Circuit Court Case No. 19-15791

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHARON BARNUM AND ROBERT SUSTRIK
PLAINTIFF – APPELLANTS,

V.

EQUIFAX INFORMATION SERVICES, LLC
DEFENDANT – APPELLEE.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
DISTRICT COURT CASE NO.:
2:16-cv-2866-RFB-NJK

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

/ / /

OTHER AUTHORITIES

I. INTRODUCTION

The actual inaccuracy doctrine should not shield Equifax from its failure to Plaintiffs with prompt notice of their dispute results.[1] Nor is there any material dispute of fact as to whether Equifax sent prompt notice to Plaintiffs; it did not.[2] Had Equifax produced *any* evidence that it sent prompt notice to Plaintiffs, there would be no need to consider whether the actual inaccuracy doctrine extends to the Prompt-Notice Provisions.

The Prompt-Notice Provisions say what they mean, and mean what they say. The language of subsections 1681i(a)(3)(A) and 1681i(a)(6)(A) is nearly identical: within five days of concluding its reinvestigation, Equifax *shall* provide a consumer with notice of their dispute results.[3] Thus, the Prompt-Notice Provisions require compliance *regardless* whether any inaccuracy remains on reinvestigation or not.

Equifax reframes the legal issue, incorrectly, in terms of whether this Court should overrule *Carvalho v. Equifax Information Services, LLC*,[4] by holding that the actual inaccuracy doctrine does not extend to the Prompt-Notice Provisions.[5]

Carvalho is easily distinguishable on its facts. Unlike Equifax here, in *Carvalho*, the CRAs *sent* the plaintiff notice of her dispute results, "explaining that

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[1] AOB at 6.
[2] *Id*. at 6-7.
[3] 15 U.S.C. § 1681i(a)(3)(A), (a)(6)(A).
[4] 629 F.3d 876 (9th Cir. 2010).
[5] EOB at 3.

they had verified the information as correct and describing further steps she could take if unsatisfied with the outcome of the reinvestigation."[6]

The relevant issue in *Carvalho* arose from the plaintiff's dissatisfaction with the CRAs' respective descriptions of the procedures they used to determine the accuracy of the disputed information.[7] The plaintiff complained that those descriptions were merely "boilerplate," and thus insufficient to meet the requirements of subsection 1681i(a)(6)(B)(iii), (a)(7), and the state law analogues.[8] Accordingly, *Carvalho* did not hold that the actual inaccuracy doctrine shields a CRA from liability when it violates the Prompt-Notice Provisions; that was not an issue before the *Carvalho* panel.

The Amicus sidesteps this issue altogether, asserting instead that "a CRA discharges its responsibility to provide the required notice by mailing such notice to the consumer."[9] In this regard, the Amicus raises two points. First, the FCRA does not require that a CRA ensure that a consumer *receives* notice of their dispute results.[10] Second, under the FCRA, a CRA's duty to "'notify' the consumer is

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[6] *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 882–83 (9th Cir. 2010).

[7] *Id*. at 883.

[8] *Id*.

[9] Brief of Amicus Curiae, Consumer Data Industry Association ("Amicus Brief") at 12-13 (citing *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* at 81 (July 2011) (the "40 Years Report").

[10] Amicus Brief at 11; *compare* AOB at 43-44 ("A court properly weighs the evidence from the view of whether the CRA sent the notice, rather than from the

discharged when the CRA mails the notice to the consumer."[11] Plaintiffs agree. However, Equifax produced *no* evidence showing that it sent Plaintiffs notice of their dispute results.

In the court below, and in their Opening Brief ("AOB"), Plaintiffs emphasized that all Equifax had to do to avoid liability—and the lengthy litigation below—was provide affirmative evidence establishing that it printed and mailed or electronically sent Plaintiffs notice of their respective dispute results.[12] Despite this, the Amicus ably knocks down the strawman argument that Plaintiffs "seek a ruling that the FCRA imposes a requirement on CRAs that does not exist – one to effectively ensure that the consumer actually receives the reinvestigation results the CRA has sent to the consumer."[13] This has never been Plaintiffs' theory of the case.

In their Opening Brief, Plaintiffs argued that this Court should adopt the Second Circuit's holding in *Podell v. Citicorp Diners Club*.[14] The *Podell* panel held

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view of whether the plaintiff received it." (citing *Podell v. Citicorp Diners Club*, 112 F.3d 98, 103 (2d Cir. 1997); *Sloane v. Experian Info. Sols., Inc.*, No. 2:17-cv-01117-RFB-VCF, 2018 WL 6566539 (D. Nev. Sept. 25, 2018)).

