

1 Stephanie R. Tatar – State Bar No. 237792

2 **TATAR LAW FIRM, APC**

3 3500 West Olive Avenue, Suite 300

4 Burbank, California 91505

5 Telephone: (323) 744-1146

6 Facsimile: (888) 778-5695

7 Stephanie@thetatarlawfirm.com

8 Thomas J. Lyons Jr., Esq.

9 *(To Be Admitted Pro Hac Vice)*

10 **CONSUMER JUSTICE CENTER P.A.**

11 367 Commerce Court

12 Vadnais Heights, MN 55127

13 Telephone: (651) 770-9707

14 Facsimile: (651) 704-0907

15 tommy@consumerjusticecenter.com

16 David George, Esq.

17 *(To Be Admitted Pro Hac Vice)*

18 **BAKER WOTRING LLP**

19 700 JP Morgan Chase Tower

20 600 Travis Street

21 Houston, TX 77002

22 Telephone: 713-980-1700

23 Facsimile: 713-980-1701

24 dgeorge@bakerwotring.com

25 *Attorney for Plaintiffs*

26 **Christopher Bentley, Nicholas Longo,**

27 **Hendry Idar III, Vincent Hardy,**

28 **Jesus Sanchez, Taryn Mitchell,**

and the class

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Christopher Bentley, Nicholas) Case No.
Longo, Hendry Idar III, Vincent)
Hardy, Jesus Sanchez, and Taryn)
Mitchell, on behalf of themselves and)
of others similarly situated,)

Plaintiffs,

v.

**CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED**

The Control Group Media Company,)
Inc., Instant Checkmate, LLC, and)
TruthFinders, LLC,)

Defendants.

1. Plaintiffs Christopher Bentley, Nicholas Longo, Hendry Idar III, Vincent Hardy, Jesus Sanchez, and Taryn Mitchell (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, complain of Defendants The Control Group Media Company, Inc. ("The Control Group"), the parent or holding company, and its subsidiaries: Instant Checkmate LLC ("Instant Checkmate") and TruthFinders LLC ("TruthFinders") (The Control Group, Instant Checkmate, and Truthfinders are collectively referred to as "Defendants.").

I. INTRODUCTION

2. This is a consumer class action that arises from a background reporting company's willful publication and sale of consumers' expunged, expuncted, and/or sealed criminal records in violation of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. (the "FCRA") and Texas Business and Commerce Code §§ 109.001-.007. Plaintiffs bring this action on behalf of consumers throughout the country who have been the subject of prejudicial, misleading, and inaccurate background reports published and/or sold by Defendants. Plaintiffs anticipate adding other relevant state-law causes of action, similar to the Texas statute cited, as appropriate.

3. Defendants' misconduct was discovered during multiple audits conducted regarding Defendants by a startup expungement service in Central Texas, which correctly feared that Defendants continued to publish and report expunged and sealed records even after receiving legal notice—which included individualized court orders—to permanently remove these records. Plaintiffs in this case come from a group of at least twenty-four clients of the Texas expungement service whose expunged or sealed records still appear on Defendants' websites and apps despite receipt of court-order notices as early as July 2017 demanding their immediate removal. That a single startup expungement service provider encountered such a high frequency of improper publications, given its limited client base and operational history, and that it encountered violations of such length,

1 certainly indicates there is a massive, class-action-sized problem before the Court
2 in this case.

3
4 4. As for the merits of the case, Plaintiffs have caught Defendants red-
5 handed here; what remains to be resolved is simply the number of people harmed
6 and the remedies available to them.¹

7 8 **II. JURISDICTION AND VENUE**

9 5. This Court has subject-matter jurisdiction under 15 U.S.C. § 1681p,
10 which allows any FCRA claim to “be brought in any appropriate United States
11 district court, without regard to the amount in controversy....” Plaintiffs are
12 bringing claims under the FCRA in this case.

13
14 6. This Court also has subject-matter jurisdiction under 28 U.S.C. § 1331,
15 which gives federal district courts original jurisdiction of all civil actions arising
16 under the Constitution, laws, or treaties of the United States. Plaintiffs are bringing
17 claims under the FCRA in this case.
18

19
20
21
22
23 ¹ Instant Checkmate and TruthFinders include both mandatory arbitration and
24 waiver of class action provisions within their websites’ terms of service, so that
25 anyone who subscribes to their background check service purportedly forfeits these
26 valuable rights. However, that did not occur here, as it was a third-party acting of its
27 own volition that subscribed to and audited Defendants’ background database.
28 Plaintiffs did not know of, approve, or pay for the audit and, therefore, have not
fallen into Defendants’ waiver trap.

