UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHRISTINE VARAD, Plaintiff, v. REED ELSEVIER INCORPORATED, d/b/a LexisNexis, Lexis Nexis Risk & Information Analytics Group, Inc., Defendant.	)	C.A. No. 06 CA 11370 MLW

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, defendant Reed Elsevier Inc. ("Reed") submits this memorandum in support of its Motion for Summary Judgment.

INTRODUCTION

In August 2006, Plaintiff filed this lawsuit claiming that "Reed d/b/a Lexis Nexis Corporation, Lexis Nexis Accurint" provided to Gall & Gall Company, Inc. ("Gall & Gall") a 1992 address that was false, defamatory and resulted in lost employment opportunities. Varad also alleged that, "upon information and belief," Reed provided the same information to the Massachusetts and Maine Board of Bar Examiners. In addition to the defamation claims, Varad alleges that Reed improperly denied her access to a "file" regarding the 1992 address.

The parties have exchanged initial disclosures and produced documents. Reed responded to Varad's interrogatories and admissions, deposed Varad and Gall & Gall, and received documents from Varad's former employer, F&W Publications, Inc. ("F&W"). Discovery closed on July 13, 3007.

As Reed will show below, the undisputed facts demonstrate that Varad cannot establish essential elements of her claims, and thus no genuine issue of material fact is presented and summary judgment for Reed on all counts is proper.

The undisputed evidence[1] reveals that prior to this lawsuit, neither Reed nor its alleged d/b/a, Lexis Nexis Risk and Information Analytics Group, Inc. ("Lexis Nexis Risk"), had any interaction whatsoever with Varad. Reed, in fact, is not doing business as Lexis Nexis Risk, and neither Reed nor Lexis Nexis Risk provided any information to Gall & Gall concerning Varad. The entity that did provide information to Gall & Gall concerning Varad – which is not a defendant in this case – is Seisint, Inc. ("Seisint"), a separate corporation owned by Reed. Varad offers no evidence as to why Reed should be held accountable for the alleged actions of a distinct legal entity.

Assuming *arguendo* that Reed was responsible for Seisint's actions, the evidence reveals that Varad's contentions do not support a triable issue of fact or law and further that Varad cannot prove the required elements of her claims. As a threshold matter, the Fair Credit Reporting Act 15 U.S.C. 1681 et seq. ("FCRA") is inapplicable here, as the testimony from Gall & Gall reveals that it only used the information from Seisint's Accurint database to confirm Varad's identity, and not for any purpose governed by the FRCA. Thus, Seisint did not act as a "consumer reporting agency" within the meaning of the statute. It follows, therefore, that Seisint's statement that Accurint is not a consumer reporting agency cannot form the basis for a claim under Mass. Gen. Laws c. 93A, as alleged.

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[1] Reed's undisputed facts are set forth in the accompanying Statement of Undisputed Facts ("SF" ¶_.") filed herewith. For brevity purposes, they will not be recited again herein.

Varad's defamation claim fares no better. As an initial matter, the allegedly incorrect information – an address from 1992 – is simply not defamatory. Moreover, the undisputed evidence reveals that F&W, Varad's employer, had no issue with the information provided by Seisint (or any other information in the Applicant Screening Report), and took no adverse action against her. Varad worked the length of her temporary assignment at F&W, and applied for no other positions at F&W. Thus, Varad has no reasonable expectation of proving that an address from 1992 defamed her or caused her "lost professional licensing opportunities." Finally, there is no evidence that Reed provided any information concerning Varad to the Massachusetts or Maine Board of Bar Examiners, and Varad has failed to put forward any evidence to the contrary. Even viewing these facts in a light most favorable to Varad, summary judgment on all counts is warranted.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. McCarthy v. Northwest Airlines, 56 F.3d 313, 314 (1st Cir. 1995). A "genuine issue" for summary judgment purposes only exists when there is evidence that "a reasonable jury drawing favorable inferences" could resolve it in favor of the non-moving party. Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 32 (1st Cir. 2000) citing Smith v. F.W. Morsely & Co., 76 F.3d 413, 427 (1st Cir. 1996).

