UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re Yvette R. Torres,

Plaintiff.

Chapter 7 Case No. 05-11409-rdd

Yvette R. Torres,

Plaintiff,

- against -

Chase Bank USA, NA,

Defendant.

Adv. Pro. Case No. 06-01576-rdd

PLAINTIFF'S OPPOSITION TO MOTION OF CHASE BANK USA, NA

Comes now the Plaintiff, Yvette R. Torres, by and through her attorneys, in response to the Defendant's motion to dismiss.

INTRODUCTION

The Plaintiff, Yvette R. Torres (hereinafter "Plaintiff"), filed the instant adversary proceeding on July 3, 2006. The Plaintiff asserts that the Defendant, Chase Bank USA NA (hereinafter "Defendant" or "Chase"), violated the Chapter 7 discharge injunction and The Fair Credit Reporting Act (herein after "FCRA"), 15 U.S.C. §1681 *et seq*. by attempting to collect a pre-petition indebtedness. The complaint seeks monetary damages by and through this Honorable Court's inherent and statutory contempt powers as provided by 11 U.S.C. § 105 as well as by 15 U.S.C. §1681 *et seq*..

On December 18, 2006, the Defendant filed a motion to dismiss pursuant to F.R.C.P. 12(c). The Defendant's motion to dismiss alleges that the Defendant's failure to accurately and properly report the pre-petition discharged debt as having a $0 balance due does not constitute a violation of

11 U.S.C. §524, that Plaintiff is not entitled to recover for contempt of 11 U.S.C. §524, and that Plaintiff's claims under the Fair Credit Reporting Act and for defamation are precluded.

Plaintiff opposes the Defendant's motion to dismiss based upon the following:

FACTS

Defendant's motion to dismiss sets forth the relevant facts. The Plaintiff does not dispute those facts. Plaintiff will not burden the Court with a mere recitation of any of the other facts.

ARGUMENT

POINT I: CHASE'S FALSE REPORTING THE DISCHARGED DEBT AS DUE AND OWING MAY BE FOUND TO HAVE CONSTITUTED AN ACT TO COLLECT

A. STANDARD FOR DISMISSAL PURSUANT TO FRCP 12(C)

When deciding a Rule 12(c) motion for judgment on the pleadings, the court applies the same standard as is used in deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Greco v. Trauner, Cohen & Thomas, L.L.P.,* 412 F.3d 360, 363 (2d Cir.2005). In a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court "must accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff." *Albert Furst von Thurn und Taxis v. Karl Prince von Thurn und Taxis***,** 2006 WL 2289847 (SDNY 2006) (quoting *Bolt Elec., Inc. V. City of New York,* 53 F.3d 465, 469 (2d Cir.1995) (citations omitted)). "The district court should grant such a motion only if, after viewing plaintiff's allegations in this favorable light, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir.1999). A court's review of such a motion is limited to the facts stated in the complaint or in documents attached to the complaint as exhibits

or incorporated into the complaint by referenced, and may also consider matters of which judicial notice may be taken. *Kramer v. Time Warner Inc.,* 937 F.2d 767 (2d Cir. 1991). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Berhneim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996). Dismissal is not warranted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Cooper v. Park,* 140 F.3d 433, 440 (2d Cir.1998) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)).

By requiring only a short and plain statement of the claim showing that the pleader is entitled to relief, Rule 8(a)(2) imposes a low pleading burden on the plaintiff. *In re Southeast Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995). This rule "establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *United Stated v. Baxter Int'l, Inc.*, 345 F.3d 866 (11th Cir. 2003).

B. DEFENDANT HAD A DUTY TO TAKE AFFIRMATIVE STEPS TO ACCURATELY REPORT PLAINTIFF'S PRE-PETITION OBLIGATION

The Fair Credit Reporting Act was enacted in 1970 to ensure fairness and accuracy in credit reporting and to implement reasonable procedures in reporting consumer debt to every "consumer reporting agency" (CRA). It is prefaced with a congressional finding that "unfair credit methods undermine the public confidence which is essential to the continued functioning of the bankruptcy system." 15 U.S.C. Section 1681(a)(1). The FCRA is designed to protect consumers from inaccurate or arbitrary information in a consumer report and to establish reporting practices that utilize accurate, relevant and current information in a confidential and responsible manner. See, e.g, St. Paul Guardian Ins. Co. v Johnson, 884, F.2d 881 (5th Cir. 1989). The general purpose of the

FCRA is to protect the creditworthiness and reputation of every consumer. See, e.g., Ackerly v Credit Bureau of Sheridan, Inc., 385 F. Supp. 658 (D. Wyo. 1974).