1 7. This Court also has subject-matter jurisdiction under 28 U.S.C. § 1367
2 for supplemental state-law claims. Plaintiffs also are bringing supplemental Texas
3 statutory claims under Texas Business and Commerce Code §§ 109.001–.007.
4

5 8. This Court also has subject-matter jurisdiction under 28 U.S.C. § 1332(a)
6 because there is complete diversity between the parties and the matter in
7 controversy is more than \$75,000. On information and belief, all members of
8 Instant Checkmate, and TruthFinders, are citizens of Delaware and/or California,
9 as is The Control Group, while Plaintiffs are citizens of Texas.
10

11 9. This Court also has subject-matter jurisdiction under 28 U.S.C. §
12 1332(d)(2) because this is a class action case where the matter in controversy,
13 exclusive of interest and costs, exceeds \$5 million and a member of a class of
14 plaintiffs is a citizen of a state different from any defendant.
15
16

17 10. This Court has general- and specific-personal jurisdiction over
18 Defendants under California Code of Civil Procedure § 410.10 because they are
19 residents of California,
20

21 11. Venue lies properly in this district pursuant to 28 U.S.C. § 1391(b)
22 because Defendants all are from San Diego, California.
23

24 **III. PARTIES**

25 12. Plaintiff Christopher Bentley is an adult individual and citizen of the
26 State of Texas who resides in Katy, Texas.
27
28

1 13. Plaintiff Nicholas Longo is an adult individual and citizen of the State of
2 Texas who resides in Portland, Texas.

3
4 14. Plaintiff Henry Idar III is an adult individual and citizen of the State of
5 Texas who resides in San Antonio, Texas.

6 15. Plaintiff Vincent Hardy is an adult individual and citizen of the State of
7 Texas who resides in San Antonio, Texas.

8
9 16. Plaintiff Jesus Sanchez is an adult individual and citizen of the State of
10 Texas who resides in Houston, Texas.

11
12 17. Plaintiff Taryn Mitchell is an adult individual and citizen of the State of
13 Texas who resides in Rowlett, Texas.

14 18. Defendant The Control Group Media Company, Inc. d/b/a "The Control
15 Group" is a Delaware corporation with its principal place of business in San Diego,
16 California. The Control Group is the parent of, holding company for, or otherwise
17 owns and controls the other named Defendants. As such, it provides or controls
18 background screening services, decision-making intelligence, public record reports
19 and operates as a consumer reporting agency. Defendant, thus, regularly conduct
20 business in the State of Texas, and it operates a principal place of business at 600
21 B. Street, San Diego, CA 92101. The Control Group and the other Defendants are
22 "consumer credit reporting agencies," as defined by 15 U.S.C. § 1681a(f), regularly
23 engaged in the business of assembling, evaluating, and dispersing information
24
25
26
27
28

1 concerning consumers for the purpose of furnishing “consumer reports,” as defined
2 in 15 U.S.C. § 1681a(d), to third parties. Defendant The Control Group can be
3 served with process by serving its agent for the service of process Paracorp, Inc. at
4 2140 S. Dupont Hwy, Camden, DE 19934, or wherever it may be found.
5

6 19. Defendant Instant Checkmate, LLC is a Delaware limited-liability
7 company with its principal place of business in San Diego, California. Defendant
8 provides or controls background screening services, decision-making intelligence,
9 public record reports and operates as a consumer reporting agency. Defendant
10 regularly conduct business in the State of Texas, and it operates a principal place
11 of business at 3111 Camino Del Rio N Suite 400, San Diego, CA 92108. Defendant
12 is a “consumer credit reporting agency,” as defined by 15 U.S.C. § 1681a(f), and
13 regularly engaged in the business of assembling, evaluating, and dispersing
14 information concerning consumers for the purpose of furnishing “consumer
15 reports,” as defined in 15 U.S.C. § 1681a(d), to third parties. Defendant Instant
16 Checkmate, Inc., can be served with process by serving its agent for the service of
17 process Paracorp, Inc. at 2140 S. Dupont Hwy, Camden, DE 19934, or wherever it
18 may be found.
19
20
21
22
23

24 20. Defendant, TruthFinders, LLC, is a Delaware limited liability company
25 with its principal place of business in San Diego, California. Defendant provides
26 or controls background screening services, decision-making intelligence, public
27
28

1 record reports and operates as a consumer reporting agency. Defendant regularly
2 conduct business in the State of Texas, and it operates a principal place of business
3 at 2534 State Street Suite 473, San Diego, CA 92101. Defendant is a “consumer
4 credit reporting agency,” as defined by 15 U.S.C. § 1681a(f), and regularly engaged
5 in the business of assembling, evaluating, and dispersing information concerning
6 consumers for the purpose of furnishing “consumer reports,” as defined in 15
7 U.S.C. § 1681a(d), to third parties. Defendant Truthfinders, LLC, can be served
8 with process by serving its agent for the service of process Paracorp, Inc. at 2140
9 S. Dupont Hwy, Camden, DE 19934, or wherever it may be found.
10
11
12

13 21. Subject to permission by the Court, Plaintiffs reserve the right to amend
14 this Complaint to include any relevant additional subsidiaries or affiliates
15 uncovered during discovery in this case.
16

17 IV. FACTUAL ALLEGATIONS

18 22. About one in three Americans has a criminal record of some kind. 87
19 percent of employers, 80 percent of landlords, and 66 percent of colleges screen for
20 criminal records. Background checking has become an intractable barrier to the
21 fundamental needs of life for huge numbers of people with criminal records and
22 has become a significant cause of poverty in this country, a phenomenon known as
23 collateral consequences.
24
25
26
27
28

1 23. To alleviate this burden, most states have expanded their
2 expungement or sealing laws in the last decade. For instance, Texas passed its own
3 protective provisions in 2013, which is today codified in Texas Business and
4 Commerce Code §§ 109.001–.007. These state laws provide additional remedies
5 and protections to those found in the federal Fair Credit Reporting Act (15 U.S.C.
6 § 1681 et seq), which has long forbidden the publication and reporting of expunged
7 or sealed records. Despite the efforts of Congress and state legislatures, however,
8 the commercial screening industry’s continued publication and reporting of
9 expunged cases threatens to undermine the whole strategy of broadening
10 expungement as a remedy for the harm of collateral consequences.