In deciding summary judgment, the court "will not consider 'conclusory allegations, improbable inferences and unsupported speculation.'" Nolan v. Krajcik, 384 F. Supp. 2d 447, 457 (D. Mass. 2005). Once the moving party successfully demonstrates

that no issue of material fact exists, the burden then shifts to the non-movant. See Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). In order to defeat a motion for summary judgment, the non-movant must produce "specific facts, in evidentiary form, that establish the presence of a genuine issue for trial." Ward, 209 F.3d at 32.

II. THE UNDISPUTED EVIDENCE ESTABLISHES THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND THAT REED IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. The Undisputed Facts Reveal that Reed Did Not Provide Any Information to Gall & Gall Concerning Varad and Had No Communication with Varad Prior To the Filing of this lawsuit.

At the outset of this lawsuit, Reed moved to substitute Seisint for Reed because Seisint is the entity that provided information to Gall & Gall concerning Varad and communicated with Varad. Despite pointing out this fact and offering to simply substitute Seisint for Reed, Varad refused substitution and chose to go forward against Reed. In March 2007, Varad moved to change the d/b/a of Reed from "LexisNexis Corporation, Lexis Nexis Accurint" to "LexisNexis, Lexis Nexis Risk and Information Analytics Group, Inc."

Summary judgment in Reed's favor is compelled for a host of reasons, the first being that Varad sued the wrong entity. All the conduct alleged in the Complaint pertains to a non-party, Seisint, and not to Reed. As Steven Gall, the president of Gall & Gall, testified, neither Reed nor Lexis Nexis Risk provided ***any*** information to Gall & Gall concerning Varad. SF ¶ 6. Further, Henry Horbaczewski, Reed's Senior Vice President and General Counsel, confirmed that prior to the filing of this lawsuit, Reed did not receive any correspondence from Varad, including a c. 93A demand letter. SF ¶ 5. Varad's changing the d/b/a of Reed to LexisNexis Risk does nothing to change the fact that Reed is not the proper defendant. Lexis Nexis Risk, a Minnesota corporation, is a

separate legal entity from Reed, and Reed is not doing business as "LexisNexis, Lexis Nexis Risk and Information Analytics Group, Inc." SF ¶ 2.

Varad's own documents support Reed's position. None of the correspondence from Varad concerning the information provided to Gall & Gall even mentions Reed or Lexis Nexis Risk. To the contrary, Varad's correspondence contends that the "Lexis Nexis **Accurint** databases" were the source of the disputed address information. (emphasis added). SF ¶ 23. Seisint, not Reed or Lexis Nexis Risk, owns the "Accurint" database, and Seisint is a separate legal entity from Reed. SF ¶¶ 3,7.

Furthermore, as stated by John Byrne, Director and Senior Corporate Counsel for Seisint, all of the correspondence sent to Varad was from Seisint – not Reed or Lexis Nexis Risk. SF ¶ 4. Reed does not have an office at the Boca Raton, Florida address to and from which the correspondence concerning Varad was sent. SF ¶ 3. These undisputed facts dictate summary judgment on all counts for Reed.

III. EVEN IF THE COURT WERE TO SUBSTANTIVELY EVALUATE VARAD'S CLAIMS, SUMMARY JUDGMENT FOR REED IS STILL PROPER BECAUSE VARAD CANNOT PROVE ESSENTIAL ELEMENTS OF HER CLAIMS

Even assuming *arguendo* the Court reached the substance of Varad's allegations and essentially equated Seisint with Reed (despite any legal basis to do so), summary judgment dismissal is still warranted.

A. The Undisputed Facts Show that Seisint Was Not Functioning as a "Consumer Reporting Agency," as Defined by 15 U.S.C. § 1681a(f), by Providing Name and Address Data to Gall & Gall to Verify Varad's Identity.

