IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL MADER, and all others similarly situated, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., Defendant.	19-CV-3787-LGS **ORAL ARGUMENT REQUESTED**[1]

<u>PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS</u>

[1] Plaintiff's counsel graduated from law school in August 2014, and was admitted to the New York Bar in October 2015. Judge Schofield's Individual Rules and Procedures for Civil Practice Rule and Procedure B.6 Plaintiff's counsel has never argued a motion in district court (only in bankruptcy court) and would appreciate the opportunity to present oral argument before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

Plaintiff, Michael Mader ("Plaintiff") submits this memorandum of law in opposition to Defendant Experian Information Solutions' ("Experian") motion to dismiss (the "Motion") the Plaintiff's Complaint ("Compl.").

PRELIMINARY STATEMENT

Experian's two prong argument fails on both prongs. First, Experian erroneously contends that it is merely a passive receptacle through which others report information, and that it cannot be held responsible for publishing information from government agencies and other reliable sources. Motion at 5. That argument wrongfully seeks to sweep away Experian's duty to ensure the "maximum possible accuracy" of its reports under 15 U.S.C. § 1681e(b) and instead require debtor to dispute information as inaccurate before any liability attaches under the FCRA.

Second, Experian mistakenly argues that as a matter of law there is no possible way to accurately report student loans in bankruptcy. Specifically, Experian argues that it cannot be expected to report discharged student debts because it is a complicated legal dispute between two parties set against the backdrop of a complex federal statute. It is not – whether a student loan fits within 11 U.S.C. § 523(a)(8) can be easily determined through a reasonable procedure by reference to objective criteria. That objective criteria begins and ends by categorizing student loans as either qualified or non-qualified educational loans.

In an attempt to gloss over Plaintiff's proposal, Defendant seems to suggest that whatever its policies are should not matter because Experian is still accurate in most instances (since admittedly most student loans are federally insured/qualified education loans). However, Experian will not be reporting accurately as a result of a reasonable procedure— it will be a result of luck, or sheer statistical advantage. Neither of which is a legally permissible way of credit reporting.

Cushman v. Trans Union Corp., 115 F.3d 220, 225 (3rd Cir. 1997) ("The FCRA evinces Congress's intent that consumer reporting agencies, having the opportunity to reap profits through the collection and dissemination of credit information, bear 'grave responsibilities,' 15 U.S.C. § 1681(a)(4), to ensure the accuracy of that information."). Experian is legally obligated to adopt reasonable procedures to ensure the maximum possible accuracy of its credit reports. Notably 15 U.S.C. § 1681e(b) does not talk about accuracy in the aggregate, but about the *accuracy of the information for individuals.* 15 U.S.C. § 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure ***maximum possible accuracy of the information concerning the individual*** about whom the report relates.") (emphasis added). It is of no consolation to the millions of individuals with dischargeable student loans that Experian gets it right most of the time for other people.

FACTUAL AND PROCEDURAL BACKGROUND

On or about March 21, 2008, Mader incurred a student loan from Sallie Mae to attend Reformed Theological Seminary (the "Debt" or "Navient Loan"). Compl at ¶ 32. Reformed Theological Seminary was not a Title IV accredited school. Compl at ¶ 33.

On or about December 28, 2012, Plaintiff sought relief under Title 11 in this Court. Compl. at ¶ 34. On or about April 16, 2013, the United States Bankruptcy Court for the Southern District of New York entered a discharge in Plaintiff's chapter 7 bankruptcy. Compl at ¶ 35. The discharge order discharged all pre-petition debt that was not excepted from discharge under 11 U.S.C. 523(a) ("Section 523(a)").

Section 523(a)(8) excepts from discharge government insured student loans and also private education loans that are qualified education loans under the Internal Revenue Code. There is no dispute that loans made to non-Title IV accredited schools are not qualified education loans.

