IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LASHONDA PEEPLES, Plaintiff, v. NATIONAL DATA RESEARCH, INC. D/B/A INTEGRASCAN, Defendant.	CIVIL ACTION NO. 1:22-cv-1764-SCJ-CMS

FINAL REPORT AND RECOMMENDATION

Plaintiff Lashonda Peeples complains that Defendant National Data Research, Inc. d/b/a Integrascan ("Defendant" or "NDR") violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. ("FCRA"), when it produced a background check consumer report that reported a criminal record that had been expunged. This matter is before the Court on Defendant's Motion for Summary Judgment. [Doc. 57]. For the reasons stated below, I will recommend that Defendant's Motion for Summary Judgment be **GRANTED**.

I. PROCEDURAL BACKGROUND

On May 4, 2022, Peeples commenced this action against Background Information Group, LLC d/b/a Integrascan. [Doc. 1, Compl.]. On July 13, 2022, Peeples filed a Consent Motion for Leave to Amend Pleading, Dismiss Party Without Prejudice, and Enlarge Deadlines. [Doc. 17]. I granted that consent motion,

and Peeples filed a First Amended Complaint naming NDR as the defendant. [Doc. 20, First Am. Compl.]. Count I of the First Amended Complaint is a cause of action under 15 U.S.C. § 1681e for failure to establish and follow reasonable procedures to ensure the maximum possible accuracy of the information in Peeples's consumer report. [*Id.* ¶¶ 88–93]. Count II is a cause of action under 15 U.S.C. § 1681i for failure to conduct a reasonable reinvestigation, correct the disputed information, and maintain reasonable procedures to prevent the reappearance of the inaccurate information in the credit file maintained concerning Peeples. [*Id.* ¶¶ 94–100].

Following discovery, NDR moved for summary judgment. [Doc. 57]. Peeples has filed a response, and NDR has filed a reply. [Docs. 63, 65]. As such, the motion for summary judgment is now ripe for resolution.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is authorized when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving

party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The court must view the evidence and all factual inferences in the light most favorable to the nonmoving party. *Adickes*, 398 U.S. at 158–59.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party must "go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed facts. *See Anderson*, 477 U.S. at 249. Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are not. *Id.* at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

III. FACTS[1]

Considering the foregoing summary judgment standard, I find the following facts for the purpose of resolving NDR's pending motion for summary judgment only.

NDR provides background checks for a fee on the website www.integrascan.com. [Doc. 56, Affidavit of Terry Sweet "Sweet Aff." ¶ 6]. NDR has designed and structured its background reporting business in such a way as to sell background reports for purposes of college admissions indirectly via the students. [Doc. 64, Pl.'s Statement of Additional Facts "PSAF" ¶ 20; Doc. 66, Def.'s Resp. to Pl.'s Stmt. of Additional Facts "DRPSAF" ¶ 20]. NDR was aware that "[a] couple dozen" colleges were instructing their students to purchase background check reports from NDR. [PSAF ¶ 21; DRPSAF ¶ 21; Doc. 52, Deposition of Terry Alan Sweet "Sweet Dep." at 11–12, 17, 58–59]. On its website, NDR maintained a designated Student Portal that specifically catered to providing background reports to students. [PSAF ¶ 22; DRPSAF ¶ 22]. NDR also sells background reports to

[1] For purposes of this Report and Recommendation, unless otherwise indicated, citations to the record are made to the CM/ECF heading at the top of the page cited; citations to deposition pages are to the actual page number of the hardcopy deposition transcript.

employers, while knowing that such employers will likely use, and often do use, such background reports to make hiring decisions concerning employees who are the subject of such background reports. [PSAF ¶ 23; DRPSAF ¶ 23].

In 2021, Peeples applied to the pre-med program at the American International College of Arts and Sciences—Antigua ("AICASA") in the hope of attending medical school and becoming a physician. [PSAF ¶ 19; DRPSAF ¶ 19; Doc. 53, Deposition of Lashonda Yvette Peeples "Peeples Dep." at 8–9]. Since childhood, Peeples had spoken of wanting to become a doctor. [PSAF ¶ 37; Doc. 63-2, Deposition of Carla Carson "Carson Dep." at 23–24].

