IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Melissa Somosky Plaintiff, v. The Consumer Data Industry Association, Defendant.	Civil Action No. 1:20-cv-04387-MKV

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

Page

FACTUAL BACKGROUND 4

A. Plaintiff's Monopolization Claim Under the Original Complaint and the Amended Complaint 4

B. The Credit Reporting Industry 7

ARGUMENT 14

I. THE "PLAUSIBILITY" STANDARD 14

II. PLAINTIFF IS IMPROPERLY USING ANTITRUST LAWS TO ATTACK CDIA'S PROCOMPETITIVE SSO ACTIVITY 15

III. PLAINTIFF STILL FAILS TO ALLEGE A PLAUSIBLE ANTITRUST INJURY 19

IV. PLAINTIFF HAS NOT ALLEGED A VIABLE RELEVANT MARKET TO SUPPORT HER CLAIM THAT CDIA IS A MONOPOLIST 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

AD/SAT, a Div. of Skylight, Inc. v. Associated Press,
920 F. Supp. 1287 (S.D.N.Y. 1996) 19

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988) 16, 21

Alt. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 19

In re Aluminum Warehousing Antitrust Litig.,
833 F.3d 151 (2d Cir. 2016) 19

In re Anzaldo,
612 B.R. 205 (Bankr. S.D. Cal. 2020) 11

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 14

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 19

Capital Imaging v. Mohawk Valley Med. Assoc.,
996 F.2d 537 (2d Cir. 1993) 18

Cassara v. DAC Servs.,
276 F.3d 1210 (10th Cir. 2002) 12

Chapman v. New York State Div. for Youth,
546 F.3d 230 (2d Cir. 2008) 23

ChriMar Systems, Inc. v. Cisco Systems, Inc.,
72 F. Supp.3d 1012 (N.D. Cal. 2014) 20

City of New York v. Grp. Health Inc.,
649 F.3d 151 (2d Cir. 2011) 21

Credit Suisse v. Billing,
551 U.S. 264 (2007) 18

Dunford v. Am. DataBank, LLC,
64 F. Supp. 3d 1378 (N.D. Cal. 2014) 8

Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.,
711 F.3d 68 (2d Cir. 2013) 19

H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Systems, Inc.,
879 F.2d 1005 (2d Cir. 1989) 22

Heerwagen v. Clear Channel Commc'ns,
435 F.3d 219 (2d Cir. 2006) 15

Hovater v. Equifax. Inc.,
823 F.2d 413 (11th Cir.), *cert. denied*, 484 U.S. 977, 98 L. Ed. 2d 488,
108 S. Ct. 490 (1987) 8

Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, Inc.,
635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982) 21

In re First Investors Financial Services Group, Inc., No. 2014-CFPB-0012,
Consent Order, ¶ 9 (Aug. 19, 2014) 11

In re Security Group, Inc., et al., No. 2018-BCFP-0002, Consent Order, ¶
51 (June 12, 2018) 11

Intellective, Inc. v. Massachusetts Mut. Life Ins. Co.,
190 F. Supp.2d 600 (S.D.N.Y. 2002) 18

Jones v. Federated Fin. Reserve Corp.,
144 F.3d 961 (6th Cir. 1998) 7

Lohrmann v. Pittsburgh Corning Corp.,
782 F.2d 1156 (4th Cir. 1986) 17

Mader v. Experian Information Solutions, LLC,
No. 19 Civ. 3787 (LGS), 2020 WL 4273813 (S.D.N.Y. July 24, 2020) 1

Natural Resources Defense Council v. Department of Interior,
410 F. Supp.3d 582 (S.D.N.Y. 2019) 7

*North American Soccer League, LLC v. United States Soccer Federation,
Inc.*,
296 F. Supp.3d 442 (E.D.N.Y. 2017) 21

Pani v. Empire Blue Cross Blue Shield,
152 F.3d 67 (2d Cir. 1998) 7

PepsiCo, Inc. v. Coca–Cola Co.,
315 F.3d 101 (2d Cir. 2002) 20

Phillips v. Trans Union, LLC,
No. 3:16-CV-00088, 2017 U.S. Dist. LEXIS 144232 (W.D. Va. Sep. 6, 2017) 11

Plaint Oil Powered Diesel Fuel Systems, Inc. v. ExxonMobil Corp.,
801 F. Supp.2d 1163 16

SD3, LLC v. Black & Decker (U.S.) Inc.,
801 F.3d 412 16

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993) 20

St. Paul Guardian Insurance Co. v. Johnson,
884 F.2d 881 (5th Cir. 1989) 8

Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors,
786 F.2d 1400 (9th Cir. 1986) 17

Trans Sport, Inc. v. Starter Sportswear, Inc.,
964 F.2d 186 (2d Cir.1992) 17

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 14

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,
382 U.S. 172 (1965) 21

Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC,
127 F. Supp.3d 156 (S.D.N.Y. 2015) 7

Wilk v. Am. Med. Ass'n,
895 F.2d 352 (7th Cir. 1990) 17, 20

In re Zinc Antitrust Litig.,
155 F. Supp.3d 337 (S.D.N.Y. 2016) 14, 15, 19, 22

Statutes

Coronavirus Aid, Relief, and Economic Security Act 10

Dodd-Frank Act Title X 8

Fair Credit Reporting Act, 15 U.S.C. § 1681 ..... *passim*

Sherman Act, 15 U.S.C. § 2 ..... *passim*

Other Authorities

12 C.F.R. § 1022 9

12 C.F.R. § 1022, App. E 9, 15

16 C.F.R. § 1660, App. A 9, 15

CDIA, *About CDIA*, https://www.cdiaonline.org/about/about-cdia/#:~:text=Founded%20in%201906%2C%20CDIA%20promotes,avoid%20fraud%20and%20manage%20risk 9