Accordingly, the Navient Loan was discharged on April 16, 2013 because it was plainly not a non-dischargeable student loan under section 523(a)(8).[2]

Thereafter and until at least April 30, 2019, Experian failed to report the Debt as discharged, and as of March. 2019, was reporting the Debt as still due and owing as having been "charged-off" with a "past due balance" of $9,009. Compl. at ¶ 37

In addition, since 2017, Experian has furnished the Plaintiff's credit report to not less than 8 entities. As examples, Experian furnished Plaintiff's erroneous credit report to: Discover Financial SVCS on March 22 and 28, 2019; (2) Capital One on October 5, 2018; and (3) Barclays Bank on September 11, 2018. See Compl, Exhibit B at pages 17-18.

On April 29, 2019, Plaintiff filed the complaint against Experian Information Solutions (Dkt. 1). On July 18, 2019, Experian filed a pre-motion to dismiss letter ("Experian Letter") (Dkt. 16). On July 25, 2019, Plaintiff responded to the Experian Letter ("Mader Letter") (Dkt. 17). On August 1, 2019, this Court held a scheduling conference and set a briefing schedule for Experian's proposed motion to dismiss (Dkt. 18). On August 29, 2019, Experian formally moved to dismiss the Complaint (Dkt. 20-22).

ARGUMENT

I. The operation of Sections 727 and 523(a) of the Bankruptcy Code

Experian's Motion is premised on a misunderstanding of how the bankruptcy discharge operates. That misunderstanding cannot defeat Plaintiff's complaint.

---

[2] Sallie Mae became Navient in 2014.

Experian posits that after a student debtor obtains a discharge under Title 11, the debtor must then take the affirmative step of filing an adversary proceeding under Fed. R. Bankr. Proc. 7001 and 7003 to prove that her student loan is dischargeable. See Motion at 7. Prior to initiation of the adversary proceeding, Experian argues that it cannot report that a student debt was discharged. Experian equivocates as to the reason for this misconception. It is unclear if Experian is arguing the debt *cannot be discharged* absent an adversary proceeding or that the parties *cannot know whether* the debt was discharged absent an adversary proceeding.

That distinction is both subtle and crucially important. In fact, it is the very distinction that underpins Plaintiff's theory of liability: Plaintiff's entire claim rests on the fact that the Debt was discharged, and that Experian should have and would have known this, and reported that accurately, if it had reasonable procedures in place to deal with student loans in bankruptcy. Plaintiff even described a very simple procedure that could be instituted. Rather than having one code for all student loans, Experian should create two codes: one for qualified education loans, and one for non-qualified education loans. Experian could simply request that creditors supply this information at the outset, and then Experian could automatically report those debts has having been discharged in bankruptcy upon receipt of a discharge notice, as it does with all other types of consumer debt.

Experian is also fundamentally wrong about discharges in bankruptcy orders. When a consumer files for relief under Title 11, she lists all pre-petition debt on her schedules. All debt will be discharged under either section 727 (for chapter 7s) or section 1328 (for chapter 13s) unless it fits within any of the nineteen exceptions to discharge under 523(a). *See* 11 U.S.C. § 727 ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . ."); *In re Speece,* 159 B.R. 314, 322 (Bkrtcy.E.D.Cal. 1993) ("The chapter 7 discharge discharges debtors from all debts that arose before the date of the order for relief under chapter 7, except nondischargeable debts."). Of those nineteen exceptions, three require affirmative action on the part of the creditor, and the other sixteen are self-effectuating. *In re Edwards*, 50 B.R. 933, 938 (Bkrtcy. S.D.N.Y 1985) ("Code § 523 specifies types of debts which may not be discharged. Three of the exceptions require creditor action to preserve; if the creditor fails to act promptly these types of debts are discharged. The balance of the exceptions to discharge do not require affirmative creditor action and are automatic."). The discharge order serves to discharge all the debts that are dischargeable. After a discharge order is issued, if either party is uncertain whether the debt was excepted from discharge it may seek a determination of discharge through an adversary proceeding. *In re Everly,* 346 B.R. 791, 795 (8th Cir. BAP 2006) ("There are nineteen exceptions to discharge listed in § 523(a) and all but three are self-effectuating . . .[o]bviously, there may be later disputes (this case is an example) over whether the debt fell into one of the appropriate categories."). But when they do, the party is only seeking declaratory relief because the debt was either discharged or not at the time of the court's discharge order. *In re Keenom*, 231 B.R. 116, 125 (Bkrtcy.M.D.Ga. 1999) ("Because the discharge has already taken place, the relief sought from the court by the parties after the case has closed is not an order to discharge the debt, but rather a declaratory order that the debt was or was not already discharged."); *In re Johnson,* 521 B.R. 912, 916 (Bkrtcy.W.D.Ark. 2014) ("The scope of the discharge is final when the court enters its order of discharge, and subsequent events cannot alter the determination that a debt either was or was not discharged.").

