# 20-2049

**In the United States Court of Appeals**
**for the Second Circuit**

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BRADLEY TEWINKLE, on behalf of himself and all others similarly situated,
*Plaintiff-Appellant,*

v.

CAPITAL ONE, N.A.,
*Defendant-Appellee.*

DOES 1-100,
*Defendants.*

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On Appeal from the United States District Court for the Western District of New York
19-CV-1002-JLS-HBS
Hon. John L. Sinatra, Jr.

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## APPELLANT'S SUPPLEMENTAL BRIEF

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## APPELLANT'S SUPPLEMENTAL BRIEF

Plaintiff-Appellant Bradley TeWinkle has alleged an Article III injury-in-fact sufficient to bring his claim that Capital One violated the Equal Credit Opportunity Act (ECOA) by failing to provide a reason for his credit termination.

Capital One's failure to provide Mr. TeWinkle a reason did not put him at risk of harm; it harmed him by denying him the ability to ascertain whether Capital One closed his account based on erroneous information or for an improper reason—such as a discriminatory reason—and by failing to give him information that could educate him and improve his creditworthiness going forward. In other words, Capital One's failure to provide Mr. TeWinkle with the information ECOA requires caused concrete downstream harm, giving him standing to proceed. To require additional allegations at the motion-to-dismiss stage would put consumers like Mr. TeWinkle in a Catch-22: Without knowing the reason for the closure of his credit account, Mr. TeWinkle likely cannot faithfully allege, for example, that he was discriminated against or that his account was closed for some other impermissible reason.

Mr. TeWinkle's allegations sufficiently plead an injury-in-fact both before and after the Supreme Court's decision in *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021). Specifically, Mr. TeWinkle has standing under *TransUnion* because the facts here are materially distinguishable from those in *TransUnion*, Mr. TeWinkle's

ECOA claim is analogous to common-law claims of good faith and fair dealing, and Mr. TeWinkle seeks injunctive relief.[1]

**1.** To start, the downstream harm caused by Capital One's failure to notify Mr. TeWinkle distinguishes these facts from those the Supreme Court found to be insufficient in *TransUnion*. In *TransUnion*, the plaintiffs alleged that TransUnion violated the Fair Credit Reporting Act (FCRA) by failing to provide information to consumers in the correct format. *TransUnion*, 141 S. Ct. at 2213-14. But the plaintiffs had failed, at trial, to provide any evidence that the improper formatting actually resulted in any consumer confusion, prevented consumers from correcting their erroneous credit reports, or otherwise caused plaintiffs any harm. *Id.*

Here, by contrast, Mr. TeWinkle is not alleging that he received information in the wrong format, but rather that he didn't receive the ECOA-mandated information *at all*. And that information failure means that he has no way of knowing whether Capital One made an error that he can correct or not. Unlike the plaintiffs' formatting error in *TransUnion*, Capital One's failure to notify Mr. TeWinkle at all caused harm: the inability to review Capital One's reason for inaccuracies or

[1] Mr. TeWinkle acknowledges that these arguments in support of his standing have not previously been articulated. However, this Court routinely entertains arguments raised for the first time in supplemental briefing when there has been an intervening Supreme Court decision. *See, e.g.*, *United States v. Walker*, 974 F.3d 193, 202 (2d Cir. 2020); *United States v. Bahel*, 662 F.3d 610, 622 (2d Cir. 2011).

illegalities in the first place and to learn any legitimate reasons he is uncreditworthy. There can be no serious dispute that the closure of his accounts—along with the prohibition on ever opening another credit account with Capital One again, *see* JA17—are concrete harms, as Capital One credit accounts presumably have some monetary value to consumers. Capital One's failure to provide an ECOA-compliant adverse action notice prevents Mr. TeWinkle from determining whether the accounts can potentially be reinstated (and the ban reversed) because the closure was premised on inaccurate information or done for an impermissible reason. If the closure was legitimate, Capital One's failure interferes with Mr. TeWinkle's ability to learn about his creditworthiness and improve it going forward. Those, too, are concrete harms.[2]

[2] The basis for Mr. TeWinkle's standing is analogous to that in the Seventh Circuit's decision in *Robertson v. Allied Solutions, LLC*, 902 F.3d 690 (7th Cir. 2018) (finding standing because the failure to receive a copy of her consumer report prior to being denied employment deprived the plaintiff of the ability to review the information for accuracy or explain negative information). Opening Br. 23-24; Reply Br. 10-11. The Seventh Circuit has confirmed that *Robertson* remains good law after its decision in *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329, 334-35 (7th Cir. 2019) (Barrett, J.), whose reasoning the Supreme Court followed in *TransUnion*. *TransUnion*, 141 S. Ct. at 2203, 2205, 2214 (citing *Casillas*). *See, e.g.*, *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 280 (7th Cir. 2020) (relying on *Robertson*); *Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282, 286 (7th Cir. 2020) (same). As such, *Robertson* remains good law after *TransUnion*, and this case is on all fours with *Robertson*.