CFPB, *CFPB Report Details How the Nation's Largest Credit Bureaus Manage Consumer Data*, available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-report-details-how-the-nationgs-largest-credit-bureaus-manage-consumer-data/ 8

CFPB, *Submit a complaint*, available at https://www.consumerfinance.gov/complaint/ (last visited November 19, 2020) 1

Equifax Information Services, LLC, and TransUnion LLC, Settlement Agreement, at 12-13, 17 (March 8, 2015), available at https://ag.ny.gov/pdfs/CRA%20Agreement%20Fully%20Executed%203.8.15.pdf 12

Fed.R.Civ.P. 12(b)(6) 1, 7, 14, 22

FTC, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations,* 3 (2011), available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf 8

FTC, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, Dec. 2004, available at https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/041209factarpt.pdf 10

United States Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section of the Sherman Act: Chapter 2*, available at https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 22

This Memorandum of Law is submitted on behalf of the defendant, Consumer Data Industry Association ("CDIA"), in support of its Motion to Dismiss the Amended Complaint (Dkt. 15) of plaintiff Melissa Somosky ("Somosky" or "Plaintiff") under Fed.R.Civ.P. 12(b)(6).

INTRODUCTION

This lawsuit concerns the reporting of student debt discharged in bankruptcy that has allegedly been improperly re-aged on credit reports furnished by Consumer Reporting Agencies ("CRAs") (Am. Compl. ¶¶ 9-19). Plaintiff alleges her credit "score" was harmed, which caused her to spend a year trying to "fix" her credit reports (Am. Compl. ¶¶ 116, 118, 132). Ms. Somosky's predicament is regrettable, and she is clearly frustrated. The proper remedy is not found in antitrust law, however, but in the Fair Credit Reporting Act, 15 U.S.C. § 1681, et al. (the "FCRA").[1] This Act provides Ms. Somosky substantial avenues for redress. She could also contact the Consumer Financial Protection Bureau ("CFPB"), which she recognizes is the federal agency responsible for monitoring and addressing credit reporting (Am. Compl. ¶ 44). The CFPB has a dispute portal and a developed infrastructure for receiving and investigating complaints. CFPB, *Submit a complaint*, available at https://www.consumerfinance.gov/complaint/ (last visited November 19, 2020).

However, Plaintiff and her counsel are now attempting to sidestep well-developed credit reporting laws, related regulations, and CFPB and other agency

[1] Plaintiff's counsel appears to recognize this as he recently filed a lawsuit in a sister district court alleging that a "discharged [education loan] as owing and delinquent" in a credit report violated the FCRA. *See Mader v. Experian Information Solutions, LLC*, No. 19 Civ. 3787 (LGS), 2020 WL 4273813, at *1-2 (S.D.N.Y. July 24, 2020).

oversight, by requesting this Court "dismantle" credit reporting guidelines. Plaintiff hopes to accomplish this demolition by calling CDIA a "monopolist" that "stifles innovation" and "harms consumers." But CDIA is a trade association in which a data reporting system – known as the Metro 2® Format – was created over twenty years ago for financial institutions, lenders and debt collectors ("data furnishers") to report credit information to CRAs in a standardized format. The Metro 2® Format simply establishes a standardized set of fields and codes to be used when data furnishers report loans and consumer debt to CRAs. The Format promotes uniformity of the reporting of data and consistency in the reviewing and use of that data.

Plaintiff does not identify exclusionary or anticompetitive behavior by CDIA – the hallmarks of antitrust conduct – nor plausibly identify other essential elements of a Sherman Act claim such as market definition or antitrust injury. In fact, Plaintiff's allegations confirm the opposite; Plaintiff acknowledges that CDIA promotes consistency and interoperability of consumer information so the concededly competitive CRAs, as well as financial institutions and lenders that rely on credit reports, have a baseline upon which to understand and assess credit information.

Not every commercial dispute or consumer grievance rises to the level of industry-wide competition concerns. The Amended Complaint should be dismissed because it is baseless and improperly seeks to bypass the bedrock elements of a claim under section 2 of the Sherman Act, 15 U.S.C. § 2:

1. Plaintiff attacks CDIA as being "monopolistic" simply because CDIA is the credit reporting industry's trade association and does not face "competition" by other hypothetical trade associations or standard-setting organizations ("SSOs"), or by CRAs

which are members of CDIA. However, many industries have a single trade association or SSO. CDIA is unaware of a solitary precedent advocating for the need for multiple competing industry trade associations or SSOs. Moreover, industry guidelines that promote interoperability and efficiency – which Plaintiff concedes is the case with CDIA's Metro 2® Format – are procompetitive unless a plaintiff can prove an anticompetitive distortion with the association's standard-setting process itself (which is not alleged here) (Point II).

2. There is a heightened pleading requirement for a plaintiff to allege not only a personal injury, but also an injury to competition itself. Plaintiff claims she is the "victim of degenerated credit reporting procedures caused by the CDIA's stranglehold on the means of production" and that but for the CDIA, her credit reporting issue would have been "cleared." (Am. Compl. ¶¶ 116, 118). This does not allege a plausible antitrust injury. There is no legal support that a trade association or SSO causes "antitrust injury" to consumers that claim to be adversely impacted by an industry standard that they believe can be improved. Nor is there a causal connection between an unidentified purported CDIA "guideline" about the format in which data furnishers provide information to CRAs and the alleged failure by CRAs to "clear" Plaintiff's discharged debt from her credit reports after she reported the alleged error to CRAs (Point III).