If a creditor elects to forgo obtaining a declaration, and proceeds to collect on a debt after discharge, the creditor proceeds at his own peril. *In re DiGeronimo*, 354 B.R. 625, 641

(Bkrtcy.E.D.N.Y. 2006) ("The Defendants here appear to have proceeded in State Court to collect the debt on an unfounded presumption that it was not discharged. They did so at their peril."); *In re Ganous*, 138 B.R. 110, 111 (Bkrtcy.S.D.Fla. 1992) ("However, whether a debt falls within the purview of § 523(a)(7) is a question of fact. If Broward fails to obtain a judicial determination that the debt is non-dischargeable, the creditor proceeds at its own peril."). If the creditor seeks to collect on a debt that turns out to have been discharged, the creditor is in violation of section 524 and may be sanctioned and held in contempt. *In re Ganous*, 138 B.R. 110, 111 (stating that if a creditor seeks to collect on a debt without obtaining a formal determination of discharge, the debtor may seek an order of contempt for discharge violations).

That is the same analysis that applies in the context of section 523(a)(8). As Plaintiff stated in the Mader Letter, the term "student loan" has no legal significance and is not defined anywhere in the Bankruptcy Code. Many types of dischargeable debts may be called "student loans" as a convenient label: personal loans to pay for college expenses, loans from friends and family, credit card debt incurred during college, loans to attend non-Title IV schools, loans to attend private secondary schools, and unpaid tuition owed directly to schools. Simply put, the term "student loan" is irrelevant as a legal matter. *In re Campbell*, 547 B.R. 49, 61 (Bkrtcy. E.D.N.Y. 2016) ("Simply calling the Bar Loan a student loan . . . says nothing about the dischargeability of the Bar Loan in bankruptcy."); *In re McDaniel*, 590 B.R. 537, 545 (Bkrtcy. D.Colo. 2018) ("'Educational' loans, or 'student' loans, are not nondischargeable simply because they are labeled as such; they must meet one or more of the criteria set forth in Section 523(a)(8)."). The question is whether the student debt fits within the exception to discharge in section 523(a)(8). *In re Haroon*, 313 B.R. 686, 689 (Bkrtcy.E.D.Va. 2004) ("A student loan creditor is not required to seek a dischargeability determination during the pendency of the bankruptcy case. The failure to seek a dischargeability determination does not alter the fact that the debt is or is not discharged upon entry of the discharge order. It merely avoids a judicial declaration of that fact at that time."). A debtor no more needs to file an adversary proceeding to prove a student debt falls outside section 523(a)(8) than she needs to file an adversary proceeding under section 523(a)(6) to prove the student debt is not a domestic support obligation.[3]

The cases relied upon by Experian are all distinguishable because those concerned when and how student loans that fit within section 523(a)(8) can be discharged if the debtor proves repayment would constitute an "undue hardship." That is completely inapposite to the Plaintiff's claim. Plaintiff had no need to demonstrate "undue hardship" through an adversary proceeding because the Navient Loan was automatically discharged by the discharge order because it did not fit within section 523(a)(8). *In re McDaniel*, 590 B.R. 537, 552 (Bkrtcy.D.Colo., 2018) ("That neither party sought to determine the dischargeability of the [Student Loans] until now does not alter whether or not the debts were discharged under Section 523(a)(8) at the time the Discharge Order was entered; thereafter they both proceeded at their own risk."); *In re Meyer,* 2016 WL 3251622, at *2 (Bkrtcy.N.D.Ohio, 2016) ("[T]he Court finds that the debtor's student loans were discharged on September 16, 2015, because they do not fall within 11 U.S.C. § 523(a)(8). The Court further finds that the student loan servicers violated the discharge injunction of § 524(a)(2) by attempting to collect on the student loan accounts after the date of the debtor's discharge."). Although many of the cases cited by Experian used the shorthand expression "student loan" when