Moreover, *TransUnion* was decided in the context of post-trial litigation, after plaintiffs had ample opportunity to conduct discovery and present evidence at summary judgment and trial. The Supreme Court found fault with the plaintiffs' standing because they failed to supply evidence that the risks that they alleged stemmed from the formatting error had come to pass. *See TransUnion*, 141 S. Ct. at 2213-14; *id.* at 2211 ("If the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm[.]"). In stark contrast, this is an appeal from the dismissal of Mr. TeWinkle's complaint—Capital One has not filed an answer, and no discovery has been conducted. All Mr. TeWinkle needs to do at this juncture is plausibly allege that he suffered concrete downstream harms from the notification failure, and he has done so.[3]

**2.** Next, Mr. TeWinkle has alleged a concrete injury because the harms stemming from the alleged notice ECOA violation have a "close relationship" to harm "traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2204. Specifically, the harm here—Mr. TeWinkle's inability to determine the reason for Capital One's termination of his

[3] For those plaintiffs that lacked standing to allege that TransUnion violated the FCRA's accuracy requirements, the Court similarly leaned on the lack of evidence that the plaintiffs' inaccurate credit reports had been disseminated; plausible allegations that the credit reports had been disseminated would have been sufficient at the motion-to-dismiss stage. *See TransUnion*, 141 S. Ct. at 2211-12.

account (and prohibition on opening any future credit accounts with Capital One, JA17) and whether there was potentially a fixable or improper reason for the termination—has a "close relationship" with the harms giving rise to common-law claims of the breach of the duty of good faith and fair dealing in contract.

The duty of good faith and fair dealing is implied in every contract, and the duty requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Security Plans, Inc. v. CUNA Mut. Ins. Soc.*, 769 F.3d 807, 817 (2d Cir. 2014) (quoting *Moran v. Erk,* 901 N.E.2d 187, 190 (N.Y. 2008)); *see* Restatement (Second) of Contracts § 205 (1981); *see also Frank v. Brunckhorst Co., LLC v. Coastal Atlantic*, 542 F. Supp. 2d 452, 462 (E.D.Va. 2008) ("Under Virginia law, every contract contains an implied covenant of good faith and fair dealing[.]"). The duty prohibits "arbitrary or irrational exercises of discretion," *Security Plans*, 769 F.3d at 818; and "[e]ven when a contract confers decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith," *Travellers Int'l, A.G. v. Trans World Airlines, Inc.,* 41 F.3d 1570, 1575 (2d Cir. 1994). Relevant paradigmatic breaches of the duty include "rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract." Restatement

(Second) of Contracts § 205 cmt. e (1981); *see Richards v. Direct Energy Servs., LLC*, 915 F.3d 88, 97 (2d Cir. 2019) (quoting Restatement). The Restatement's illustration of this category of breach is where a party refused to accept a shipment because of deficiencies it never communicated to the other party, deficiencies the other party could have corrected had it known about them. Restatement (Second) of Contracts § 205 cmt. e (1981).

Here, Capital One's unilateral termination of Mr. TeWinkle's accounts and banning him from ever opening any additional Capital One accounts in the future without giving him any reason for its actions prevented Mr. TeWinkle from enjoying the fruits of the contract—the benefits of his Capital One accounts. As explained already, Capital One's failure to give him any reason prevented Mr. TeWinkle from reviewing Capital One's closure rationale for inaccuracies and improper purposes, and prevented Mr. TeWinkle from, for example, attempting to have his accounts reinstated had the closure been premised on an inaccurate or improper reason. Because the lack of information about the reason for the termination harmed Mr. TeWinkle's ability to receive the benefits of his accounts, Capital One's "rejection of performance for unstated reasons" is a classic type of breach of the duty of good faith and fair dealing. *See* Restatement (Second) § 205, cmt. e (1981) (listing as an

illustration where a party rejected performance for unstated problems that the other party could have corrected had it known what the problems were).