AICASA directs its student applicants to obtain a background report from NDR, and NDR knows that AICASA directs its student applicants to purchase background reports from NDR. [PSAF ¶¶ 24, 25; DRPSAF ¶¶ 24, 25]. On December 14, 2021, Peeples logged onto NDR's website and ordered a background report on herself (the "Report") with the intent to use it in her admissions application to AICASA. [Doc. 57-1, Def.'s Stmt. of Mat. Facts ("DSMF") ¶ 3; Doc. 64, Pl.'s Resp. to Def.'s Stmt. of Mat. Facts ("PRSMF") ¶ 3]. On that same date, NDR sold the Report to Peeples, and Peeples received the Report. [DSMF ¶¶ 1, 5; PRSMF ¶¶ 1, 5; Peeples Dep. at 11].

According to NDR, the Report was sold subject to a non-disclosure agreement contained within the Integrascan User Agreement that prohibited Peeples from disclosing the Report to any third party. [Doc. 56, Sweet Aff. Ex. 1 (Doc. 56 at 10–15)]. However, NDR presents conflicting evidence as to when Peeples would have accepted the terms of the Integrascan User Agreement. On one hand, NDR presents evidence indicating that Peeples would have agreed to the terms of use at the time of account creation and establishment. [Sweet Aff. ¶¶ 7, 9]. On the other hand, NDR relies on evidence that Peeples would have agreed to the terms of use at the time she purchased the Report. [Sweet Dep. at 43]. Irrespective of whether Peeples actually agreed to terms that precluded her from disclosing the Report to any third party, it is undisputed that the Report was disseminated only to Peeples and was not disclosed to any third party, except for the dissemination within this litigation after Peeples initiated the current legal proceedings. [DSMF ¶ 14; PRSMF ¶ 14].

The Report disclosed only a single criminal record for Peeples, which was listed as "GIVING FALSE INFORMATION." [Sweet Dep. at 35]. The Report indicated that the information was obtained from an official governmental database, but it is undisputed that the GIVING FALSE INFORMATION record was obtained from Tracers.com. [PSAF ¶ 29; DRPSAF ¶ 29; Sweet Dep. at 35–38]. According to the testimony of Terry Sweet, the CEO and president of NDR, Tracers.com

obtained the record from "SOUTH CAROLINA BERKELEY COUNTY SUMMARY COURTS." [Sweet Dep. at 5–6, 37–41, 45–47]. Tracers.com is a non-governmental private repository of data that does not receive notification when a record is removed from, and no longer existing in, the public governmental database. [PSAF ¶ 30; DRPSAF ¶ 30].

Peeples was, in fact, convicted of "GIVING FALSE INFORMATION" in the Court of General Sessions of Berkeley County, South Carolina, on September 2, 2003. [DSMF ¶ 6; PRSMF ¶ 6]. This record of conviction was later expunged by an order filed on December 19, 2019, in the Court of General Sessions of Berkeley County, South Carolina. [Doc. 53, Peeples Dep. Ex. 3 (Doc. 53 at 72–73)]. The expungement order stated, in part, that Peeples was "entitled to have all records, including any outstanding bench warrants, related to this offense expunged and destroyed or sealed according to [Section 22-5-910] of the South Carolina Code of Laws." [*Id.* at 73]. Accordingly, the court ordered that "all records related to such arrest and subsequent discharge, including associated bench warrants, pursuant to the above-reference section be expunged or destroyed and that no evidence of such records pertaining to such charge shall be retained by any municipal, county or state agency," except as set forth in four limited exceptions stated in the expungement order. [*Id.*].

The Report NDR sold Peeples on December 14, 2021, did not indicate that the record of conviction had been expunged because: (1) Tracers.com does not provide that information; and (2) prior to the receipt of a consumer dispute, it would be too costly for NDR to contact the relevant court to ascertain whether a record had been expunged. [Peeples Dep. at 11; Sweet Dep. at 46–50].