[3] As the EDNY has noted, if all "student loans" were presumptively non-dischargeable, it would ensnare far too many types of debt that Congress never intended to capture under section 523(a)(8). *In re Homaidan,* 596 B.R. 86, 102 (Bkrtcy.E.D.N.Y. 2019) ("If this Section had the breadth for which the Defendants advocate, it is hard to see where it would end – conceivably, it could encompass credit card debt that was incurred to purchase textbooks, personal loans that were used to pay for tuition and school fees, and any other debt that, in one way or another, facilitated a student's efforts to gain the 'benefits' of an 'education.'").

discussing the "undue hardship" standard, such references were merely dicta in actions where the debtor was not disputing that the loans fit within section 523(a)(8).

II. <u>Plaintiff Has Adequately Pled That Experian's Procedures Are Unreasonable</u>

Plaintiff has pled that Experian's procedures are not reasonable to ensure the maximum possible accuracy of credit reports. *See* Compl. at ¶¶ 20, 22, 30-31, 77, 84. Despite arguing Plaintiff failed to plead this element, Experian's argument is that as a matter of law its procedures are reasonable. That is nearly always inappropriate at the motion to dismiss stage. "Defendant's imploration of the Court to determine whether Defendant's interpretation was 'reasonable' is inappropriate here: at the motion to dismiss stage, the Court's only role is to determine whether the *complaint* is sufficient." *Korman v. Walking Co.,* 503 F.Supp.2d 755, 761 (E.D.Pa.2007).

Experian seeks to escape liability by arguing that under *Henson/Sarver*, Plaintiff's claims must fail. Specifically, Experian argues that under *Sarver/Henson*, a credit bureau is able to rely on public records, or reputable financial institutions, to publish third party credit without any additional procedures to ensure maximum possible accuracy. *Henson/Sarver* are inapposite to the facts of this case for three reasons.

First, *Sarver/Henson* are Seventh Circuit precedents that have never been adopted by the Second Circuit. Courts in the Third Circuit have explicitly rejected it:

> There is no reason to believe that the Third Circuit would adopt the Seventh Circuit's holding in *Sarver,* as interpreted by Equifax, that a credit reporting agency's procedures are reasonable as a matter of law whenever the credit reporting agency simply repeats information received from a reputable source. Under such a holding, there is no incentive for credit reporting agencies such as Equifax or Experian to ever change or improve their current procedures. Under the holding that Equifax urges, as long as Equifax is simply repeating information from reputable sources, it has fulfilled its duty § 1681e(b) duty, even if there is easily available a procedure that would greatly improve accuracy at a minimal cost.

O'Brien v. Equifax Information Services, LLC, 382 F.Supp.2d 733, 739 (E.D.Pa. 2005)[4]

Second, *Sarver/Henson* are distinguishable from the facts in this case. *Henson* concerned the reporting of a court record that later turned out to have been entered in error. *Henson v. CSC Credit Services*, 29 F.3d 280, 285 (7th Cir. 1994) ("The documents do conclusively establish, however, that the clerk erroneously *noted* in the Judgment Docket that a money judgment had been entered against Greg."). *See also Salem v. Legal Liaison Service*, 2019 WL 1057371, at *4 (N.D.Ill., 2019)("In *Henson*, an Indiana state court erroneously noted in its Judgment Docket that a money judgment had been entered against one of the plaintiffs."). The Seventh Circuit found that it would be unreasonable require a credit bureau to determine whether a judgment was entered as the result of clerical error. This situation is completely different. Plaintiff is not claiming the record in this case is inaccurate or was entered in error—but rather that Experian's interpretation of the record is erroneous and unreasonable.

