**NO. 16-1091**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**JEFFREY BRILL**,
*Plaintiff-Appellant*,

v.

**TRANS UNION LLC**,
*Defendant-Appellee*.

On appeal from a final order of the
U.S. District Court for the Western District of Wisconsin
(Honorable Stephen L. Crocker, U.S. Magistrate Judge)

# APPELLANT'S PETITION FOR REHEARING EN BANC

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October 18, 2016

**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 16-1091

Short Caption: Brill v. TransUnion

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Jeffrey Brill

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: s/ Julie A. Murray Date: 10/18/2016

Attorney's Printed Name: Julie A. Murray

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Joel Winnig Date: 10/18/2016

Attorney's Printed Name: Joel Winnig

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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## RULE 35(b)(1) STATEMENT

Plaintiff-appellant Jeffrey Brill seeks rehearing en banc of a decision affirming the Federal Rule of Civil Procedure 12(b)(6) dismissal of his Fair Credit Reporting Act (FCRA) claim against Trans Union, a credit reporting agency. Brill alleged that Trans Union failed to conduct, as required by 15 U.S.C. § 1681i(a)(1)(A), a reasonable reinvestigation of the accuracy of a delinquent lease extension account that Trans Union reported on Brill. Although Brill disputed the debt by providing documentation that his name had been forged on the extension, Trans Union did nothing more than ask the furnisher of information to confirm by automated means that its records continued to show that Mr. Brill was responsible.

Rehearing is necessary to ensure uniformity of this Court's precedent. The panel decision, which upheld the 12(b)(6) dismissal of Brill's claim after assuming facts not in evidence and faulting Brill for not attaching evidence to his complaint, is irreconcilable with *Henson v. CSC Credit Services*, 29 F.3d 280 (7th Cir. 1994). *Henson* holds that the reasonableness of a credit reporting agency's investigation of a disputed debt is a question for the trier of fact, and it does not require a plaintiff to attach evidence to his complaint. The panel's decision is also inconsistent with this Court's recent decisions describing what constitutes a "plausible" claim under Rule 8's pleading standard. *See*, *e.g.*, *Carlson v. CSX Transp., Inc.*, 758 F.3d 819 (7th Cir. 2014); *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010).

In addition, the panel's opinion conflicts with decisions of the Third, Fourth, and Fifth Circuits. Those circuits have held—on appeal from summary judgment orders or final verdicts—that where a consumer disputes the accuracy of a debt on the ground that the debt is someone else's, the creditor must often do more than recheck the information received from the original source. Unlike the panel decision here, those circuits have held the reasonableness of a reinvestigation is a question for the jury, not a question resolvable as a matter of law on a motion to dismiss. *See Johnson v. MBNA America Bank, NA*, 357 F.3d 426 (4th Cir. 2004); *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997); *Stevenson v. TRW Inc.*, 987 F.2d 288 (5th Cir. 1993); *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986).

## BACKGROUND AND PROCEDURAL HISTORY

Under the FCRA, if a consumer disputes with a credit reporting agency the "completeness or accuracy of any item of information contained in the consumer's file," the agency must "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. § 1681i(a)(1)(A). The FCRA also makes clear that, if a disputed item of information "is found to be inaccurate or incomplete or cannot be verified," the consumer reporting agency has a statutory obligation to "promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the

reinvestigation." *Id.* § 1681i(a)(5)(A). Thus, once the reinvestigation requirement has been triggered, the default rule is that the disputed information must be deleted or modified unless it can be verified—that is, the statute requires the consumer reporting agency to give the benefit of the doubt to the consumer.

In May 2009, Jeffrey Brill leased a car jointly with his then-girlfriend Kelly Pfeifer. A3; A21. The original lessor assigned the lease to Toyota Motor Credit Corporation (Toyota). *Id.* Brill and Pfeifer subsequently lost contact with each other, and Pfeifer kept the car. A3; A22. Brill did not sign any documents to extend the lease. A3; A22. Nonetheless, after the original lease term ended in May 2012, Trans Union reported in Brill's credit file that he continued to have an account with Toyota and was delinquent in making payments on that account. A3-4; A24; A28. After making inquiries with Toyota, Brill obtained a copy of a lease extension from May 2013 on which his signature was forged. A3; A22-A23. Brill believes that Pfeifer, who also appears to have signed the document in her own name, forged Brill's signature as a joint lessee. A22-23.