Varad claims that Reed violated the FRCA in failing to provide her with the contents of her "file" in response to her request. Putting aside the fact that Reed never corresponded with Varad prior to her filing this lawsuit – and thus did not deny her

access to anything (SF ¶ 5) – Varad's FCRA claim still fails. In order for the FCRA to be applicable here, Seisint[2] had to have been functioning as a "consumer reporting agency," as defined by section 603(f) of the FCRA, 15 U.S.C. § 1681a(f), in providing Varad's name and address data to Gall & Gall. The undisputed evidence reveals that Gall & Gall used the name and address data in the "address source manager" report provided by Seisint ***only*** to verify Varad's identity – to determine that Varad was who she claimed to be. SF ¶ 13. Providing information for identity verification is not a purpose covered by the FCRA. See e.g., Dotzler v. Perot, 914 F. Supp. 328, 330-31 (E.D. Mo. 1996), aff'd, 124 F.3d 207 (8th Cir. 1997). Seisint was not functioning as a consumer reporting agency.

The FCRA's definitions of the terms "consumer reporting agency" and "consumer report" are interrelated, each referring to and dependent upon the other. See 15 U.S.C. §§ 1681a(d), 1681a(f). Consequently, Seisint cannot be deemed to be functioning as a consumer reporting agency unless the information in the "address source manager" report that it communicated to Gall and Gall was a consumer report. The FCRA defines the term "consumer reporting agency" to mean any person which "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 USC § 1681a(f). However, to qualify as a "consumer report" under the FCRA, information (i) must "bear[] on" at least one of seven enumerated factors, and (ii)

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[2] In this section, Reed makes its opposition on behalf of Seisint, the only entity that provided the allegedly incorrect information to Gall & Gall. As set forth above, Seisint is a separate legal entity from Reed and Lexis Nexis Risk (SF ¶¶ 2,3), Seisint, not Reed or Lexis Nexis Risk, owns the Accurint database (SF ¶ 7), and Seisint, not Reed or Lexis Nexis Risk, provided the information to Gall & Gall and corresponded with Varad (SF ¶ 5,6). Accordingly, Reed's Motion for Summary Judgment on all counts should be granted on these facts alone.

be "used or expected to be used or collected" for establishing a consumer's "eligibility" for credit, insurance, employment, or other "permissible purposes" authorized under the FCRA, and (iii) must be communicated by a consumer reporting agency. 15 U.S.C. § 1681a(d). By definition, Seisint cannot be deemed to have functioned as a consumer reporting agency because the information it communicated to Gall & Gall was not a consumer report. The information concerning Varad that Seisint communicated to Gall & Gall for the purpose of verifying Varad's identity was not a consumer report because such information does not bear upon one or more of the FCRA's enumerated factors, nor was it "used or expected to be used or collected" for one of the "permissible purposes" governed by the FCRA.

First, the information regarding Varad that Seisint communicated to Gall & Gall for identity verification purposes, her name, current and prior addresses, date of birth partial social security number and phone number, did not meet the threshold requirement of a consumer report. As a matter of law, such identification information is not a consumer report because it does not bear upon Varad's "creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" – the enumerated factors in the FCRA. 15 U.S.C. § 1681a(d)(1). Dotzler v. Perot, 914 F. Supp. 328, 330-31 (E.D. Mo. 1996), aff'd, 124 F.3d 207 (8th Cir. 1997) (address updates furnished by a credit bureau containing only consumers' names, current addresses, former addresses, and, for some consumers, social security account numbers, was not a "consumer report" because it did not bear upon the FCRA's enumerated factors); see also Individual Reference Servs. Group v. FTC, 145 F. Supp.2d 6, 20 (D.D.C. 2001) (noting that the Federal Trade Commission, which is the federal agency primarily responsible for

enforcing the FCRA, takes the position that a report consisting only of identification information typically printed at the top of a credit report "was not subject to the FCRA because it 'does not bear on the creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living, unless such terms are given an impermissibly broad reading'").