Sarver involved a certain Lloyd Sarver whose credit report showed a bankruptcy but who had never filed for bankruptcy (it turned out to have been a case of mistaken identity). The Plaintiff in *Sarver* argued that Experian lacked reasonable procedures to prevent the error from occurring. On summary judgement (not motion to dismiss), Experian provided testimony regarding the procedures it had in place to ensure the accuracy of its reports, which the Court found to be

[4] *See also Wilson v. Corelogic SafeRent, LLC*, 2017 WL 4357568, at *4 (S.D.N.Y. 2017) ("To accept SafeRent's argument that reliance on information obtained from a governmental agency, regardless of context, categorically insulates a CRA from liability, would severely undermine FCRA's remedial purpose.")*; Cortez v. Trans Union, LLC*, 617 F.3d 688, 710 (3d Cir. 2010) ("Congress surely did not intentionally weave an exception into the fabric of the FCRA that would destroy its remedial scheme by allowing a credit reporting agency to escape responsibility for its carelessness whenever misleading information finds its way into a credit report through the agency of a third party."); *Cushman v. Trans Union Corp.,* 115 F.3d 220, 225 (3d Cir.1997) ("The 'grave responsibility' imposed by § 1681i(a) must consist of something more than merely parroting information received from other sources").

objectively reasonable, notwithstanding the fact that a mistake had obviously occurred. *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) ("One can easily see how, even with safeguards in place, mistakes can happen. But given the complexity of the system and the volume of information involved, a mistake does not render the procedures unreasonable.").

In contrast to *Henson/Sarver*, this case is nearly identical case to *White v. Trans Union,* where the Central District of California rejected the *Sarver/Henson* argument as it related to reporting debt after bankruptcy discharge. In *White*, Plaintiffs alleged that the credit bureaus were failing to update their credit reports to reflect that certain debts were discharged in bankruptcy. The Defendants moved to dismiss on nearly identical grounds: "TransUnion further maintains that because the legal effect of such bankruptcy discharge orders is not readily apparent to entities, such as credit reporting agencies, that are not actual parties to the bankruptcy proceeding, it must be reasonable for them to rely exclusively upon the public record and information voluntarily provided by to update the status of discharged accounts." *White v. Trans Union, LLC,* 462 F.Supp.2d 1079, 1081 (C.D.Cal. 2006). The trial court rejected this argument:

> The FCRA and the CCRAA both obligate credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates" . . . nothing in these statutory provisions suggests that there is an exception to an agency's standard obligation to employ reasonable procedures to ensure maximum possible accuracy for bankruptcy-related information.
>
> *White v. Trans Union, LLC*, 462 F.Supp.2d 1079, 1081–82 (C.D.Cal. 2006) (citations omitted).

Third, the holdings in *Sarver/Henson* were *conditional* upon the information being provided by a reliable source. *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) ("In the absence of notice of prevalent unreliable information from a reporting lender, which would put Experian on notice that problems exist, we cannot find that such a requirement to investigate would be reasonable given the enormous volume of information Experian processes daily."). And this Court has held that *Henson* does not stand for the proposition that Experian is arguing. *Wilson v. Corelogic SafeRent, LLC*, 2017 WL 4357568, at *4 (S.D.N.Y., 2017) ("Contrary to SafeRent's position, courts have not held that reliance on the records received from a governmental agency is *per se* reasonable for purposes § 1681e(b)."). If Navient is reporting that all student loans are non-dischargeable, then Navient is clearly not a reliable source of information. As Plaintiff pled, the idea that all student loans are non-dischargeable is contradicted and foreclosed by the case law surrounding this issue, the media attention on that case law, the plain language of the discharge order, and Navient's public disclosures that loans like Plaintiff's are dischargeable in bankruptcy. Compl. at ¶ 30. At the very least, Navient's reliability raises a question of fact.

