 (citing *Miller v. Equifax Info. Servs., LLC*, No. 3:ll-cv-01231, 2014 WL 2123560, at *4 (D. Ore. May 20, 2014). This is especially true given his financial status and lack of resources and health insurance to pay for such treatment or employment that could provide it.

Moreover, Williams did suffer physical harm including loss of appetite, headaches he had to medicate, and insomnia. As recognized by the District Court, DE:217, 47, those harms, over time, can lead to serious illness. The District Court's ruling regarding the harms low wage earners have when losing their jobs is also particularly insightful. DE:217, 48. Clearly, the harm Williams suffered was both physical and economic.

Appellant's attempts to distinguish *Goldsmith* are unavailing. An unfulfilled threat is not injury itself and the Eleventh Circuit did not suggest it was. *Goldsmith*, *supra*. In many of the cases cited by Appellant for its contention that emotional distress is not physical harm, *State Farm*, *supra*, *Bach v. First Union Nat. Bank*, 149 Fed. Appx. 354, 364 (6th Cir.2005), and *Bennett v. Am. Med. Response, Inc.*, 226 Fed. Appx. 725, 728 (9th Cir.2007),[19] and *Smith*, supra, there

[19] Although Appellant, at page 39 of its Brief, suggests that the plaintiff in *Bennett* had difficulty sleeping there was no reference to this in the decision.

were no reference to physical symptoms as there are here. Moreover, none of them involved a protracted period of unemployment, and the corresponding inability to earn a living, as a result of the defendant's action as here where Williams was, with minor exceptions, unemployed for almost two years.[20] Finally, none of the cited cases were decisions of this appellate court or even decisions of courts within the Eleventh Circuit.

2. *The Second Factor Weighs In Favor Of Williams Because Appellant's Conduct Evinced An Indifference To, And A Reckless Disregard Of, The Health And Safety Of Others*

The District Court correctly found that the second factor, whether the "tortious conduct evinced an indifference to or reckless disregard of the health or safety of others," *State Farm, Supra* at 419, weighed in Williams's favor. When evaluating this second factor, courts consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). Section I of this Brief describes how Appellant acted with reckless disregard of its FCRA obligations and that analysis applies equally here.

Losing the Rent-A-Center and Winn-Dixie employment opportunities affected his ability to obtain health insurance; a fact evident from the record

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[20] From February 2012, when he applied to Rent-A-Center, until November 2013, when he was hired by Winn-Dixie.

because health insurance is either provided by the employer or costs money to buy. As noted by the District Court, the jury also could have reasonably inferred that it affected his ability to pay for other basic necessities like food, water, shelter, and clothing. DE:217, 49.

The record shows that the health of Williams and, perhaps, thousands of other persons are being affected while losing or being delayed in obtaining jobs and health insurance because of erroneous background searches. *Miller*, *supra* at *5 (accepting the argument that "the jury could have regarded [the plaintiff] as an 'exemplar of the harm that [the defendant] is prepared to inflict on many other consumers'"). Appellant is harming thousands of people every year. Although Appellant claims it has taken "corrective action" – it has done nothing to change its handling and mismatching of persons with common names. DE:217, 56 ("this Court is quite concerned that Appellant has not gone so far to even hint that it plans to change its procedures to address this type of problem.") There is no record evidence of any corrective action; in fact, Appellant always disputed that it even acted negligently to the District Court.

Employers are being deceived into believing over 14,000 workers they already interviewed and wish to hire are not desirable. Appellant's actions harm them and the employees because its actions deny thousands of employees each year the ability to earn wages and recklessly label them as criminals, all based on

the lie that these reports are thorough. Appellant's violations evinced an indifference or reckless disregard for the health and safety of others and the need for punitive damages to compel Appellant to change its ways is abundantly clear.

3. *The Third Factor Weighs In Favor Of Williams Because Williams Was Financially Vulnerable*

Similarly, the third factor in assessing reprehensibility, "whether the target of the conduct had financial vulnerability," *State Farm, Supra* at 419, weighs in Williams's favor. As the District Court observed, like most people seeking employment, Williams who, at 35, lives with his mother, had little-to-no income when he applied for the Rent-A-Center and Winn-Dixie positions and was, with very minor exceptions, deprived of income for almost two years due to Appellant's actions. DE: 217, 50 (*citing Goldsmith*, 513 F.3d at 1283 (holding that the plaintiff was financially vulnerable because he "had to borrow money" after being terminated)).