A creditor that reports debts to the credit reporting agencies has a duty to accurately report and maintain the accuracy of the information throughout the debtor's relationship with the creditor. Pursuant to 15 U.S.C. § 1681s-2(a)(1)(A), a furnisher is not permitted to furnish any information relating to a consumer to any consumer reporting agency if the furnisher knows or has reasonable cause to believe that the information is inaccurate. 15 U.S.C. §1681s-2(a)(2) places a duty on a furnisher to notify a consumer reporting agency of any inaccurate or incomplete information provided with respect to a consumer's tradeline. Such an inaccuracy would necessarily include a balance due to a furnisher on an account when that account has been sold or transferred.

In the bankruptcy context, the furnisher may have reported a debt as a slow pay, over 30 days late, or as a charged off account prior to the debtor's bankruptcy filing. After the filing, the creditor is allowed under the Act to list the bankruptcy in the information it provides to the CRA. However, when that debt has been discharged in either a Chapter 7 or 13 bankruptcy then the furnisher should amend the report to the CRA and provide that the debt has a "0" balance. The bankruptcy may still be listed, for a period of up to 10 years from the date of filing, but the discharged trade-line debt cannot remain showing a balance due.

Specifically, the FTC Commentary to the FCRA at Section 607(F)(6) provides as follows: "A consumer report need not be tailored to the user's needs. It may contain any information that is complete, accurate, and not obsolete on the consumer who is the subject of the report. 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 due to reflect the fact that the consumer is no longer liable for the discharged debt."

In the instant action, Defendant was a listed creditor in Plaintiff's Chapter 7 bankruptcy case. Defendant was notified both of the filing of the Plaintiff's Chapter 7 bankruptcy case as well as of the discharge of the Plaintiff's pre-petition debt to Defendant. As such, Defendant knew that the pre-petition debt owed by Plaintiff to Defendant had been discharged.

The Defendant clearly had notice of the inaccuracy of the reporting of the accounts as due and owing. The Defendant was presented with notice of such inaccuracy on at least three separate occasions, and refused to take corrective action in the face of those notices. As such, a cause of action clearly exists as to the Defendant's illegal and willful behavior.

C. DEFENDANT WAS REQUIRED TO PROPERLY UPDATE ITS REPORTING OF THE PLAINTIFF'S ACCOUNT UPON RECEIPT OF A DISPUTE AS TO ACCURACY AND COMPLETENESS OF THE ACCOUNT

15 U.S.C. § 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 and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file.

15 U.S.C. §1681s-2(b)(1) provides that after receiving notice pursuant to 15 U.S.C. §1681i of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the creditor must take all of the following actions:

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation then to promptly–

(i) modify that item of information;

(ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

Debtor on April 28, 2006 triggered the dispute resolution mechanism contemplated by 15 U.S.C. §1681i by requesting of Experian, Equifax and TransUnion that they reinvestigate all tradelines of all creditors listed on her bankruptcy proceeding, including the tradeline of Defendant.

For the purposes of the Defendant's motion, it is to be assumed that both Experian and Equifax provided notice to Defendant of the contents of the dispute and performed reinvestigations of Plaintiff's credit reports. Plaintiff's May 9, 2006 Experian reflected that Defendant continued to report a balance due on the discharged debt. Plaintiff's May 15, 2006 Equifax report similarly showed a balance due after the investigation was performed.

The Defendant herein reports to Experian and Equifax using the Metro 2 format as implemented by the Consumer Data Industry Association (CDIA), an international trade association that works with credit reporting agencies and furnishers to establish and maintain standards for the consumer reporting industry.

The Metro 2 Format enables the reporting of accurate, complete and timely credit information. *See Credit Reporting Resource Guide* at 2-1(2005).

The Consumer Information Indicator (CII), which is reported in Field 38 of the Base Segment, Field 11 of the 11 Segment, and Field 11 of the 12 Segment of the Metro 2 Format,

contains a value that indicates a special condition that applies to the specific consumer. *See Credit Reporting Resource Guide* at 5-28(2005). Code "E" is established for accounts that have been discharged through Bankruptcy Chapter 7. *Id.*

Given the foregoing, the Defendant not only had the ability to report the debt properly upon a change in status of the nature of the obligation, but industry best practices dictated that it do so and provided a means for it to do so. Defendant was aware of the fact that Plaintiff had sought and obtained a discharge of the debt, had been the recipient of numerous written notifications of said discharge, had been subject to the dispute procedures of the Fair Credit Reporting Act, had been given every single opportunity to act on the information provided in a truthful and accurate way.