III. <u>Plaintiff Has Adequately Pled a Factual Inaccuracy</u>

Experian next argues that it is only liable for factual inaccuracies, and Plaintiff has failed to plead a factual inaccuracy. That is wrong. Plaintiff plainly alleged that Experian reported that the Debt is past-due and owing. It is factually incorrect that the Navient Loan has a past due balance. The Navient Loan was discharged on April 16, 2013. Plaintiff pled this fact. *Mortimer v. Bank of America, N.A.*, 2013 WL 1501452, at *10 (N.D.Cal. 2013) ("To avoid presenting a misleading picture, the creditor must also report that the account was discharged through the bankruptcy and the outstanding balance on that account is zero.")

The cases relied upon by Experian are inapposite. For example, in *Carvalho*, the plaintiff alleged that Equifax was misreporting a medical debt. However, the basis for this argument was that the plaintiff argued her insurance company should have paid the debt, and if the insurance company had paid the debt, then the information would not be accurate. In fact, the plaintiff in *Carvalho* admitted the information being reported by Equifax was technically true but that it would not be true if the insurance company had done what it promised her it would do. "Indeed, she concedes that '[a]ll the data that shows in my credit report is correct" on its face.' *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 891 (9th Cir. 2010). Likewise, in *Padgett*, the credit bureau was reporting a consumer loan. Plaintiff alleged that the loan violated Florida usury laws, and for that reason was void. But the Plaintiff in that case had never sued the lender seeking to have the loan voided. *Padgett v. Clarity Services, Inc.,* 2018 WL 6628274, at *2 (M.D.Fla., 2018) ("Padgett alleges that Clarity violated § 1681e(b) because Clarity should have known that Plain Green's "spurious" loans to the class members were "void and uncollectible."). Thus, the Padgett court likewise concluded that the Plaintiff failed to plead any inaccuracy absent a court order that voided the usurious loan. *Padgett v. Clarity Services, Inc*., 2018 WL 6628274, at *3 (M.D.Fla. 2018) ("Padgett's complaint fails in its entirety under § 1681e(b) because she does not allege that Clarity's reporting of the Plain Green debt was *inaccurate*."). Hupfauer is likewise distinguishable. Although Experian cites language from *Hupfauer* about the burden associated with reporting discharged debt, Experian fails to note the dispositive fact in the *Hupfaue*r case: the credit bureaus had zeroed out the balance on the discharged debt, which the court found made the report accurate and conformed with FTC guidelines on reporting discharged debts on credit reports. *Hupfauer v. Citibank, N.A.,* 2016 WL 4506798, at *5 (N.D.Ill. 2016) ("[A] consumer report may include an account that was discharged in bankruptcy (as well as the bankruptcy itself), as long as it reports a zero balance to reflect the fact that the consumer is no longer liable for the discharged debt."). Thus, again, the report in *Hupfauer* was technically accurate. [5]

Note the key distinction between the cases cited by Experian and the instant case: Mader filed for bankruptcy relief, and obtained a discharge order that discharged his debt. Plaintiff is not claiming the loan would have been discharged if he had gone into bankruptcy, or that he is operating under an "undue hardship" and therefore Experian should be reporting that the debt was discharged because the court would surely discharge the debt if he filed an adversary proceeding. Plaintiff has pled that his Debt was discharged because it was not excepted from discharge under section 523(a)(8). Compl. at ¶ 35. Plaintiff further pled that Experian lacks reasonable procedures for accurately reporting student loans, and that this was the cause of the factual inaccuracy on his report. Compl. at ¶ 43. *See Barton v. Ocwen Loan Servicing LLC*, 2013 WL 5781324, at *6 (D.Minn. 2013) ("In addition, if Ocwen knew that Plaintiff had filed for bankruptcy, but did not