3. Plaintiff's "relevant market" definition is implausible. In her initial Complaint, Plaintiff identified a relevant market of "credit reporting procedures." CDIA urged this "market" was fatally flawed because, under well-settled law, an appropriate antitrust relevant market when addressing standards-related activity is the market upon

which the SSO promulgates standards, not a "standards market." In her Amended Complaint, Plaintiff attempts to remedy this flaw by changing the "relevant market" to "credit reporting" governed by the FCRA, which includes reporting of credit information by CRAs. Even if this new "market" was viable, Plaintiff's Sherman Act §2 claim should be dismissed because CDIA and the CRAs are then "sharing" a "monopoly." The Second Circuit has squarely rejected a "shared monopoly" theory of antitrust liability. Neither "market" identified by Plaintiff in the initial Complaint or the Amended Complaint is plausible. (Point IV).

FACTUAL BACKGROUND

A. Plaintiff's Monopolization Claim Under the Original Complaint and the Amended Complaint.

Plaintiff filed her initial Complaint against CDIA under § 2 of the Sherman Antitrust Act, seeking injunctive relief, treble damages and punitive damages. (Dkt. 2). The Complaint attacked CDIA for being the credit industry trade association that promulgates a uniform credit reporting format, which Plaintiff claims resulted in the "flawed" Metro 2® Format. (Compl. ¶ 13). Plaintiff alleged the antitrust laws are implicated because CDIA "controls more than 90% of the marketplace for credit reporting procedures" and engaged in "anticompetitive conduct" that prevented "CRAs" and "market participants" from developing "innovative," "new" credit report methodologies. (Compl. ¶¶ 47-57).

CDIA filed an August 24, 2020 pre-motion letter addressing the following grounds for dismissal (Dkt. 11): (1) furnishing credit reporting guidelines is not the proper subject of an antitrust challenge as Plaintiff failed to allege anticompetitive or exclusionary conduct by CDIA; (2) Plaintiff's credit "score" was not an "antitrust injury";

and (3) credit reporting procedures is not a relevant market. Plaintiff responded by August 28 letter, requesting leave to amend the Complaint due to "valid" issues raised by CDIA. (Dkt. 12).

The Court granted Plaintiff's request to serve an amended complaint (Dkt. 13).[2] Notwithstanding CDIA's prior explanation of why Plaintiff's antitrust claim mandates dismissal, the Amended Complaint again alleges a single count of monopolization against CDIA that is premised on Plaintiff's *ad hominem* attacks on the Metro 2® Format.

The new allegations contained in the Amended Complaint meant to remedy the flaws addressed by CDIA's August 24 letter confirm the futility of Plaintiff's antitrust claim. Namely, Plaintiff complains she has been unsuccessful in convincing the CRAs to remove re-aged discharged debt from credit reports. (Am. Compl. ¶ 13). Plaintiff blames CDIA for not having heightened credit reporting accuracy requirements, but fails to allege improper conduct by CDIA, instead choosing to blame CDIA for alleged inaction by CRAs, data furnishers and other players in the credit reporting industry.

Plaintiff acknowledges the requirement to plead plausible anticompetitive conduct in a relevant market and antitrust injury. Plaintiff now defines the impacted relevant market as "credit reporting," which is "a marketplace where commercial actors collect, organize and sell historical information on consumers' buying, borrowing and repayment history." (Am. Compl. ¶ 31). The Metro 2® Format is the "standardized procedure" governing collection and aggregation of consumer data furnished by banks and

[2] Plaintiff served an untimely Amended Complaint on September 18, which resulted in the need to file for leave to amend the Complaint. (Dkts. 15, 16). Plaintiff made that motion on September 22, which CDIA did not oppose, and this Court granted on September 30, 2020. (Dkt. 17).

merchants like Visa, Bank of America, and Sallie Mae (Am. Compl. ¶¶ 32-33), which data is collected by the three CRAs -- Equifax, Experian and TransUnion -- which produce credit reports. (Am. Compl. ¶ 34). Since 2012, Plaintiff concedes that this "market" has been regulated by the CFPB (Am. Compl. ¶ 44), and that the CFPB's "new regulatory role over the Credit Reporting Market" allegedly caused CRAs to no longer "compete." (Am. Compl. ¶ 47).

Plaintiff claims that having an "efficient" industry association to set credit reporting guidelines harms "innovation." (Am. Compl. ¶¶ 61-64). Plaintiff points to "CDIA's expert on credit reporting" who testified that "[t]here is a need for consistent reporting practices so that there is accuracy and consistency in scoring across all consumer reporting agencies, and so that each consumer reporting agency is not making arbitrary decisions about how to report and score credit information." (Am. Compl. ¶ 61). Plaintiff claims there "is no evolution coming to Metro 2 and there can be no progress in the Credit Reporting Market until this compulsory 'sameness' is enjoined." (Am. Compl. ¶ 67). Plaintiff, however, inconsistently alleges competitive "Enterprise Procedures" have been developed by CRAs to offer consumers innovative credit reporting products. (Am. Compl. ¶¶ 73, 76 ("Credit Bureaus work hard to solve problems, even those that nobody ever expected them to solve.")).