Brill alerted Trans Union to the forgery in May 2014. A3; A23-A24. Brill provided Trans Union with a sample of his true signature on the original 2009 lease agreement for comparison with the 2013 lease document and pointed out that—unlike the phony signature on the latter document—he always signs his name using his middle initial. A3; A6 n.5; A25. Brill also directed Trans Union's attention to

four other respects in which the real 2009 and fake 2013 signatures clearly differed. A25. Brill suggested to Trans Union that the employees or agents of Toyota who dealt with Pfeifer on the lease extension might have information about the disputed lease document. A26. However, Trans Union's reinvestigation consisted solely of sending an automated consumer dispute verification (ACDV) to Toyota to verify basic information about the debt and parroting its response that the debt was Brill's. A4 & n.2; A26.[1]

Brill sued Toyota in February 2015 for violating a separate FCRA provision that governs a creditor's obligations when informed of a disputed debt. That case reached a confidential settlement and was voluntarily dismissed on May 12, 2015. *See* Docket, *Brill v. Toyota Motor Credit Corp.*, No. 3:15cv00068 (W.D. Wisc.).

Later that month, Brill sued Trans Union under the FCRA for its failure to conduct a reasonable reinvestigation of the accuracy of the disputed information, and he sought damages and injunctive relief. A13; A28. The operative complaint described the dispute he sent to Trans Union in detail. It stated that Brill had provided a copy of the original lease and his signature to Trans Union, that he had identified

[1] An ACDV "describ[es] the dispute to the original source. The original source verifies the disputed information by checking a box on the ACDV form indicating the adverse account is accurate." *Dixon-Rollins v. Experian Info. Solutions, Inc.*, 2010 WL 3749454, at *1 n.2 (E.D. Pa. Sept. 23, 2010). For a more detailed description of ACDVs, see National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (2009), *available at* http://bit.ly/2epzJqB.

for Trans Union at least four ways in which his real signature differed from the forged signature on the lease extension, and that he had suggested to Trans Union that Toyota employees involved in the lease extension were likely to have additional information. A25-26. Before Trans Union filed an answer or the parties engaged in any discovery, the district court granted Trans Union's motion to dismiss Brill's claim under Federal Rule of Civil Procedure 12(b)(6). A2.

A panel of this Court affirmed, concluding that Brill failed to state a "plausible" claim. Slip Op. 8. It endorsed the district court's conclusion that "TransUnion had no duty to verify the accuracy of Brill's signature on the Toyota lease, because Toyota, as the lessor, was in a better position to determine the validity of its own lease." *Id*. 4. The panel stated that the forged lease was created by Toyota; "TransUnion had had nothing to do with it." *Id.* Under these circumstances, the panel held that Trans Union's ACDV to Toyota "was an appropriate procedure, especially as TransUnion couldn't readily locate any other document that might have resolved the issue." *Id.* The panel cited nothing in the record to support its conclusion about the ease with which other documents could have been located.

The panel also dismissed as unreasonable the actions that Brill had suggested Trans Union could have easily taken to investigate the accuracy of the disputed information. It rejected Brill's contention that Trans Union could have examined the signatures as "undeveloped and unsupported." *Id.* 6. Specifically, the panel

concluded that Brill had an obligation to attach the signatures on the original lease and forged lease extension to his complaint to show that the signatures were obviously different. The panel determined that by not having done so, Brill had "refus[ed] to present a case, [and] instead insist[ed] that he need provide no evidence to support any of his allegations." *Id.* 7; *see also id.* 3 (stating that "Brill contends that the signatures were *obviously* of different persons, but the contention cannot be evaluated because he hasn't submitted the signatures in the litigation"); *id.* 4 (stating that the panel had not "seen the signatures, . . . which are not in the record," and faulting Brill for "withhold[ing] from the court [this] evidence"); *id.* 7 (stating that Brill provided "no evidence for his claim that the signatures clearly differ").