[5] The rest of Experian's cases fare no better. In *Childres*, the debtor had voluntarily withdrawn her bankruptcy, whereas the credit bureaus were reporting the bankruptcy as "dismissed." The Seventh Circuit made two holdings. First, it was accurate to say the bankruptcy was dismissed, because a withdraw is a dismissal. *Childress v. Experian Information Solutions, Inc.,* 790 F.3d 745, 747 (7th Cir. 2015)("Every bankruptcy case that is 'withdrawn' at the request of the petitioner is dismissed. There was therefore no inaccuracy in the statement in the plaintiff's credit report that her bankruptcy petition had been dismissed."). Second, in the context of a withdrawn bankruptcy, the statute itself requires the debtor to provide documentation to that effect. *Id. at 746* ("The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.,* provides that "if any case arising or filed under Title 11 [the Bankruptcy Code] is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal."). Myrick was decided on summary judgment rather than 12(b)(6) and Equifax provided testimony regarding the reasonableness of its procedures which the court accepted as sufficient. *Myrick v. Equifax Information Services, LLC*, 2017 WL 3324467, at *3 (E.D.N.C., 2017). Phillips is confusing because in that case the district court denied the motion as to the FCRA claims finding that the Plaintiff had stated a claim for willful violations. *Phillips v. Archstone Simi Valley LLC*, 2016 WL 7444550, at *7 (C.D.Cal. 2016) ("Taking these allegations as true, the Landlord Defendants' violations of the FCRA were both knowing and reckless, entitling Phillips to punitive damages. *See Safeco*, 551 U.S. at 48, 68. Accordingly, their MJP is **DENIED** as to this claim.").

follow up to determine if the debt had been discharged, a reasonable jury could find that Ocwen willfully violated Plaintiff's FCRA rights when it pulled Plaintiff's credit history when it knew or should have known that the debt was discharged."). Furthermore, Experian's argument that the dischargeability of debt is "above-its-pay-grade" to determine is not unique to student loans. The dischargeability of each of Plaintiff's debts was arguably a complex "legal dispute" between two parties set against the complicated backdrop of Title 11. And yet, Experian accurately reported that the "SYNCB/CARE CREDIT" debt was discharged in bankruptcy. See Compl at Exhibit B at page 4.

IV. Plaintiff Has Pled Willfulness

Plaintiff has pled that Experian violated 1681e(b) willfully, or at least recklessly. As pled—and seemingly confirmed by Experian's Letter and Motion—Experian treats all student loans the same. *See* Compl. ¶ 21-22. But as Plaintiff pled in his complaint, there are crucial legal distinctions between qualified education loans, and non-qualified education loans. Experian has an affirmative policy of treating all student loans the same and affirmatively deciding to ignore any differnces that are plainly laid out in the Bankruptcy Code. Defendant's actions are willful, or reckless, for at least three reasons. First, the plain language of the discharge order put Experian on notice that not all "student loans" were excepted from the discharge. *See* Compl. ¶ 12. To the extent Experian interpreted "most" to mean "all," Experian was either intentionally misrepresenting the discharge order, or else made a grossly negligent reading of a court record. Experian's failure to understand how a bankruptcy discharge operates with a student loan is either willful, or reckless, given the discharge under 11 U.S.C. § 727 has been in operation for more than 40 years and Experian has apparently never taken the time to understand how it works. Second, there is a substantial body of case law articulating this distinction between dischargeable and non-dischargeable student loans, along with significant media attention discussing this case law. *See* Compl. ¶ 16-18. *Shah v. Stanley*, 2004 WL 2346716, at *9 (S.D.N.Y. 2004) (imputing knowledge of media reports to litigant). Third, the lenders themselves have publicly disclosed that loans like the Plaintiff's are dischargeable in bankruptcy. *See* Compl. ¶ 16-19. Accordingly, Plaintiff has sufficiently alleged that Experian has been either willful, or at least reckless, with regards to understanding the legal operation of a bankruptcy discharge, and developing procedures to ensure the maximum possible accuracy of reports with respect to dischargeable student loans.