4. *The Fourth Factor Weighs In Favor Of Williams Because The Conduct Involved Repeated Actions And Was Not An Isolated Incident*

The District Court also found that the fourth factor, whether "the conduct involved repeated actions or was an isolated incident," *State Farm, Supra* at 419, strongly weighs in Williams's favor. Appellant asserted to the District Court that this "was an anomalous case" that is "exceedingly rare." DE:208, 32, but the District Court noted that "14,346 people may argue otherwise." DE:217, 51 (*citing*

Gore, *supra* at 576-77 (1996) (noting that, when considering the fourth factor, courts should review whether defendant's actions "formed part of a nationwide pattern of tortious conduct"). *Action Marine Inc. v. Continental Carbon Inc*., 481 F.3d 1302, 1320 (11th Cir.2007), *cert. denied*, (awarding $17.5 million in punitive damages with only $1.2 million in compensatory damages because "Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation").

As with the issue regarding willfulness, the jury reasonably concluded that Appellant has done nothing to ameliorate the risk faced by common-name consumers. Appellant had to strike a balance between accuracy and profit; it chose the latter. Appellant favored profits and sacrificed the accuracy that would have come from giving each adjudicator access to a credit-reporting bureau like Experian. DE:201, 317-18. In doing so, Appellant - a multi-million-dollar corporation - shifted its costs to defenseless, vulnerable consumers. As recognized by the District Court, "[t]hat is both shocking and disgraceful." DE:217, 51. Its lack of procedures even resulted in Williams's SSN mysteriously being inserted into in the Rent-A-Center background report although the match had nothing to do with his SSN. DE:201, 267-68.

Appellant's argument that its licensing agreement limited the use of Experian – stating in its Brief at page 36 that "[n]o evidence explains how or why

the contract so provided" – is disingenuous. As demonstrated by its financials, which were introduced as evidence, Appellant could have afforded a license for all adjudicators. It had no financial necessity for cutting corners and shifting the burden of those errors to unwitting potential employees and employers.

As noted by the District Court, Appellant's .38% inaccuracy rate is, quite frankly, unflattering. As discussed *infra*, this is only the rate resulting from formal complaints filed with Appellant about mismatches – and it is not the Florida rate which is an average of .51%. DE:200, 95. It is not even the rate of common name mismatch errors, which Appellant never introduced at trial. Moreover, this happened twice to the same person over the course of thirteen months and there is nothing to prevent it from happening again.

5. *The Fifth Factor Weighs In Favor Of Williams Because The Harm Is The Result Of Intentional Malice, Trickery, Or Deceit*

The final factor, whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident," *State Farm*, *Supra* at 419, also favors Williams. Appellant actions were not a "mere accident," *State Farm*, supra at 419 (*citing Gore*, supra at 576—77) as discussed *supra* regarding its reckless/willful decisions. It admitted violating its common name procedures and making conscious decisions to limit useful databases needed to perform an accurate background search. It also ignored easy to implement, industry standard cross-blocking techniques.

Moreover, on its website, Appellant claims its reports are prepared with "precision and insight" using a "[v]ast solution suite of intelligently packaged data." In reality, Appellant refuses to implement industry standard cross-blocking techniques or permit all of its adjudicators the use of readily available address history databases. DE:201, 257; Plaintiff's Trial Exhibit 58. Thus, Appellant's claims on its website are false and, as a direct result, thousands of consumers are wrongfully deemed ineligible for employment. The Supreme Court has held that, while a punitive damages award may not be used for the purpose of punishing a defendant for harming others, "a plaintiff may show harm to others in order to demonstrate reprehensibility." *Philip Morris USA v. Williams*, 549 U.S. 346, 354-55 (2007).

