**No. 14-491**

# In the United States Court of Appeals for the Fourth Circuit

MICHAEL T. DREHER,
on behalf of himself and all others similarly situated,
*Plaintiff-Respondent,*

v.

EXPERIAN INFORMATION SOLUTIONS, INC.,
*Defendant-Petitioner.*

On Petition for Permission to Appeal from the
United States District Court for the Eastern District of Virginia

## ANSWER IN OPPOSITION TO PETITION FOR PERMISSION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)


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## INTRODUCTION

Just a few months after the denial of its previous petition, Experian filed its latest petition, once again asking this Court to cast aside the "rule that a party is entitled to a single appeal, to be deferred until final judgment." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009). This time Experian invokes 28 U.S.C. § 1292(b), seeking review of the holding that it deliberately withheld important information from consumers, in violation of the Fair Credit Reporting Act.

But this Court has stressed that § 1292(b) is "an extraordinary remedy," "not to be granted lightly." *Fannin v. CSX Transp., Inc.*, 1989 WL 42583, *2 (4th Cir. 1989). It is reserved only for "exceptional cases 'where a decision of the appeal may avoid protracted and expensive litigation.'" *Medomsley Steam Shipping Co. v. Elizabeth River Terminals*, 317 F.2d 741, 743 (4th Cir. 1963). Here, Experian cannot even show that an appeal now would "materially advance the ultimate termination of the litigation," as § 1292(b) requires. Because liability has been determined and class notice sent, all that remains is "a simple, per-violation statutory damages calculation," at which point the case "reduce[s] to mouse-clicking simplicity." ECF No. 167, at 4, 9.

Nor has Experian shown that the order involves a "controlling question of law" on which there is "substantial ground" for disagreement, which § 1292(b) also demands. As it did in its last petition, Experian contends that the class lacks Article

III standing. But that argument again overlooks clear precedent to the contrary with which no circuit disagrees, and again mistakenly relies on ERISA cases in which plaintiffs sought standing to sue on behalf of pension plans. Experian also claims that the district court misapplied the holding in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007)—that a FCRA violation is "willful" if it is objectively reckless—and should have let that question go to a jury. But *Safeco* itself decided recklessness as a question of law, and no case from any circuit holds otherwise.

## BACKGROUND

**1. The Facts.** In late 2010, Michael Dreher discovered that someone had stolen his identity and opened a credit card in his name two years before. As Dreher later discovered, this person turned out to be his cousin, who "took out the business credit card in Dreher's name in order to cover expenses for his failing bowling alley in Indiana." Op. 3. Dreher learned of the identity theft when the National Security Agency, while processing his Top Secret security clearance, notified him that his credit report listed a delinquent account under the name "Advanta Bank"—an account that he did not open and had never heard of. ECF No. 76-2, at 1. The NSA investigator told Dreher that if he could not prove that he made payments on the account, it could jeopardize his clearance. *Id.*

To see his credit report for himself, Dreher requested a copy from Experian. It listed one delinquent account—Advanta Bank—with a P.O. box as the only

contact information. "No phone number [is] available," the report read. *Id.* No. 76-3, at 4. When Dreher requested a second report in early 2011, it said the same thing. *Id.* No. 76-4, at 4. Because he'd never had any contact with Advanta Bank and didn't recognize the name, he wrote a letter to the address provided, in which he explained the situation, disputed the debt, and requested verification that the account was in fact his. *Id.* No. 76-2, at 1–2. He waited a month, didn't hear back, and then wrote another letter. *Id.* at 2. This time he received a response (on Advanta letterhead), but it did not resolve the problem. *Id.* So he wrote to Advanta once more the next month; Advanta did not respond. *Id.*

Shortly thereafter, in June 2011, Dreher requested a third credit report from Experian. It still showed the delinquent account, but now the account was listed under a slightly different name: "Advanta Credit Cards." *Id.* No. 76-5, at 4. After he disputed the debt on the account and explained to Experian that his identity had been stolen, Experian sent Dreher a letter informing him that the "Advanta Credit Cards" account had been deleted but that a new account—"Advanta Bank Corp."—"remain[ed]." *Id.* No. 76-7, at 2; 76-8, at 2–3. The letter included a note saying that the "credit grantor requests that you contact them directly." *Id.* No. 76-8, at 2–3 (initial capitalization removed). There was no phone number—only the same P.O. Box to which he had already written three times, to no avail. *Id.* at 5.

