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Hon. Mary Kay Vyskocil
U.S Courthouse, 500 Pearl St
New York, NY 10007-1312

re: Somosky v. CDIA, 1: 20-4387-MKV

Dear Judge Vyskocil:

The Consumer Data Industry Association ("CDIA" or "Defendant") makes four arguments in support of dismissal. First, credit reporting procedures are not a recognized subject of an antitrust challenge. Second, Somosky lacks antitrust standing. Third, the complaint fails to define a market in sufficient detail. Fourth, the complaint fails to plead exclusionary conduct. Plaintiff responds to each point below but also respectfully requests leave to amend the complaint to address more directly the CDIA's points, some of which are well taken.[1]

The complaint alleges that the CDIA exercises monopolistic control within the consumer credit reporting marketplace ("Credit Reporting Market"), a marketplace where commercial actors collect, organize and sell historical information on consumers credit history ("Data"). This Data is produced, aggregated and refined using standardized procedures ("Metro 2 Guidelines") into personalized reports about specific consumers ("Credit Reports") by three classes of economic agents: (1) the data furnishers and data users, such as Visa, Bank of America, Sallie Mae ("Data Furnishers/Buyers" or "DFBs") who supply the CRAs with the Data and purchase the finished Credit Reports; (2) credit reporting agencies, such as Experian, Equifax, and Transunion ("CRAs") who collect the Data from the DFBs and produce Credit Reports for sale to the DFBs/Consumers; and (3) natural persons, such as Melissa Somosky ("Consumers") who are the subjects of the Data and often buyers of Credit Reports. The Credit Reporting Market is governed under the Fair Credit Reporting Act ("FCRA"), which requires the CRAs to use *reasonable procedures to ensure the maximum possible accuracy* of the Data and Credit Reports. The FCRA does not condescend to explain exactly what to do or how to do it, relying instead on the good faith and professional judgment of the CRAs. The CRAs, misconstruing this compliment as an intolerable burden, surrendered their autonomy to the CDIA after 2012, and replaced their professional judgment with the Metro 2 Guidelines. *See,* Morning Session Transcript, Accuracy in Consumer Reporting Workshop at 16 ("Morning Trans.") (Dec. 10, 2019) ("The Metro 2, the agreement among the agencies — that was a game changer . . . cooperation among the credit bureaus and the furnishers, the constant coordination.").

This surrender to formalism has made the Credit Reporting Market an increasingly infuriating journey into bureaucratism. *See* FTC, Remarks of Stacey Slaughter at CDIA (Jun. 5, 2019) ("consumers have reported experiences with the credit bureaus reminiscent of a Kafka tale."). The CRAs do not compete to develop new procedures or reimagine what "maximum possible accuracy" could mean 50 years after Congress coined the term. Metro 2's stranglehold on the industry and its attendant barriers to entry have chilled any efforts to disrupt or improve the system; said another way, computer engineers and teenage prodigies have no cause to spend

[1] As noted by the CDIA, it was during the course of discovery in *Mader* that Experian, a CRA, stated that it had no power or ability to alter its reporting procedures because the CDIA controlled Metro 2. *See e.g., Mader v. Experian Information Solutions*, 1:19-cv-03787-LGS, ECF 61-1 at 14 (S.D.N.Y. Feb. 27, 2020).

their nights working away in their parents' garages to solve the latest problem in Credit Reporting. As errors, breaches and problems compound, and the criticism from both sides in Congress grows louder, the CRAs respond not with any renewed commitment to innovation, but instead with semantic white papers criticizing the critics, paid for and promoted by the CDIA. Compl. ¶ 25, 44. Through such means, and with the agreement of the CRAs, has this monopoly been kept alive during multiple tech booms that transformed every other facet of our economy over the last thirty years. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 229 (S.D.N.Y. 2019) (coercing distributors into anticompetitive exclusive agreements that restrain market entry). The CDIA disingenuously insists things cannot be as bad as all that or else the business community would demand better. *See e.g.* Morning Trans. at 16 (Dec. 10, 2019) ("I did mention this before [but] remember that our customers' profitability depends on the data. So if we inaccurately put negative data to file, it's reducing the profitability of our customers."). But as alleged, the business community does not rely upon Credit Reports for its marketing needs. Compl. ¶ 29-30. The business community fulfills its demands in a parallel marketplace that refines, reformats and repurposes the Metro 2 Data into a thousand ingenious products ("Enterprise Reports") that are everything Credit Reports are not: innovative, accurate, and useful.