Regardless, Congress explicitly allowed FCRA punitive-damage awards even in the absence of intentional malice, trickery, or deceit. *Soroka v. Homeowners Loan Corp.*, No. 8:05-cv-2029, 2006 WL 4031347, *2 (M.D. Fla. June 12, 2006) (explaining that an FCRA plaintiff does not have to show "'malice or evil motive'" to warrant a punitive-damages award).

6. *Other Factors Also Support The Punitive Damage Award*

Although not required by *State Farm*, other evidence also shows that the jury found Appellant's conduct reprehensible. Williams's counsel suggested a $1,080,000 to $3,300,000 range for the punitive-damage award in his closing

argument. DE:202, 564. In fact, he first suggested the low-end of that range, stating that it was "appropriate" to make Appellant "change their ways." DE:202, 563. Moreover, Williams's counsel stressed that the $3,300,000 figure was the "high end" of possible punitive damages. DE:202, 564. Nonetheless, the jury awarded Williams the largest possible award that was suggested.

Based on the foregoing, Appellant's actions were sufficiently reprehensible to justify the punitive damages awarded by the jury.

B. The Ratio Of Compensatory Damages To Punitive Damages Is Well Within Constitutional Guidelines

The second guidepost considers the ratio of actual harm suffered by the plaintiff (as measured by the amount of compensatory damages) to the punitive-damage award. *State Farm*, supra at 424. Although the ratio of punitive to compensatory damages is important, *Sepulveda*, *supra* at 866 (*citing State Farm*, supra at 425), the Supreme Court has opted not to announce a bright-line rule regarding the tolerable ratio. A multi-digit multiplier is particularly appropriate when there is "a substantial need for deterrence" or where the defendant's conduct "was exceedingly reprehensible." *Goldsmith*, 513 F.3d at 1284.

1. *A Punitive Damage Ratio Of 13.2 to 1 Is Constitutional*

The District Court analyzed the punitive damage ratio at 13.2 to 1 and found that constitutional. DE:217, 56. Punitive damages are designed to deter. *See U.S. EEOC v. W&O, Inc.*, 213 F.3d 600, 614 (11th Cir.2000) (*citing Gore*, *supra* at

584). Thus, a strict application of the *State Farm* single-digit multiplier formula would not adequately deter Appellant's misconduct. Indeed, "sometimes a 'bigger award is needed to attract the . . . attention of a large corporation' in order to promote deterrence effectively." *Kemp v. Am. Tel. & Tel. Co*., 393 F.3d 1354, 1364 (11th Cir.2004). That is particularly so when the defendant is "a large and extremely wealthy . . . corporation." *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338 (11th Cir.1999).

Appellant may say that it regrets what occurred, but the District Court was concerned that Appellant "has not even gone so far [as] to hint that it plans to change its procedures to address this type of problem." DE:217, 56. To the contrary, until this appeal, Appellant always disputed everything – even that it acted negligently (or as its Brief now calls it, made a "mistake"). Brief at 37.

As suggested by the District Court, "Appellant made a business decision to shift the burden to more than 14,000 innocent consumers to ensure the quick turnaround and low price that earned it a large market share." DE:217, 56. "What is so pernicious is that Appellant will continue shifting that burden—and, by extension, strip thousands of qualified low-wage, hourly employees of job opportunities—so long as it makes good business sense to do so." *Id.*

In cases involving, as here, low-wage hourly employees, the *State Farm* single-digital multiplier formula provides Appellant a perverse incentive to persist

in its burden-shifting strategy because the compensatory damages will not justify a punitive damage award that actually acts as a deterrent. Here, the $3.3 million punitive-damages award amounts to 1% of the $336.5 million that Appellant paid to acquire certain Lexis Nexis companies (a significant portion of that purchase was Lexis Nexis Screening Solutions, Inc. which prepared the background report to Rent-A-Center and was acquired by Appellant). DE:201, 331. As noted by the District Court, an award in this amount "should, at a minimum, 'attract the attention of whomever is in charge of the corporation's daily decisions.'" DE:217, 57 (*quoting Johansen*, *supra* at 1338).