[11] *Id*. at 12-13; *compare* AOB at 43 ("When a consumer establishes by admissible evidence that they did not receive notice of their dispute results, a CRA may establish the opposite is true with evidence of backend reconciliation data confirming that it mailed the dispute results to the consumer." (citing *Podell v. Citicorp Diners Club*, 112 F.3d 98, 103 (2d Cir. 1997); *Sloane v. Experian Info. Sols., Inc.*, No. 2:17-cv-01117-RFB-VCF, 2018 WL 6566539 (D. Nev. Sept. 25, 2018)).

[12] AOB at 38-47.

[13] Amicus Brief at 11.

[14] AOB at 43-47 (112 F.3d 98 (2d Cir. 1997)). Despite Equifax's contrary arguments, it appears that the Second Circuit Court of Appeals is the only circuit

that when a consumer establishes by admissible evidence that they did not receive notice of their dispute results, a CRA may establish the opposite is true with evidence of back-end reconciliation data confirming that it mailed the dispute results to the consumer.[15] Plaintiffs also illustrated *Podell's* application to the case of *Sloane v. Experian Info. Sols., Inc.*,[16] where Experian avoided liability by showing that it mailed Sloane his notice of dispute results through payment confirmation through its U.S. Postal Service Account, among other things.[17] Equifax and the Amicus ignore *Podell* and *Sloane* entirely.

As in the court below, Equifax instead discusses what its print-and-mail procedures are generally, emphasizing what should have happened—that it sent Plaintiffs prompt notice—without addressing whether what should have happened actually did. Instead, Equifax explains only that the "records do not show that those results were withheld[.]"[18] This is insufficient to address the rule upon which *Podell*, *Sloane*, and even the Amicus agree would discharge Equifax's liability here: a CRA discharges its duty to provide the required notice by mailing it to the consumer.

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court to have considered whether a CRA is liable for failure to comply with the Prompt-Notice Provisions. The *Podell* opinion is silent on whether the actual inaccuracy doctrine should be extended to a CRA's duties under the Prompt-Notice Provisions.

[15] *Id*. at 43 (citing 112 F.3d at 103).

[16] *Id*. at 43-46 (discussing *Sloane v. Experian Info. Sols., Inc.*, No. 2:17-cv-01117-RFB-VCF, 2018 WL 6566539 (D. Nev. Sept. 25, 2018)).

[17] *Id*. at 45 (citing 2018 WL 6566539 at *3).

[18] EAB at 10, 11.

That duty turns on notice, not the underlying reinvestigation procedure or whether it was reasonable. Accordingly, this Court should reverse the court below, and hold that the actual inaccuracy doctrine does not shield Equifax from its failure promptly send Plaintiffs notice of their dispute results.

II. ARGUMENT

A. The trial court's order must be reversed because it is contrary to law.

Under Equifax's construction of the Prompt-Notice Provisions, it has *no* obligation to provide consumers with dispute results even if Equifax: (1) determines that a dispute is frivolous or irrelevant, (2) reasonably determines that the previous reporting was accurate, (3) reasonably determines that it needs additional information such as proof of a consumer's address before completing its reinvestigation, or (4) determines that the disputed information is inaccurate and correctly updates that information accordingly. Equifax badly misconstrues the Prompt-Notice Provisions, effectively reading those mandates out of the statute.

Almost categorically ignoring the facts underpinning this Court's decision in *Carvalho*—where the Prompt-Notice Provisions were not at issue because the defendant CRAs sent the plaintiff notice of her dispute results—Equifax maintains that *Carvalho* controls.[19] *Carvalho* is distinguishable on its facts: Neither this Court

[19] EAB at 16.

nor the *Carvalho* trial court ever considered the Prompt-Notice Provisions, explicitly or impliedly. *Carvalho* therefore does not control.

1. Carvalho v. Equifax does not control this case.

Equifax leans heavily on *Carvalho v. Equifax Info. Servs.*,[20] for its proposition that the prima facie elements of Plaintiffs' claims include a showing that the information they disputed was, in fact, inaccurate.[21] *Carvalho* is easily distinguishable because the provisions and issues presented in *Carvalho* were tied to the underlying reinvestigation procedures. Here, the issue turns on notice of the results of the reinvestigation itself.

In *Carvalho*, the plaintiff challenged the accuracy of past due account reporting based on the creditor's failure to properly bill her medical insurer.[22] The trial court held that the CRA was not liable because the dispute turned on a legal construction of the contract between the plaintiff and her creditor, a legal issue that the CRA was not qualified to resolve.[23] This Court agreed, concluding that inaccuracy was latent and thus best resolved in a suit against the creditor, rather than the CRA.[24]

[20] 629 F.3d 876 (9th Cir. 2010).
[21] ECF No. 148 at 14-15.
[22] 629 F.3d at 891.
[23] *Carvalho*, 588 F. Supp. 2d at 1097.
[24] 629 F.3d at 891.

