

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

MARK S. MAYER,

Plaintiff,

v.

Case No: 6:20-cv-2283-GAP-EJK

HOLIDAY INN CLUB VACATIONS  
INCORPORATED and EXPERIAN  
INFORMATION SOLUTIONS, INC.,

Defendants.

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**ORDER**

This matter comes before the Court without a hearing on Defendant's Motion to Dismiss (Doc. 29) Plaintiff's Amended Complaint (Doc. 28). In ruling on this Motion, the Court considered Plaintiff's Response in Opposition (Doc. 31).

**I. Background<sup>1</sup>**

On September 15, 2014, Plaintiff Mark S. Mayer ("Mayer") entered a timeshare agreement (the "Agreement") with Defendant Holiday Inn Club Vacations Incorporated ("HICV") for a property in Cape Canaveral, Florida. Mayer made timely payments each month under the Agreement from November

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<sup>1</sup> This factual summary is based on the allegations contained in the Amended Complaint (Doc. 28) and "in reviewing motions to dismiss we accept as true the facts stated in the complaint and all reasonable inferences therefrom." *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1534 (11th Cir. 1994).

2014 until July 2017,<sup>2</sup> but then ceased making payments. Mayer mailed HICV letters in January 2019 and November 2019 that disputed the Agreement's validity. These letters stated that Mayer elected to rescind the Agreement and permitted HICV to retain all payments already made as liquidated damages.

In August 2019, Mayer obtained a copy of his consumer disclosure report from Defendant Experian Information Solutions, Inc. ("Experian"). Mayer alleges that the report "contained inaccurate and incomplete factual information relating to the [HICV] Account." Doc. 28 ¶ 39. Mayer submitted letters to Experian disputing the credit report in January 2020, March 2020, and April 2020. The letters each indicate that the dates associated with Mayer's dispute were from "07/2017 - Present." Doc. 28-2 at 2; Doc. 28-4 at 2; Doc. 28-6 at 2. The letters stated that the basis for the dispute was that Mayer terminated the Agreement and that, pursuant to its terms, he owed no balance. *Id.* Experian communicated each dispute to HICV, HICV certified that the information was accurate, and Experian communicated this response back to Mayer.

Mayer filed this lawsuit against Defendants on December 15, 2020, asserting claims under the Fair Credit Reporting Act. HICV filed a Motion to Dismiss the Complaint on January 20, 2021. Doc. 14. The Court granted HICV's Motion and

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<sup>2</sup> These payments included payments in February, May, and July 2016.

dismissed Mayer's claim against HICV without prejudice on March 9, 2021. Doc. 27. Mayer filed an Amended Complaint on March 30, 2021. Doc. 28. HICV has filed a Motion to Dismiss (Doc. 29) Count I of Mayer's Amended Complaint.<sup>3</sup>

## II. Legal Standard

In ruling on a motion to dismiss, the Court must view the complaint in the light most favorable to the plaintiff, *see, e.g., Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1534 (11th Cir. 1994), and must limit its consideration to the pleadings and any exhibits attached thereto. *See Fed. R. Civ. P. 10(c); see also GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). The Court will liberally construe the complaint's allegations in the Plaintiff's favor. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). However, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

In reviewing a complaint on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "courts must be mindful that the Federal Rules require only that the complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003) (citing Fed. R. Civ. P. 8(a)). This is a liberal pleading requirement,

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<sup>3</sup> Experian filed an answer to the Amended Complaint on April 13, 2021. Doc. 30.

one that does not require a plaintiff to plead with particularity every element of a cause of action. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001). However, a plaintiff's obligation to provide the grounds for his or her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–555 (2007). The complaint's factual allegations "must be enough to raise a right to relief above the speculative level," *id.* at 555, and cross "the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

### **III. Analysis**

In its prior order, the Court determined that Mayer failed to state a claim under the FCRA because the claim involved a legal dispute, not a factual inaccuracy. Doc. 27 at 5. Mayer filed an Amended Complaint alleging that HICV violated the FCRA with respect to two sets of data: a group of payments from 2016 and all payment due dates after July 2017.

#### **A. 2016 Payments**

The original complaint contained no allegations about Mayer's 2016 payments. The Amended Complaint now alleges that Mayer's credit report incorrectly reflected "No Data" for February 2016, May 2016, and July 2016. He alleges that he made full payments for those months. These new allegations raise

factual inaccuracies that are covered under the FCRA. The problem is that Mayer does not allege that he ever disputed the accuracy of the report for those dates.

The FCRA requires a Credit Reporting Agency (“CRA”) to investigate the accuracy of the disputed information upon receipt of a dispute by a consumer. 15 U.S.C. § 1681i(a)(1)(A). Under the plain language of the FCRA, a CRA is not obligated to investigate the accuracy of credit data if it has not been disputed. *Id.* Likewise, a furnisher is only obligated to investigate the accuracy of data when a consumer disputes the accuracy of that data with a CRA. 15 U.S.C. § 1681(b)(1); *see also Foxx v. Ocwen Loan Servicing*, No. 8:11-CV-1766, 2012 WL 2048252, at \*6 (M.D. Fla. June 6, 2012) (no furnisher duty to investigate where consumer failed to notify the CRA of his dispute).