Plaintiff claims she has been harmed because of frustrating delays she has faced clearing discharged student debt from her credit reports. (Am. Compl. ¶¶ 9-10, 132). Plaintiff blames the CRAs for failing to "fix" this "error" (Am. Compl. ¶ 19), but then speculates that "[b]ut for the monopolistic [sic] of the CDIA, the plaintiff and her attorney

would have successfully cleared her Credit Report and allowed her to return to normal activity without resort to litigation." (Am. Compl. ¶ 116).

B. The Credit Reporting Industry

The Amended Complaint concedes that credit reporting is regulated by the FCRA and enforced by the CFPB. Yet, Plaintiff is seeking to have this Court declare the data format which has long been used by the credit reporting industry deemed unlawful under antitrust laws, to be replaced by hypothetical standard setting credit reporting entities that will "compete" with one another by having contrasting information-sharing rules. Such a pronouncement will undo decades of consumer credit reporting laws, oversight and enforcement.[3]

The FCRA was adopted in 1970 with the purpose of requiring CRAs to:

> Adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this tile.

15 U.S.C. § 1681. The FCRA is aimed at protecting consumers from inaccurate information and "establishing credit reporting procedures that utilize correct, relevant, and up-to-date information in a confidential and responsible manner." *See, e.g., Jones v. Federated Fin. Reserve Corp.,* 144 F.3d 961, 965 (6th Cir. 1998); *St. Paul Guardian*

[3] In order to address Plaintiff's attack on the FCRA and consumer credit reporting, we are providing the relevant statutes, caselaw and other uncontroverted publicly available information. Second Circuit law permits the Court to take judicial notice of these materials. *See, e.g., Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes."); *Natural Resources Defense Council v. Department of Interior*, 410 F. Supp.3d 582, 598 (S.D.N.Y. 2019) (citing *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp.3d 156, 166 (S.D.N.Y. 2015) (noting that courts routinely take judicial notice of publicly available government documents)).

Insurance Co. v. Johnson, 884 F.2d 881, 883 (5th Cir. 1989); *Hovater v. Equifax. Inc.,* 823 F.2d 413, 417 (11th Cir. 1987), *cert. denied*, 484 U.S. 977, 98 L. Ed. 2d 488, 108 S. Ct. 490 (1987); *Dunford v. Am. DataBank, LLC,* 64 F. Supp. 3d 1378, 1389 (N.D. Cal. 2014). The FCRA applies to CRAs and data furnishers, and explicitly addresses requirements related to accuracy and the handling of consumer disputes.

The Federal Trade Commission ("FTC") and federal financial agencies were originally tasked with enforcement of the FCRA. FTC, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations,* 3 (2011) ("*40 Years Report*"), available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf. In 2003, the FTC was granted specific rulemaking authority. *Id.* at 5. Certain rules were the sole responsibility of the FTC while others were carried out jointly or in coordination with other agencies responsible for FCRA enforcement. *Id*. In 2011, the CFPB took over FCRA enforcement. *Id.* at 3, n.13.[4]

In 2012, the CFPB released a report detailing how the nation's largest CRAs manage consumer data. In that report, the CFPB outlined that in a typical month, CRAs receive updates "from approximately 10,000 information furnishers" and that the furnishers provide this information "on more than 1.3 billion tradelines." *See* CFPB,

[4] "In the Dodd-Frank Act, Congress established the Bureau and generally consolidated the rulemaking authority for Federal consumer financial laws in the Bureau. Title X of the Dodd-Frank Act transferred rulemaking authority for a number of consumer financial protection laws from seven Federal agencies to the Bureau as of July 21, 2011" including the FCRA (except with respect to sections 615(e) and 628). *Finalization of Interim Final Rules (Subject to Any Intervening Amendments) Under Consumer Financial Protection Laws,* 81 Fed. Reg. 25323 (Apr. 28, 2016).

CFPB Report Details How the Nation's Largest Credit Bureaus Manage Consumer Data, available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-report-details-how-the-nationgs-largest-credit-bureaus-manage-consumer-data/ (last visited Oct. 28, 2020).

Despite specific rulemaking authority being delegated to the FTC and CFPB, there are no mandatory rules or regulations that provide detailed technical guidance on *how* furnishers should report the extremely high volume of sensitive information to CRAs or how they should convey information related to dispute investigations. Regulations anticipate a standardized reporting format. Appendix E to 12 C.F.R. § 1022 (Regulation V). Thus, "Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies" require furnishers to develop policies and procedures that include "[u]sing standard data reporting formats and standard procedures for compiling and furnishing data, where feasible, such as the electronic transmission of information about consumers to consumer reporting agencies." 12 C.F.R. § 1022, App. E, III(b); *see also* 16 C.F.R. § 1660, App. A, III(b).

Over the past forty years, CDIA has published a standardized technical credit data reporting format, led by Equifax, Experian, and TransUnion. This format brings greater precision in reported data called the "Metro Format." *See* CDIA, *About CDIA*, https://www.cdiaonline.org/about/about-cdia/#:~:text=Founded%20in%201906%2C%20CDIA%20promotes,avoid%20fraud%20and%20manage%20risk (last visited Oct. 28, 2020). In 1997, CDIA published[5] the

[5] The CDIA has operated under several names. At the time Metro 2 Guidelines were originally introduced, the CDIA was known as Associated Credit Bureaus. *See* https://www.cdiaonline.org/about/about-

Metro 2® Format which was a more updated and robust version of the original Metro™ Format. Metro 2® Format provides a standardized and uniform format data furnishers can use to report their tradelines and related updates to the CRAs. *See* FTC, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, Dec. 2004, available at https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/041209factarpt.pdf (last visited Oct. 28, 2020) ("The CDIA reports that as of 1996, more than 95% of data received by the CRAs used the Metro format. [Metro 2®] was introduced in 1997, and by 2003, more than half of all accounts were reported in this format.").

