UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ZORANA ALEKSIC, and STEVEN SCHALLER, on behalf of themselves and the class members described herein,	)	
Plaintiffs,	)	
vs.	)	13-cv-7802
	)	Judge Guzman
EXPERIAN INFORMATION SOLUTIONS, INC., and CLARITY SERVICES, INC.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
AMENDED MOTION FOR CLASS CERTIFICATION

Plaintiffs have requested that this Court enter an order determining that this action alleging violation of the Fair Credit Reporting Act ("FCRA") be certified as a class action, and submit this memorandum in support of their motion.

FACTS

Clarity Services is a subprime credit bureau, whose two principal investors were involved in the payday loan industry. One of them, Charles Hallinan, once did business with Scott Tucker, who was accused of making illegal payday loans by the FTC.[1] (Exhibit A) The majority of Clarity's customers consist of payday lenders, many of which operate only online, and most of

[1]http://www.ftc.gov/news-events/press-releases/2012/04/ftc-charges-payday-lending-scheme-piling-inflated-fees-borrowers

which operate illegally, in violation of state law. The online payday lending industry is rife with abuse and unscrupulous players. It is well known that online payday lending is illegal in many states, and that in many other states, including Illinois it is illegal and criminal if engaged in by lenders who are not properly licensed.

Consumer advocates, including the FTC and various state consumer protection officials, constantly warn consumers about dealing with such entities, and especially about providing sensitive personal information to online payday lenders and the lead generators who assist them.[2] Online payday lenders have a history of flouting the law and are the subject of continued enforcement actions by both state and federal consumer protection officials.[3]

Despite the well known problems with the industry, and the fact that most such entities are operating illegally, defendants entered into an agreement to provide services to a large number of illegal online payday lenders, in exchange for money. The services provided constituted consumer credit reports as defined by the Fair Credit Reporting Act, and, among other things, they consisted of verifying the accuracy of information provided by the illegal lenders, and providing a risk score based on credit related information Clarity possessed about plaintiffs, along with the factors which contributed to the score. Defendants were aware that such lending is completely illegal in many states, and that licenses were required by many other

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[2] *See e.g.*, http://www.consumer.ftc.gov/blog/online-payday-loan-or-window-scam; http://www.consumer.ftc.gov/blog/online-payday-loan-brokers-adding-insult-consumer-injury; http://www.bankrate.com/brm/news/debt/debtcreditguide/payday-warning1.asp; http://www.dfi.wa.gov/consumers/alerts/lead-generators-cashadvanceresults.htm

[3] http://www.responsiblelending.org/payday-lending/research-analysis/State-Enforcement-Issue-Brief-10-4-FINAL.pdf; http://www.consumerfed.org/pdfs/Studies.IPDL.FTC.Actions10.30.12.pdf; http://blogs.reuters.com/great-debate/2012/09/21/is-the-payday-loan-business-on-the-ropes/

states to do business in this industry, yet overlooked the fact that the entities they did business with lacked licenses, and in a few cases were located offshore. Defendants did not impose any geographic limits on the illegal lenders' access to consumer information, despite the fact that it would have been a crime for them to make a loan in many states, including Illinois, where plaintiffs resided. (Sec.Amd.Cmpt. ¶38) Loans of this nature made in violation of Illinois law are void:

> Notwithstanding any other provision of this Section, if any person who does not have a license issued under this Act makes a loan pursuant to this Act to an Illinois consumer, then the loan shall be null and void and the person who made the loan shall have no right to collect, receive, or retain any principal, interest, or charges related to the loan. 205 ILCS 670/20(d); *see also*, 815 ILCS 122/4-10(h).