Mayer alleges a factual inaccuracy with the 2016 payments, but he does not allege that he disputed those dates with Experian. His dispute letters to Experian only reference dates from July 2017 onward. Because he did not dispute the accuracy of the 2016 payments with Experian, Experian was not required to investigate those dates. *See Foxx*, 2012 WL 2048252, at \*6. And HICV as a furnisher is not required to investigate data that has not been disputed with a CRA.<sup>4</sup>

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<sup>4</sup> Mayer’s Response in Opposition is correct to the extent that it argues that the Court must accept his allegations that he made payments throughout 2016 as true. However, he fails to allege that he ever disputed the 2016 payment data. The Amended Complaint simply alleges that he mailed three letters to Experian and Mayer attaches those letters to the Complaint and incorporates them by reference. Those letters do not dispute the accuracy of the 2016 data.

Therefore, HICV's Motion to Dismiss will be granted with respect to the 2016 payments.

### **B. Payment Dates After July 2017**

With respect to the second data set for payment dates after July 2017, the relevant allegations here are the same as in the original complaint: Mayer entered the Agreement with HICV, Mayer made payments from sometime in 2014 until July 2017, and HICV reported a balance due for payments not made after July 2017. Mayer contends that this information is inaccurate because the Agreement's liquidation clause permitted him to stop making payments and excused him from any future payments due. HICV argues that the issue of whether the liquidation clause excused Mayer's payments is a legal dispute, not a factual inaccuracy, and that the Court should dismiss Count I.

Mayer argues that the Eleventh Circuit's recent decision in *Losch v. Nationstar Mortgage LLC*, 995 F.3d 937 (11th Cir. 2021) supports his FCRA claim. Because *Losch* was decided after the March 2021 order, the Court will consider the arguments under this new guidance.

As discussed previously, "[a] plaintiff must show a factual inaccuracy rather than the existence of disputed legal questions to bring suit against a furnisher under § 1681s-2(b)." *Hunt v. JPMorgan Chase Bank, Nat'l Ass'n*, 770 F. App'x 452, 458 (11th Cir. 2019) (quoting *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 38 (1st

Cir. 2010)). *Losch* elaborated the issue of whether an FCRA claim raises a factual dispute or a legal dispute. In *Losch*, a CRA failed to update the plaintiff's credit report to reflect the fact that a bankruptcy court discharged his mortgage debt. *Losch*, 995 F.3d at 944–45. The Eleventh Circuit held that failing to report a court's bankruptcy-debt discharge was a factual inaccuracy sufficient to support a FCRA claim. *Id.* at 945. The Court explained that while CRAs are not required to resolve legal disputes, "there is no doubt that *Losch's* mortgage was discharged." *Id.* at 946. In other words, once a court resolves a legal dispute, the court's resolution of that issue becomes fact.

A liquidation provision – such as the one in the Agreement – would typically qualify as a legal dispute and not a factual inaccuracy. *See Batterman v. BR Carroll Glenridge, LLC*, 829 F. App'x 478, 481 (11th Cir. 2020). As Mayer points out, however, this is not the first time that HICV has faced this issue in court. HICV previously brought a foreclosure action in state court against another party. *Orange Lake Country Club, Inc. v. Arndt*, 2016-CA-6342 (Fla. 9th Cir. Ct. Aug. 14, 2019).<sup>5</sup> In that case, the court determined that pursuant to a liquidated damages provision identical to the one at issue here, HICV was not entitled to a deficiency.<sup>6</sup>

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<sup>5</sup> The summary judgment order can be found in the docket at Docket Entry 31-1. HICV was formerly known as Orange Lake Country Club. *See* Doc. 28

<sup>6</sup> Compare Doc. 28-1 at 5 ¶ 13 with Doc. 31-1 ¶ 5.

The court entered this judgment on August 19, 2019, several months before Mayer submitted his disputes to Experian. A federal court in this district similarly held that a purchaser plausibly alleged that HICV was not entitled to payments following a purchaser's termination pursuant to the liquidated damages provisions in an identical contract. *See Barkley v. Holiday Inn Vacations Inc.*, 6:20-cv-964-Orl (M.D. Fla. Aug 4. 2020) (Doc. 40).

*Losch* instructs that under certain circumstances, a court's order on a disputed legal issue can change that issue into an undisputed fact. *See Losch*, 995 F.3d at 946. The Court acknowledges that these other judgments pertain to HICV's contracts with other parties and are not dispositive of HICV's contract with Mayer. However, since all these contractual provisions are identical, Mayer has raised a meritorious factual dispute as to the accuracy of his credit report. The Eleventh Circuit has stated that the FCRA imposes a "maximal accuracy standard" and to state a claim, a plaintiff must show that a report is "factually incorrect, objectively likely to mislead its intended user, or both." *Erickson v. First Advantage Background Servs. Corp.*, 981 F.3d 1246, 1252 (11th Cir. 2020). Mayer has pled a FCRA claim against HICV by plausibly alleging that, due to the liquidated damages provision in his contract, Mayer's credit report contained a factual inaccuracy or was objectively likely to mislead. Therefore, HICV's Motion to Dismiss will be denied with respect to the payment dates after July 2017.



#### IV. Conclusion

Accordingly, it is **ORDERED** that Defendant HICV's Motion to Dismiss (Doc. 29) is **GRANTED** in part and **DENIED** in part as set forth in this order.

**DONE** and **ORDERED** in Chambers, Orlando, Florida on June 8, 2021.



  
GREGORY A. PRESNELL  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record  
Unrepresented Party