The *Carvalho* plaintiff also alleged that although the defendant CRAs *sent* her notice of the results of reinvestigation, those notices included inadequate descriptions of the procedures the CRAs used to determine the accuracy of the disputed information.[25] The plaintiff complained that those descriptions were merely "boilerplate," and thus insufficient to meet the requirements of subsection 1681i(a)(6)(B)(iii), (a)(7), and its state law analogues.[26]

The trial court disagreed, holding that claims brought under subsections 1681i(a)(6)(B)(iii), (a)(7), and its state law analog under these provisions "are tied to the underlying reinvestigation requirements, and a plaintiff who cannot state a claim for inadequate reinvestigation procedures logically cannot state a claim for failure to provide notice of alleged defects in those procedures."[27]

The Prompt-Notice Provisions under Subsection 1681i(a)(6) must be construed more broadly than Subsection 1681i(a)(6)(B)(iii) because it is only one component of the notice of dispute results that Subsection 1681i(a)(6) guarantees to consumers.[28] Nevertheless, Equifax effectively insists that this Court intended its rule for determining the reasonableness of a reinvestigation to apply with equal

[25] *Cavalho*, 588 F. Supp. 2d at 1099.
[26] *Id*.
[27] *Id*. at 1099-1100.
[28] 15 U.S.C. § 1681i(a)(6)(B)(iii) (instructing that the *contents* of a notice of reinvestigation results must include a description of the reinvestigation procedure); *compare with* § 1681i(a)(6)(A) (requiring prompt-notice of the results).

force and without distinction to Equifax's duties under the Prompt-Notice Provisions. But this runs contrary to the *Carvalho* trial court's rationale where it recognized the inherent limitations of the actual inaccuracy doctrine's application to a CRA's duty to initiate a reinvestigation:

> [T]he inaccuracy requirement under § 1681i (and hence under its California counterpart, § 1785.16(d)(4)) appears to be purely a judicial screening device. A consumer cannot be required to demonstrate the existence of an inaccuracy in his or her credit report in order to trigger a reinvestigation in the first instance. This is because a reporting agency has only one permissible option to avoid reinvestigating a dispute, that is, a determination that the dispute is frivolous or irrelevant.[29]

This limitation on the doctrine logically forecloses its extension to the Prompt-Notice Provisions because a consumer should likewise not be required to demonstrate the existence of an inaccuracy in his or her credit report in order to trigger prompt notice of the results of the consumer's dispute. Unlike a description of the reinvestigation undertaken, the duty to reinvestigate and provide prompt notice of the results are not tied to the underlying reinvestigation procedures at issue in *Carvalho*.

In turn, when Equifax failed to send Plaintiffs notice of the results, it also sent Plaintiffs no description of the reinvestigation. This is readily distinguishable from *Carvalho* where the CRAs *sent* the plaintiff notice of dispute results, thus

[29] 588 F. Supp. 2d at 1099-1100 (quoting 15 U.S.C. § 1681i(a)(1)(A) & (3)(A) ("the agency *shall* . . . conduct a reasonable reinvestigation" *except* upon determining that the dispute is frivolous or irrelevant) (emphasis in original)).

allowing the plaintiff to review the description of the reinvestigation, even if she found it insufficient.

Another component of the *Carvalho* panel's rationale forecloses any remaining doubt that *Carvalho* controls here. The panel noted that Subsections 1681i(b)-(c) "allow[s] consumers who are dissatisfied by a reinvestigation to file a brief explanatory statement to be reported along with the disputed item."[30] This statement of dispute provides "'potential creditors [with] both sides of the story," thus allowing the consumer to independently determine how they will weigh a disputed account.[31] The panel recognized that the statement of dispute may not "obliterate the stain of a derogatory item."[32] But that fact only reinforced they panel's view that a consumer should dispute the reporting directly with the furnisher because, if successful, the result would obviate the need to add a statement of dispute to future consumer reporting.[33]

Here, Equifax's failure to send Plaintiffs notice of their dispute results deprived them of the opportunity to even conclude whether they were dissatisfied with the results of Equifax's reinvestigation. By extension, Equifax deprived Plaintiffs of their right to determine whether and in what respects they would

[30] 629 F.3d at 892.

[31] *Id*. (quoting *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160 n.23 (11th Cir. 1991)).

[32] *Id*.

[33] *Id*.

request that Equifax include a statement that some or all of the information at issue remained in dispute.

Equifax's failure to notify Plaintiffs also undercuts the *Carvalho* panel's admonition to consumers that they should dispute the reporting directly with the furnisher. The analogous FCRA provision to the state law at issue in *Carvalho*, Subsection 1681i(a)(6)(B)(iii), provides consumers with more than just a right to request a description of the underlying reinvestigation procedures. That provision also requires that a CRA provide the consumer with the business name, phone number, and address of any furnisher the CRA contacted to verify the disputed information.[34] A CRA's failure to send the notice of dispute results also deprives consumers of the information necessary to identify, contact, and directly dispute the information with the furnisher. Were this Court to extend the actual inaccuracy doctrine to Subsection 1681i(a)(6)(A), it would nullify the *Carvalho* panel's instruction to consumers that they should dispute information directly with the furnisher.