In plaintiffs' cases, their information was sold to the following illegal online payday lenders and lead generators: (a) Mambo Cash, (b) Great Plains Lending, (c) Red Rock Tribal Lending, LLC, (d) CIAW T3 Leads Night, (e) CashwebUSA, (f) Lead Express, (g) Payday Max Ltd., (h) Vivus Servicing, Ltd., (i) Mambo Cash, an entity located in Costa Rica, (j) Green Trust Cash, (k) Star Group, LLC, (l) RP Capital, LLC, and (m) Blue Novis Inc.. (Sec.Amd.Cmpt. ¶¶8, 13)

After Clarity issued the reports, plaintiffs received harassing phone calls regarding phantom payday loans. This sort of scam is common in the industry, and the CFPB and FTC recently filed actions against a group of online payday lenders who were involved in such scams.[4]

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[4]http://www.consumerfinance.gov/newsroom/cfpb-sues-online-payday-lender-for-cash-grab-scam/; http://www.ftc.gov/news-events/press-releases/2014/09/ftc-action-halts-payday-loan-scheme-billed-tens-millions.

II. PLAINTIFFS' CLAIMS.

Plaintiffs' Second Amended Complaint alleges that Clarity violated §1681b of the Fair Credit Reporting Act ("FCRA") which provides that no consumer reporting agency may release a consumer report to anyone unless it has reasonable grounds to believe the report will be used for a permissible purpose, and §1681e(a) of the FCRA which provides that a consumer reporting agency must have adequate procedures in place to ensure that it does not release a consumer report to anyone without making reasonable efforts to verify the identity of the entity requesting the report and the uses certified by the prospective users.

III. CLASS SOUGHT BY PLAINTIFFS.

Plaintiffs seek to certify the class defined as follows: (a) all individuals (b) with Illinois addresses (c) whose consumer credit reports (as defined by the Fair Credit Reporting Act) were provided to Mambo Cash, Great Plains Lending, Red Rock Tribal Lending, LLC (Castlepayday), CIAW T3 Leads Night (Cash in a Wink), CashwebUSA/Cowboy Productions, Lead Express/Tribal Lending Enterprises/Gentle Breeze, Payday Max Ltd., Vivus Servicing, Ltd., Green Trust Cash, Star Group, LLC, RP Capital, LLC, and/or Blue Novis Inc. (e) on or after a date two years prior to the filing of this action.[5]

Documents obtained from the Illinois Department of Financial Institutions have verified that none of the entities listed in the class definition have a license to make loans in Illinois. (Exhibit B)

[5] Because this Court denied plaintiffs' motion to compel Clarity to produce the full list of its payday lending customers who were supplied reports for individuals with Illinois addresses, plaintiffs have revised their proposed class definition to cover only reports released to the lenders about whom they have information from Clarity and the Illinois Department of Financial Institutions.

IV. THE PROPOSED CLASS MEETS THE REQUIREMENTS FOR CERTIFICATION

1. Rule 23(a)(1) -- Numerosity

Fed.R.Civ.P. 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." *Driver v. AppleIllinois LLC*, 265 F.R.D. 293, 300 (N.D.Ill. 2010) held that

> **plaintiffs are not required to specify the exact number of persons in the class; a properly-supported estimate is sufficient. See *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989). A court may make common sense assumptions to determine class size. See *Hispanics United of DuPage Co. v. Village of Addison, Illinois*, 160 F.R.D. 681, 688 (N.D.Ill. 1995)** (quotations and citations omitted).

The Court in *Perdue v. Individual Members of the Indiana Board of Bar Examiners*, 266 F.R.D. 215, 218 (S.D.Ind. 2010), noted that:

> **the Seventh Circuit has not provided specific guidance about when a putative class is large enough to satisfy the numerosity requirement. However, in [*Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008)], the court assumed that fourteen individuals would be insufficient... Similarly, in *Pruitt v. City of Chicago*, 472 F.3d 925, 926 (7th Cir. 2006), the court noted that "joinder of fewer than 40 workers... would be practical" so class certification was inappropriate.**

This is in line with the basic presumption that joinder of more than 40 persons is generally considered impractical. *Hale v. AFNI, Inc.*, 264 F.R.D. 402, 404-405 (N.D.Ill. 2009) (citing *Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1333 (7th Cir. 1969)).