The Metro 2® Format has become the industry standard for credit reporting that was contemplated by the regulations outlined above. The Metro 2® Format sets forth a standardized set of data fields and codes used by lenders, financial institutions and debt collectors when provided data to the CRAs. One of the goals of the Metro 2® Format is to ensure consistency among the data reported by the furnishers. Thus, for example, mortgages are reported with the same account type, and the status of the account (paid as agreed, 30 days past due, 60 days past due) is reported using common codes. Also, the Metro 2® Format standardizes reporting when special situations arise such as bankruptcy, forbearances and short sales.[6]

---

cdia/#:~:text=Founded%20in%201906%2C%20CDIA%20promotes,avoid%20fraud%20and%20manage%20risk (last visited Oct. 28, 2020).

[6] By way of example, in the recently enacted Coronavirus Aid, Relief, and Economic Security Act ("CARES"), Congress amended the FCRA to add requirements regarding the reporting of an accommodation given to debtor due to the COVID-19 pandemic. However, to effectuate Congress' intent, CDIA provided specific guidance to the Metro 2® Format users to explain in detail how such

CFPB enforcement actions have embraced Metro 2® Format as the accepted industry standard for transmission of credit data. For example, in the CFPB's Consent Order entered in *In re First Investors Financial Services Group, Inc.,* the CFPB recognized that "Metro 2 was developed by the [CDIA] to serve as a standard industry-accepted format for the electronic reporting of credit information." No. 2014-CFPB-0012, Consent Order, ¶ 9 (Aug. 19, 2014); *see also id.* at ¶ 3.h. (defining "systematic inaccuracy" to include Respondent's failure to "correctly translate its customers' account information into the standard industry-accepted format (*i.e.,* "Metro 2") before furnishing such information for CRAs."). Similarly, in *In re Security Group, Inc., et al.,* the CFPB found Security Group, Inc.'s policies and procedures "did not address how to code properly customer account information or responses to consumer disputes using the Metro 2 Guide and did not ensure that their monthly furnishing system was coordinated with their consumer dispute furnishing practices." No. 2018-BCFP-0002, Consent Order, ¶ 51 (June 12, 2018).

In addition, courts recognize the importance Metro 2® Format plays in creating a standardized format in the credit reporting industry. *In re Anzaldo,* 612 B.R. 205, 211 (Bankr. S.D. Cal. 2020) ("As the [Credit Reporting Resource Guide] is designed to assist furnishers in electronic reporting through the Metro 2 system, it is often referred to as the 'Metro 2 Guidelines.' These guidelines are generated by the industry for its purposes and not in response to any regulatory requirement. Although furnishers must be compliant to participate in the Metro 2 system, they retain discretion on how to

---

impacted accounts should be reported. https://www.cdiaonline.org/covid-19/ (last visited November 16, 2020). This detailed guidance was designed to insure consistency in reporting.

interpret and follow the guidelines."); *Phillips v. Trans Union, LLC,* No. 3:16-CV-00088, 2017 U.S. Dist. LEXIS 144232, at *17 n.3 (W.D. Va. Sep. 6, 2017) (noting that the CDIA "has created the form that credit reporting agencies and creditors use to communicate. The CDIA also publishes a guide explaining how to use the form and what the various fields indicate.").[7]

Indeed, if furnishers and CRAs "are to communicate meaningfully among themselves within the framework of the FCRA, it proves essential that they speak the same language, and that important data be reported in categories about which there is genuine common understanding and agreement." *Cassara v. DAC Servs., Inc.,* 276 F.3d 1210, 1225 (10th Cir. 2002). The Metro 2® Format provides guidance to the industry while also creating efficiencies to help maintain and enhance accurate credit reporting. To that end, the Metro 2® Format enables the accurate and timely transmission of data, provides for complete identification information for the consumer to allow accounts to be more accurately matched to the correct individual, and provides flexibility for future updates and improvements. *See* CDIA, 2020 Credit Reporting Resource Guide, at 2-1:

[7] Similarly, a 2015 settlement agreed to by over thirty state attorneys general and Equifax, Experian, and TransUnion directed that: "The CRAs shall announce the full retirement of the Metro 1 data reporting format. Thereafter, at the end of a reasonable notice period that provides furnishers with sufficient time to undertake all steps necessary to migrate to the Metro 2 data reporting format, the CRAs shall no longer accept any data from furnishers utilizing the Metro 1 data reporting format. . . The CRAs shall revise training materials and instruct new and existing furnishers on Metro 2 reporting standards for reporting deceased indicators…" *In the Matter of the Investigation of Experian Information Solutions, Inc.; Equifax Information Services, LLC, and TransUnion LLC*, Settlement Agreement, at 12-13, 17 (March 8, 2015), available at https://ag.ny.gov/pdfs/CRA%20Agreement%20Fully%20Executed%203.8.15.pdf.