Carvalho cannot control under the facts in this appeal. The Prompt-Notice Provisions were not even remotely at issue in *Carvalho*. Unlike the Equifax here, in *Carvalho*, the CRAs sent the plaintiff prompt notice of her dispute results. As a result, that plaintiff had the information that Congress granted her through

[34] 15 U.S.C. § 1681i(a)(6)(B)(iii).

Subsection 1681i(a)(6). Thus, unlike Plaintiffs here, the *Carvalho* plaintiff had the information necessary to identify, contact, and dispute directly with the furnishers through which the CRA had verified the disputed reporting. This Court cannot extend the actual inaccuracy doctrine to the Prompt-Notice Provisions, without also directly undercutting the *Carvalho* panel's rationale. Accordingly, this Court should hold that to the extent *Carvalho* is persuasive, it weighs in favor of reversal.

2. The Prompt-Notice Provisions plainly require that CRAs send notice of dispute results even where a consumer's dispute is frivolous or irrelevant.

"[A] consumer reporting agency has only one permissible option to avoid reinvestigating a dispute, that is, a determination that the dispute is frivolous or irrelevant."[35] Even if the CRA terminates the reinvestigation on either of these bases, Subsection 1681i(a)(3)(A) is clear on its face: the CRA *shall* in any event notify the consumer of the determination by mail, unless the consumer otherwise authorizes notice by other means available to the CRA. Not hypothetically. Not in the abstract. Not later than five days after reaching that determination, a CRA *shall* send notice of the results even if it has terminated the reinvestigation.[36]

Equifax characterizes this requirement as "incoherent: If a CRA has no duty to reinvestigate accurate information, it logically cannot have any derivative duty to

[35] 588 F. Supp. 2d at 1098.
[36] 15 U.S.C. § 1681i(a)(3)(B).

notify a consumer of the reinvestigation results."[37] This truly falls beyond the pale given that elsewhere in its Answering Brief, Equifax recognizes its duty to notify the consumer of the determination even after it chooses to terminate the reinvestigation.[38] That duty is not derivative, but categorical. Equifax's post-hoc legal arguments fail both under both *de jure* and *de facto* scrutiny.

The Prompt-Notice of this determination is not merely procedural, either.[39] This is because a CRA must provide not only notice of its determination, but also "the reasons for the determination" and "identification of any information required to investigate the disputed information."[40] This substantive information comports with Congress's intent that "'a consumer will be afforded an opportunity to respond to those concerns that led the [CRA] to make its determinations.'"[41] Like Equifax's conflicted reading, the district court's blunt application of the actual inaccuracy doctrine to Subsection 1681i(a)(3) is contrary to law, and it must be reversed.

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[37] EAB at 30 (citing 588 F. Supp. 2d at 1100).

[38] *Id.* at 5-6 (quoting 15 U.S.C. § 1681i(a)(3)(A)-(B).

[39] *Id*. at 12 (characterizing the underlying putative class action as one brought "for purely procedural violations of the FCRA."). This appears to be the only argument that either Equifax or the Amicus offer in response to Plaintiffs' argument that the Prompt-Notice Provisions convey substantive rights to information that, among other things, facilitate accurate reporting. AOB at 28-36.

[40] 15 U.S.C. § 1681i(a)(3)(C).

[41] AOB at 34 (quoting S. Rep. No. 103-209 at 19 (1993)).

3. *Congress crafted Section 1681i(a)'s reinvestigation procedures and Prompt-Notice Provisions to promote accurate reporting through independent functions.*

Equifax and the Amicus wrongly conflate the FCRA's reinvestigation procedures with its Prompt-Notice Provisions. Take the example of Equifax's speculation "that the failure to give notice could itself *make* the determination [under Subsection 1681i(a)(3)] unreasonable."[42] Equifax does not offer any examples of how this would be so; nor could it. The bases for properly determining that a dispute is frivolous or irrelevant are not speculative.

Equifax and the Amicus entirely ignore Plaintiffs' reliance on *In the Matter of Equifax Inc.*,[43] where the FTC identified a handful of reasonable bases for properly determining a dispute is frivolous or irrelevant. A CRA may properly conclude that a dispute is 'frivolous' only when it is clearly 'beyond credulity' or made in bad faith.[44] "Relevant factors under this standard include whether the dispute is repetitious of earlier disputes already reinvestigated, whether it is clear that reinvestigation would not reveal information contrary to that contained in the original report, or, perhaps, whether the dispute has been raised only for the purpose

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[42] EAB at 31, n.4.