Eventually Dreher discovered that Advanta didn't actually exist. It was closed by the Utah Department of Financial Institutions in March 2010—eight months before Dreher requested his first credit report from Experian. *Id.* No. 76-1, at 3. A different company, CardWorks, had started servicing Advanta credit-card accounts on August 1, 2010. *Id.* at 1–5. Experian knew this. *Id.*

But instead of listing CardWorks as one of the sources for Advanta accounts, Experian adopted a different policy: It asked CardWorks—its customer—what *it* wanted Experian's reports to say. CardWorks' answer? "We want the subscriber code to remain in the Advanta company ID"—as "Advanta Credit Cards," not CardWorks—even though CardWorks was now "the only party servicing the accounts" and handling the credit reporting, and thus a source of information. *Id.* No. 76-18, at 2–3; No. 76-19, at 5, 15; *see id.* No. 76-1, at 2 ("We would like for this new code to report on the consumers' trade line as Advanta Credit Cards."). Experian asked if CardWorks wanted its name identified as well, as is industry practice. *Id.* No. 76-19, at 7. CardWorks replied: "No, we would not want CWS or CardWorks mentioned in the trade line, just Advanta Credit Cards." *Id.* at 8.

Experian obliged. Although it could have easily listed both entities' names, it instead adopted a company-wide policy—for all relevant accounts—to have "the name changed to 'ADVANTA Credit Cards,'" without also mentioning CardWorks, while still giving CardWorks "access" to those accounts. *Id.* at 9–12.

**2. The Fair Credit Reporting Act.** "Congress enacted [the] FCRA in 1970 out of concerns about abuses in the consumer reporting industry." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001). "Congress found that in too many instances [consumer reporting] agencies were reporting inaccurate information," often without consumers' knowledge. *Id.*; *see* S. Rep. No. 91-157, at 3-4 (1969) (describing "inability" of consumers to discover errors). And even if consumers learned of an error, they usually had "difficulty in correcting inaccurate information" because of skewed market incentives: "a credit reporting agency earns its income from creditors or its other business customers"—the same entities it relies on to obtain credit information—and "time spent with consumers going over individual reports reduces . . . profits." 115 Cong. Rec. 2412 (1969).

With the FCRA, Congress sought to change this. The FCRA thus contains "a variety of measures designed to insure that agencies report accurate information." *Dalton*, 257 F.3d at 414–15. One is the requirement that reporting agencies, upon any request by a consumer, "clearly and accurately disclose to the consumer . . . [a]ll information in the consumer's file at the time of the request," as well as "[t]he sources of the information." 15 U.S.C. § 1681g(a)(1) & (2). By giving consumers the right to access the information in their files—and to know where it came from—this requirement serves two important purposes: it allows consumers to confirm that the information is accurate, and it tells them whom to contact if it's

not. Congress believed it "necessary to give consumers a specific statutory right to acquire such information on sources" because it "may be the only way in which the consumer can effectively" correct mistakes. 116 Cong. Rec. 35,940 (1970).

Like other disclosure statutes, the FCRA enforces its provisions by creating a private right of action with a two-tier damages scheme. "If a violation is negligent, the affected consumer is entitled to actual damages. If willful, however, the consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even punitive damages." *Safeco*, 551 U.S. at 53. Willful violations, the Supreme Court held in *Safeco*, include not only conduct known to violate the law, but also acts made with "reckless disregard of statutory duty"—"an objective standard" that is satisfied when a defendant's position is "objectively unreasonable" such that it "rais[es] an 'unjustifiably high risk' of violating the statute." *Id.* at 52, 68–70.