D. DEFENDANT'S REFUSAL TO CORRECT THE REPORTING OF THE DISCHARGED DEBT, MAY BE FOUND TO BE A VIOLATION OF THE DISCHARGE INJUNCTION

In regard to whether the Complaint states a claim on which relief can be granted under the Bankruptcy Code, Plaintiff asserts that the permanent injunction continues to grant relief to consumers even after discharge. Under 11 U.S.C. §362(a)(6), a creditor is prohibited from any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case The prohibition applies to any "act" whether or not the act is related to a proceeding according to COLLIERS ON BANKRUPTCY, (15th ed. 1992). Once the case is over, the automatic stay is replaced by the discharge injunction. 11 U.S.C. §524(a). See also *In re Henry* 266 B.R. 457 (Bankr. C.D. Calif 2001).

Section 524(a) states, in pertinent part:

(a) A discharge in a case under this title-

…

> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

11 U.S.C. § 524(a). This section replaces the automatic stay of § 362 with a permanent injunction against enforcement of all discharged debts after entry of the discharge.

It has been found that placing of a notation on a debtor's credit report "must certainly be done in an effort to effect collection of the account." *In re Sommersdorf,* 139 B.R. 700, 701 (Bankr.S.D.Ohio 1991) ("Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay."). In *In re Singley,* 233 B.R. 170, 174 (Bankr.S.D.Ga.1999), the court found the creditor's intent in making a notation on a debtor's credit report was material in finding a violation of the automatic stay, precluding summary judgment. Placing of a notation in a debtor's credit report was considered along with other collection activities to find violations of the discharge injunction in *Goodfellow,* 298 B.R. at 362, and *Miele v. Sid Bailey, Inc.,* 192 B.R. 611, 613 (S.D.N.Y.1996).

In the *Sommersdorf* case the Court reviewed 11 U.S.C. §362(a)(6) as to what acts might violate the automatic stay. After its analysis, the court discussed that the policies behind the provisions of §362 and §1301 are related to each other and the stay created by §1301 is similar to that of §362 of the Bankruptcy Code. The Court examined credit reporting in great detail and found that placing a notation on an account (specifically a charge-off) was an effort to effect collection of the debt. The *Sommersdorf* Court examined a number of cases which held that while it may be inconvenient or an increased burden for a creditor to take extra steps to prevent violations of the stay, that those who fail to do so, do so at their own peril. (*Sommerdorf*, 701, citing *In re Spaulding*, 116 B.R. 567, 570 (Bankr. S.D. Ohio 1990). The *Sommersdorf* Court also found that incorrect notations are exactly the kind of "creditor shenanigans" intended to be prohibited by the automatic stay.

It has been recognized that the reporting of a debt to a credit reporting agency is "a powerful tool designed, in part, to wrench compliance with payment terms . . . " *Sullivan v. Equifax, Inc.*, 2002 WL 799856, *4 (E.D.Pa.,2002) (citing *Rivera v. Bank One,* 145 F.R.D. 614, 623 (D.P.R.1993) & *Matter of Sommersdorf,* 139 B.R. 700, 701 (Bankr.S.D.Ohio 1991)). *See Ditty v. CheckRite, Ltd., Inc.,* 973 F.Supp. 1320, 1331 (D.Utah 1997).

In another case, *Carrier v Proponent Federal Credit Union*, 2004 WL 1638250 (W.D. La. 2004), the Court detailed why a similar motion to dismiss would not be granted:

> "Proponent asserts that Carriere has failed to plead a violation of a discharge injunction under 11 U.S.C. §524. Section 524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived."
>
> Section 524(a)(2) protects the debtor from any formal or informal attempts to collect a personal liability. *Walker v. M & M Dodge, Inc.*, 180 B.R. 834, 842 (W.D. La. 1995). These attempts include: "(1) commencing an action on such debt; (2) continuing such action already initiated; or (3) employing process to collect on such debt, e.g., through the use of garnishment or attachment writes." *Walker*, 180 B.R. at 842 (quoting 3 COLLIER ON BANKRUPTCY, ¶ 524.01). All informal actions to collect, including "telephone calls, letters, threats to collect or initiate legal action, intimidation intended to enforce payment, and personal contacts to collect or recover," are barred as well. *Id.* at 842-43.
>
> "Even a mere threat to enforce a surviving lien will violate the injunction if the evidence demonstrates that the threat is try an effort to coerce payment. *Id.* In the complaint, Carriere alleged that Proponent "failed to comply with the bankruptcy discharge order," and that such acts and omissions in violating the discharge order were "willful, intentional and designed to cause harm to plaintiff." (citations omitted). Alternatively, Carriere asserts that Proponent's acts in violating the order were "negligent."
>
> "Proponent argues that Carriere failed to allege that it intended to "collect a debt" when it reported to credit reporting agencies that Carriere's loans had been "charged off." However, there is no requirement that plaintiff plead that the credit furnisher intended to collect a debt when it filed an adverse report. As noted by the court in *Singley v. American General Finance*, 233 B.R. 170 (S.D. Ga. 1999), *reconsideration denied*, 236 B.R. 105 (Bankr. S.D. Ga. June 21, 1999), which was relied upon by Proponent, "[t]he Court is unable to conclude, based on the facts presented by Movant [for summary judgment]...that Movant did not act with the intent to collect the debt from [plaintiff] when it made the report to the credit bureau." *Id.* at 173. In other words, until the parties have had an opportunity to conduct discovery, the Court cannot

> determine what Proponent's intent might have been when it reported that Carriere's debts had been "charged off." See also, *In re Weinhoeft*, 2000 WL 33963628, *2 (Bkrtcy. C.D. Ill. 2000) ("even if it is shown that the Bank's reports to the credit-reporting agencies contain truthful information, such a report, if made with the intent to harass or coerce a debtor into paying a pre-petition debt, could be deemed a violation of the automatic stay. [citations ommitted]. On this point alone, Debtors have clearly pleaded facts which, if proven true, would entitle debtors to relief.").

Carriere, 2004 WL 1638250 (W.D. La. 2004)

In re recent case of *In re Norman*, 2006 WL 2818814 (Bkrtcy.M.D.Ala.,2006) the court in deciding a motion to dismiss brought by a creditor-defendant in a similar case, questions whether "some creditors are systematically [failing to properly update credit reports of debtors to indicate that no balance is due thereon] in an effort to diminish the value of a discharge in bankruptcy. Given the facts as alleged in the complaint, the Court finds that the Bank, as the moving party, cannot show that the Plaintiff cannot prevail under any set of facts." *In re Norman,* at *3. The *Norman* court affirmed its own decision in the holding of *In re Carruthers*, 2007 WL 128795 (Bkrtcy.M.D.Ala.,2007).

Defendant relies heavily on its own recent victory in the case of *In re Bruno,* 2006 WL 3086307 (Bkrtcy. W.D.N.Y. 2006) without acknowledging that the *Bruno* case is not on point with the facts herein. In *Bruno*, the Debtor-Plaintiff took no action prior to instituting the adversary proceeding to request that the Creditor-Defendant that it correct its reporting of the subject credit reports. The Plaintiff in *Bruno* merely obtained copies of a post-discharge credit report and, rather than attempting to resolve the matter without the assistance of the bankruptcy court, instituted a lawsuit.

In addition, *Bruno* court was faced with a question only of whether 11 U.S.C. §524 standing alone required affirmative action on the part of a creditor. The allegations made in that case were remarkably different than those presented to this Court inasmuch as here, the Plaintiff attempted to resolve the matter with the Defendant. In addition, the *Bruno* case did not indicate that the

Defendant had made an intentionally false statement to a credit reporting agency with respect to a pre-petition discharged debt.

Furthermore, the record in *Bruno* makes it clear that the court in that case did not have any evidence before it regarding the sale and transfer of the account and the contractual duty arising therefrom to accurately, properly and timely report such transactions.

In fact, the *Bruno* court stated as follows:

> if a debtor who has been discharged in bankruptcy wishes to avoid what the debtor asserts has occurred in this case, then attorneys for bankruptcy debtors should be advising their clients, after the issuance of the bankruptcy discharge, to obtain a copy of their credit report or reports and follow the established process under those other Acts for updating the record, if they wish to do so.

Bruno, at *2. In the within case, the Plaintiff took exactly those steps. Plaintiff not only sought and received a discharge of her obligation to Defendant, she followed the established process under the Fair Credit Reporting Act for updating the record of her Account. It was the intentional and willful failure to update the reporting of the Account in the fact of such steps that cause the violation of §524.