V. Plaintiff Has Adequately Pled That Experian Furnished An Inaccurate Report

Plaintiff pled that Experian provided Plaintiff's erroneous credit report to not less than 8 potential creditors in the last 2 years. See Compl. at ¶ 50. Plaintiff went further and attached Exhibit B to the complaint, which shows the names of the creditors, and the dates Experian provided the credit report to them. *See* Exhibit B at pages 17-18. Indeed, Experian seems to have acknowledged the merits of this claim by virtue of dropping its statute of limitations defense. In its initial pre-motion letter, Experian argued that Plaintiff's claims were time-barred because his bankruptcy occurred more than 5 years ago. Plaintiff responded that the statute of limitations began to run from the date of issuance of each erroneous report. Defendant thereafter accepted this, and dropped its statute of limitations argument from its Motion. But if Experian acknowledges that its statute of limitations defense was hollow, its new argument that plaintiff failed to allege that Experian furnished an inaccurate report is equally meritless. The very grounds upon which this claim is timely is the same grounds upon which Plaintiff has pled that Experian furnished an inaccurate report.

VI. Plaintiff Adequately Pled Injury And Damages

Plaintiff pled two sources of injury: a decreased credit score, and reputational injury arising from Experian's representation of Plaintiff being in default on a debt. Both have been found sufficient injuries to confer Article III standing. First, decreased credit score has been found to constitute a cognizable injury. "It is clear that a reduction in credit score constitutes an injury in fact, and numerous courts have taken that view." *Miller v. Dish Network, L.L.C.*, 326 F.Supp.3d 51, 59 (E.D.Va. 2018) (collecting cases). Indeed, Plaintiff specifically pled that because of Experian's erroneous reporting, Plaintiff was denied improved credit opportunities. See Compl. at ¶ 45. The specific monetary value of that loss of credit will be developed in discovery. Second, Plaintiff pled that Experian's actions have caused reputational injury. Compl. at ¶ 44-49. Plaintiff pled that the error on his credit report was informing creditors that Mader remains in default on debt, even 6 years after his bankruptcy. This caused embarrassment and potential creditors to think that Plaintiff has learned nothing from his bankruptcy, and continues to be unable to manage his finances. Compl. at ¶ 47, 49. This Court has found such defamation actionable under the FCRA. *See Gambles v. Sterling Infosystems, Inc.,* 234 F.Supp.3d 510, 522–23 (S.D.N.Y. 2017) ("The effect, the SAC claims, was to falsely portray Gambles as shiftless, unstable and itinerant, and thus ill fit for business employment. These echo the sorts of allegations on which tort claims were permitted to proceed at common law, whether based on the disclosure of private information or theories of slander or defamation."). To the extent that Experian's argument is premised on a lack of actual damages rather than injury-in-fact, the Second Circuit has held that humiliation and mental distress constitute actual damages even absent demonstrable out-of-pocket costs under the FCRA. *Casella v. Equifax Credit Information Services*, 56 F.3d 469, 474 (2nd Cir. 1995) ("In granting appellees' motion for summary judgment, the District Court properly recognized that 'actual damages' may include humiliation and mental distress, even in the absence of out-of-pocket expenses."); *Gorman v. Experian Information Solutions, Inc.,* 2008 WL 4934047, at *7 (S.D.N.Y. 2008) (citing *Casella* and stating that actual damages may consist of either "out-of-pocket expenses or emotional distress."). Furthermore, Experian's argument that Plaintiff's bankruptcy is the primal and ultimate cause of his ruined credit is meritless. Motion at 24. People recover from bankruptcy. People rebuild their lives. People reenter the workforce, and the credit markets. That is the entire purpose of the "fresh start." For Experian to argue that Plaintiff should not be able to demand an accurate credit report today because he had a bankruptcy six years ago demonstrates just how cavalierly Experian takes it responsibilities under the FCRA.

CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court DENY the Defendant's Motion. To the extent the Court grants the Motion on any of the grounds found in Section V or VI of the Motion, Plaintiff requests leave to replead since those arguments were not raised in Defendant's pre-motion letter.

September 12, 2019

Respectfully submitted,

s/ Austin Smith

SMITH LAW GROUP
3 Mitchell Place
New York, New York 10017
(917) 992-2121
Austin@acsmithlawgroup.com

CERTIFICATE OF SERVICE

I certify that on September 12, 2019, I caused the above memorandum of law to be served upon all parties to this action registered on ECF.

/s Austin C. Smith