**3. This Case.** In September 2011, Dreher brought this case challenging Experian's policy as a willful violation of the FCRA's requirement that consumer reporting agencies disclose all "sources of information" in a credit report. 15 U.S.C. § 1681g(a)(2). Because actual damages for informational injuries can be difficult to prove, Dreher sought statutory damages on this claim. And because he challenged a uniform policy—Experian's refusal to identify CardWorks as a source—he sought certification of the claim as a class action. ECF No. 140–41.

Experian moved for summary judgment on the claim, which the district court denied. *Id.* No. 87. The court held that "[a]lthough Experian posits that the word 'sources' could have many meanings, in the context of this case and the FCRA, the term clearly embraces CardWorks. Whatever else it might mean, the term 'sources of the information' certainly includes the entity that gave the information to Experian." *Id.* at 8–9. The court drew added support for its holding from the standard industry practice of "identify[ing] both the previous servicer/issuer of the debt and the current servicer," and from the fact that "Experian actually considered following this practice and using the trade line 'Advanta/CWS' but instead deferred judgment to CardWorks." *Id.* at 11–12.

Because Experian wants to continue deferring to its customers, it repeatedly told the district court in the class-certification hearing that it will litigate the case to final judgment and then seek review from this Court if it loses. As Experian's counsel put it, "this is not a case that can be settled." Hearing Tr. 6/10/14, 5:1–2.

Shortly thereafter, the court certified a class of all people who requested an Experian credit report in or after August 2010 that identified Advanta "as the only source of the information for the tradeline." ECF No. 167, at 2. "The 'overarching issue,'" the court explained, "concerns Experian's willfulness: whether Experian acted in objectively reasonable fashion in failing to identify Cardworks as a source of information" and instead deferring to what Cardworks wanted Experian to tell

consumers. *Id.* at 5. Once that common question is resolved, the court stressed, all that will remain is to fix "a simple, per-violation statutory damages calculation," after which the case "reduce[s] to mouse-clicking simplicity." *Id.* at 4, 9.

**4. Experian's Previous Petition for Interlocutory Review.** Experian sought permission from this Court for an interlocutory appeal under Rule 23(f). *See* Rule 23(f) Pet., No. 14-325. Experian's central argument was that class members lacked Article III standing because they had not been injured—even though they had been denied specific information to which they were entitled under the FCRA. Seizing on a sentence from the decision discussing available statutory remedies, not Article III standing, Experian asserted that the district court "expressly recognized" that most class members "have suffered no injury in fact." *Id.* at 1, 7–8. From there, Experian relied primarily on *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013)—an ERISA case brought on behalf of a pension plan by members who couldn't recover individually—to argue that "this Court has specifically rejected the proposition" that the "'deprivation of [a] statutory right . . . is sufficient to constitute injury-in-fact for Article III standing.'" Rule 23(f) Pet. 9. This Court denied the petition. *See* Order, No. 14-325 (Sept. 2, 2014) (Motz, Wilkinson, King, *JJ.*).

**5. Summary-Judgment Order.** After Experian's petition had delayed the proceedings by two months, Experian then made the same Article III argument to the district court in another summary-judgment attempt—more than three years

after the case was filed. *See* ECF No. 180. Experian also again moved for summary judgment on willfulness, asking the court to rule as a matter of law that Experian lacked the "objective culpability" required by *Safeco*, "whatever [its] subjective intent may have been," because "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Id.* at 3, 25, 27.

In response, Dreher argued that Experian's theory of Article III standing "ignores established precedent from the Fourth Circuit holding that a denial of a right of information under a federal statute is a cognizable injury and mistakenly relies on ERISA cases in which plaintiffs sought standing to sue derivatively on behalf of pension plans." *Id.* No. 182, at 15. He also moved for summary judgment on willfulness, arguing that "Experian's utter disregard for the statute's plain language"—including its decision to let CardWorks "dictate whether Experian would identify CardWorks as a 'source'"—"makes its conduct objectively unreasonable as a matter of law" and reckless under *Safeco*. *Id.* No. 176, at 2, 7.