FEATURES OF THE METRO 2® FORMAT

- Accepted by all consumer reporting agencies, the Metro 2® Format enables the reporting of accurate, complete and timely credit information.
- Meets all requirements of the Fair Credit Billing Act (FCBA), the Fair Credit Reporting Act (FCRA), the Equal Credit Opportunity Act (ECOA) and all applicable state laws.
- Allows credit information to be added and mapped to the consumer's file with greater consistency.
- Allows complete identification information to be reported for each consumer (including co-debtor, co-signer, etc.) each month which improves the ability of the consumer reporting systems to match to the correct consumer.
- Accommodates cycle reporting of data, which allows more timely updating of the credit file.
- The Payment History Profile (up to 24 months) makes it possible for the credit grantor to supply automated updates/corrections for the file rather than costly manual updates/corrections, and reduces consumer disputes.
- Flexibility of the format provides for future enhancements.

Reporting in the Metro 2® Format greatly benefits the credit grantor, the consumer reporting agencies and your customer, the consumer.

INDUSTRY REPORTING STANDARDS

An industry standard for reporting consumer accounts will ensure the integrity and consistency of the credit information being reported.

- All accounts must be reported a minimum of once per month.
- A final Account Status Code must be reported when the accounts are ultimately paid or closed with a zero balance.
- If reporting by cycles, all accounts must be reported at the close of each cycle.
- When reporting delinquent accounts, the "Industry Standard for Reporting Account Delinquency" must be followed.

ARGUMENT

I. THE "PLAUSIBILITY" STANDARD

Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), when addressing a Rule 12(b)(6) motion to dismiss, a district court will assess whether a complaint states a plausible claim, *i.e.*, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and alterations omitted). The *Twombly* court further cautioned courts to be particularly discerning when assessing antitrust claims because "proceeding to antitrust discovery can be expensive." *Id.* at 558.

The required elements of a privately asserted Sherman Act § 2 monopolization claim are: (1) monopoly power by a single actor; (2) in a relevant market; (3) which is willfully acquired or maintained; and (4) antitrust injury by the plaintiff. *In re Zinc Antitrust Litig.*, 155 F. Supp.3d 337, 377 (S.D.N.Y. 2016) (citing *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)) ("To state any claim under Section 2, a plaintiff must allege plausible facts that a defendant possesses market power (sometimes referred to

as 'monopoly power') in a relevant market, and willfully acquired or maintained such power as 'distinguished form growth or development as a consequence of a superior product, business acumen, or historic accident.'" "To state a claim under Section 2, a plaintiff must also allege facts that the defendant has engaged in 'improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintain market power.'" *Zinc*, 155 F. Supp.3d at 377 (citing *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 227 (2d Cir. 2006)).

II. PLAINTIFF IS IMPROPERLY USING ANTITRUST LAWS TO ATTACK CDIA'S PROCOMPETITIVE SSO ACTIVITY

Plaintiff acknowledges that CDIA is the consumer reporting industry's trade association, which members include CRAs and data furnishers. (Am. Compl. ¶¶ 31-34). Plaintiff concedes that if data furnishers were not required to produce data in a uniform manner, and CRAs did not report based on uniform standards, the interoperability that characterizes the credit reporting industry "would be destroyed" (Am. Compl. ¶ 44), *i.e.*, this would end the established format on the type of consumer information to be provided by data furnishers to CRAs, as well as the manner to report it. Data furnishers would have no clear guidance on what consumer information to report and how to report it to CRAs. Customers could be left with products that provided diminished guidance on their creditworthiness. The Metro 2® Format was precisely developed to meet regulators' desire to have common standards to avoid such confusion and inconsistencies for credit reporting information by data furnishers. *See* 12 C.F.R. § 1022, App. E, III(b); 16 C.F.R. § 1660, App. A, III(b). Rather than promote

"competition," Plaintiff's goal of "dismantling of the CDIA" would sow confusion and harm industry efficiency. (Am. Compl. ¶¶ 65, 123).

Nevertheless, Plaintiff urges that having a single SSO "flattens innovation" and harms "competition" because Plaintiff believes Metro 2® Format is not "intelligent" and could be improved. (Am. Compl. ¶ 44, 61-62, 66, 113). This is antithetical to antitrust laws. The Metro 2® Format's promotion of uniformity of the reporting of data and consistency in the reviewing and use of that data are goals deemed "procompetitive." As a former Commissioner of the FTC explained:

> Standard setting is essentially pro-competitive because it gives consumers a baseline to compare increasingly complex items and allows competitors to produce compatible goods… When the imposition of a standard might restrain or prohibit market access, the fairness of the standard setting procedure and the procedural safeguards extended to interested parties will be evaluated to determine whether an antitrust violation has occurred. The criteria on which the standard is based, who makes the decisions regarding promulgation of the standard, the notice given to interested parties, notice of the actual decision, and the interested parties' opportunity to be heard will be considered. Neutral decision makers and decisions based on expert opinions generally receive more weight than the arguments made by those who perceive an adverse economic consequence.

Antitrust Implications in Standard Setting, Christine A. Varney, 1995 WL 232950, at *1-2 (Feb. 22, 1995).

There are many industry SSOs that promulgate common technical standards for industry participants to adhere to. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495 (1988) (describing the National Fire Protection Association as a private, voluntary organization that "publishes product standards and codes related to fire protection"); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 420 (4th Cir. 2015) (describing Underwriters Laboratory as a private standard-setting

organization responsible for promulgating safety standards on table saws); *Plaint Oil Powered Diesel Fuel Systems, Inc. v. ExxonMobil Corp.*, 801 F. Supp.2d 1163, 1168 (D.N.M. 2011) ("ASTM's largest committee, titled D02, Petroleum Products and Lubricants. . ., of which the Defendant Oil Companies are members, promulgates standards, specifications, classifications, test methods, and guidelines for liquid fuels in the diesel fuel industry."). Plaintiff makes no allegations that the Metro 2® Format raises potential antitrust concerns with CDIA's conduct. There is no allegation that CDIA limits market access, that the Metro 2® Format is the product of an unfair process, or that CDIA lacks procedural safeguards.