Although Brill never claimed that Trans Union had to hire a handwriting expert to examine the signatures—he argued that lay analysis would have been sufficient given the differences between the signatures—the panel rejected the possibility of using an expert as unduly burdensome. The panel relied on commercial websites outside the record and cited by neither party to support the panel's conclusions that "handwriting experts are expensive and often produce inconclusive results," and that "[f]orcing a credit reporting agency to hire a handwriting expert in every case of alleged forgery"—a categorical position that Brill did not advance—"would impose an expense disproportionate to the likelihood of an accurate resolution of the dispute over whether it was indeed forgery." *Id.* 5-6.

The panel also rejected Brill's suggestion that Trans Union could have investigated the accuracy of the information by evaluating Toyota's procedures for verifying the identity of customers or by interviewing the Toyota employees who were involved in the lease extension. *Id.* 6. The panel stated that because Brill sued Toyota—a suit that did not begin until more than eight months after Trans Union first had an obligation to reinvestigate the accuracy of the disputed debt—Brill "was in a superior position to TransUnion" to do these things through discovery; that it "might well be unduly burdensome for TransUnion to ask Toyota to identify, and put TransUnion in touch with, the employees," and that "[n]o company" in Toyota's position would have let Trans Union speak to its employees. *Id.* The panel pointed to nothing in the complaint to support its conclusions.[2]

## ARGUMENT

### I. The Panel's Opinion Is at Odds with This Court's Decision in *Henson v. CSC Credit Services* and with Its Recent Jurisprudence Addressing Rule 8's Pleading Standard.

In *Henson v. CSC Credit Services*, 29 F.3d 280 (7th Cir. 1994), this Court held that whether a credit reporting agency conducts a "reasonable reinvestigation" under the FCRA is a question of fact reserved for a jury. *Id.* at 287; *cf. Crabill v. Trans*

[2] The panel suggested in dicta that Brill's claim might also fail because he reached a confidential settlement with Toyota that may have given him the relief he sought from Trans Union. Slip Op. 4, 7. However, its holding did not hinge on this issue, which the parties never briefed and on which Brill has never had the opportunity to present evidence.

*Union, LLC*, 259 F.3d 662, 664 (7th Cir. 2001) (holding that the reasonableness of a furnisher's procedures for assessing accuracy under the FCRA "is treated as a factual question even when the underlying facts are undisputed"). It also identified the applicable standard for gauging reasonableness: "Whether the credit reporting agency has a duty to go beyond the original source will depend, in part, on whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable. The credit reporting agency's duty will also depend on the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer." *Henson*, 29 F.3d at 287.

The panel's decision creates an intra-circuit conflict with *Henson* for two reasons. First, the panel's decision cannot be squared with *Henson*'s admonition that the reasonableness of a reinvestigation is a question of fact reserved for the jury. The panel engaged in pure speculation about the costs to Trans Union of verifying the accuracy of the information disputed by Brill, and then expressly weighed those costs against the likelihood of correcting inaccurate information. For example, relying on its own internet research, the panel concluded that "handwriting experts are expensive and often produce inconclusive results," and it determined that the costs were "disproportionate to the likelihood of an accurate resolution of the dispute." Slip Op. 5-6. That type of analysis is precisely what *Henson* reserves for a

jury, after a party has had an opportunity to conduct discovery, present evidence, and test the evidence of its opponent.

The panel similarly departed from *Henson* when it speculated as to the cost and likely utility of seeking more detailed verification from Toyota employees involved in the lease extension, concluding that it "might well be unduly burdensome for TransUnion to ask Toyota to identify, and put TransUnion in touch with, [its] employees," and that "[n]o company" would agree to that arrangement. *Id.* 6. Nothing in the complaint supports these conclusions, and the case law makes clear that credit reporting agencies *do*, in some circumstances, speak with the employees of furnishers of information in an attempt to resolve disputes. *See*, *e.g.*, *Pinner v. Schmidt*, 805 F.2d 1258, 1262 (5th Cir. 1986) (upholding a jury verdict for a consumer on a § 1681i claim even where a consumer reporting agency spoke directly with a creditor's employee).[3]

[3] The panel's conclusion that Brill "was in a superior position to TransUnion" (Slip Op. 6) to interview Toyota employees and examine Toyota's practices through discovery in his suit against that company is misplaced for a more basic reason: Brill sued Toyota in February 2015, more than eight months after Trans Union's obligation to reinvestigate arose. The panel's speculation as to what Brill could have done in the Toyota litigation cannot conceivably affect Trans Union's legal obligation in May 2014, when Brill disputed the accuracy of the delinquent lease extension. Moreover, Congress created private rights of action under the FCRA against both furnishers of information and consumer reporting agencies. *See* 15 U.S.C. §§ 1681n, 1681o; *see also id.* § 1681a(b) (defining "person[s]" covered by the FCRA). Nothing in the FCRA suggests that a claim against one such entity might preclude a claim against the other.