On December 14, 2021, the same date that Peeples ordered and received the Report, Peeples sent an email to support@integrascan.com requesting that the conviction be removed from the Report. [DSMF ¶ 7; PRSMF ¶ 7]. In a separate email sent that same day, Peeples emailed Terry Sweet a copy of the expungement order. [DSMF ¶ 7; PRSMF ¶ 7]. On December 15, 2021, Sweet sent Peeples an email telling her that he would not remove the conviction from the Report. [DSMF ¶ 8; PRSMF ¶ 8]. Sweet, acting for NDR, investigated the conviction, determined that Peeples had, in fact, been convicted of the offense of giving a false statement, and confirmed that the conviction had been expunged. [DSMF ¶ 9; PRSMF ¶ 9; PSAF ¶ 26; DRPSAF ¶ 26; Sweet Aff. ¶ 17]. NDR determined that the FCRA does not prohibit it from including the disputed, expunged record in its background reports. [PSAF ¶ 26; DRPSAF ¶ 26]. Sweet made this determination, without the assistance of an attorney, based on his personal belief of what is "common knowledge." [PSAF ¶ 27; DRPSAF ¶ 27]. Sweet does not have a legal background

or training, but he has more than thirty years of experience in the reporting industry and has studied the laws and rules that apply under the FCRA. [PSAF ¶ 27; DRPSAF ¶ 27; Sweet Dep. at 29–31, 70].

On January 10, 2022, Peeples sent an email to terry@skipmax.com informing NDR that she had spoken with her attorney and that NDR had thirty days to verify the information in the Report. [DSMF ¶ 10; PRSMF ¶ 10]. On January 11, 2022, Sweet sent Peeples an email from terry@skipmax.com informing Peeples that NDR would not accept any further correspondence via email. [DSMF ¶ 11; PRSMF ¶ 11]. On January 12, 2022, Peeples sent Sweet a certified letter complaining about the conviction entry and requesting an investigation of the accuracy of the Report. [DSMF ¶ 12; PRSMF ¶ 12].

On or about February 4, 2022, Peeples's record in NDR's database was marked "**EXPUNGED**". [DSMF ¶ 13; PRSMF ¶ 13]. Sweet avers that NDR set a block on Peeples's records so that NDR's online system would no longer issue background checks concerning Peeples. [Sweet Aff. ¶ 17]. However, on July 12, 2022, Peeples was able to view a subsequent background report that showed the "**EXPUNGED**" notation. [Doc. 52, Sweet Dep. Ex. 3 (Doc. 52 at 118); Peeples Dep. at 21, 23; Sweet Aff. ¶ 19].

The reason Peeples requested on December 14, 2021, and again on January 10, 2022, that the conviction for "GIVING FALSE INFORMATION" be deleted from the Report was because she did not want AICASA to know that she had been convicted of the offense. [DSMF ¶ 15; PRSMF ¶ 15]. Peeples ultimately elected not to send the Report to AICASA. [DSMF ¶ 17; PRSMF ¶ 17; Peeples Dep. at 27–29, 37–38]. Instead, she provided the school with a Criminal History Request Form that indicated a lack of any criminal history in Georgia. [Doc. 53, Peeples Dep. Ex. 1 (Doc. 53 at 67); Peeples Dep. at 10–11].

Peeples deferred enrolling in school that January and paid a $500 deferment fee, but she was able to enroll in August with the Criminal History Request Form she provided. [Peeples Dep. at 12, 25–26, 32, 37, 41, 46]. Peeples attended AICASA from August through December but was informed by the school that she would have to provide a report from NDR to enroll the next semester. [*Id.* at 33, 46–47]. Because Peeples was unable to resolve the issues with the Report, Peeples did not return to AICASA. [*Id.* at 47]. Peeples has experienced anxiety, stress, mental anguish, insomnia, embarrassment, lack of appetite, and frequent crying. [*Id.* at 33–35, 37, 41–42; Carson Dep. at 17].