In the present case, the class is so numerous that joinder of all members is impracticable. The Illinois Department of Financial Institutions has verified that none of the lenders listed in the class definition have a license to operate in Illinois. (Exhibit B) Each of the lenders is an online payday lender, and the evidence produced by defendants and available on the lenders' websites shows they all make loans at interest rates which far exceed 9%, which would require a license

in Illinois.[6] These rates are typical for the industry. (Exhibit C)

Clarity has admitted that it can come up with a list of people with Illinois addresses whose reports were provided to a particular lender during a certain time period.(Clarity's Responses to Plaintiffs' Second Requests for Admission, No. 5) Clarity has also admitted that it provided over 100 such reports to each of the following lenders within two years of the filing of the complaint: Mambo Cash, Cashwebusa, Paydaymax, Vivus Servicing, and Star Group. (Clarity's Responses to Plaintiffs' Second Requests for Admission, Nos. 6-10). Numerosity is therefore clearly satisfied.

2. Rules 23(a)(2) and 23(b)(3) – Predominance of common questions of law or fact

Fed.R.Civ.P. 23(a)(2) requires that there be a common question of law *or* fact. Rule 23(b)(3) requires that the questions of law or fact common to all members of the class predominate over questions pertaining to individual members.

Hale, *supra*, 264 F.R.D. at 405, 407, held that

> **Commonality generally exists when the defendant has engaged in "standardized conduct" toward the members of the proposed class. *Smith v. Nike Retail Servs., Inc.*,**

[6] Great Plains, Clarity No. 1577 (349.05%); Cash in a Wink: (456 to 2281% for "VIP" customers, more for regular customers) (ECLG No. 941); Green Trust (ECLG No. 938-941 web site says its loans are an "expensive" form of borrowing, Clarity Doc. p. 1585 provides typical payday loan payment schedule); Mambo (Clarity Doc. p. 1636, web site notes "expensive form of credit"); Red Rock (800.3501%, Clarity Doc. p. 1647); Vivus Servicing (Clarity Doc. No. 1665, provides typical payday loan payment schedule); Paydaymax (363.96% for new customers, 485.45 for existing customers, Clarity Doc. No. 807); Blue Novis (Clarity Doc. no. 1552 says "expensive form of borrowing"); Lead Express/Gentlebreeze: (web site notes representative APR is 391%:http://www.gentlebreezeloansinc.com/rates-and-fees.html); Blue Thread Lending: (web site notes sample APR's from 260-782%: http://bluethreadlendingcom.com/fees.php); Cashwebusa: (Clarity Doc. No. 453, notes "this is an expensive form of borrowing"; Public documents show they charged $150 interest on a $500 loan: http://www.nh.gov/banking/orders/enforcement/documents/12-447-cd-20130612.pdf

> **[234 F.R.D. 648, (N.D. Ill. 2006). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). ...**
>
> **Rule 23(b)(3)'s predominance requirement is typically satisfied where the central, common issue is whether the defendant's form letter violates the FDCPA. See *Quiroz v. Revenue Production Mgmt., Inc.*, 252 F.R.D. 438, 444 (N.D. Ill. 2008) (finding that predominance was satisfied where the common question was whether the defendant's form letter violated §1692e); see also *Day v. Check Brokerage Corp.*, 240 F.R.D. 414, 418-19 (N.D. Ill. 2007) (finding that predominance was satisfied where class members received "very similar" letters, and the common legal issue was whether those letters violated the FDCPA); *Jackson v. Nat'l Action Fin. Servs., Inc.*, 227 F.R.D. 284, 290 (N.D. Ill. 2005) (same).**

More generally, *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331, 334 (N.D. Ill. 1974) held that satisfaction of the predominance requirement of Fed.R.Civ.P. 23(b)(3) "normally turns on the answer to one basic question: is there an essential common factual link between all class members and the defendant for which the law provides a remedy?" *Accord*, *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 310 (N.D.Ill. 1995). *See*, *Walker v. Calusa Investments, LLC*, 244 F.R.D. 502, 506-507 (S.D.Ind. 2007) (similar). Where a question of law involves "standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement . . . is usually met." *Franklin v. City of Chicago*, 102 F.R.D. 944, 949 (N.D.Ill. 1984); *accord*, *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D.Ill. 1988); *Wahl v. Midland Credit Mgmt.*, 06 C 1708, 2007 U.S. Dist. LEXIS 39626, *14-15 (N.D.Ill., May 30, 2007); *Smith v. Nike Retail Services, Inc.*, 234 F.R.D. 648, 659 (N.D.Ill. 2006).