11 24. Moreover, the proliferation of background check companies,
12 numbering in the hundreds and all charging subscription or access fees, creates
13 insurmountable logistical and financial obstacles to anyone wanting to insure his
14 or her expunged criminal record was, in fact, removed from publication by the
15 universe of online businesses operating in this field. First, someone would need to
16 locate every reporting site, which is practically impossible, and, second, pay to join
17 every site and then negotiate the removal of any wrongful publication of expunged
18 or sealed records found, on a site-by-site basis. More difficult still, a number of
19 background reporting companies, such as Defendants in this case, employ multiple
20 online “storefronts,” each branded with a different name but all using the same
21
22
23
24
25
26
27
28

1 employees and database. By this method, they attempt to confuse clients and avoid
2 any and all regulation by disclaiming that they are governed by the FCRA at all.
3
4 Needless to say, but the only reason not to operate openly as a legitimate, regulated
5 background reporting company is to save the expense and effort required to provide
6 accurate and legally permissible background information. As a result of this “Wild
7
8 West” situation in the background screening industry, expunged records can be,
9 and are, available for anyone to view for months or even years while,
10 simultaneously, remaining unknown and undiscoverable to the individuals reported
11 upon.
12

13 ***A. Defendants’ History of FCRA Non-Compliance***

14 25. Instant Checkmate is one of America’s largest, most heavily trafficked
15 online background reporting services. Instant Checkmate, its parent company, The
16 Control Group, and its 2015 sibling spinoff, TruthFinders, have made their fortunes
17 monetizing the criminal backgrounds, employment records and personal data of the
18 American public.
19
20

21 26. Founded in 2010, “Instant Checkmate embodied the clever and brash
22 kind of company seeking opportunities on the Wild West frontier of personal data.
23 By using aggressive marketing, it attracted a stream of new users. Even within a
24 young industry, it surpassed existing businesses to become a leading site selling
25
26
27
28

1 personal dossiers to the public, with a focus on criminal records.”² Instant
2 Checkmate was attracting twenty million unique visitors *a month* by early 2014,
3 and Instant Checkmate advertised that it had conducted more than 180 million
4 searches in its first four years of operation and, on information and belief, those
5 numbers have only continued to rise since. The company’s stratospheric growth
6 was fueled by a multimillion-dollar marketing campaign aimed squarely at selling
7 comprehensive background reports about unsuspecting Americans, the exact type
8 of reporting product that falls within the purview and protections of the FCRA.
9 Among other purchasers, Instant Checkmate sold these reports to people who, as a
10 matter of law, are expressly subject to the FCRA: employers and property
11 managers.
12

13
14
15
16 27. Specifically, Instant Checkmate spent millions of dollars advertising its
17 consumer background reports to anyone who wanted to investigate a potential new
18 renter, child care provider, household worker, or other employee. According to the
19 U.S. Department of Justice (“DOJ”) and the U.S. Federal Trade Commission
20 (“FTC”), this advertising included statements on the company’s official website,
21 its company blog, ubiquitous Google Ad Words campaigns, and banner
22 advertisements distributed through Instant Checkmate’s affiliate advertising
23
24
25

26 ² Tanner, Adam. *What Stays in Vegas: The World of Personal Data – Lifeblood of*
27 *Big Business – and the End of Privacy as We Know It*. New York, PublicAffairs,
28 2014 (p. 68)

1 networks. (See Exhibit A, Complaint in *United States v. Instant Checkmate, Inc.*,
2 Case No.: 14cv0675-H(JMA) (S.D.C.A. March 28, 2014)(pp. 3-4)
3

4 28. Complying with the FCRA is neither cheap, nor easy—and a
5 company that could somehow avoid its compliance requirements would have an
6 enormous advantage over its competition; indeed, an advantage so large that it
7 might vault into the stratosphere of the background reporting industry by year four
8 of its existence. Crucially, the FCRA provides wide-ranging protections to
9 maximize the accuracy of the data sold on any individual and to provide potential
10 renters, credit applicants, and employees adequate transparency, remedies, and
11 ability to consent. The FCRA creates, moreover, nearly identical compliance duties
12 on both the background reporting company and the person or business who
13 purchases the background check. Most background reporting companies in this \$3
14 billion a year industry clearly state that they comply with the FCRA and assist their
15 clients with compliance as well.
16
17
18
19

20 29. Instant Checkmate, on the other hand, pioneered and today dominates
21 a shadowy landscape of companies in the industry that openly refuse to comply
22 with the FCRA—this is not hyperbole, Instant Checkmate, TruthFinders, and the
23 assortment of companies that emulate them, place notices and disclaimers on their
24 websites and apps stating that the FCRA’s consumer protection laws simply do not
25 apply to them. Instant Checkmate does not do this to warn away companies who
26
27
28