IV. DISCUSSION

A. Count I – Violation of 15 U.S.C. § 1681e(b)

Peeples alleges in Count I that NDR violated Section 1681e(b) of the FCRA by failing to follow reasonable procedures to assure the maximum possible accuracy of the information in the Report. [First Am. Compl. ¶¶ 88–93]. In its summary judgment motion, NDR argues that the Court lacks subject matter jurisdiction over Count I of the Complaint because the Report is not a consumer report within the definition of "consumer report" set forth in 15 U.S.C. § 1681a(d). [Doc. 57 at 1; Doc. 57-2 at 6–9]. NDR additionally argues that Peeples lacks Article III standing because the Report was never disseminated to any third party and because Peeples has not suffered a concrete injury remediable under the FCRA sufficient to create a federal case or controversy due to the Report's accuracy. [Doc. 57 at 2; Doc. 57-2 at 9–17]. For the reasons explained below, I am constrained to agree with NDR that it is entitled to summary judgment on the Section 1681e(b) claim because the Report was not communicated or published to a third party.

The FCRA was enacted "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15

U.S.C. § 1681(b). To achieve this end, the FCRA regulates "consumer reports," which the FCRA defines as follows in Section 1681a(d):

> (1) IN GENERAL. –The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--
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> (A) credit or insurance to be used primarily for personal, family, or household purposes;
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> (B) employment purposes; or
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> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1).

Section 1681e(b) of the FCRA requires a consumer reporting agency preparing a "consumer report" to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). To establish a prima facie violation of Section 1681e(b), a consumer must present evidence that (1) a consumer reporting agency's "consumer report" contained factually inaccurate information, (2) that the procedures it took in preparing and distributing the report were unreasonable, and (3) that damages followed as a result. *Losch v. Nationstar Mortg. LLC*, 995 F.3d

937, 944 (11th Cir. 2021) (citations omitted). "[U]nlike violations under other provisions of the FCRA, a violation of Section 1681e(b) concerns only information communicated about a consumer to a third party." *Coleman v. Experian Info. Sols., Inc.*, 655 F. Supp. 3d 1285, 1314 (N.D. Ga. 2023) (citing *Benjamin v. Experian Info. Sols., Inc.*, 561 F. Supp. 3d 1330, 1354 (N.D. Ga. 2021)).

Here, the Report that NDR provided to Peeples was not a "consumer report" because it was not communicated to a third party. In *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330 (11th Cir. 2015), the Eleventh Circuit interpreted the statutory language of the FCRA and drew a distinction between a "consumer report" and a consumer's credit "file." *Id.* at 1334–35. "[T]he term 'file', when used in connection with information on any consumer, means all of the information on that consumer *recorded and retained by a consumer reporting agency* regardless of how the information is stored." *Id.* (emphasis in original). "A file is simply the information [on a consumer] retained by a consumer reporting agency." *Id.* at 1335. "A 'consumer report' requires communication to a third party, while a 'file' does not." *Id.* In the instant case, because NDR provided the Report to Peeples and not a third party, the Report cannot constitute a consumer report. *See Seckinger v. Equifax Info. Servs., LLC*, No. CV 415-304, 2018 WL 1511170, at *7 (S.D. Ga. Mar. 27, 2018) ("Since the information was provided to Seckinger, and not a third-party

potential creditor, it cannot itself constitute a consumer report."). Peeples's FCRA claim under Section 1681e(b) thus fails as a matter of law. *Johnson v. Equifax, Inc*., 510 F. Supp. 2d 638, 645 (S.D. Ala. 2007) ("Because a prerequisite to a cause of action under § 1681e(b) is evidence showing that a consumer report was furnished to a third party, all of [the plaintiff]'s FCRA claims fail as a matter of law.").