Even assuming *arguendo* that identification information may in some circumstances bear upon a person's creditworthiness or other FCRA enumerated factor, the "address source manager" report that Seisint furnishes to customers for identity verification purposes does not bear upon any of the enumerated factors for the persons whose identity is being authenticated. Determining the likelihood that someone is who they claim to be reveals virtually nothing about the "real" job applicant that would then be used to evaluate her fitness for the position to be filled. For example, the "real" applicant for employment may or may not be creditworthy or have a bad reputation, but the employer cannot proceed to even think about these issues until it determines whether the person applying for employment is in fact the person she claims to be.

Second, the identification information furnished by Seisint is not a consumer report because it is neither collected nor expected to be used as a factor in making eligibility decisions. It cannot reasonably be contended that detecting or screening out fraudsters from the employment application process constitutes an evaluation of a *bona fide* applicant's fitness or eligibility for employment. Until the employer reasonably assures itself that the person with which the employer believes it is interacting is in fact the person she claims to be, the employer cannot proceed to evaluate the applicant's application and otherwise decide whether this "real person" is someone whom it wishes

to consider for employment. Authenticating a person's identity is a prerequisite – but not equivalent to – determining that person's eligibility for employment.

This analytical distinction is analogous to the difference between a college board testing service (i) determining that a high school student to whom it is administering a standardized college admission test is in fact who he claims to be and (ii) and evaluating his performance on the standardized college admission test. Determining that the student is who he claims to be does not constitute determining his test score or eligibility for admission to college. Until the college board testing service reasonably satisfies itself that the person with which it is interacting is not impersonating someone else, the college board testing service cannot proceed to score to the person for his performance on the standardized test. That is, authenticating a student's identity is a prerequisite – but not equivalent to – determining that person's eligibility for admission to college. By the same reasoning, authenticating a person's identity is not equivalent to determining that person's eligibility for employment. While determining a person's eligibility for employment is covered by the FCRA, authenticating that same person's identity is not.

Furthermore, the evidence in the record establishes that the "address source manager" report furnished by Seisint was neither collected nor expected to be used as a factor in making eligibility decisions concerning Varad because Seisint takes affirmative steps to prohibit its customers from using the information for any "permissible purpose" covered by the FCRA. SF ¶ 26. Seisint's contract with Gall & Gall specifically prohibits Gall & Gall from using Seisint's Accurint database information for any purpose covered by the FCRA. Id. As the president of Gall & Gall confirmed, Gall & Gall complied with its contractual obligations with Seisint, and only used the information in the "address

source manager" for its intended purpose – to verify Varad's identity. SF ¶¶ 13,26. Gall & Gall did not use the Accurint information to determine Varad's eligibility for employment or whether she should be employed by F&W, or for any other purpose. Id. Consequently, the identification information furnished by Seisint was not collected, or expected to be used, or used as a factor in making eligibility decisions, and thus is not a consumer report. Id. Therefore, Seisint cannot be deemed to have functioned as a consumer reporting agency.

This evidence conclusively shows that Seisint did not function as a consumer reporting agency, but rather simply provided Gall & Gall with threshold identification information, a purpose not covered by the FCRA. Thus, the fact that Seisint did not provide Varad with the contents of any "file" is of no consequence here. For these reasons, summary judgment for Reed on Varad's FCRA claim should be granted.

B. Varad Cannot Establish the Elements of Defamation.

i. The Undisputed Facts Show that the Address Information Provided By Seisint Did Not Cause F&W To Conclude that Varad Lied on her Employment Application or To Take Any Adverse Action Against Her

The undisputed evidence shows that Varad cannot establish the elements required to sustain a claim for defamation. A defamation plaintiff must show that the "defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss." Amrak Productions, Inc. v. Morton, 410 F.3d. 69, 72 (1st Cir. 2005). "A communication is susceptible to defamatory meaning if it 'would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment of the community.'" Id. The

threshold question of "whether a communication is reasonably susceptible of a defamatory meaning, is a question of law for the court." Id. (internal quotations omitted).