[43] AOB at 29 (citing 96 F.T.C. 844 (1980), 1980 WL 338977 at *160, *rev'd in part on other grounds*, 678 F.2d 1047 (11th Cir. 1982). Note: the F.T.C. reporter pages are not discernable from the publication on Westlaw, but the Westlaw "*" numbering convention is. Accordingly, Plaintiff pin cites to the Westlaw numbering convention).

[44] *Id.*

of harassment."[45] "[A] reporting agency may not properly conclude that a dispute is 'irrelevant' unless it can conclude that the disputed information is not adverse, that is, information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility for credit, insurance, employment, or other benefit."[46] A dispute over potentially adverse information simply cannot be "irrelevant."[47] "In view of the importance of the reinvestigation requirement to the statutory scheme, the 'frivolous or irrelevant' exception should also be construed sufficiently narrowly that doubts are resolved in favor of reinvestigation."[48]

Equifax speculates beyond credulity that the failure to provide prompt notice "could *itself* make the determination unreasonable" where a CRA has conformed its determination to the FTC's holding and rationale. Not one of the FTC's bases were tied to, or even remotely dependent on whether the CRA provides prompt notice. Accordingly, this Court should reject Equifax and the Amicus's conflated reading that the Prompt-Notice Provisions somehow influence the reasonableness of a CRA's determination that a dispute is frivolous or irrelevant.

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[45] *Id*. at *159.
[46] *Id*.
[47] *Id*.
[48] *Id*. at *160.

B. The district court must be reversed because its extension of the actual inaccuracy doctrine rendered informational injury to Plaintiffs when it deprived them of their rights to substantive notice.

Buried in footnotes, and unsupported by any controlling authority, Equifax and the Amicus argue a "no harm, no foul" defense to Equifax's failure to send Plaintiffs notice of their dispute results.[49] The common theme between them appears to be that Equifax's failures render only "nebulous frustrations" with "no resulting harm" upon Plaintiffs.[50] Equifax and Amicus's arguments are fundamentally flawed.

1. Ramirez v. TransUnion LLC forecloses any doubt: when a CRA violates the Prompt-Notice Provisions, it causes consumers to suffer informational injury.

One day before Equifax filed its Answering Brief, this Court entered its opinion in *Ramirez v. TransUnion LLC* where it upheld the district court's findings and conclusions that TransUnion had caused informational injury to class members when it willfully violated its obligation to clearly and accurately disclose information it maintained about them.[51] In response to the members' request for their credit reports, TransUnion failed to: (1) clearly and accurately disclose that

[49] EAB at 32, n.5; Amicus Brief at 9, n.2.
[50] *Id*., respectively.
[51] 951 F.3d 1008 (9th Cir. 2020)

they were considered potential matches to the United States Department of Treasury's Office of Foreign Asset Control ("OFAC") Database, in violation of Subsection 1681g(a); and (2) include a summary-of-rights form with an OFAC Letter that TransUnion mailed separately, in violation of Subsection 1681g(c)(2).[52] At issue was TransUnion's policy of not including the OFAC information on its 1681g(a) disclosures to consumers, even though it included that information on consumer reports it provided to third parties.[53] Instead, TransUnion sent a separate "OFAC Letter" informing them that they were a potential match to the OFAC list, without also disclosing the version of the OFAC alerts it included with consumer reports it sent to third parties.[54]

The *Ramirez* panel held that Subsection 1681g(a)'s requirement that TransUnion "*clearly and accurately* disclose *all* information in the consumers' reports" "'unambiguously foreclosed'" TransUnion's interpretation that the provision allowed it to separately mail the OFAC Letter.[55] The panel reasoned that TransUnion had not clearly and accurately disclosed the OFAC information because

[52] *Id*. at 1029, 1031.
[53] *Id*. at 1031.
[54] *Id*. at 1031-32.
[55] *Id*. at 1031 (emphasis in original); i*d*. (quoting *Syed v. M-I, LLC*, 853 F.3d 492, 505 (9th Cir. 2017)).

it sent that information separately from its Subsection 1681g(a) disclosures, and even then, the OFAC Letter itself was confusing.[56]

The *Ramirez* panel also held that Subsection 1681g(c)(2) required that TransUnion not only include a summary-of-rights form with its Subsection 1681g(a) disclosures, which it had done, but that it also include a summary-of-rights form with the OFAC Letter, which it had not.[57] TransUnion argued that by including the summary-of-rights form with its Subsection 1681g(a) disclosures, it reasonably assumed that the class members would understand that those rights extended to the OFAC Letter.[58] The panel rejected this because Subsection 1681g(c)(2)'s plain language required that "[a] summary of rights must be sent with *each* written disclosure."[59]

The *Ramirez* panel held that Subsection (a) and (c)(2) were neither merely procedural nor technical requirements.[60] That was because those provisions "work together to protect consumers' interests in having access to the information in their credit reports upon request and understanding how to correct inaccurate information in their credit reports upon receipt."[61] The panel reasoned that Subsection (a) and

[56] *Id*. at 1032.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 1029.
[61] *Id*.