Peeples argues that NDR sold her the Report with the knowledge that she would, in turn, submit it to the school as a condition of her eligibility for admission. [Doc. 63 at 9]. According to Peeples, the Report was an active report that NDR knew would be used for an evaluative purpose, as opposed to a dormant report that would simply exist in Peeples's credit file. [*Id.*]. Peeples thus argues that NDR should not be able to escape liability under the FCRA simply because its business model is to sell the background reports to the consumers (i.e., the student applicants being evaluated) rather than directly to the third-party end users (i.e., the educational institutions).[2] [*Id.* at 12].

[2] Without citing any evidentiary support, Peeples suggests that NDR intentionally chose this business model to attempt to evade obligations under the FCRA. [Doc. 63 at 2–3, 12]. However, it is far from clear to the Court that the FCRA authorizes consumer reporting agencies to provide background reports directly to educational institutions for the purpose of serving as a factor in establishing a consumer's eligibility for admission to a school because that is not one of the permissible purposes expressly delineated under 15 U.S.C. § 1681a(d) or 15 U.S.C. § 1681(b). The parties disagree about whether the background reports

Peeples further asserts that the statutory definition of a "consumer report" is satisfied with respect to any report "communicated for an immediate and useful evaluative purpose, without regard to the identity of the recipient of the report," [*id.* at 11], but this is not the law in the Eleventh Circuit. The Eleventh Circuit requires that a plaintiff bringing a claim under Section 1681e(b) show that the agency prepared and distributed the report to a third party. *Losch*, 995 F.3d at 944 (citing *Collins*, 775 F.3d at 1335); *see also Rumbough v. Experian Info. Sols, Inc.*, No. 6:16-cv-1305-Orl-18GJK, 2018 WL 10455201, at *4 (M.D. Fla. Feb. 14, 2018) (granting summary judgment on Section 1681e(b) claim where, among other things, the plaintiff "admitted that he did not have any evidence to show that Trans Union provided his consumer credit report to a third party"); *Bailey v. Equifax Credit Info. Servs., Inc.*, No. 1:14-cv-797-MHC-JCF, 2016 WL 11540113, at *17 (N.D. Ga. Nov. 28, 2016) (holding that a "prerequisite to a cause of action under § 1681e(b)" is that a consumer reporting agency "published an inaccurate credit report to any third party") (citing *Johnson*, 510 F. Supp. 2d at 645), *adopted by* 2017 WL 10728913

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would qualify as having an employment purpose or could be provided in connection with a business transaction initiated by the consumer or in connection with a determination of the consumer's eligibility for a license. The applicability of these purposes seem doubtful, but I need not resolve this issue to adjudicate Peeples's Section 1681e(b) claim.

(N.D. Ga. Jan. 9, 2017); *Lazarre v. JPMorgan Chase Bank, N.A.*, 780 F. Supp. 2d 1320, 1328 (S.D. Fla. 2011) (holding that a claim under § 1681e(b) requires that a consumer reporting agency publish an inaccurate consumer report to a third party). Based on this well-established authority, I reject Peeples's arguments and will recommend that the district judge grant summary judgment on Peeples's claim under Section 1681e(b) in Count I.[3]

B. Count II – Violations of 15 U.S.C. § 1681i

In Count II of the First Amended Complaint, Peeples alleges that NDR violated 15 U.S.C. § 1681i by failing to (1) perform a reasonable reinvestigation and correct or suppress the expunged record in her Report upon receipt of her disputes and supporting documentation and (2) maintain reasonable procedures to prevent the reappearance of the inaccurate information in Peeple's file and in consumer reports concerning Peeples. [First Am. Compl. ¶¶ 94–100]. With respect to Count II

[3] I have not addressed in detail NDR's alternative arguments that (1) the Report is not a "consumer report" within the meaning of 15 U.S.C. § 1681a(d) because it is not for credit, insurance, or employment purposes; (2) Peeples cannot prove the Report was inaccurate; and (3) Peeples lacks standing because she has not suffered a concrete injury remediable under the FCRA. If the district judge disagrees with my analysis that Peeples cannot proceed with her Section 1681e(b) claim because the Report was not communicated to a third party, this civil action may be referred back to me to supplement this Report and Recommendation with an in-depth analysis of NDR's alternative arguments for summary judgment as to Count I.