Instead, Plaintiff attacks CDIA's status as the consumer reporting industry's trade association or *de facto* SSO and claims that a recognized data reporting system should be replaced by theoretical "competition." While CDIA is sensitive to Plaintiff's frustration with CRAs and consumer reporting companies, her grievance with CDIA does not sound in antitrust law. *See, e.g., Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156, 1164 (4th Cir. 1986) (industry standards are often set forth in some type of code or they may be adopted by a trade organization of a given industry); *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 374 (7th Cir. 1990) (rejecting plaintiffs' theory that defendant, as a trade association, "acts as a conspiracy or combination every time it promulgates industry standards which unreasonably restrain competition" and stating that "a trade association is not, just because it involves collective action by competitors, a walking conspiracy"); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188-89 (2d Cir.1992) ("To sustain a § 2 claim, the plaintiff must prove not only that the defendant had the power to monopolize, but also that it willfully acquired or maintained its power, thereby causing

unreasonable 'exclusionary,' or 'anticompetitive' effects" (internal citations omitted)); *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986) (upholding district court's determination that where the evidence fails to show exclusionary conduct, there is no triable issue of fact on a Section 2 monopolization claim).

Plaintiff acknowledges that information contained in credit reports is governed by the FCRA which requires "the industry to adopt and employ 'reasonable procedures' to ensure that … Credit Reports were prepared with the 'maximum possible accuracy.'" (Am. Compl. ¶ 30) and concedes that the "FCRA regulates the consumer reporting market" (Am. Compl. ¶ 31), while the CFPB "regulates" the "credit reporting market." (Am. Compl. ¶ 44). Plaintiff can attempt to participate in improving alleged deficiencies concerning information provided by data furnishers by engaging with the CFPB, the FTC, state regulators or by filing a claim under the FCRA or similar state laws. Not every commercial dispute or consumer grievance rises to the level of industry-wide competition concerns. Courts are leery to apply antitrust scrutiny, particularly where that could result in harming procompetitive activity. *See Intellective, Inc. v. Mass. Mut. Life Ins. Co.*, 190 F. Supp.2d 600, 612-13 (S.D.N.Y. 2002) (citing *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assoc., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) ("[A] plaintiff must demonstrate that defendants' conduct 'has an actual adverse affect [sic] on competition as a whole in the relevant market'").[8]

[8] Plaintiff's admission that the FCRA and CFPB regulate the alleged erroneous information in her credit reports, combined with her effort to misuse antitrust laws to second guess CDIA's data reporting format, supports antitrust preclusion under *Credit Suisse v. Billing*, 551 U.S. 264 (2007). Due to Plaintiff's failure to plausibly allege key elements of a monopolization claim – anticompetitive conduct, antitrust

III. PLAINTIFF STILL FAILS TO ALLEGE A PLAUSIBLE ANTITRUST INJURY

Plaintiff alleges she has been harmed by CDIA because she is the alleged "victim of degenerated credit reporting procedures caused by the CDIA's stranglehold on the means of production" and that absent the Metro 2® Format, her credit reporting issue would have been "cleared." (Am. Compl. ¶¶116, 118, 130).

This fails to allege a plausible antitrust injury. "To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016) (citing *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013)). "Because an antitrust injury must be of the type which the antitrust laws were intended to prevent, an injury to competition is required." *AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 920 F. Supp. 1287, 1306 (S.D.N.Y. 1996). "To establish antitrust injury, a plaintiff must allege plausible facts that he suffered 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *In re Zinc Antitrust Litig.*, 155 F. Supp.3d 337, 358 (S.D.N.Y. 2016) (quoting *Gatt Commc'ns*, 711 F.3d at 75); *see also In re Aluminum Antitrust Litig.*, 833 F.3d at 157 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) ("In order to establish antitrust injury, the plaintiff must demonstrate that its injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'"). "Thus, although causally

---

injury and a relevant market – CDIA is not here moving for dismissal on this ground. CDIA respectfully reserves its right to raise antitrust preclusion if the case proceeds.

related to an antitrust violation, injury does not constitute 'antitrust injury' unless it is 'attributable to an anti-competitive aspect of the practice under scrutiny.'" *In re Zinc*, 155 F. Supp.3d at 358 (citing *Alt. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).

Plaintiff provides no legal support that an SSO causes "antitrust injury" to consumers that claim to be adversely impacted by an industry promulgated standard they disagree with. Nor is there a causal connection between a purported CDIA rule about CRAs accepting data furnisher information (Am. Compl. ¶ 130) and the subsequent alleged failure by CRAs to "clear" Plaintiff's discharged debt from her credit reports. There is no cited CDIA "rule" preventing CRAs and commercial actors from fixing a reporting error.

Moreover, Plaintiff claims it was CFPB's "new regulatory role over the Credit Reporting Market" which allegedly caused CRAs to no longer "compete." (Am. Compl. ¶ 47). Plaintiff thus confirms that any alleged cessation of competition was caused by an intervening actor – the CFPB – long after CDIA's 1997 promulgation of Metro 2® Format.