(c)(2) were closely intertwined because these interests could "only be fulfilled together; one without the other is meaningless."[62]

Ramirez controls here because like Subsection 1681g(a), notices of dispute results disclose the all the information that Congress deemed necessary to provide consumers for their evaluation of whether they successfully disputed information. Like Subsection 1681g(c)(2), Subsection 1681i(a)(6)(B) requires the notice of results to include a summary of rights that includes: (1) include a notation that the information remains in dispute, (2) contact information for the furnishers the CRA used to verify the subject information, (3) a description of the CRA's reinvestigation procedures, (4) the right to request that the CRA notify certain creditors that the information remains disputed or was corrected,[63] (5) understand why their dispute is frivolous or irrelevant, and (6) know what additional information a CRA may need to further process a dispute.[64] Just as Subsections 1681g(a) and (c) were closely intertwined because the interests they protected could "only be fulfilled together," the Prompt Notice Provisions are closely intertwined with the substantive

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[62] *Id*.

[63] *See* Argument, *supra*, at II.A.2 and at II.A.1 (discussing *Carvalho's* application to Subsections 1681i(b)-(d) and 1681i(a)(6)(B)(iii)).

[64] AOB at 15, n.53 and accompanying text (citing E.R. at 221-23 and explaining that Equifax uses for letters as notices of dispute results to inform consumers that it has not completed a reinvestigation because it requires either additional information from the consumer, or because it determines the dispute is frivolous or irrelevant).

information that Congress required CRAs include with those notices; "one without the other is meaningless."

2. Equifax's failures deprived Plaintiffs of their rights to substantive notices that the FCRA requires Equifax to include in their notices of dispute results.

Although neither Equifax nor the Amicus acknowledge it, Equifax's expert opined that notices of dispute results carry a broad range of substantive value that are not tied directly to the underlying reinvestigation.[65] In his opinion, those values include: (1) notice of the consumer's rights, (2) understanding whether the dispute was successful, (3) an ability to determine whether the results are satisfactory, and (4) "some sense of closure" in "rectif[ying] credit file accuracy."[66] Likewise Plaintiffs' experts opined that Equifax's failure to send prompt notice damaged Plaintiffs because it harmed their interests in accurate, complete, and fair reporting about them.[67] They opined that this harm arises because Equifax's failures prevented Plaintiffs from taking appropriate further action based upon the information that would have been contained in their notices of dispute results.[68]

[65] AOB at 20 (citing E.R. at 823, 875, 877, 880, 1312-15).
[66] *Id*.
[67] E.R. at 823, 826, 879, 1019-21, 1183.
[68] *Id*.

Take for example Subsection 1681i(a)(6)(B)(ii).[69] That provision requires the notice of results to include "a consumer report" that is based upon the consumer's file as that file is revised as a result of the reinvestigation.[70] The Eleventh Circuit concluded that Congress defined the term "consumer report" under Subsection 1681a(d), Congress intended that it carry the same meaning where Congress included it in Subsection 1681i(a)(6)(B)(ii).[71] Thus, Subsection 1681i(a)(6)(B)(ii) guarantees to consumers the substantive right to review the post-reinvestigation reporting in the same form that the CRA will be reporting it to third parties. In this respect, *Ramirez* must control here because just as TransUnion's failure to disclose the class members the form of its OFAC reporting to third parties violated Subsection 1681g(a), Equifax's failure to send *any* notice of results to Plaintiffs also constituted a deprivation of their right under Subsection 1681i(a)(6)(B)(ii) to review Equifax's post-reinvestigation reporting in the form of a consumer report.

Regardless of whether the consumer continues to dispute that reporting, or whether the CRA corrected the disputed information, Congress provided consumers with additional rights under Section 1681i. For example, Subsection 1681i(b)-(c) grants a consumer the right to request that the CRA add a 100-word statement of

[69] *See also* Argument, *supra*, at II.A (discussing the substantive information that Congress provided consumers under Subsection 1681i(a)(6)(B)(iii)).

[70] 15 U.S.C. § 1681i(a)(6)(B)(ii).

[71] *Id*. at 776 (quoting 15 U.S.C. § 1681a(d)(1)).

dispute to any subsequent consumer reports containing the information in question; CRAs must comply with that request.[72] In turn, Subsection 1681i(d) grants a consumer the right to request that a CRA notify creditors who previously received a consumer report that included the disputed information.[73] Under that provision, the CRA must furnish that creditor with notification that the information in question remains disputed or that the CRA otherwise updated it.[74] As with Subsection 1681i(a)(6)(B)(ii), Equifax's failure to send *any* notice of dispute results to Plaintiffs also constituted a deprivation of their rights under Subsection 1681i(b)-(d).