specifically, NDR argues that Peeples cannot prevail on any cause of action under 15 U.S.C. § 1681i concerning the accuracy of NDR's data files because the Report was accurate. [Doc. 57 at 2; Doc. 57-2 at 17–21]. NDR also argues that Peeples's claims under 15 U.S.C. § 1681i(a)(1) for failure to reinvestigate and under § 1681i(a)(5) for failure to prevent the reappearance of inaccurate information both fail because further reporting was blocked. [Doc. 57 at 2; Doc. 57-2 at 19–21].

Section 1681i provides that "if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer . . . the agency shall . . . conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate." 15 U.S.C. § 1681i(a)(1)(A). The consumer reporting agency shall "record the current status of the disputed information, or delete the item from the file" within thirty days of receiving notice of the dispute. *Id.* If the consumer reporting agency reasonably determines that the dispute is frivolous or irrelevant, it may terminate the reinvestigation of the disputed information. 15 U.S.C. § 1681i(a)(3). Assuming no such determination is made, in conducting the reinvestigation, the consumer reporting agency "shall review and consider all relevant information submitted by the consumer . . . with respect to such disputed information." 15 U.S.C. § 1681i(a)(4). If the consumer reporting agency finds that an item of the disputed

information is inaccurate or incomplete, then the consumer reporting agency must, among other things, "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." 15 U.S.C. § 1681i(a)(5).

To prevail on a claim under § 1681i, a plaintiff must establish the following: (1) her consumer file contained inaccurate or incomplete information; (2) she notified the consumer reporting agency of the alleged inaccuracy; (3) the dispute is not frivolous or irrelevant; (4) the agency failed to respond or conduct a reasonable reinvestigation of the disputed item(s); and (5) the failure to reinvestigate caused the consumer to suffer out-of-pocket losses or intangible damages such as humiliation or mental distress. *Steed v. Equifax Info. Servs., Inc.*, No. 1:14-cv-437-SCJ-CMS, 2016 WL 7888040, at *11 (N.D. Ga. July 15, 2016), *adopted by* 2016 WL 7888039 (N.D. Ga. Aug. 31, 2016). "A consumer . . . cannot bring a [§ 1681i] claim against a credit reporting agency when it exercises its independent professional judgment, based on full information, as to how a particular account should be reported on a credit report." *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160 (11th Cir. 1991). In contrast to Section 1681e(b) claims, a violation of Section 1681i does not require that the information be communicated to a third party. *Collins*, 775 F.3d at 1335.

Here, viewing the evidence and all factual inferences in the light most favorable to Peeples, as the nonmoving party, Peeples presents evidence that her consumer file contained information that a reasonable jury could find was incomplete. In this regard, the Report reflected her conviction but initially did not indicate that the record of the conviction had been expunged. With respect to the second element of her Section 1681i claim, there is no dispute that Peeples contacted NDR multiple times to dispute the accuracy of NDR including the expunged conviction in the Report. Further, there is no indication that NDR has ever taken the position that the dispute was or is frivolous or irrelevant. Liability thus depends on whether NDR failed to conduct a reasonable reinvestigation of the disputed item and, if so, whether the failure to do so caused Peeples to suffer out-of-pocket losses or intangible damages, such as humiliation or mental distress.

In response to Peeples's dispute concerning the inclusion of the conviction in the Report, NDR obtained the expungement order from Peeples, reinvestigated the disputed information in light of the expungement order, and updated Peeples's criminal information to reflect that the criminal record associated with her conviction for giving false information had been expunged. NDR informed Peeples that it would not remove the conviction entry from its records.