At this time, because he doesn't know the reason for the termination, Mr. TeWinkle is not challenging and cannot challenge the termination and ban on future accounts; rather, he is challenging the fact that he lacks the information to contemplate such a challenge, information to which he alleges he is entitled to under ECOA. But, the lack of information may itself be indicative of other breaches of the duty of good faith and fair dealing, including the abuse of power in terminating a contract and the bad faith exercise of discretion.[4]

Though the claims here are quite close to those under good faith and fair dealing, Mr. TeWinkle has standing to bring his ECOA claim even if the claims are not an "exact duplicate" of claims for breaches of good faith and fair dealing. *See*

[4] Capital One's email notifying Mr. TeWinkle of the account closures and future ban on accounts states that it may close Mr. TeWinkle's accounts "for any reason." JA17. However, the account agreements are not yet in the record, and, even assuming Capital One's email is accurate, it is unclear at this stage what the contractual parameters of that discretion are, if any. Regardless, Capital One cannot terminate consumers' accounts for illegal reasons, such as a discriminatory reason prohibited by ECOA. State law varies on to the extent to which the duty of good faith and fair dealing applies to terminations where the contract provides for unilateral termination for any reason. *Compare, e.g.*, *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 102 (2d Cir. 2015) (applying New York law indicating that the duty cannot overcome a clause allowing termination for any reason), *with Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (duty of good faith applied to contract for at-will employment).

*TransUnion*, 141 S. Ct. at 2204. Even if Mr. TeWinkle could not quite bring a successful breach of good faith and fair dealing action, the relationship between his injury and the harms the duty is meant to prevent are close enough. Indeed, as *TransUnion* recognizes, Congress can "elevate" existing injuries by providing causes of action for harms that may have been previously inadequate at law. *Id.* at 2205. Here the harms recognized by the duty of good faith and fair dealing—including failure to provide reasons for rejecting performance and abusing power or engaging in bad faith to terminate contracts—are the same harms for which Congress provided a cause of action in ECOA in allowing suit for the failure to provide a reason for the termination of a credit account. *See* S. Rep. 94-589, at 4 (1976) ("In those cases where the creditor may have acted on misinformation or inadequate information, the statement of reasons gives the applicant a chance to rectify the mistake."). That gives Mr. TeWinkle an Article III injury-in-fact.

**3.** Finally, regardless of whether Mr. TeWinkle has standing to pursue damages for Capital One's ECOA violation, he has standing to pursue injunctive relief. Namely, he has standing to seek an injunction requiring Capital One to comply with ECOA by providing him—and the class, if the case is permitted to proceed as a class action—the reasons for the closure of the credit account. Mr. TeWinkle's complaint expressly seeks injunctive relief, and that request is not

limited to the specific example provided in the prayer for relief. *See* JA14. As *TransUnion* explains, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial," even though such a risk may not give rise to standing to seek damages for past harms. *TransUnion*, 141 S. Ct. at 2210-12.

Mr. TeWinkle has already been harmed for the reasons stated above, but, at the least, not knowing whether one's account was closed for inaccurate or illegal reasons, or knowing the reasons why one is uncreditworthy, presents a real risk of harm: the risk that Mr. TeWinkle's Capital One ban is premised on inaccurate information that could be corrected, and his account rights salvaged; that his account was closed for an impermissible reason that may be actionable; or that not being able to correct his uncreditworthy behavior will lead to Mr. TeWinkle being barred from opening accounts with other banks in the future.

Unless Capital One is closing accounts and banning consumers for entirely arbitrary reasons, one or more of the risks identified *will* come to pass: Mr. TeWinkle's credit account will have been closed based on an inaccuracy, for an improper reason, or for a legitimate reason that Mr. TeWinkle can try to correct going forward as he interacts with other creditors. The harm is imminent.

## CONCLUSION

For these reasons, and the reasons stated in Appellant's Opening and Reply Briefs, Mr. TeWinkle has Article III standing. If the Court disagrees, Appellant respectfully requests the opportunity to amend his complaint.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font. This brief complies with the ten-page limit imposed by this Court's July 15, 2021, order.

/s/ Leah M. Nicholls
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July 29, 2021

## CERTIFICATE OF SERVICE

I certify that on July 29, 2021, I electronically filed the foregoing Appellant's Opening Brief via the CM/ECF system and served all parties or counsel via CM/ECF system.

/s/ Leah M. Nicholls
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