Here, there are common questions of law and fact which will predominate and, in fact, will dictate the outcome, including:

a. Whether Clarity had a reasonable belief that there was a permissible purpose for

furnishing and providing credit reports to illegal internet/payday lenders.

b. Whether any alleged consent provided in an agreement is valid if the agreement is void under Illinois law.

b. Whether Clarity had reasonable procedures in place to ensure that they only provided credit reports to entities that had a permissible purpose for obtaining those reports;

c. Whether Clarity properly monitored the entities after obtaining the required initial certification from those entities;

d. Whether Clarity's practices violated the FCRA.

e. Whether Clarity's conduct was willful, as defined by the FCRA.

The only individual issue is the identification of the members of the class, a matter capable of ministerial determination from defendant's records, as defendant has admitted. Questions readily answerable from a defendant's files and business records do not present an obstacle to class certification. *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 674-676 (N.D.Ill. 1989), found that the commonality and predominance requirements were met even though there were individual questions of injury and damages; those questions could be answered by "merely… comparing the contract between the consumer and the contractor with the contract between the consumer and Community Bank." *Accord*, *George v. Kraft Foods Global, Inc.*, 251 F.R.D. 338, 347 (N.D.Ill. 2008) ("some factual variation among the class grievances will not defeat a class action.... so long as those individual issues are manageable through bifurcated hearings or some other mechanism that allows the common issues to be adjudicated together.")

The Seventh Circuit has held that the need for "separate proceedings of some character ...

to determine the entitlements of the individual class members to relief" should "not defeat class treatment of the question whether defendants violated [the law]." *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). "Once that question is answered, if it is answered in favor of the class, a global settlement... will be a natural and appropriate sequel. And if there is no settlement, that won't be the end of the world. [Fed.R.Civ.P.] 23 allows... courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class member concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *Id.*

3. Rule 23(a)(3) -- Typicality

Fed.R.Civ.P. 23(a)(3) requires that the claims of a named plaintiff be typical of the claims of the class. *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998), held that "[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." (Citation and internal quotation marks omitted.) *Accord, Driver*, *supra*, 265 F.R.D. at 304.

In the instant case, typicality is inherent in the class definitions. By definition, the members of the class were subjected to the same practices as the plaintiffs, and thus suffered the same violation of the FCRA that plaintiffs suffered. Clarity may argue that plaintiffs are not typical because the credit pulls in their situation appear to have resulted from identity theft, while other class members may have consented to the credit pulls. However, it is apparent from

the consumer complaints against Clarity with the Better Business Bureau and CFPB, that many other class members are also identity theft victims. In addition, this difference does not destroy typicality because Illinois law provides that loans entered in violation of Illinois law are void, which would also make any consent provided void as well. 205 ILCS 670/20(d); 815 ILCS 122/4-10(h).

Morever, the issue of whether a class member consented is irrelevant to plaintiffs' claim under Section 1681e(a), which imposes independent requirements that the credit bureau have a reasonable belief that the information provided will not be misused. Clarity could not possibly have had a reasonable belief that a criminal would use a credit report for a permissible purpose or that a lender not licensed to operate in Illinois could make a loan to an Illinois resident.

4. Rule 23(a)(4) -- Adequacy of representation

The rule also requires that the named plaintiff provide fair and adequate protection for the interests of the class. That protection involves two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *accord*, *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975); *In re Alcoholic Beverages Litigation*, 95 F.R.D. 321.

Plaintiffs understands the obligations of a class representative, and have retained experienced counsel, as is indicated by Exhibit D, which sets forth counsel's qualifications.

The second relevant consideration under Rule 23(a)(4) is whether the interests of the named plaintiff are coincident with the general interests of the class. Here, the named plaintiffs and the class members all seek damages as the result of defendant's violations of the FCRA.

Given the identity of claims between plaintiffs and the class members, there is no potential for conflicting interests in this action. There is no antagonism between the interests of the named plaintiffs and those of the class.