In the instant case, Varad argues that by providing allegedly incorrect address information to Gall & Gall and potentially others, Reed somehow defamed her. As a threshold matter, the statements (assuming Varad could put forth admissible evidence to show that they were made by Reed) simply are not defamatory, as a South Dakota address from fourteen years ago cannot possibly subject Varad to "scorn, hatred, ridicule or contempt." See Albright v. Amrak Productions, Inc., 321 F. Supp. 2d 130, 136 (D. Mass. 2004) aff'd Amrak Productions, Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005); see also Nolan v. Krajcik, 384 F. Supp. 2d 447, 457 (D. Mass. 2005); Fitzgerald v. Town of Kingston, 13 F. Supp. 2d 119, 126 (D. Mass. 1998). Varad concedes that the statements regarding her address history are not "inherently disparaging," but she nonetheless contends that the address history provided in the "address source manager" is capable of being defamatory because she believes it caused F&W to determine that she had lied on her employment application. See Varad's First Motion for Summary Judgment [docket entry 12]. Other than her "belief," however, the record is devoid of any evidence to support her contention.

For Varad to meet the threshold requirement of the information being susceptible to a defamatory meaning, Varad must show that "any considerable and respectable class of the community" would discredit Varad based on the purported defamatory information – in this case, address from 1992. Albright, 321 F. Supp. 2d at 135. In an attempt to meet this requirement, Varad contends that as a result of the address information, F&W concluded that Varad lied on her employment application. The Affidavit of Richard

Wallace, Varad's supervisor at F&W, completely contradicts Varad's claim. In his Affidavit, Mr. Wallace swears that (i) the Applicant Screening Report (which contained the address source manager information) was not an issue or problem for F&W, (ii) F&W did not conclude that Varad lied on her employment application, and (iii) F&W took no adverse action against Varad as a result of the information in the Applicant Screening Report. SF ¶¶ 17-19. Mr. Wallace goes on to state that if F&W had had an issue with the Report, it would not have continued to employ Varad as it did. Id. Thus, Varad cannot prove an essential element of her claim – that the address information was defamatory.

While the above facts are sufficient to support summary judgment for Reed on the defamation claim, further evidence dictates this result as well. In Varad's employment application to F&W, the "residential history" section directed: "[a]ll applicants must account for the last 10 years." SF ¶ 18. In completing this section, Varad listed only a single address, the address that she confirmed at her deposition has been her address continually since at least 1995. Id. However, the address which Varad claims "defamed" her was from 1992 – more than 10 years old – and thus was not requested, nor would it have been included, on Varad's employment application. Id. Therefore, given that the "defamatory" address allegedly provided by Reed did not contradict anything in Varad's employment application (because only the past 10 years were to be listed), even without F&W's Affidavit, no reasonable inference could be made that such information would somehow cause F&W to conclude that Varad lied. Without a statement that is capable of a defamatory meaning, Varad's claim fails. See Albright, 321 F. Supp. 2d at 135.

Varad also contends that she was defamed because "legitimate address history information such as my former marital address in Burlington, Massachusetts was missing

from the Lexis Nexis Accurint address history report so that when I **truthfully** included that address information as requested...it appeared as though I was being untruthful regarding my address history...". SF Tab 7, Exhibit 14 at ¶ 2. (emphasis added). As noted above, Varad only listed her current address on the application. Thus, no "untruthfulness" could possibly be inferred. In fact, Varad testified that she does not believe she updated her license to reflect the Burlington, Massachusetts address. SF ¶ 20. In any event, Varad's own evidence undermines any claim of defamation.

Other evidence in the record independently confirms that F&W did not conclude that Varad lied on her employment application. F&W's employment application states that if F&W denies employment because of information it obtained from a consumer reporting agency, F&W must notify the applicant of such, including providing the applicant with the name of the consumer reporting agency. SF Tab 6, Exhibit A. Varad has failed to produce any evidence indicating that this notice was ever provided.