1 may be looking for an FCRA compliant background service. To the contrary,
2 Instant Checkmate has been posting this disclaimer nonstop since its founding in
3 2010, during a multi-year period in which it spent millions of dollars advertising to
4 people and businesses wanting to investigate renters and new hires. This disclaimer
5 was wink-and-a-nod advertising to countless small-to-medium sized businesses
6 and individuals who, just like Instant Checkmate, illegally sought to avoid the time
7 and expense of complying with the FCRA, including the payment of higher fees to
8 FCRA compliant services.
9
10

11
12 30. By statute, the FTC is the public sector enforcer of the FCRA. On its
13 official website is an entire section devoted to stamping out Instant Checkmate's
14 disclaimer scheme and, to this day, the FTC site holds up Instant Checkmate as a
15 cautionary tale. As for Instant Checkmate's disclaimer scheme, the FTC warns
16 would be copycat sites that:
17

18 "You know that phrase 'If it quacks like a duck...'? It's
19 applicable in the Fair Credit Reporting Act context, too. If a
20 company meets the legal definition of a 'consumer reporting
21 agency,' it's a consumer reporting agency. Including a disclaimer
22 that says, in effect, 'But we're not a [Consumer Reporting
Agency]!' won't change that."

23 (See www.ftc.gov/news-events/blogs/business-blog/2013/01/background
24 [screening-reports-fcra-just-saying-youre-not](http://www.ftc.gov/news-events/blogs/business-blog/2013/01/background)).
25

26 31. In 2014, Defendants, and their corporate officers, were charged by the
27 U.S. Department of Justice, heavily fined by the FTC, and permanently enjoined
28

1 from continuing their unlawful business practices by Judge Huff of the United
2 States District Court of the Southern District of California. The U.S. Government
3 categorized Instant Checkmate as a Consumer Reporting Agency under the FCRA
4 and fined them \$525,000 for committing an assortment of the same violations
5 Plaintiffs complain of in this complaint. The Court's permanent injunction states:
6

7
8 "IT IS ORDERED that Defendant [Instant Checkmate],
9 Defendant's officers, agents, servants, employees, and all other
10 persons in active concert or participation with any of them, who
11 receive actual notice of this Order, whether acting directly or
12 indirectly, in connection with operating as a Consumer Reporting
13 Agency, are hereby permanently restrained and enjoined from:

14 A. furnishing a Consumer Report to any Person who
15 Defendant does not have reason to believe has a
16 Permissible Purpose to receive the Consumer
17 Report;

18 B. failing to maintain reasonable procedures designed
19 to limit the furnishing of Consumer Reports to
20 Persons that have Permissible Purposes to receive
21 them. Such reasonable procedures shall require that:
22 prospective users of the information identify
23 themselves, certify the purposes for which the
24 information is sought, and certify that the
25 information will be used for no other purpose; and
26 that Defendant make a reasonable effort to verify
27 the identity of a new prospective user and the uses
28 certified by such prospective user prior to
furnishing such user a Consumer Report;

C. failing to maintain reasonable procedures to assure
the maximum possible accuracy of the information
concerning the individual about whom a Consumer
Report relates; and

1 D. failing to provide a notice identical or substantially
2 similar to the one attached as Attachment B to this
3 Order, to any person to whom a Consumer Report
4 is provided by Defendant, provided that Defendant
5 may provide an electronic copy of the notice to a
6 user if: (a) in the ordinary course of business, the
7 user obtains Consumer Report information from
8 Defendant in electronic form, and (b) the notice is
9 Clear and Prominent.”

10 (See Exhibit B, Consent Order of Judge Marilyn L. Huff, pp. 4-5)

11 32. The issuance of Judge Huff’s 2014 Consent Order was a crossroads
12 moment for Instant Checkmate. But, instead of getting into compliance with the
13 FCRA, as contemplated by the plain language of the order and the size of its
14 monetary fine, Instant Checkmate simply eliminated specific advertisements to
15 employers and property managers. That’s it. Nothing else about their shady
16 business practices changed at all—obviously—or Plaintiffs would not be here
17 today. Multiple audits show that many months after receiving court-orders and
18 notices to remove Plaintiffs’ expunged or sealed records, nearly all still appear on
19 Defendants’ database and consumer reports in complete defiance of both the federal
20 court injunction and the Texas state courts who issued the expungements.

21 33. Instant Checkmate, a business who came to dominate the background
22 reporting industry in four short years by purposefully flouting the FCRA, whose
23 customer base at the time of the Consent Order was stocked full of employers and
24 property managers, had two viable paths before it on May 28, 2014: (1) get into
25
26
27
28

1 FCRA compliance, or (2) scour its client base for improper users and disgorge
2 them, if possible, or start over from scratch. Instead, Instant Checkmate merely
3 tweaked its advertising and continued to enjoy the fruits of its intentional
4 misconduct. Importantly, here, the Consent Order also required Instant Checkmate
5 to supply periodic compliance reports to the FTC through 2017 – it certainly
6 remains to be seen if these compliance reports fully disclosed the flimsy playbook
7 Instant Checkmate was running to avoid compliance requirements post May 28,
8 2014.