POINT II: PLAINTIFF IS ENTITLED TO RECOVER DAMAGES

Defendant, in its moving papers, claims that Plaintiff is not entitled to recover damages yet turns the Court's attention to the provisions of 11 U.S.C. § 105, a bankruptcy court may issue any order, process or judgment necessary to carry out the provisions of the Bankruptcy Code. Contempt of court is typically the remedy for a § 524 violation. *In re Dabrowski*, 257 B.R. 394, 415 (Bankr. S.D.N.Y. 2001). Defendant then carefully points out that where civil contempt exists for a § 524 violation, a debtor may recover all expenses, including attorneys' fees. *In re Cruz*, 254 B.R. at 816. As noted in *Dabrowski*, an award of attorneys' fees is only "appropriate (1) when a party willfully

disobeys a court order, and (2) when a party acts in bad faith, vexatiously, wantonly or for oppressive reasons." *In re Dabrowski*, 257 B.R. at 416.

In the instant action, Plaintiff alleges in Paragraph 69 of the Complaint "that in order to carry out the provision of the Code and to maintain its integrity this Court must impose actual damages, punitive damages and legal fees against the Defendants pursuant to the provisions of Section 105 of the Code." As such, Plaintiff has properly pled a cause of action under 11 U.S.C. §105.

Given the foregoing, it is clear that a finding that Defendant is in contempt of the provision of §524 would enable the Plaintiff to recover under 11 U.S.C. §105 as pled.

POINT III: PLAINTIFF CAN ASSERT A FAIR CREDIT REPORTING ACT CLAIM

A. THE FAIR CREDIT REPORTING ACT IS NOT PRE-EMPTED BY THE U.S. BANKRUPTCY CODE

Defendant makes the argument that the Plaintiff's claims under the Fair Credit Reporting Act are precluded by using cases that discuss the Fair Debt Collection Practices Act. The Defendant neglects to realize that the Fair Credit Reporting Act and Fair Debt Collection Practices Act serve very different purposes.

In *Worm v American Cynamid Co.*, 970 F.2d 1301 (4th Cir. 1992), the Court described the two basic types of preemption, field preemption and conflict preemption, as follows: "Preemption may occur on two bases, the first of which turns on the discovering of the intent of Congress. Congress may expressly provide that federal law supplants state authority in a particular field or its intent to do so may be inferred from its regulating so pervasively in the field as not to leave sufficient vacancy within which any state can act. But even absent an express or implied congressional intent to

preempt state authority in a field, state law is nevertheless preempted by operation of law to the extent that it actually conflicts with federal law." *Id.* at 1304.

The *Worm* court went on to state, however, that when determining whether preemption occurs due to a conflict with federal law, a court must consider whether "it is impossible to comply with both state and federal law" or whether "state law stands as an obstacle to the accomplishment of the full purposes and objectives of federal law." *Id.* at 1306. Along this same line, the federal courts have consistently held that "repeal by implication" is not favored; as the Seventh Circuit has recently stated, "it is a cardinal principle of construction that [when] there are two acts upon the same subject, the rule is to give effect to both. Congressional intent behind one federal statute should not be thwarted by the application of another federal statue if it is possible to give effect to both laws." *United States v Palumbo Brothers, Inc.*, 145 F.3d 850, 862 (7th Cir. 1998), *quoting from United States v Borden*, 308 U.S. 188, 198 (1939).

The FCRA is designed to protect consumers from inaccurate or arbitrary information in a consumer report and to establish reporting practices that utilize accurate, relevant and current information in a confidential and responsible manner. *See, e.g, St. Paul Guardian Ins. Co. v Johnson*, 884 F.2d 881 (5th Cir. 1989). The general purpose of the FCRA is to protect the creditworthiness and reputation of every consumer. *See, e.g., Ackerly v Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658 (D. Wyo. 1974). The FCRA is to be liberally construed in favor of consumers to effectuate these purposes. *Guimond v Trans Union Credit Info. Co.*, 45 F.3d 1329 (9th Cir. 1995).

Section 1681n of the Act specifically imposes civil liability for willful noncompliance. Specifically, Section (a) provides that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" in an amount equal to the sum of any actual damage or damages of not less than $100.00 and not more than $1,000.00, punitive damages, and the costs of the action including reasonable attorney

fees. Section 1681o then imposes civil liability for negligent non-compliance with the Act. In general, this Section provides that [a]ny person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to the consumer in an amount equal to" any actual damages, plus costs and attorney's fees.