Moreover, as suggested by the District Court, when compared to other punitive-damage awards, this is not the type of "breathtaking" award that courts have repeatedly struck down. *Id*. (*citing State Farm*, *supra* at 428-29 (striking down a 145:1 punitive-damages award ratio); *Gore*, *supra* at 582—83 (disapproving of a 500:1 punitive- damages award ratio)). "It is much closer to the single-digit multiplier formula announced in *State Farm*, and pales in comparison to other awards that have been approved by the Eleventh Circuit." DE:217, 57-8 (citing *Kemp*, *supra* at 1365 (reducing a punitive-damage award from 8,692:1 to 2,173:1); *Johansen*, *supra* at 1339 (upholding a 100:1 punitive-damage award ratio). Indeed, this Court has upheld punitive damage awards with ratios exceeding 100:1 and 2,173:1. *Id.*

Appellant argues that "the constitutional line must be closer to" 1:1 effectively urging this court to adopt a bright line rule against punitive damages exceeding a ratio of 1:1, despite the Supreme Court itself "declin[ing] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* Such a rule would eliminate the very purposes of punitive damages: to punish and deter. *U.S. EEOC*, 213 F.3d at 614.

The District Court cautioned that, without this award, "Appellant will continue shifting [its] burden [under the FCRA]—and, by extension, strip thousands of qualified low-wage, hourly employees of job opportunities—[because] it makes good business sense to do so." DE:217, 56.

2. *The Applicable Ratio Is Actually Closer To 6:1*

In *Action Marine*, *supra* at 1308 this Court affirmed a $17.5 million punitive award premised upon a finding of bad faith that resulted in $1.9 million in compensatory damages and attorney fees of nearly $1.3 million. This Court noted that in Georgia awards of attorney fees in tort cases are compensatory in nature. *Id.* at 1321. Consequently, "we include the attorney fees as part of the measure of actual damages for the necessary comparison." *Id.* "The majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis." *Blount v. Stroud*, 915 N.E.2d 925, 943 (2009)

Additionally, because attorneys' fees are legally the property of the client they are compensatory in nature. In *Astrue v. Ratcliff,* 130 S.Ct. 2521, 2525 (2010), the Supreme Court held that an award of attorneys' fees under the Equal Access to Justice Act (EAJA) is payable to the litigant, not his or her attorney. The Court held that the language of section EAJA is unambiguous: courts must award fees to "a prevailing party," and the "prevailing party" is the litigant herself.

Similarly, in the instant case, 15 U.S. Sec. 1681n and o are clear that violators are "liable to that consumer" for attorneys' fees and costs. *Lewis v. Ohio Professional Electronic Network LLC*, 248 F. Supp. 2d 693 (S.D. Ohio 2003) ("actual damages" available under FCRA may include pre-litigation attorney fees; a consumer should not have to retain an attorney in order to force compliance with the statute.); *Nitti v. Credit Bureau of Rochester, Inc.*, 84 Misc. 2d 277, 375 N.Y.S.2d 817 (Sup 1975) (the FCRA enables private litigants to assist in the enforcement of the Congressional purposes by creating a species of "private attorney general" to participate in enforcement). Awards per 15 U.S. Sec. 1681n and o are thus clearly compensatory in nature.

The agreed bond posted by Appellant was $4.1 Million, or $550,00 over the amount of the judgment. DE:228. Thus, the estimated attorneys' fees Williams is entitled to under Sec. 1681 are $500,000 via the loadstar. When added to other compensatory damages, the result is a single digit ratio punitive damage to

compensatory damage ratio of 6:1.

III. The Issue Of Harm To Reputation Was Properly Submitted To The Jury

There was sufficient evidence to submit the issue of harm to Williams's reputation the jury.

A. Appellant's Appeal Improperly Requests A New Trial

Appellant's Brief only appeals the "reputational damages component" of the compensatory damage award. However, the Brief's Conclusion asks that the entire "compensatory damages award should be vacated." Appellant's requested relief improperly exceeds the scope of its actual appeal.