Finally, assuming *arguendo* this Court finds that the statements at issue could be reasonably susceptible to a defamatory meaning, Varad's claim would still fail, because, as attested to by F&W, F&W took no action against Varad as a result of the address information. See e.g., Albright, 321 F. Supp. 2d at 139 (damages in defamation claim needed to be a "specific claim of actual harm"). Thus, because no adverse action was taken against Varad and she worked the entire length of her temporary position, Varad has not suffered any damages.

ii. The Undisputed Evidence Reveals That No Address Information Was Provided To the Massachusetts or Maine Board of Bar Examiners Concerning Varad

Varad alleges, "upon information and belief," that Lexis Nexis Accurint provided the same address history information to the state of Massachusetts Board of Bar

Examiners and the State of Maine Board of Bar Examiners. SF ¶ 30.

As an initial, dispositve matter, Varad admittedly did not pass the bar exam in any jurisdiction, including Massachusetts and Maine. Id. Thus, Varad's inability to practice law was not caused by, and has nothing to do with Reed, Lexis Nexis Risk or Seisint, because a prerequisite to being admitted in Massachusetts or Maine is achieving a passing grade on the respective bar exams. Id. Given that Varad never passed the bar exam in either jurisdiction, she cannot show a causal connection between any conduct by Reed and any alleged damages she claims she suffered.[3]

Putting aside the causal connection, Varad still cannot establish that a defamatory statement was made. Discovery (as opposed to Varad's "belief") has revealed that the Maine Board of Bar Examiners did not receive any information from Seisint, Reed or Lexis Nexis Risk concerning Varad. SF ¶ 31. Further, there is no evidence of any searches conducted by the Massachusetts Board of Bar Examiners, nor does Seisint have a contract with the Massachusetts Board of Bar Examiners for its Accurint database. Varad has not produced any evidence to the contrary. SF ¶ 32.

However, even if one were to assume that Reed or Seisint had provided address information to the Massachusetts Board of Bar Examiners (which it did not), Varad's

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[3] Varad's causation allegation also directly contradicts her prior sworn testimony in an action she pursued against the Chairman of the Board of Bar Examiners. Varad v. Barshak, 261 F.Supp.2d 47 (D. Mass. 2003)(summary judgment dismissal), aff'd, 93 Fed. Appx. 255 (1st Cir.), cert. denied, 543 U.S. 873 (2004). In that action, Varad submitted an affidavit claiming the Bar Examiner's alleged denial of an adequate accommodation to a handwriting disability was the ***sole*** cause of her inability to practice law. SF ¶ 34. Varad now claims that Reed is responsible for her non-admission to the Massachusetts bar. Varad's document production does not support her claim for damages either. In her initial disclosures, Varad claims that she made "full disclosure" of her damages claim in the documents she produced in this litigation (and thus provided no computation or category of damages, as required by Rule 26(a)(C)). In response to Reed's request for "all documents concerning the damages plaintiff alleges were caused by Reed..." (request No. 12), Varad produced printouts from www.infirmation.com of salaries for 1st through 8th year attorneys at seven of the largest Boston law firms. Having never passed the bar exam, this information is completely irrelevant. The only other documents Varad produced to support her claim of damages is a 13 page application for employment for Lustig, Glaser & Wilson, P.C. (with only the first eight lines of page 1 filled out), and some miscellaneous corporate filings.

defamation claim still fails because the applications Varad submitted for the Massachusetts bar exam did not request address history – rather the application only required a current address. Id.[4] Thus, Varad did not "truthfully" – or otherwise – list her prior addresses on the Massachusetts bar application, and therefore even if Reed had provided address information, it would not have contradicted Varad's bar applications. Since Varad claims this purported "contradiction" is the basis for her defamation claim, the claim fails. Id.