There can be no preemption of the Plaintiff's claims under the Fair Credit Reporting Act because they can all be determined without doing violation to the Bankruptcy Code's purpose of adjudicating all claims in a single proceeding. *See, e.g., Paul v Montz*, 906 F.2d 1468 (10th Cir. 1990); *Johnson v First Nat'l Bank*, 719 F.2d 270 (8th Cir. 1983), *cert. denied* 465 U.S. 1012 (1984).

The recent case of *Wakefield v. Cavalry Portfolio Services, LLC.*, Case No. 06-CV-1066-BR (USDC Oregon 2006) held that the Fair Credit Reporting Act and the US Bankruptcy Code co-exist. The court, relying on *In re Miller*, No. 01-02004, 2003 WL 25273851, at *2 (D. Idaho Aug. 15, 2003) as well as the holding of the U.S. Bankruptcy Court for the Eastern District of Virginia in *In re Potes*, 336 B.R. 731, 733 (E.D. Va. 2005), held that the FCRA and the Bankruptcy Code co-exist, and that the same act could give rise to remedies under both FCRA and the Bankruptcy Code. *See In re Miller*, at *2 (". . . there appears to be no conflict in remedies between the FCRA and the Code . . . ").

Finally, the case of *In re Bruno*, cited by Defendant in its Memorandum of Law and argued by Defendant with the exact same law firm as is the case herein, implicitly stands for the proposition that the U.S. Bankruptcy Code and the Fair Credit Reporting Act are not mutually exclusive remedies. By indicating that a post-discharge debtor could avail itself of the mechanisms of the Fair Credit Reporting Act, the court effectively maintained that the U.S. Bankruptcy Code did not preclude the FCRA issues.

B. THE BANKRUPTCY COURT DOES NOT LACK JURISDICTION TO ADJUDICATE PLAINTIFF'S CLAIMS

28 U.S.C. § 157, which provides in pertinent part that each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district. Such is the case in the Southern District of New York under the Standing Order of Reference signed by Acting Chief Judge Robert J. Ward dated July 10, 1984.

With respect to a determination of "related-to" jurisdiction, courts generally adopt the standard first articulated by the United States Court of Appeals for the Third Circuit: "whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984); *In re G.S.F. Corp.,* 938 F.2d 1467, 1475 (1st Cir. 1991).

As indicated above, *Wakefield v. Cavalry Portfolio Services, LLC* as well as *In re Miller* and *In re Potes* have all confirmed that the same act could give rise to remedies under both FCRA and the Bankruptcy Code and, therefore, that the act complained of by Plaintiff herein is related to the U.S. Bankruptcy Code. Given the foregoing, it is clear that this Court has jurisdiction to hear and to adjudicate the Plaintiff's cause of action sounding in the Fair Credit Reporting Act.

POINT IV: PLAINTIFF IS NOT PRECLUDED FROM ASSERTING A CLAIM UNDER DEFAMATION

Defendant claims that the Plaintiff's state law defamation claims are preempted under the U.S Bankruptcy Code. In the within action, the Defendant made an inaccurate statement as to the status of the Account at the time of the alleged sale. Specifically, Defendant made a representation that a balance was due on the Account to Defendant at a time that the Account was transferred or sold.

The Defendant relies upon *Vogt* for the proposition that the preempting of a claim under the Fair Debt Collection Practices Act and related state statutes. Defendant's argument relies on the claim of defamation arising on its own, rather than as a consequence of the discharge violation. In reading the Code as well as a diligent search of relevant case law, Plaintiff is unable to locate any authority to indicate that such is the case. As such, Plaintiff requests that Defendant provide authority for its position.

WAIVER OF MEMORANDUM OF I.AW

Plaintiff respectfully requests that the Court waive the requirement of S.D.N.Y. LBR 9013-1 for the filing of a separate memorandum of law in connection with this matter, but movant reserves the right to file a brief in the event that such waiver is not granted.

WHEREFORE based upon the above and foregoing the Plaintiff respectfully prays to the Court as follows:

A. That this court strike the request to compel arbitration contained in the Defendant's motion;

B. That the court deny the Defendant's motion to dismiss; and

C. That the Plaintiff have such other and further relief as the Court may deem just and proper.

Dated: February 6, 2007
New York, NY

FleischmanLaw, P.C.

By: /s/ Jay S. Fleischman

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