9
10
11
12 ***D. Defendants Practice as a Consumer Reporting Agency***

13 34. Given they claim the law does not apply to them, it is not surprising
14 that Defendants routinely and wrongfully deprive American consumers of the many
15 rights afforded to them by the FCRA, including the right to obtain free copies of
16 reports that Defendants sell about a consumer, and the right to require that
17 Defendants only report information that adheres to the standard of maximum
18 possible accuracy. These rights, of course, mirror Instant Checkmate's obligations
19 under its 2014 permanent injunction, which honored the FTC's conclusion that
20 Instant Checkmate operated as a consumer reporting agency under the FCRA.
21

22
23 35. Defendants operate background investigation websites that allow
24 users to search for consumers based on several categories, including name, date of
25 birth, and state of residence. Those reports can contain numerous items of
26
27
28

1 information, including but not limited to age, employer, current and previous
2 addresses, phone numbers, email addresses, arrest and conviction records, the
3 identity of relatives, property records, marriage and divorce records, social media
4 accounts, and lawsuit records.

6 36. Defendants allow consumers nationwide to request—for a fee—a
7 background report on virtually any person in the United States. In response to a
8 request, Defendants obtain information from various sources and assemble it into
9 detailed reports they provide to users. These reports contain private, sensitive and
10 often erroneous data, including but not limited to residential history, birth dates,
11 criminal records, tax records, DMV records, professional license records, civil
12 suits, and social media information.

15 37. Defendants maintain inadequate policies or procedures to insure they
16 accurately assemble and provide consumer reports in compliance with the FCRA,
17 especially in the matter of eliminating expunged, expuncted, or sealed criminal
18 records from their websites and reports.

21 38. All of Defendants' terms of service pages expressly disclaim any and
22 all responsibility for inaccuracies in their respective data bases and reports,
23 including criminal records, by purporting to foist this duty on the government
24 agencies and third-party data providers who create or provide this information to
25 Defendants.
26
27

1 39. Instead, Defendants seek to shield their non-compliant reporting
2 behind a self-serving claim that none of them are consumer reporting agencies, that
3 they do not sell consumer reports, and that they are not subject to the FCRA.
4

5 40. But what Defendants really provide is highly sensitive personal, legal
6 and financial information regarding individuals. The information is the same
7 information that is provided in consumer reports by recognized consumer reporting
8 agencies and the information in Defendants' reports are compiled using the same
9 data sources as the major consumer reporting agencies reports.
10

11 41. Moreover, Defendants' customers are in no way prevented from using
12 these reports for the same purposes as users of other consumer reports — to make
13 decisions regarding employment, housing, and credit worthiness, among other
14 things.
15

16 42. For the reasons above, and at all relevant times, Defendants were
17 consumer reporting agencies ("CRA"), defined by section 1681a(f) of the FCRA
18 as follows: "The term "consumer reporting agency" means any person which, for
19 monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole
20 or in part in the practice of assembling or evaluating consumer credit information
21 or other information on consumers for the purpose of furnishing consumer reports
22 to third parties, and which uses any means or facility of interstate commerce for the
23 purpose of preparing or furnishing consumer."
24
25
26
27
28

1 43. Defendants obtain distilled and incomplete public record information,
2 including criminal record history, from third party databases and courthouses and
3 maintain such data in consumer files that they create and assemble. As a CRA,
4 Defendants are also required to follow reasonable procedures to assure maximum
5 possible accuracy of the information concerning the individual about whom the
6 report relates, per 15 U.S.C. § 1681e(b).
7
8

9 44. Defendants do not, however, maintain strict procedures designed to
10 ensure that such information is complete and up to date, nor do they utilize
11 reasonable procedures designed to assure maximum possible accuracy. Based upon
12 a common policy and practice, Defendants regularly and illegally publish and
13 report criminal records that have been expunged, expuncted or sealed by court
14 order.
15
16

17 45. For example, each Class Representative comes from a group of
18 similarly injured clients of a single expungement service in Central Texas that – of
19 its own volition and without instruction from or payment by their injured clients –
20 audited Defendants. In each case, Defendants’ published, publicly available
21 database included sealed, expunged or expuncted criminal records many months
22 past the date that Defendants were provided legal notice to remove the
23 impermissible and inaccurate information. If a single expungement service found
24 many of its clients were injured in just the last year alone, it seems inevitable that
25
26
27
28

1 there will be hundreds if not thousands more nationwide whose rights were
2 similarly ignored by these Defendants, and likely for many years. Simply put,
3 despite being fined \$525,000 and being placed under a 3-year monitoring program
4 by the Department of Justice and FTC in 2014, these Defendants still fail or refuse
5 to run a background reporting service in a legally compliant manner.
6

7
8 46. Defendants' practices not only violate the FCRA as a matter of law,
9 the practices exact serious consequences on consumer job applicants and interstate
10 commerce. Consumers who have attempted to obtain the deletion of negative
11 background history are prejudiced in their ability to adequately determine whether
12 the information is being accurately published or reported.
13

14
15 47. Despite their duties to maintain strict procedures to assure that
16 criminal record information is complete and up to date, and to utilize procedures
17 designed to assure maximum possible accuracy of the criminal record information
18 that they publish and/or sell to the public, Defendants have nonetheless
19 deliberately, willfully, intentionally, recklessly and negligently adopted a policy
20 and practice that disregards these duties, in violation of the FCRA.
21

22
23 48. Finally, Defendants also fail to provide notice to consumers at the
24 time they sell reports as required by the FCRA. They do not provide consumers
25 with a disclosure of all the information in their files that pertains to the consumer
26 or the sources of this information upon request, as required by the FCRA. They do
27
28