The Marketplace

Monopolization, or attempted monopolization, requires a defined market, because "without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993) (citation omitted). A market definition is a deeply fact-intensive inquiry and courts hesitate to grant motions to dismiss. *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001). The complaint defines the applicable marketplace over which the CDIA has acquired a monopoly as the "means of credit reporting" marketplace, Compl. ¶ 65 ("The CDIA's acquisition of total and complete control over the means of credit reporting has led to a disastrous environment for consumer welfare.") or the "marketplace for credit reporting procedures." Compl. ¶ 47. Somosky's definition is largely coterminous with the CFPB's definition. *See Consumer Financial Product and Service Market*s, 77 Fed. Reg. 9592 (Feb. 17, 2012) (defining the CDIA's relevant marketplace as accounting for 94% of all receipts for entities that "collect, analyze, maintain, or provide consumer report or other account information used in a decision by another person.").

Antitrust Injury and Standing

Identifying an antitrust injury is a three-step process: (1) identify the practice complained of and the reasons such a practice is or might be anticompetitive; (2) illustrate how the practice identified by the plaintiff put the plaintiff in a worse position; and (3) compare the anticompetitive effect of the specific practice at issue to the actual injury alleged. *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86, 94 (2d Cir. 2019). Defendant denies that "low-quality credit reports" are a recognized antitrust injury. This is not correct; low-quality of goods are one of three traditionally recognized forms of injury. *Aventis*, 383 F. Supp. 2d 488 at 503 (noting that antitrust injuries are found wherever "there has been an adverse effect on prices, output, or ***quality of goods*** in the relevant market.") (emphasis added). More specifically, Somosky's Credit Report lost 100 points after a DFB re-aged one of her debts (a debt which the same DFB re-reported as discharged in 2013) and erroneously reported that Somosky had declared a second bankruptcy in 2019. Somosky has now spent more than a year with a ruined credit score, and no purchasing or borrowing power, after working diligently since her 2013 bankruptcy to repair her credit profile. "But for" the CRAs fanatical reliance on Metro 2, Somosky and her attorneys would be able to persuade someone with authority to remove an obviously false notation that benefits nobody and is contradicted by all other Data maintained by the CRAs about Somosky; "but for" Metro 2, Somosky's experience would not be an everyday occurrence that people have bizarrely accepted as an unfortunate fact of modern life. No other industry — let alone an industry that harvests personal information from involuntary participants – could get away with this level of planned negligence for this long.

In addition to an injury, antitrust standing also requires determining whether "any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws." *Aventis Envtl. Sci. USA LP v. Scotts Co.*, 383 F. Supp. 2d 488, 497 (S.D.N.Y. 2005). Somosky is an efficient enforcer of the antitrust laws. She participates directly— both voluntarily and involuntarily— in the Credit Reporting Market as a subject of the Data and a purchaser of Credit Reports. *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016) ("Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."). Somosky also participates indirectly as a subject and third-party beneficiary/casualty of the Enterprise Reports. *In re Foreign Exch. Benchmark Rates Antitrust Litig,* 2016 WL 5108131, at *9 (S.D.N.Y. Sept. 20) ("[A]ntitrust laws do not require a plaintiff to have purchased directly from a defendant in order to have antitrust standing."). Somosky does not contend, as Defendant states, that standard setting is inherently anticompetitive. On the contrary, Somosky agrees with the FTC Commissioner cited by Defendant that standards are useful when used as a baseline. Defendant and the CRAs, however, use Metro 2 as a straight-jacket. This type of standard setting conduct, even the Defendant's authority warns, has "noncompetitive aspects [and] can thwart innovation [and] entrench an older standard when a newer, better, or more widely accepted technology is available." *Antitrust Implications in Standard Setting*, 1995 WL 232950.

Exclusionary Conduct

Defendant argues that Somosky failed to plead exclusionary conduct. But this is not accurate. Compl. ¶ 49 ("The CDIA has no competition developing superior procedures because there is an agreement to use Metro 2 and only Metro 2, and Data Furnishers are forced to purchase membership in the CDIA before they are allowed to supply data to the CRAs."). Even if that were true, exclusionary conduct is only one type of anticompetitive conduct, which is "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *LLM Bar Exam, LLC v. Barbri, Inc.*, 271 F. Supp. 3d 547, 582 (S.D.N.Y. 2017). Somosky has sufficiently alleged a variety of conduct that satisfies this requirement. *See, e.g,* Compl. ¶ 51 ("The CDIA controls the reporting requirements for a billion-dollar industry upon which American finance is dependent [on] an annual budget of five million per year."); at ¶ 49 ("CRAs have a vested financial incentive to keep the Consumer Procedures as bad as possible because they can earn money fixing those problems under Enterprise.").

Sincerely,

/s Austin C. Smith