In conclusion, Varad cannot prove a defamatory statement, a causal connection, or damages with regard to her defamation claim against Reed. Because these are essential elements of her claim, summary judgment for Reed on this count is warranted. See Kourouvacilis v. General Motors Corp., 410 Mass 706, 716 (1991)(summary judgment proper where plaintiff has no reasonable expectation of proving an essential element of the claim).

C. Varad Cannot Establish the Essential Elements of a Claim for Violation of M.G.L. c. 93A.

Varad premises her 93A claim on the allegation that Reed made misleading claims to her that it does not function as a consumer reporting agency.[5] See Second Amended Complaint, ¶ 11. Two gating predicate grounds – absence of a pre-suit demand letter and absence of a commercial relationship – warrant summary judgment for Reed on

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[4] Reed was able to obtain Varad's applications to the Massachusetts Bar. However, the Maine Board of Bar Examiners stated policy is that bar applications are confidential. To date, Varad has refused to produce any documents responsive to Reed's first request for production of documents concerning her bar applications, results, or other documents pertaining to the applications from either Massachusetts or Maine. Varad maintains her refusal to produce these documents notwithstanding a discovery conference, wherein counsel for Reed made a specific request for such documents.

[5] To the extent that Varad's 93A claim is based on her allegations of defamation, dismissal is warranted for the reasons set forth in § III(B). See e.g., Albright, 321 F. Supp. 2d at 142 ("where allegedly defamatory statements do not support a cause of action for defamation, they also do no support a cause of action under G.L. c. 93A"); accord Cronis v. General Elec. River Works Employees Credit Union, 812 N.E.2d 1244 (2004).

the 93A claim.

First, neither Reed nor Lexis Nexis Risk has been served with a demand letter, as the statute requires. SF ¶ 5. Case law is clear that failing to adhere to the demand letter requirement mandates dismissal of the 93A claim. See M.G.L. c. 93A §9(3)(thirty days prior to filing suit, a demand letter must be served on the defendant); City of Boston v. Aetna Life Ins. Co., 399 Mass. 569, 574, 506 N.E.2d 106, 109 (1987)(failure to allege sending of 93A demand letter is fatal); McMahon v. Digital Equipment Corp., 944 F. Supp. 70, 77 (D. Mass. 1996)(same).

Reed's evidence shows that the only entity that received or made communications with Varad prior to the litigation was Seisint. SF ¶ 4. Varad's own correspondence, her purported 93A demand letter, was addressed to "Lexis Nexis Accurint" at Seisint's corporate offices in Boca Raton, Florida. SF ¶ 23. Reed does not have an office at the Boca Raton, Florida address, and no where in the letter is Reed or Lexis Nexis Risk mentioned. SF ¶¶ 3, 23. These facts conclusively establish that Varad has not meet the demand requirement of M.G.L. c. 93A § 9(3).

Second, because neither Reed nor Lexis Nexis Risk corresponded with Varad, neither was engaged in a commercial relationship with Varad. See e.g. Begelfer v. Najarian, 409 N.E.2d 167, 176 (Mass. 1980) (court held that defendants were not engaged in trade or commerce as required by c. 93A because their participation in the underlying transaction was minimal, stating that to meet the "trade or commerce" requirement of 93A, courts must consider "whether the participant played an active part in the transaction."). In this case, the undisputed evidence shows that neither Reed nor Lexis Nexis Risk played ***any*** role in the transaction at issue, because they did not

correspond with Varad prior to the institution of this lawsuit. SF ¶ 5. Thus, Varad fails to establish the "trade or commerce" requirement, and, for this additional reason, summary judgment is proper.