1 not provide consumers with a free annual disclosure under the FCRA, which shall
2 consist of “all information in the consumers file at the time of the request.” Quite
3 the opposite is true: Defendants willfully violate the FCRA by making
4 misrepresentations to convince consumers who visit their site or contact them that
5 they do not sell consumer reports and are not governed or regulated by the FCRA
6 as a consumer reporting agency or in any other respect.
7
8

9 49. For nearly a decade, Instant Checkmate has maximized profits by
10 playing cat-and-mouse with industry regulators and the law. Defendants seek to
11 avoid their FCRA obligations to gain a competitive advantage over reputable
12 consumer reporting agencies who go to the time and expense of complying with
13 the law, which directly impacts interstate commerce.
14
15

16 **E. *Defendants Published Criminal Records Under Texas Law***

17 50. Based on the same facts that triggered the FCRA compliance
18 requirements above, Defendants also fall squarely within the ambit of Chapter 109
19 of the Texas Business and Commerce Code.
20

21 51. In Texas, when an order of expunction is final, “the release,
22 maintenance, dissemination, or use of the expunged records for any purpose is
23 prohibited,” and “the person arrested may deny the occurrence of the arrest and the
24 existence of the expunction order.” TEX. CODE CRIM. PROC. art. 55.03. Similar
25 provisions exist in Texas for sealed criminal records, as well. TEX. GOV. CODE
26
27
28

1 §411.0755. Indeed, Texas refuses to sell criminal record data to background
2 reporting companies who publish expunged or sealed records. TEX. GOV. CODE
3 §411.0835) (“If ... a private entity that purchases criminal history record
4 information from the department has been found by a court to have committed three
5 or more violations ... the department may not release any criminal history record
6 information to that entity until the first anniversary of the date of the most recent
7 violation.”). Recognizing the seriousness of the harm such misconduct creates, the
8 State of Texas specifically makes wrongful publication a second-degree felony.
9 TEX. GOV. CODE §411.085.3

13 52. As for private-party claims, Chapter 109 of the Texas Business and
14 Commerce Code governs business entities that are engaged in publication of certain
15 criminal record information. TEX. BUS. & COMM. CODE §§ 109.001–.007. Chapter
16 109 applies to a business entity that “publishes” criminal record information and
17 that charges “a fee or other consideration to correct or modify criminal record
18 information.” TEX. BUS. & COMM. CODE § 109.002(a)(1).

21 53. By posting the information on their websites, Defendants made
22 Plaintiffs’ criminal record information available for inspection by anyone with
23 access to the website; thus, “publishing” such records under Texas law, which
24
25
26
27 3 Plaintiffs expressly reserve the right to bring R.I.C.O. claims, subject to the
28 Court’s permission, should discovery confirm their apparent viability in this case.

1 defines “publishing” very broadly, requiring only that a background investigation
2 website or company “communicate or make information available to another
3 person in writing or by means of telecommunications and includes communicating
4 information on a computer bulletin board or similar system.” TEX. BUS. & COMM.
5 CODE § 109.001(4).
6

7
8 54. By charging, for example, \$34.78 per month for a standard plan
9 subscription (and these prices vary between Defendants depending on special
10 offers, etc.)—and by making these fees or consideration mandatory for anyone
11 wanting to access their own personal criminal records as part of the correction or
12 modification process — Defendants charge “a fee or other consideration to correct
13 or modify criminal record information” under Texas law.
14
15

16 55. Moreover, Defendants’ websites all contain a trap that ironically also
17 constitutes “other consideration” under the law. Before anyone may pay for and
18 create an account with Defendants to ascertain whether or not their expunged or
19 sealed records are being unlawfully published, they must agree to waive any right
20 to pursue a trial by jury or class action. Foregoing these valuable rights also
21 constitutes a form of consideration in this case.
22
23

24 56. Next, a business entity may not publish criminal records if it has
25 knowledge or has received notice that an order of expunction has been issued under
26 Texas Code of Criminal Procedure article 55.03. On information and belief,
27
28

1 Defendants, or their third-party Texas data provider, received notice of expunction
2 for each Plaintiff from both the Texas Department of Public Safety and from
3 Plaintiffs themselves.
4

5 57. A business entity that publishes information in violation of section
6 109.005 is liable to the individual who is the subject of the information in an amount
7 not to exceed \$500 for each separate violation, and in the case of a continuing
8 violation, an amount not to exceed \$500 for each subsequent day on which the
9 violation occurs. An individual who prevails in an action under section 109.005 is
10 also entitled to recover court costs and reasonable attorney's fees. TEX. BUS. &
11 COMM. CODE § 109.005(d).
12
13

14 **F. *The Experience Of Representative Plaintiffs***
15

16 58. The Representative Plaintiffs share nearly identical underlying
17 damages in this case. Much like the vast majority of Americans who employ a
18 criminal defense attorney to handle an expungement, for approximately \$500 each,
19 Plaintiffs all hired the same online expungement assistance service to expunge
20 certain criminal records related to past offenses qualifying for expungement or
21 sealing under Texas law. In each case, Plaintiffs — much like anyone nationwide
22 seeking to expunge, expunct, or seal criminal records in an American court or
23 tribunal — also paid several hundred dollars in court costs, fees, and related
24
25
26
27
28

1 expenses to successfully expunge or seal their records and received an
2 Expungement Order from state court.