The court sided with Dreher on both issues. As to standing, the court reproached Experian for again "pounc[ing] on a statement" taken out of context from the class-certification decision to suggest that class members had not suffered an injury in fact. Op. 6. The court explained that class members have standing because the FCRA gives them "the right to receive certain information from consumer reporting agencies, including the sources of information on their credit

reports," "the violation of which causes an informational injury that can be redressed in federal court." *Id.* at 2, 6, 7. As to willfulness, the court held that "Experian's decision to intentionally omit CardWorks" from the reports—which "CardWorks specifically requested"—"so obviously violated the language of the Act" as to be objectively reckless under *Safeco*. *Id.* at 2, 4. "Experian's conduct met that high threshold," the court explained, "by blatantly ignoring the Act's clear and simple command to disclose the 'sources of information' for the Advanta trade lines." *Id.* at 8 n.7. "Experian easily could have disclosed both Advanta and CardWorks," but instead chose to defer to CardWorks. *Id.* at 15.

Although the court certified its order under § 1292(b), it provided no reasons for why it did so. Order 1–2. It did not identify a controlling legal issue warranting an immediate appeal. Nor did it explain how an appeal could materially advance the litigation's termination given that the court has set a trial date on damages for May 4, 2015, after which final judgment will be entered.

## ARGUMENT

This Court has emphasized that it will exercise its discretion to grant review under § 1292(b) only very "sparingly," and that the statutory "requirements must be strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989). The party seeking review has the "burden" of showing that "exceptional circumstances justify

a departure from the basic policy postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

To carry this heavy burden, Experian must show three things: *first*, that an immediate appeal will "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b); *second*, that the summary-judgment order "involves a controlling question of law," *id.*—in other words, "a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes," *Fannin*, 1989 WL 42583, at *5; and *third*, that there is "substantial ground for difference of opinion" as to that question, 28 U.S.C. § 1292(b), such that there is a split of authority or at least "genuine doubt as to whether the district court applied the correct legal standard," *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 527 (E.D.N.C. 2010). Experian fails each criterion.

## I. Experian has not shown that an interlocutory appeal will "materially advance the termination of the litigation."

The first requirement is the most straightforward. Experian must show that "certification will materially advance the ultimate termination of the litigation." *Union Cnty. v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008). It cannot possibly do so here, and barely even tries. That is because this case is set to end in just a few months, and the class has already received notice. All that is left is the fixing of "a simple, per-violation statutory damages calculation." ECF No. 167, at 4. A trial for that limited purpose has been scheduled for May 4, meaning that "the

appeals process itself would take longer than the time remaining before trial." *Tesco Corp. v. Weatherford Int'l, Inc.*, 722 F. Supp. 755, 768 (S.D. Tex. 2010). "Given that the trial on damages is imminent, it is evident that it would not expedite the ultimate termination of this litigation to delay the proceedings for an interlocutory appeal." *Brown v. Pro Football, Inc.*, 812 F. Supp. 237, 239 (D.D.C. 1992). That alone dooms Experian's case for immediate review.[1]

## II. Experian has not shown that the district court's summary-judgment order involves a "controlling question of law" on which there is "substantial ground for difference of opinion."

### A. Article III standing and informational injury

Even if Experian could satisfy the first requirement, it cannot satisfy the other two. Its main bid for a "controlling question of law" on which there is "substantial ground for difference of opinion" is the same argument it featured in its failed petition for an interlocutory appeal under Rule 23(f): that the class lacks Article III standing because it has not suffered a legally cognizable injury. Experian