A CRA's failure to send notice of dispute results to a consumer is neither nebulous, nor harmless; instead, it causes real world harm in the form of informational injury that, as here, may be measured in actual damages to Plaintiffs.[75] Accordingly, this Court must hold that the actual inaccuracy doctrine does not shield a CRA from liability for failing to comply with the Prompt-Notice Provisions.

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[72] 15 U.S.C. § 1681i(b)-(c).
[73] *Id*. at § 1681(d).
[74] *Id*.
[75] *See e.g.*, E.R. at 10 (finding no dispute of material fact: "Both Plaintiffs also experienced damages (*e.g.*, uncertainty, anguish, and anxiety) as a result of not receiving notice regarding their disputes."); AOB at 18-20.

C. Equifax cannot establish that it actually sent consumers any of the 21,271,181 notices of dispute results it "generated."

Equifax makes much of the fact that it "generated" notices of dispute results for Plaintiffs, even while admitting in the Court below that that this does not mean it sent those results to Plaintiffs.[76] The crux of Equifax's argument was then and is now that because Equifax generated dispute results for Plaintiffs, they did not share common claims with the consumers for whom Equifax did not generate results in response to 1,268,565 cases that it opened during Relevant Time Period.[77] Equifax first argued that "generated" versus "sent" distinction in opposition to Plaintiffs' Motion to Certify the Class to bolster its arguments that Rule 23(b)(3)'s predominance and superiority requirements were insurmountable hurdles to certification.[78]

Notably, that was *not* the position that Equifax represented to the magistrate judge in opposition to Plaintiffs' motions to compel. There, Plaintiffs moved to compel Equifax to produce the underlying data that it relied on to calculate its interrogatory responses.[79] Equifax consistently opposed production based upon its assertions that it "provided the total number of consumer disputes it received during

[76] EAB at 9-10.

[77] EAB at 9 (citing E.R. at 1370-72); F.E.R. at 59-61. Equifax characterizes as notices of dispute results as "responses"; but for the sake of consistency, Plaintiff declines to adopt that characterization here.

[78] F.E.R. at 59-61.

[79] F.E.R. at 146-48; 205-219.

the Relevant Time Period . . . and the total of responses it *sent* during that period."[80] Equifax also represented that it "was able to *generate* a count of the number of disputes received and *sent* by writing code and creating a program that queried the entire ACIS consumer database of records" for the Relevant Time Period.[81]

During the hearing and later in her order on Plaintiffs' discovery motions, the magistrate judge emphasized that Equifax had certified the number of disputes it received and the number of notices of dispute results it sent.[82] Plaintiffs moved to compel production because the calculations were subject to serious questions over whether Equifax provided responsive numbers, based upon reliable data and documented evidence.[83] The magistrate judge responded:

> Okay. But they have certified in their response that, and I'm reading from the joint statement, that Equifax opened 22,539,476 new cases relating to the disputes it received by U.S. mail, e-mail, or other electronic means. The fact that you disagree with their response or you don't think their response is accurate, that's really not an objection, is it?[84]

Plaintiffs countered:

> the problem is that we don't know what they mean by this; that they are using nomenclature that's not backed up by documents, by process, policies, or procedures capable of explaining it. Neither could their witness. And so our problem is that the numbers are not supported by

[80] F.E.R. at 167:22-24, 208:17-19, 216:6-8 (emphasis added).
[81] F.E.R. at 178 ¶ 14 (emphases added); 178, ¶ 14.
[82] E.R. at 1150:23-1151:1, 1151:15-17; F.E.R. at 274-75, n.3.
[83] E.R. at 1151:11-12.
[84] *Id*. at 1150:23-1151:4.

> evidence. And so we don't have a way to understand how that calculation is being made.[85]

However, the magistrate judge was unpersuaded: "But does it matter? They've certified that's the number. That's their answer. That's what they've certified."[86] That is also how the magistrate judge wrote her opinion: "At the hearing, Plaintiffs' counsel expressed doubt as to the accuracy of this response. Nonetheless, the interrogatory response was certified by Equifax pursuant to Rule 26(g) of the Federal Rules of Civil Procedure, *see* Docket No. 96-12 at 6, and Plaintiffs' counsel's skepticism as to its accuracy is not grounds to compel a further response."[87] Finding that any further inquiry into the underlying documents and data would impose an undue burden on Equifax, the magistrate judge also granted Equifax its request for a protective order from further discovery on this issue.

Equifax should be judicially estopped from asserting now that "generated" does not mean "sent."[88] The magistrate judge adopted Equifax's prior inconsistent statements equating "generated" with "sent" when she entered a protective order preventing any further discovery on that issue. Even if Equifax is not judicially estopped from taking its inconsistent position here, Equifax faces an even larger problem. It never

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[85] *Id*. at 1151:7-13.
[86] *Id*. at 1151:15-17.
[87] F.E.R. at 275, n.3.
[88] *In re Laser Land Leveling, Inc.*, 185 F.3d 867 (9th Cir. 1999) (holding that "judicial estoppel applies only when the court hearing the previous action adopted, in some manner, the inconsistent statement presented during that action.").

produced any evidence that it sent consumers any of the 21,271,181 notices of dispute results it "generated."