3
4 59. Similarly, Plaintiffs all paid an additional \$100 to personally notify
5 the universe of background check companies, including Defendants, that they must
6 remove the expunged, expuncted or sealed records from their database. In other
7 words, all Plaintiffs suffered similar, if not identical, economic damages when
8 Defendants both deprived them of the benefit of what they paid to obtain and what
9 they paid to make sure Defendants were aware of their duty under law.
10

11
12 60. Next, copies of Plaintiffs' Expungement Orders were served on
13 appropriate state agencies and law-enforcement agencies, which promptly removed
14 and expunged all records and related files from state-run databases. These
15 expunged Texas criminal charges were eliminated from the Texas Department of
16 Public Safety database that was provided to bulk purchasers, including Defendants
17 (either directly or through a third-party provider).
18

19
20 61. Likewise, Plaintiffs, through their expungement assistance service,
21 provided proper notice to over a hundred commercial background reporting
22 services, including Defendants. The online mailing service used on behalf of
23 Plaintiffs shows receipt of this notice by one or more of Defendants.
24

25 62. Despite the repeated efforts of both Plaintiffs and the State of Texas,
26 the expunged criminal records for the Plaintiffs, and approximately two dozen other
27
28

1 clients of the expungement services, continue to be published and available to the
2 public on Defendants' websites, at least as of the filing date for this Original
3 Complaint. Evidence of these violations was gathered independently of Plaintiffs
4 and other clients by their third-party expungement service provider who had
5 become concerned that Defendants were simply ignoring the legal notices they
6 received. This third-party simply subscribed to Defendants' website and reviewed
7 its clients' published reports for a fee.
8

9
10 63. As for the removal from public view of the expunged charges from
11 state-run databases, any preparer of a background check that maintained strict
12 procedures designed to insure complete and up to date information would have been
13 aware that it was no longer appropriate to report the expunged charges. Frankly,
14 even a preparer using less than strict procedures would have caught these
15 publication and reporting problems, but Defendants clearly were not and are not
16 even doing minimal verification or record cleanup.
17
18

19
20 64. Thus, Defendants published and possibly reported Plaintiffs'
21 expunged criminal records long after they had been hidden from public view and
22 then eliminated from relevant state-run databases. Clearly, Defendants failed or
23 refused to search for updated public record information on Plaintiffs' expunged
24 criminal charges or employ other best practices to avoid publication of erroneous
25 consumer data.
26
27
28

1 **disputes with Defendants and/or waived future participation in any class**
2 **action:**

3
4 i) **FCRA CLASS:** *All natural persons residing in the United*
5 *States whose expunged, expuncted, or sealed criminal records*
6 *were published after Defendants received notice that they were*
7 *so expunged, expuncted or sealed within 2 years of the filing of*
8 *this complaint; and,*

9
10 ii) **TEXAS BUSINESS and COMMERCE CODE CLASS:** *All*
11 *natural persons who received an expunction from a Texas*
12 *court or whose criminal records were sealed by a Texas court*
13 *and whose expunged, expuncted, or sealed criminal records*
14 *were published after Defendants received notice that they were*
15 *so expunged, expuncted, or sealed within 4 years of the filing*
16 *of this complaint.*

17
18 68. Each Class is so numerous that joinder of all members is
19 impracticable. Although the precise number of Class members is known only to
20 Defendants, Plaintiffs aver upon information and belief that each Class numbers in
21 the thousands. Defendants publish and sell standardized criminal history record
22 information to thousands of individuals and businesses throughout the country.

23
24 69. There are questions of law and fact common to the Classes that
25 predominate over any questions affecting only individual Class members. The
26 principal questions include (a) whether Defendants, by employing a policy and
27

1 practice of publishing and disclosing expunged criminal record histories, willfully
2 and negligently violated FCRA section 1681e(b) by failing to follow reasonable
3 procedures to assure maximum possible accuracy of the information concerning the
4 individual about whom the report relates; and (b) whether Defendants violated
5 Chapter 109 of the Texas Business and Commerce Code for the same reasons.
6

7
8 70. Plaintiffs' claims are typical of the claims of each Class, which all
9 arise from the same operative facts and are based on the same legal theories.

10 71. Plaintiffs will fairly and adequately protect the interests of each Class.
11 Plaintiffs are committed to vigorously litigating this matter. Plaintiffs have secured
12 counsel experienced in handling consumer class actions. Neither Plaintiffs nor their
13 counsel have any interests which might cause them not to vigorously pursue this
14 claim.
15

16
17 72. This action should be maintained as a class action because the
18 prosecution of separate actions by individual members of the Classes would create
19 a risk of inconsistent or varying adjudications with respect to individual members
20 which would establish incompatible standards of conduct for the parties opposing
21 the Classes, as well as a risk of adjudications with respect to individual members
22 which would as a practical matter be dispositive of the interests of other members
23 not parties to the adjudications or substantially impair or impede their ability to
24 protect their interests.
25
26
27
28

73. A class action is a superior method for the fair and efficient adjudication of this controversy. The interest of Class members in individually controlling the prosecution of separate claims against Defendant is small as each cause of action is subject to a statutory damages cap and there is no reason to award different amounts per day among Plaintiffs of those statutory damages that accrue daily. Management of the Class claims is likely to present significantly fewer difficulties than those presented in many individual claims. The identities of the Class members may be obtained from Defendants' records.