[1] *See also Picard v. Katz*, 466 B.R. 208, 2010 (S.D.N.Y. 2012) ("[W]ith the trial . . . just two months from now, the main effect of granting the [appeal] would be to materially delay, rather than materially advance, the ultimate termination."); *Cuttic v. Crozer-Chester Med. Ctr.*, 806 F. Supp. 2d 796 (E.D. Pa. 2011) (where "the only issues before the Court are the wil[l]fulness of Defendant's violation of the FLSA and damages," an "appeal is unnecessary to accelerate the ultimate termination"); *Redhead v. Conference of Seventh-day Adventists*, 566 F. Supp. 2d 125, 139 (E.D.N.Y. 2008) ("Given the imminence of trial, it is likely that [final judgment will be entered] before the parties would have finished filing their briefs in an interlocutory appeal."); *Lockridge v. City of Oldsmar*, 2005 WL 2788010, *1 (M.D. Fla. 2005) ("appeal will not materially advance the ultimate termination of this litigation" where trial would "begin in six weeks on the limited issue of damages").

again misleadingly asserts that "[t]he district court acknowledged as much" by carefully selecting quotations out of context, and again argues that this Court's "holding in *David* should resolve this case." Pet. 12–13. Further, Experian claims that the question "has divided the courts of appeals." Pet. 12. None of that is true.

For starters, the district court did not "acknowledge" that class members lack a legally cognizable injury. Exactly the opposite: The court held that class members have standing because they have suffered a concrete and particularized "informational injury that can be redressed in federal court"—specifically, they have been denied certain information to which they are entitled under the FCRA. Op. 2. As this Court has recognized, such "informational injury" is "sufficiently concrete and specific to satisfy Article III." *Salt Institute v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *see Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 703 (E.D. Va. 2010). This doctrine of informational injury is well established in Supreme Court precedent, and the federal circuits uniformly hold such deprivation of information to be a sufficient injury for standing purposes in a wide variety of statutory contexts, from government-sunshine and election law to health, safety, and environmental regulation.[2] Experian cites no case to the contrary, nor any case

[2] *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *FEC v. Akins*, 524 U.S. 11, 24-25 (1998); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004); *Grant v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003); *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000); *Pub.*

finding Article III standing lacking in a suit under the FCRA, let alone one with the sort of concrete and particularized information-disclosure violations at issue here.

Instead, Experian invents a new rule: that "a plaintiff must demonstrate some harm over and above 'not knowing.'" Pet. 15. But Experian has no support for that rule, and it is not the law in any circuit. Indeed, it squarely conflicts with Supreme Court precedent holding that when a plaintiff alleges a right to receive certain information to which he is denied—for example, "information under the Freedom of Information Act"—that denial "constitutes a sufficiently distinct injury to provide standing to sue." *Pub. Citizen*, 491 U.S. at 449–50. The plaintiff need not also "demonstrate some harm over and above" the denial of information, as Experian contends. If that were the law, there would be nothing left of the concept of "informational injury," *Akins*, 524 U.S. at 24, and statutory notice and disclosure requirements under a broad range of statutes would be rendered unenforceable.[3]

Unable to point to cases concerning standing under the FCRA and similar consumer-protection statutes, Experian once more leans on this Court's decision in *David v. Alphin*. But the ERISA claims in that case were different from the FCRA

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*Citizen v. FTC*, 869 F.2d 1541, 1543 (D.C. Cir. 1989); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983).

[3] Consumer laws often allow statutory damages for informational injuries. Congress generally "creates statutory damages remedies because it wants to encourage civil enforcement suits in situations where actual damages are difficult to prove," as in many consumer cases. *Doe v. Chao*, 306 F.3d 170, 198 (4th Cir. 2002).

claims here in a fundamental way: They involved a derivative suit by plan members who sued "on behalf of the Pension Plan," and were "not permitted to recover individually." 704 F.3d at 332. When someone violates the fiduciary requirements of ERISA, they are liable to the retirement plan itself—not to the individual members of the plan. 29 U.S.C. § 1109. The private cause of action is merely an enforcement mechanism. In contrast, the FCRA creates both a cause of action and an individualized right: When someone violates the FCRA with respect to a particular consumer, they are "liable to that consumer." 15 U.S.C. § 1681n. *David* therefore did not address the question whether an individual has standing when she brings a suit on her own behalf alleging that an illegal action has caused her a personal injury, like the informational injury at issue here.