Even if plaintiff could clear these two barriers, a third, independent reason requires summary judgment dismissal of Varad's 93A claim. Varad contends that a 93A claims lies because, in response to her request for her "file," Reed unfairly and deceptively stated that it was not a consumer reporting agency. Assuming *arguendo* that Reed was responsible for Seisint's statement that Accurint is not a consumer reporting agency and thus not governed by the FRCA, this claim hinges solely on whether Seisint is falsely claiming that it is not a consumer reporting agency. As Reed demonstrated above, infra § III(A), any such statement is true. Thus, there is nothing unfair or deceptive about it, and Varad cannot meet an essential element of a 93A claim. See Albright, 321 F. Supp. 2d at 139.

D. Varad's Prior Affidavit Is Not Admissible for Summary Judgment Purposes Because it Is Based Upon "Information and Belief," Not Facts.

Varad's contentions are unsupported by documentary evidence or admissible testimony. The affidavit Varad previously filed in support of her first motion for summary judgment rests largely upon "information and belief." In order to be admissible for summary judgment, however, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); see also Goguen v. Textron, Inc., 234 F.R.D. 13, 16 (D. Mass. 2006). "The object of Rule 56(e) is not to replace conclusory allegations of the complaint with conclusory allegations

of an affidavit." Ahmed v. Berkshire Medical Center, Inc., No. 98-1496, 1999 U.S. App. LEXIS 24961 at * 1 (1st Cir., Oct. 5 1999).

Thus, the seven paragraphs in Varad's affidavit asserted "upon information and belief" or upon "belief" are inadmissible and should not be considered in opposition to Reed's present motion. See National Tower LLC v. Plainville Zoning Board of Appeals, 297 F. 3d 14, 24 (1st Cir. 2002)(qualification that "I am informed and believe" would make statements inadmissible to support summary judgment). Particularly concerning, for example, are Varad's claims that (upon information and belief) Reed provided "defamatory and libelous" address history information to the Massachusetts and Maine Board of Bar Examiners, and that such information has adversely affected her ability "to earn a living in [her] chosen profession." SF Tab 7, Exhibit 14 at ¶ 10. Despite the seriousness of these allegations, there is not a scintilla of evidence in the record to support her claim that ***any*** information was ***ever*** provided to the Massachusetts and/or Maine Board of Bar Examiners by Reed (or any entity associated with Reed), nor is there any evidence that if such information was provided, it was defamatory or libelous, or that it impacted in any way her ability to practice law. See infra, § III(B). In fact, the evidence shows that Varad's inability to practice her chosen profession (law) is due only to the fact that she failed the Massachusetts and Maine bar exam on four separate occasions. SF ¶ 30.

Furthermore, Varad's Affidavit is replete with conclusory statements that are based on inadmissible evidence. For example, Varad states that based on the "assertions" on the Accurint web site, she "formed a belief" that "Lexis Nexis Accurint reported the same false, misleading and libelous address information and data concerning my address

history was reported [sic] to government agencies and law enforcement and court representatives of the State of Massachusetts...." SF Tab 7, Exhibit 14 at ¶¶ 4,5. These statements are wholly unsupported and conclusory, and are inadmissible at summary judgment. See e.g. Ahmed, 1999 U.S. App. LEXIS 24961 at *1 (noting plaintiff's insistence that he has "personal and sensory knowledge" of all of the recited facts did not overcome their conclusory or hearsay nature).[6]

CONCLUSION

For the reasons stated herein, summary judgment in favor of Reed is proper on all counts. Varad cannot prove essential elements of her claims, and thus has no reasonable expectation of success at trial. The undisputed, material facts dictate that no genuine issue of fact exists and that summary judgment is proper as a matter of law.

REED ELSEVIER INC.

By its attorneys,

/s/ Kristin M. Cataldo
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Dated: August 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2007, I caused a copy of the foregoing to be served on Christine M. Varad, P.O. Box 583, Milton, MA 02186 via first class mail.

/s/ Kristin M. Cataldo
Kristin M. Cataldo

[6] While Varad's statements made "upon information and belief" in her Affidavit are inadmissible hearsay and thus cannot be admitted to prove the truth of her assertions, the statements are admissions made under oath which are binding on Varad. See Fed. R. Evid. 801(d)(2).