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BY ECF

Hon. Mary Kay Vyskocil
United States District Court
Southern District of New York
500 Pearl Street, Room 2230
New York, NY 10007

Re: Somosky v. Consumer Data Industry Association; No. 1:20-cv-04387-MKV

Dear Judge Vyskocil:

On behalf of defendant Consumer Data Industry Association ("CDIA"), we respectfully submit this letter pursuant to Your Honor's Practice Rule 4.A.1 seeking authorization to move to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for the failure to state a plausible claim.

CDIA is a trade association that promulgates credit reporting guidelines. Compl. ¶ 2. Credit reporting is conducted by credit reporting agencies ("CRAs") that sell a variety of products to businesses. Compl. ¶ 8. Plaintiff blames credit reporting guidelines for a purported error about student debt that appeared on her credit report. Compl. ¶ 64. Plaintiff's counsel previously unsuccessfully challenged such reporting of student debt under the Fair Credit Reporting Act. *See Mader v. Experian Information Solutions, LLC*, 2020 WL 4273813, at *1 (S.D.N.Y. July 24, 2020) (granting summary judgment for a CRA on a plaintiff's claims that the CRA violated the FCRA by "failing to use reasonable procedures to ensure maximum possible accuracy of his credit report"). Counsel now takes a different path – blaming an industry credit reporting association for being a "monopolist" that somehow harmed competition for credit reporting. Compl. ¶ 66.

Plaintiff fails to state a claim under Section 2 of the Sherman Act which, under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), requires <u>plausible</u> allegations of: (1) CDIA's possession of monopoly power in a relevant market; and (2) its willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. *LLM Bar Exam, LLC v. Barbri, Inc.*, 271 F. Supp.3d 547, 581-82 (S.D.N.Y. 2017) (quoting *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).

CDIA presently intends to seek dismissal on at least four independent grounds:

1. <u>Furnishing Credit Reporting Guidelines is Not the Proper Subject of an Antitrust Challenge</u>

Plaintiff alleges CDIA promulgates credit reporting guidelines that resulted from a process involving CDIA's members. Compl. ¶¶ 10-13. Plaintiff acknowledges that common standards are

meant to be "efficient" and "uniform" for businesses that obtain customer credit reports. Compl. ¶ 11. Plaintiff concedes that subsequent improvements to CDIA's Metro 2® Format guidelines – Enterprise Procedures – have been successfully developed by CDIA's CRA members. Compl. ¶ 30. While Plaintiff complains about the accuracy of some credit reports and wishes for another entity to promulgate different credit reporting standards, the Complaint does not explain why credit reporting guidelines is worthy of an antitrust challenge.

Plaintiff has not properly alleged that the Metro 2® Format is the product of anticompetitive behavior. A former Commissioner of the Federal Trade Commission 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. . . . 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). Plaintiff makes no allegations that the credit reporting standards promulgated by CDIA are biased toward certain competitors, or who makes the decisions concerning the Metro 2® Format and what sort of input members have in considering new reporting procedures. At most, Plaintiff alleges that the Metro 2® Format has resulted in low-quality credit reporting. Even accepting the allegations as true, which we dispute, Plaintiff has not explained why these credit reporting procedures are a proper subject of antitrust scrutiny.

Moreover, the very product being attacked by Plaintiff has at least implicitly been endorsed by government actors. Namely, a 2015 settlement agreed to by over thirty state attorneys general and CDIA members Equifax, Experian, and TransUnion, directed that:

> [A]t the end of a reasonable notice period specified in the Implementation Schedule 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).

2. Plaintiff Has No Antitrust Standing

Plaintiff does not have antitrust standing, a required element of a private antitrust claim. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries." *Gelboim v. Bank of America Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983)). "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) (citation omitted). "The Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of [competitors] in the relevant market." *Id.* at 1306-07 (quoting *Associated General Contractors*, 459 U.S. at 538).

Plaintiff's "injury" appears to be that a credit report includes her student debt through May 2026, "causing her credit score to drop by 100 points." Compl. ¶¶19, 63. This injury has nothing to do with competition, market conduct or pricing, and therefore there is no alleged antitrust injury. Moreover, a sister district court rejected the claim that such reporting of student debt causes injury. *Mader*, 2020 WL 4273813, at *1. It is hard to conceive a plausible antitrust injury.

3. <u>Plaintiff Has Not Defined a Plausible Relevant Market</u>

Similarly, Plaintiff does not plausibly define a relevant market, a required element of monopolization. While Plaintiff baldly labels a "market" for "credit reporting procedures," there are no facts alleged discussing the basis of that market definition, substitutability between services or other indicia of competition.

In *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 296 F. Supp.3d 442, 471-72 (E.D.N.Y. 2017), a district court cited extensive case law to support the proposition that the proper market when alleging anticompetitive conduct by an industry association is the product regulated by that association. By this logic, Plaintiff's market definition of "credit reporting procedures" is incorrect. If anything, the correct product market might be credit reports offered by the CRAs, a highly competitive industry. As CDIA does not even compete in that "market," it is hard to imagine how CDIA can monopolize that market.

4. <u>Plaintiff Has Not Pled Exclusionary Conduct</u>

Plaintiff has not alleged any exclusionary conduct by CDIA. The Supreme Court has held that "[t]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Comm's Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Even if CDIA somehow has a monopoly over credit reporting guidelines, Plaintiff still must allege that CDIA engaged in anticompetitive conduct. Yet, there are no facts setting forth any conduct by CDIA to exclude anyone from participating in association consumer reporting activities; to the contrary, the Complaint suggests that CDIA mandates industry participation. While Plaintiff speculates that CDIA has an "agreement" with CRAs like Experian, Plaintiff does not even define the substance of such agreement, let alone explain how an "agreement" was anticompetitive. There is simply no alleged anticompetitive conduct by CDIA.

Respectfully submitted,

/s/

Daniel N. Anziska

cc: Austin Smith, Esq.