5. Rule 23(b)(3) -- Class action is superior to other available methods of resolving this controversy

Efficiency is the primary focus in determining whether the class action is the superior method for resolving the controversy presented. *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545 (N.D. Ill. 1972). The Court is required to determine the best available method for resolving the controversy in keeping with judicial integrity, convenience, and economy. *Scholes*, 143 F.R.D. at 189; *Hurwitz v. R.B. Jones Corp.*, 76 F.R.D. 149 (W.D.Mo. 1977). It is proper for a court, in deciding the "best" available method, to consider the ". . . inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974).

Where, as here, the defendant has 'engaged in standardized conduct by sending form letters to many consumers, and each individual consumer's claim would likely be too small to vindicate through an individual suit,' a class action is the most efficient, effective way to proceed. *Quiroz*, [*supra*, 252 F.R.D. at 444]; see also *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)."

Randolph further held that "[a] class action is superior where potential damages may be too insignificant to provide class members with incentive to pursue a claim individually.... the Seventh Circuit has noted that although the FDCPA allows for individual recoveries, this

assumes that the plaintiff is aware of his or her rights, willing to be subjected to litigation and able to find an attorney to take the case. *Mace*, [*supra*, 109 F.3d at 344]. 'These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives.' *Id.*" *Randolph*, 254 F.R.D. at 520.

Courts have recently held that actions alleging FCRA violations are appropriate for class resolution. *Cicilline v. Jewel Food Stores, Inc.*, 542 F. Supp. 2d 831 (N.D.Ill. 2008), *Matthews v. United Retail, Inc.*, 2008 U.S. Dist. LEXIS 17217 (N.D.Ill. Mar. 5, 2008), *Harris v. Circuit City Stores, Inc.*, 2008 U.S. Dist. LEXIS 12596 (N.D.Ill. Feb. 7, 2008), *Halperin v. Interpark, Inc.*, 2007 U.S. Dist. LEXIS 87851 (N.D.Ill. Nov. 29, 2007).

In this case there is no better method available for the adjudication of the claims which might be brought by each individual debtor. A lot of the class members are undoubtedly not even aware that Clarity has provided their consumer reports to illegal lenders, and others are unaware that Clarity's conduct violated the FCRA. Individual cases are not economically feasible, especially given the need to prove willfulness under the FCRA.

The special efficacy of the consumer class action has been noted by the courts and is applicable to this case:

> **A class action permits a large group of claimants to have their claims adjudicated in a single lawsuit. This is particularly important where, as here, a large number of small and medium sized claimants may be involved. In light of the awesome costs of discovery and trial, many of them would not be able to secure relief if class certification were denied . . . .**

In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 732 (N.D. Ill. 1977) (citations omitted). Another court noted:

> **Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action. As Professors Wright, Miller and Kane have discussed, in analyzing consumer protection class actions such as the instant one, 'typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis. These financial barriers may be overcome by permitting the suit to be brought by one or more consumers on behalf of others who are similarly situated.' 7B Wright et al., §1778, at 59; see e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ('Class actions . . . may permit the plaintiff to pool claims which would be uneconomical to litigate individually.') The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form.**

Lake v. First Nationwide Bank, 156 F.R.D. 615, 628-629 (E.D.Pa 1994).

CONCLUSION

Plaintiffs respectfully request that this Court enter an order determining that this action may proceed as a class action, for the reasons stated above.

Respectfully submitted,
s/ Daniel A. Edelman
Daniel A. Edelman

Daniel A. Edelman
Tara L. Goodwin
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)
courtecl@edcombs.com

CERTIFICATE OF SERVICE

I, Daniel A. Edelman, hereby certify that on October 14, 2014 I caused the forgoing documents to be filed with the Clerk of the Court and served on the following persons via electronic mail using the CM/ECF System:

Rodney L. Lewis
Jeremy S. Unruh

Colleen Walter
Polsinelli, P.C.
161 N. Clark St., Suite 4200
Chicago, IL 60601
rodneylewis@polsinelli.com
junruh@polsinelli.com
cwalter@polsinelli.com

s/ Tara L. Goodwin
Tara L. Goodwin

Daniel A. Edelman
Tara L. Goodwin
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX) (may use for service of pleadings)
Email address for service: courtecl@edcombs.com