Peeples argues that the Report remained inaccurate following the reinvestigation because NDR did not completely remove the information regarding the criminal conviction from the Report, but Peeples cites no legal authority requiring such action by NDR to comply with the FCRA. [Doc. 63 at 19–20]. I have conducted my own extensive research, and I am not aware of any case that directly addresses whether a consumer reporting agency violates the FCRA by including an expunged conviction in a background check report. However, in the context of convictions that have been dismissed, set aside, or arguably intended to be expunged, courts have held that complete removal of the conviction is not required for a report to be accurate under the FCRA.

"[F]ederal courts have long defined the term ["conviction"], in the FCRA context and in other contexts, to turn on a finding of guilt after a plea or verdict of guilt, regardless of any subsequent non-merits-based or rehabilitative expungement." *Bugoni v. Emp. Background Investigations*, No. SAG-20-1133, 2022 WL 888434, at *3 (D. Md. Mar. 25, 2022). In a case examining what constitutes a "conviction" for purposes of a federal gun-licensing statute, the Supreme Court held that the meaning of the term "conviction" in a federal statute is a question of federal law, not state law, unless Congress provides otherwise. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111–12 (1983), *superseded in*

part by 18 U.S.C. § 921(a)(20). The Court affirmed the enhancement of a sentence under the Gun Control Act with the defendant's prior conviction even though a state court had discharged the defendant and expunged the charge under a pre-trial diversionary program. *Id.* at 112–15. In reaching this decision, the Court reasoned that "expunction under state law does not alter the historical fact of the conviction" or the "legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty." *Id.* at 115.

Following *Dickerson*, the Seventh Circuit has held that federal law controls what constitutes a conviction for purposes of the FCRA's reporting requirements. *Aldaco v. RentGrow, Inc.*, 921 F.3d 685, 689 (7th Cir. 2019). As stated by the court in *Aldaco*, the FCRA "prohibits reporting agencies from disclosing any arrest record or other adverse item more than seven years old but permits them to report 'records of convictions of crimes' no matter how long ago they occurred." *Id.* at 687. Finding that the word "convictions" in 15 U.S.C. § 1681c(a) encompasses pleas of guilt, the Seventh Circuit affirmed the district court's grant of summary judgment to the consumer reporting agency and held, in part, that the plaintiff's guilty plea to a battery charge was properly reported as a conviction in a criminal background check

report despite the state court's dismissal of the charge nineteen years prior based on the plaintiff's completion her supervision sentence.[4] *Id.* at 686, 689.

Likewise, in *Bugoni*, cited *supra*, the Maryland district court extended these principles to find that a "[p]laintiff's 'set aside' conviction still constituted a conviction subject to reporting under the FCRA" and that the consumer reporting agency accurately reported the conviction, "including the fact that it had been set aside and dismissed fifteen years later for non-merits-based reasons." 2022 WL 888434, at *3. The court held that the consumer reporting agency's inclusion of the conviction in the background investigation report did not constitute an FCRA violation, and the court granted summary judgment in favor of the consumer reporting agency.[5] *Id.*

Obabueki v. Choicepoint, Inc., 236 F. Supp. 2d 278 (S.D.N.Y. 2002), a post-trial decision denying the plaintiff's motion for judgment as a matter of law or new trial, is also instructive. In *Obabueki*, the plaintiff had pleaded nolo contendere to a

[4] The Seventh Circuit mentioned that the plaintiff could have had the battery record expunged but that she did not ask the state court to do so. *Aldaco*, 921 F.3d at 686. The Seventh Circuit did not address whether an expungement would have altered its analysis.