Because class members have standing under "established" law, and Experian "has cited no law to the contrary," "there is no substantial ground for difference of opinion" as to this question. *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994).

### B. *Safeco*'s application to the facts of this case

Experian's only other attempt to identify an issue satisfying § 1292(b)'s criteria is the district court's holding that Experian willfully violated the FCRA "by blatantly ignoring the Act's clear and simple command to disclose the 'sources of information' for the Advanta trade lines," and instead catering to CardWorks' desire "to go unlisted on the credit reports." Op. 4, 8 n.7. Experian contends that

this holding warrants "immediate review" because the Supreme Court's decision in *Safeco* does not "make willfulness a question for the court," but rather requires a jury to determine whether Experian "act[ed] with a willful state of mind." Pet. 3, 11, 19. Further, Experian complains that the district court relied too heavily on the FCRA's text to guide its willfulness determination. Neither argument justifies a departure from the final-judgment rule.

**1.** The first argument runs smack into *Safeco* itself, which "treated willfulness as a question of law" and decided the issue "without a trial." *Van Straaten v. Shell Oil Prods. Co.*, 678 F.3d 486, 490–91 (7th Cir. 2012). The Supreme Court did so, as Judge Easterbrook has explained, because "the statutory standard concerns objective reasonableness, not anyone's state of mind." *Id.* at 491; *see also id.* (Cudahy, *J.*, concurring) ("[T]he appropriate and sole measure of recklessness is objective reasonableness," which "may be determined as a matter of law and without a trial."); *Safeco*, 551 U.S. at 69 & n.18 (holding that recklessness is "objectively assessed" and does not "require[] subjective knowledge on the part of the offender"). Because Experian's reading of the statute in this case "must be 'objectively reasonable' under either the text of the Act or 'guidance from the courts of appeals or the Federal Trade Commission'"—and because "*Safeco* instructs [the court] not to consider the subjective intent of Experian"—there is no doubt that the question may be decided as a matter of law. *Levine v. World Fin.*

*Network Nat'l Bank*, 554 F.3d 1314, 1318 (11th Cir. 2009) (quoting *Safeco*, 551 U.S. at 70). Indeed, Experian itself recognized as much just a few months ago, asking the district court to grant summary judgment in its favor because the recklessness standard is one of "objective culpability"—no matter what Experian's "'subjective intent may have been.'" ECF No. 180, at 25 (quoting *Safeco*, 551 U.S. at 70 n.20).

Now seeking interlocutory review, and needing to show a substantial ground for disagreement, Experian points to three cases (at 20) that it claims require the issue to go to a jury. But the first (*Dalton v. Capital Associated Industries*, 257 F.3d 409 (4th Cir. 2001)) concerned an alleged "knowing" violation of the FCRA, not a reckless one, and predates *Safeco* anyway. The second (*Fuges v. Southwest Financial Services, Ltd*, 707 F.3d 241 (3d Cir. 2012)) decided recklessness as a matter of law, and the same court recently reiterated that "[a]n actor's 'subjective bad faith' is irrelevant—the test is whether the actor's conduct was 'objectively unreasonable.'" *Seamans v. Temple Univ.*, 744 F.3d 853, 868 (3d Cir. 2014). And the last case (*Ashby v. Farmers Insurance Co.*, 565 F. Supp. 2d 1188 (D. Or. 2008)) relied primarily on an older case that "did not discuss the fact that [*Safeco*] treated the subject as one of law," was later "vacated as moot," and is now "defunct" and "has no force" in light of subsequent precedent. *Van Straaten*, 678 F.3d at 491 (describing *Whitfield v. Radian Guar., Inc.*, 501 F.3d 262 (3d Cir. 2007)). Such "a dearth of cases does not constitute substantial ground for difference of opinion." *Union Cnty.*, 525 F.3d at 647.