B. Appellant Failed To Make A Record That The Outcome Was Materially Affected By The Alleged Error

The verdict form agreed to by Appellant never listed "reputational damages," only compensatory damages. Appellant never objected to the verdict form as required. *See* F.R.C.P 51(b); *Ayuyu v. Tagabuel*, 284 F.3d 1023, 1026 (9th Cir.2002) (Rule 51 includes objections to the form of the verdict). Appellant also failed to prove that reputational damages were even awarded by the jury, or if so in what amount; thus, it failed to prove the alleged error materially affected the outcome of the trial. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir.1999) (the error of law must be so prejudicial as to "have affected the

outcome of the proceedings."). Indeed, in its JMOL, it argued that the entire award was for lost wages and emotional distress.

C. Reputational Damages Were Properly Submitted To The Jury

Williams testified that he lived in the small community of Chiefland (which the Census shows has only 2,245 residents). He testified that he was gravely concerned that any prospective employer who used Appellant's services would blindly trust an erroneous report, thus leading that employer to "think that [he was] hiding something." *Id.* Just the mere possibility that he could be dragged through this again "ma[de] [him] cringe." DE:200, 149. Williams testified that he was labeled by Appellant as a criminal; his reputation is important to him. DE:200, 149. Furthermore, Sylvia Bazan believed Appellant's report that he was a criminal and stated that if he didn't do this stuff, it would have never come up in his record so he "must have done something wrong." *Id.* Moreover, Williams grew concerned he would be labeled a criminal" (149:12-16) and testified that the two individuals who had initially hired him at Rent-A-Center and Winn-Dixie told him that Appellant's reporting system was accurate and that they would need to move on to other applicants. *Id.*, DE:206, page 10. A Rent-A-Center manager's "demeanor changed" after the criminal-background report was issued because he trusted its accuracy. DE:200, 150.

The jury could have reasonably concluded that it wasn't Williams's good reputation that led to the position with the Levy County Sheriff's Office—it was his father's. DE:200, 170. Regardless, the above noted evidence shows it was diminished in other respects.

The District Court agreed with this conclusion, noting that while it may not have been reasonable for the jury to infer that others in the community heard about this incident and trusted the report if Williams lived in, say, Atlanta, Jacksonville, or Miami, that inference is reasonable given Chiefland's small size and rural nature. DE:217, 40. Accordingly, even if Williams's good reputation (and not his father's) earned him the position with the Sheriff's Office, the jury could have reasonably concluded that it was nonetheless tarnished. *Id.*

CONCLUSION

The District Court's thoughtful 60-page Order upholding the verdict should be affirmed. The issues of reckless disregard of Appellant's obligations under the FCRA and reputational harm were properly submitted to the jury. Moreover, the District Court properly and painstakingly applied the *State Farm* and *Gore* factors to uphold the verdict as constitutional.

Respectfully submitted,

/s/ Barry S. Balmuth, B.C.S.
Barry S. Balmuth, P.A.
2505 Burns Road
Palm Beach Gardens, FL 33410
Tel: (561) 242-9400
balmuthlaw@alumni.emory.edu

Michael Massey, L.L.M.
Massey & Duffy, PLLC
855 E. University Avenue
Gainesville, FL 32601
Tel: (352) 505-8900
Massey@352law.com

Attorneys for Plaintiff-Appellee

Date: October 2, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE, REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. I certify that this Brief complies with the applicable type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because the Brief contains 12,998 words (According to the word count in Microsoft Word, which was used to prepare the Brief), excluding the parts of the Brief exempted by Federal Rule App. P. 32(f).

2. I also certify this Brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). I prepared this Brief in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

/s/ Barry S. Balmuth, B.C.S.
Barry S. Balmuth, P.A.

CERTIFICATE OF FILING AND SERVICE

I certify that on October 2, 2017, I electronically filed the foregoing Brief with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, including:

Frederick T. Smith
Thomas J. Piskorski
Jules A. Levenson
Seyfarth Shaw LLP
233 South Wacker Drive, Suite 8000 Chicago, Illinois 60606
Telephone: (312) 460-5000 Facsimile: (312) 460-7000
fsmith@seyfarth.com, tpiskorski@seyfarth.com, jlevenson@seyfarth.com

/s/ Barry S. Balmuth, B.C.S.
Barry S. Balmuth, P.A.