VI. CAUSES OF ACTION

COUNT ONE – FCRA § 1681e(b)

74. Plaintiffs incorporate the foregoing paragraphs as though the same were set forth at length herein.

75. Pursuant to sections 1681n and 1681o, each of the Defendants is liable for negligently and/or willfully violating the FCRA by failing to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom a consumer report relates, in violation of section 1681e(b).

76. As a result of Defendants' conduct Plaintiffs suffered actual damages in the form of out of pocket loss in the funds paid to complete the expungement, expunction, or sealing of criminal records process only to have Defendants continue to report obsolete and impermissible criminal information about them.

1 77. Plaintiffs seek actual, statutory and punitive damages in addition to
2 their costs and attorney fees pursuant to 15 U.S.C. §1681n.

3
4 **COUNT TWO – TEX. BUS. & COM. CODE §§ 109.001–.007**

5 78. Plaintiffs incorporate the foregoing paragraphs as though the same
6 were set forth at length herein.

7
8 79. Pursuant to sections 109.001—.007, each of the Defendants are liable
9 for failing to remove Plaintiffs’ expunged criminal records from their websites and
10 reports after being provided notice.

11
12 80. Plaintiffs are entitled to a penalty of up to \$500 for each separate
13 violation. Each of the Defendants has engaged, and is engaging, in a continuing
14 violation, so a separate penalty of up to \$500 per violation is owed for each day on
15 which the violation occurred TEX. BUS. & COMM. CODE § 109.005(b).

16
17 81. Plaintiffs are entitled to their attorneys’ fees and costs related to their
18 claim for penalties under Texas Business and Commerce Code Chapter 109. TEX.
19 BUS. & COMM. CODE § 109.005(d).

20
21 **COUNT THREE - INJUNCTIVE RELIEF UNDER TEXAS LAW**

22 82. Plaintiffs incorporate the foregoing paragraphs as though the same were
23 set forth at length herein.

24
25 83. Plaintiffs request that the Court enter a temporary and permanent
26 injunction ordering Defendants to comply with Texas Business and Commerce
27

Code Chapter 109 by (1) immediately removing all information regarding any criminal record information related to Plaintiffs or any class members that has been expunged by a Texas court from their databases, and (2) not publishing any criminal record information that has been expunged by a Texas court. TEX. BUS. & COMM. CODE § 109.005(c) (“In an action brought under this section, the court may grant injunctive relief to prevent or restrain a violation of this section.”).

84. Plaintiffs are entitled to their attorneys’ fees and costs related to seeking and obtaining injunctive relief. TEX. BUS. & COMM. CODE § 109.005(d).

VII. JURY TRIAL DEMAND

85. Plaintiffs demand trial by jury on all issues so triable.

VIII. PRAYER FOR RELIEF

86. WHEREFORE, Plaintiffs seek relief against Defendants as follows:

(a) That an order be entered certifying the proposed Classes under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiffs and their counsel to represent the Classes;

(b) That judgment be entered against Defendants for statutory damages in the amount of not less than \$100 and not more than \$1,000 per violation per Class member, pursuant to 15 U.S.C. § 1681n(a);

(c) That judgment be entered against Defendants for punitive damages pursuant to 15 U.S.C. § 1681n(a)(2);

(d) That judgement be entered against Defendants for statutory damages in the amount of not more than \$500 per violation

1 per Class member and, in the case of a continuing violation,
2 an amount not to exceed \$500 for each subsequent day on
3 which such violation(s) occurred, pursuant to Chapter 109 of
the Texas Business and Commerce Code;

4 (e) That the Court enter a temporary injunction, and on final
5 judgment a permanent injunction, prohibiting Defendants
6 from publishing criminal record information that has been
expunged by a Texas court;

7
8 (f) That judgment be entered in favor of Plaintiffs for actual
9 damages related to obtaining the expungement, expunction or
sealing of criminal records;

10 (g) That the Court award costs and reasonable attorney's fees
11 pursuant to 15 U.S.C. §1681n and §1681o; and

12 (h) That the Court grant such other and further relief as may be
13 just and proper.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated this 19th day of December, 2019.

2 Respectfully Submitted,

3
4 By: *s/Stephanie R. Tatar*

5
6 Stephanie R. Tatar – State Bar No. 237792
7 TATAR LAW FIRM, APC
8 3500 West Olive Avenue, Suite 300
9 Burbank, California 91505
10 Telephone: (323) 744-1146
11 Facsimile: (888) 778-5695
12 Email: Stephanie@thetatarlawfirm.com

13 David George, Esq.
14 (*Pro Hac Vice Application Forthcoming*)
15 BAKER WOTRING LLP
16 700 JP Morgan Chase Tower
17 600 Travis Street
18 Houston, TX 77002
19 Telephone: 713-980-1700
20 Facsimile: 713-980-1701
21 Email: dgeorge@bakerwotring.com

22 Thomas J. Lyons Jr., Esq.
23 (*Pro Hac Vice Application Forthcoming*)
24 CONSUMER JUSTICE CENTER P.A.
25 367 Commerce Court
26 Vadnais Heights, MN 55127
27 Telephone: (651) 770-9707
28 Facsimile: (651) 704-0907
Email: tommy@consumerjusticecenter.com

ATTORNEYS FOR PLAINTIFFS