[5] While relying on the cases that stated that federal law controls, the court nevertheless mentioned that "Arizona law specifie[d] that the conviction need not be removed from the defendant's criminal record." *Bugoni*, 2022 WL 888434, at *3.

misdemeanor fraud charge in 1995. *Id.* at 280. Two years later, the conviction was set aside and dismissed. *Id.* In 1999, the plaintiff applied for a marketing manager position at IBM and completed a questionnaire that inquired about whether he had been convicted of or pled guilty or no contest to a crime or other offense in the prior seven years. *Id.* The plaintiff answered "no" to this question. *Id.* at 281. IBM then purchased a criminal background check from the defendant, Choicepoint, a consumer reporting agency. *Id.* The report included the 1995 conviction but not the 1997 dismissal order. *Id.* When contacted by IBM regarding the 1995 conviction, the plaintiff sent IBM a copy of the 1997 dismissal order, but IBM still withdrew an offer of employment that IBM had previously made to the plaintiff. *Id.* Like Peeples argues in this case, the plaintiff in *Obabueki* argued that "only a report that listed no convictions for plaintiff would have been correct, and thus any mention of the 1995 conviction—even if accompanied by information about the 1997 dismissal order—rendered the report incorrect as a matter of law." *Id.* at 283. The court disagreed, finding that "[r]egardless of whether the 1997 Order legally expunged the 1995 conviction . . . the record of the conviction still existed and was publicly available" when Choicepoint prepared the background check report and further explaining as follows:

> [A] finding that there is no liability for the disclosure of publicly available records is more consistent with the FCRA's principles of

> truthful reporting than would be a judicially mandated policy requiring agencies such as Choicepoint to accurately interpret unsettled issues of state law, or holding those agencies liable for their customer's inaccurate interpretations of similar legal questions. Accordingly, the Court rejects plaintiff's contention that only a report indicating that plaintiff had no convictions would have been proper under the FCRA.

Id. at 284.

While each of the above cases is factually distinguishable in some respects, I still find them persuasive. As was the case in *Obabueki*, NDR was able to obtain information regarding Peeples's conviction, notwithstanding the South Carolina expungement order. For purposes of FCRA reporting, the historical fact of Peeples's conviction was not altered by the expungement order, and the FCRA expressly permits consumer reporting agencies to report "records of convictions of crimes." 15 U.S.C. § 1681c(a). Federal law, not South Carolina law, dictates that Peeples's conviction was still a conviction. Although the initial report of the conviction was arguably incomplete without the notation that the record of the conviction had been expunged, upon receiving the dispute and the expungement order from Peeples, NDR modified and corrected Peeples's credit file to reflect the expungement. Having done so, NDR complied with its reinvestigation obligations, and I am not convinced that anything more was required. Because NDR was reporting factually accurate information following its reinvestigation, summary judgment is appropriate in this circumstance. *See Bauer v. Target Corp.*, No.: 8:12–cv–00978–AEP, 2013

WL 12155951, at *12 (M.D. Fla. June 19, 2013). While this result may be harsh, it is up to Congress to decide whether consumer reporting agencies should be held liable for reporting expunged convictions. As the FCRA is currently drafted, I find no liability under the circumstances presented in this case.

For the reasons set forth above, I will recommend that the district judge grant summary judgment on Peeples's claim under Section 1681i of the FCRA.[6]

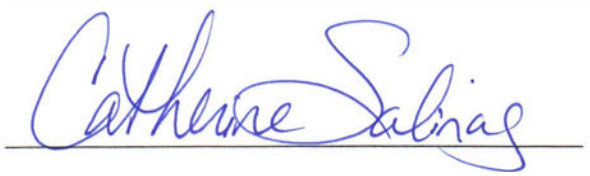
V. CONCLUSION

Based on the foregoing, I **RECOMMEND** that Defendant's Motion for Summary Judgment [Doc. 57] be **GRANTED**.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

[6] I find it unnecessary to address NDR's alternative argument that Peeple's Section 1681i claims fail because further reporting was blocked. NDR also makes several other general arguments, which I do not address, including that its actions in this case are protected under the Free Speech Clause of the First Amendment to the United States Constitution and were not negligent or willful [doc. 57-2 at 21–24] and that Peeples's damages are not recoverable because they are speculative and self-imposed [*id.* at 24–25]. If the district judge would like me to address any or all of these arguments, the case may be referred back to me to issue a supplemental Report and Recommendation.

SO RECOMMENDED AND DIRECTED this 4th day of January, 2024.



Catherine M. Salinas
United States Magistrate Judge