Therefore, Plaintiff fails to meet the requirement of alleging facts plausibly demonstrating an anticompetitive connection between an alleged error on her credit reports that has not been "cleared" and CDIA. *See Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 374 (7th Cir. 1990) (rejecting plaintiffs' antitrust claim where plaintiff failed to show any connection to the defendant or the defendant's standard).

IV. PLAINTIFF HAS NOT ALLEGED A VIABLE RELEVANT MARKET TO SUPPORT HER CLAIM THAT CDIA IS A MONOPOLIST

"A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." *PepsiCo, Inc. v. Coca–Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002). The Supreme Court has found the crucial role that defining a relevant market plays in § 2 monopolization cases. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (requiring inquiry "into the relevant product and geographic market and the defendant's economic power in that market"); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition."); *see also City of New York v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011) ("To state a claim under § 7 of the Clayton Act, §§ 1 or 2 of the Sherman Act, or New York's Donnelly Act, a plaintiff must allege a plausible relevant market in which competition will be impaired.").

Plaintiff's initial Complaint alleged a market for "credit reporting guidelines," (Dkt. 2), which CDIA urged is not a viable relevant market. (Dkt. 11). In urging dismissal, CDIA cited *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 296 F. Supp.3d 442, 471-72 (E.D.N.Y. 2017), an antitrust lawsuit against the North American soccer SSO, in which a sister district court found the relevant market at issue is the product regulated by the SSO, not the challenged standards themselves. *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 496 (1988) (market definition was the market for "electrical conduits," the product regulated by the SSO);

Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, Inc., 635 F.2d 118, 124 (2d Cir. 1980) (market definition was the market for "low-water cut-off" devices, the product regulated by the SSO), *aff'd*, 456 U.S. 556 (1982)).

Recognizing this flaw, Plaintiff now describes an allegedly monopolized "credit reporting market" that mirrors credit reporting governed by the FCRA. (Am. Compl. ¶ 31). Plaintiff concedes that the "credit reporting market" includes commercial actors such as the three CRAs. (Am. Compl. ¶¶ 30, 34). Plaintiff alleges that these CRAs are fiercely competing with each other in this "market" by providing a variety of accurate "Enterprise Procedure" products for sale to banks, landlords and other potential consumers of credit information. (Am. Compl. ¶¶ 70-79).

If one adopts Plaintiff's "credit reporting market," then at least the CRAs and CDIA are "sharing" the alleged "credit reporting" monopoly. *See also* Am. Compl. ¶ 4 (quoting Congress member Patrick Henry that "the [three] agencies" comprise an "oligopoly"). Yet, there can only be a single monopolist in a market. *See* United States Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section of the Sherman Act: Chapter 2*, available at https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 (Section 2's requirement that single-firm conduct create or maintain, or present a dangerous probability of creating, monopoly power serves as an important screen for evaluating single-firm liability). For this reason, "[t]he Second Circuit has held that a shared monopoly theory may not support a monopolization or attempted monopolization claim under Section 2, and numerous district courts . . . have repeatedly rejected the viability of a Section 2 conspiracy claim based on a shared monopoly theory." *In re Zinc*

Antitrust Litig., 155 F. Supp.3d 337, 382 (S.D.N.Y. 2016) (citing *H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989)).

Plaintiff has not alleged a viable relevant market to support her monopolization claim. This provides an independent ground for dismissal under Rule 12(b)(6).

CONCLUSION

Plaintiff's cosmetic effort to fix the flaws with her antitrust claim fail and the grievance has now been unmasked as a collateral attack to rewrite the FCRA and second guess regulators' expertise and oversight. Plaintiff's second "bite at the apple" should be her last, and the Amended Complaint should be dismissed with prejudice as futile. *See, e.g., Chapman v. New York State Div. for Youth*, 546 F.3d 230, 239 n.3 (2d Cir. 2008) (affirming district court's dismissal of antitrust claims with prejudice where, "[g]iven the nature of the claims, repleading would be futile; [petitioner] offers no plausible argument as to how the failure to plead a relevant market could be rectified through an amended complaint.").

Dated: November 20, 2020

By: /s/ Daniel N. Anziska

Daniel N. Anziska, No. 3926276
TROUTMAN PEPPER HAMILTON SANDERS LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 704-6009
Email: daniel.anziska@troutman.com

and

Cindy Hanson, No. 2633337 (*Pro Hac Vice Motion Pending)*
TROUTMAN PEPPER HAMILTON SANDERS LLP
600 Peachtree Street, N.E.
Suite 3000
Atlanta, GA 30308
Telephone: (404) 885-3830
Email: cindy.hanson@troutman.com

David N. Anthony, Va. No. 31696 (*Pro Hac Vice Motion Pending)*
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
15th Floor
Richmond, VA 23219
Telephone: (804) 697-5410
Email: david.anthony@troutman.com

Attorneys for Defendant
Consumer Data Industry Association

CERTIFICATE OF SERVICE

I, Daniel N. Anziska, hereby certify that on November 20, 2020, I electronically served this *Memorandum of Law in Support of Defendant Consumer Data Industry Association's Motion to Dismiss the Amended Complaint* via ECF on the following:

Christine Wairimu Mundia
1131 5th St NW, Unit A
Washington, DC 20001
Telephone: 814-882-5046
Email: christinemundia@gmail.com
Counsel for Plaintiff

Austin C. Smith
Smith Law Group LLP
99 Wall Street, Ste No. 426
New York, NY 10005
Telephone: 917-992-2121
Email: austin@acsmithlawgroup.com
Counsel for Plaintiff

/s/ Daniel N. Anziska