**2.** Experian also asks this Court to rush in to decide whether the district court focused too much "on the text of the operative provision" of the FCRA, as well as the case law and any authoritative FTC guidance—none of which supports Experian's position—and not enough on "such matters as statutory purpose, industry practice," and an email from someone at a different agency that did not mention (much less interpret) the FCRA and was not sent to Experian. Pet. 3.

That argument is not only strange; it is case-specific and completely without support. Indeed, Experian cites only one case in making this argument—*Safeco*. But *Safeco* instructs courts, when determining willfulness, to do exactly what the district court did here: determine whether the statute is "pellucid," and (if it is not) consider whether the defendant's "reading has a foundation in the statutory text," plus any "guidance from the courts of appeals or the [FTC]." 551 U.S. 69–70; *see also Seamans*, 744 F.3d at 868. As one circuit has held, "under *Safeco* there is no underlying purpose criterion to determine whether an interpretation of the Act is objectively reasonable. What matters under *Safeco* is the text of the Act and authoritative interpretations of that text." *Levine*, 554 F.3d at 1319. The same is true of industry practice. "'Everyone knows' is no substitute for support in the text." *Van Straaten*, 678 F.3d at 489.

Ignoring these authorities, Experian claims that the district court wrongly interpreted *Safeco* as "requiring an interpretive methodology" and as setting forth a

"standard of liability." Pet. 18-19. But the court applied the correct legal standard—whether "the defendant's conduct involved 'an unjustifiably high risk of harm'"—and reached the correct conclusion: that "Experian's conduct met that high threshold by blatantly ignoring the Act's clear and simple command to disclose the 'sources of information.'" Op. 8 & n.7. That conclusion is particularly correct in light of the undisputed fact that Experian originally intended to comply with the Act, but then changed its mind at the behest of CardWorks, which "specifically requested to go unlisted. . . . Experian happily obliged." *Id.* at 4. Moreover, "a completely adequate precaution" (listing both names on the credit report) "would have cost nothing," which is further "indicative of willful violation." *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (Posner, *J.*).

In any event, this is a case-specific question that does not warrant review. "The antithesis of a proper § 1292(b) appeal," after all, "is one that turns on whether . . . the district court properly applied settled law to the facts or evidence of a particular case." *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Experian will have the opportunity to challenge the court's application of *Safeco* in a few months—after final judgment.

## III. The lack of stated reasons for the § 1292(b) certification counsels against interlocutory review.

Experian's inability to carry its burden is fatal given "[t]he district court's failure to specify the controlling question or questions of law it had in mind when

certifying" the case, or to explain how an appeal would advance the end of litigation. *Id.* at 1255. Like other courts, this Court has "made the same or similar points with respect to certifications under [Rule 54(b)]," *Linton v. Shell Oil Co.*, 563 F.3d 556, 558 (5th Cir. 2009), requiring orders with the "reasons stated." *Parker v. Baltimore & Ohio R.R.*, 850 F.2d 689 (4th Cir. 1988). Thus, "[a] district-court order certifying a § 1292(b) appeal should state the reasons that warrant appeal," and "a thoroughly defective attempt may be found inadequate to support appeal." 16 Wright & Miller, *Federal Practice & Procedure* § 3929 (3d ed. 2008). One circuit has held that a "district court's recitation of the statutory language without providing any reasoning [is] an abuse of its discretion," *White*, 43 F.3d at 378, while another "expect[s] the [district] court to explain *why*, rather than assert that, immediate appeal will materially advance the disposition," *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1239 (7th Cir. 1991), *vacated on other grounds*, 502 U.S. 801 (1991).

At the very least, Experian must make up for this deficit with reasons of its own showing that this is indeed the rare case satisfying §1292(b)'s stringent standards. It has failed to do so. Rather than grant an interlocutory appeal at this late stage—three and a half years into the case—this Court should wait a few more months and let the litigation run its course.

## CONCLUSION

The petition for permission to appeal should be denied.

Respectfully submitted,

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January 20, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on January 20, 2015, I electronically filed the foregoing answer with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

*/s/ Deepak Gupta*
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