Second, *Henson* made clear that a party need not attach to a complaint that asserts a § 1681i claim evidence documenting the manner in which the consumer disputed the accuracy of a debt. In *Henson*, Trans Union erroneously reported that the plaintiffs were subject to a judgment debt based on inaccurate information in a court docket. The consumers' complaint asserted a violation of § 1681i, alleging that the consumers "contacted Trans [Union] twice, in writing to correct the horrible injustice" and that "nobody at Trans [Union] would correct the injustice." 29 F.3d at 283 (internal quotation marks omitted). This Court, viewing the facts in the light most favorable to the plaintiffs, held that the complaint could "reasonably be considered as an allegation that [one of the consumers] contacted Trans Union and notified it of the disputed money judgment and that Trans Union did not conduct a proper reinvestigation and failed to correct the inaccurate information." *Id.* at 286. It thus reversed a district court's dismissal of the consumers' § 1681i claim. The Court emphasized that, if the consumers showed on remand that they brought the alleged error to the agency's attention, "the trier of fact must balance" the factors relevant to assessing reasonableness. *Id.* at 287.

*Henson*'s analysis demonstrates that Brill's complaint, which was far more specific than that considered in *Henson*, should not have been dismissed under Rule 12(b)(6). Unlike the consumers in *Henson*, who alleged that they advised Trans Union of a "horrible injustice," Brill pleaded that he disputed the accuracy of the

debt with Trans Union based on a forgery of his signature; that he provided Trans Union with the original lease and his signature; and that he directed Trans Union to at least four ways in which his real signature obviously differed from the forged signature on the lease extension. The panel's conclusion that Brill had an obligation to attach copies of the signatures to his complaint to survive a motion to dismiss cannot be squared with *Henson.* Significantly, despite the plain relevance of *Henson*, the panel cited it only once, with a "*cf.*" signal. Slip Op. 4.

The panel's holding likewise cannot be reconciled with this Court's precedent addressing the pleading standard under Federal Rule of Civil Procedure 8 after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010), this Court held that to state a "plausible" claim after those two cases, a plaintiff need only "give enough details about the subject-matter of the case to present a story that holds together." And in *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 827 (7th Cir. 2014), this Court reversed a 12(b)(6) dismissal where a district "court repeatedly faulted [the plaintiff] for not providing 'evidence' in support of her claims." This Court held that "of course evidence is not required at the pleading stage." *Id.*; *see also Hurst v. Hantke*, 634 F.3d 409, 411 (7th Cir. 2011) (stating that the "Federal Rules of Civil Procedure [do not] require a plaintiff to attach evidence to his complaint"). The panel cited no authority contradicting this case law, and its conclusion that Brill was

obliged to attach evidence to his complaint to state a "plausible" claim cannot be reconciled with it.

## II. The Decision Conflicts with Authority in Three Other Circuits.

En banc rehearing should be granted for the separate reason that the decision conflicts with decisions of the Third, Fourth, and Fifth Circuits. These courts have held, in cases involving debts disputed as belonging to other individuals, that a credit reporting agency can be required to go beyond the original source of information to conduct a reasonable reinvestigation, and that the reasonableness inquiry is reserved for the jury. The panel's opinion—which holds as a matter of law that a credit reporting agency need do no more than submit an ACDV to a creditor when presented with an allegation of forgery—cannot be squared with other circuits' law. Although Brill pointed to this authority in merits briefing, the panel ignored it.