D. Under *Nayab v. Capital One Bank*, Equifax should have the burden to prove it sent any of the 21,271,181 notices of dispute results it "generated"; but, it did not.

Shortly after Plaintiffs filed their Opening Brief, this Court entered its opinion in *Nayab v. Capital One Bank (USA), N.A.*[89] The *Nayab* panel held that the burden of establishing a negative would shift the defendant "where holding otherwise 'would impose upon the plaintiffs a difficult, if not an impossible, task' of requiring them to produce evidence that a fact is not the case, though evidence to the contrary 'could be readily produced by the defendant.'"[90] Similarly, the panel observed that "'the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'"[91]

In *Nayab*, the issue was whether Capital One had obtained the plaintiff's consumer report for a permissible purpose under 15 U.S.C. § 1681b(a).[92] The *Nayab* panel noted that Subsection 1681b(a) provided a list of exceptions to Subsection

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[89] 942 F.3d 480 (9th Cir. 2019).

[90] *Id*. at 494 (quoting *United States v. Denver & Rio Grande R.R. Co.*, 191 U.S. 84, 91–92 (1903)).

91 Id. at 495 (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005)).

[92] *Id*.

1681b(f)'s the general prohibition against obtaining consumer reports.[93] The plaintiff learned that CapitalOne had pulled her consumer report from the face of consumer disclosure she obtained from Experian.[94] However, she had not authorized Capital One to access her credit file at Experian, and thus alleged that Capital One obtained her consumer report from Experian without having a permissible purpose for doing so.[95] Capital one successfully moved to dismiss the case asserting that the plaintiff had failed to plead that Capital One obtained credit for an impermissible purpose. The *Nayab* panel reversed, holding that by pleading Subsection 1681b(a)'s general prohibition against Capital One obtaining her consumer information, the burden shifted to Capital One to establish that any of Subsection 1681b(f)'s exceptions applied.[96]

Here, to justify its 1,268,565 gap in notices of dispute results "generated," Equifax asserts several reasons for why that is perfectly reasonable, even where Plaintiffs proved every element of their case. Equifax claims it has no duty to "generate" disputes such as where it has received "duplicate disputes, cases in which a consumer's address cannot be verified, and cases submitted by credit clinics."[97] Equifax forwards no provision under the FCRA or supporting caselaw establishing

[93] *Id*.
[94] *Id*. at 497.
[95] *Id*.
[96] *Id*. at 499.
[97] EAB at 10.

these are exceptions or affirmative defenses to the Prompt-Notice Provisions' general rule. On this basis alone, this Court need not even apply *Nayab's* burden-shifting analysis.

Assuming *arguendo* that Equifax's speculation results in a *Nayab* analysis, then under *Nayab*, Equifax has the burden to prove that the 1,268,565 gap related to notices it claims fall within the exceptions, which it did not. Plaintiffs attempted to obtain that information from Equifax, but it refused, and instead obtained a protective order. Likewise, *Podell v. Citicorp Diners Club*[98] is consonant with *Nayab* in that both required that Equifax prove, at the very least, that it promptly sent Plaintiffs notice of their dispute results, which it did not.

To hold otherwise would impose upon Plaintiffs "the impossible, task" of requiring them to produce evidence that Equifax did not send them prompt notice of their dispute results, even though Equifax should have readily produced evidence to the contrary if it had any. On the record before this Court, Equifax did not produce any evidence that it sent prompt-notice to Plaintiffs or the remaining 21,271,181 consumers for whom it "generated."

Accordingly, this Court should reverse the court below on its clearly erroneous finding that there remains a dispute of material fact as to whether Equifax sent prompt notice of results to Plaintiffs.

[98] 112 F.3d 98 (2d Cir. 1997).

III. CONCLUSION

Equifax's failure to adequately supervise its third-party mailing vendor was reckless. Although its written documents give lip service to general quality-control procedures, it was entirely unable to support them with any specificity. Indeed, Equifax could not even produce its complete operative vendor agreement or policies and procedures sufficient to carry out its stated Controls Policy. *The scope of Equifax's disregard for its statutory duty to provide prompt notice of dispute results is staggering.* Consider that in verified interrogatory responses, Equifax represented that it opened 22,539,476 new cases in response to Disputes it received through U.S. Mail and through electronic means during the Relevant Time Period. Given its over-delegation of its statutory duties to FIS, that is the number of times Equifax ran the risk of violating its duty to provide prompt notice to consumers. This Court should reverse on both issues.

Dated: April 30, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font, and contains 6,905 words.

Dated: October 25, 2019.

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