In *Cushman v. Trans Union Corp.*, 115 F.3d 220, 222 (3d Cir. 1997), after someone fraudulently obtained credit cards in Jennifer Cushman's name, Cushman alerted Trans Union about the fraud. Cushman provided less information than Brill gave Trans Union in this case: All she did was "notif[y] [Trans Union] that she had not applied for or used the three credit cards in question, and suggested that a third party had fraudulently applied for and obtained the cards." *Id.* Trans Union's reinvestigation consisted solely of confirming the debts with the creditors and asking if Cushman had opened a fraud investigation (she hadn't). *Id.* Relying on this Court's

decision in *Henson*, among other authorities, the Third Circuit rejected Trans Union's argument that "it is never required to go beyond the original source in ascertaining whether the information is accurate." *Id.* at 224. Instead, the Third Circuit held that "[a] reasonable jury weighing th[e] evidence in light of the factors identified in *Henson* . . . could have rendered a verdict for Cushman." *Id.* at 226. It noted, for example, that "the jury could have concluded that seventy-five cents per investigation was too little to spend when weighed against Cushman's damages." *Id.*

Similarly, *Stevenson v. TRW Inc.*, 987 F.2d 288, 290-91 (5th Cir. 1993), involved a credit report reflecting debts that belonged to a person with the same name as the plaintiff, and others that had been incurred fraudulently by the plaintiff's estranged son using the plaintiff's social security number. The consumer reporting agency's reinvestigation consisted only of sending the creditors automated inquiries about the disputed accounts. *Id.* at 291. The Fifth Circuit upheld the district court's finding that TRW had violated § 1681i and rejected the credit bureau's argument that the consumer's only recourse was to attach a statement of dispute to his credit report and otherwise resolve the dispute with the creditor on his own. *Id.* at 293; *see also Pinner v. Schmidt*, 805 F.2d 1258, 1260-62 (5th Cir. 1986) (upholding a jury verdict on a § 1681i claim against a consumer reporting agency where the agency reinvestigated fictitious charges on the consumer's account by talking only to an employee of the creditor suspected of making the charges).

*Johnson v. MBNA America Bank, NA*, 357 F.3d 426 (4th Cir. 2004), another case in which the wrong person had been identified as responsible for an account, considered the reinvestigation duty of a furnisher of credit information, which the court found analogous to the duty of a consumer reporting agency. MBNA had issued a credit card to Linda Johnson's husband. After he filed for bankruptcy, MBNA claimed that Johnson was a co-obligor on the account even though she was only an authorized user. *Id.* at 428-29. Because MBNA subsequently confirmed the debt after several consumer reporting agencies reported Johnson's dispute to MBNA, *see id.* at 429, Johnson sued MBNA for violating its duty, as a furnisher of credit information, to investigate, *see* 15 U.S.C. § 1681s-2(b). Citing this Court's decision in *Henson* and finding that the furnisher's and consumer reporting agency's duties to investigate required the same analysis, *see* 357 F.3d at 432-33, the Fourth Circuit affirmed a jury verdict in favor of Johnson, *id.* at 429-33. The court held that the evidence supported the jury's verdict because MBNA did no more than confirm its computer system's records of Johnson's name, address, and account status despite being notified of the specific nature of Johnson's dispute. *Id.* at 431.

The lesson from these cases—two of which explicitly applied this Court's approach in *Henson*—is that when a consumer alleges that charges are fraudulent or do not belong to her, a proper reinvestigation often requires more than just rechecking the same information received from the original source, and the

reasonableness of the reinvestigation is a question for the jury, not a question resolvable as a matter of law on a motion to dismiss. Because Trans Union here did no more "reinvestigating" than the consumer reporting agencies in *Cushman*, *Stevenson*, *Johnson*, and *Pinner*, Brill's claim could not have been dismissed under Rule 12(b)(6) had it been brought in the Third, Fourth, or Fifth Circuits. This Court should grant rehearing en banc to ensure consistency with these courts of appeals.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc and reverse the district court's order dismissing Brill's complaint.

Dated: October 18, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the page limitations set forth in Federal Rule of Appellate Procedure 35 as follows: The petition is 15 pages in length, not including material not counted under Federal Rule of Appellate Procedure 32.

/s/ Julie A. Murray
Julie A. Murray

## CERTIFICATE OF SERVICE

I certify that on October 18, 2016, I electronically filed this petition with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Julie A. Murray
Julie A. Murray