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

Melissa Somosky Plaintiff, v. The Consumer Data Industry Association Defendant.	Case No. 20-cv-4387

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

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This Memorandum of Law is submitted on behalf of the plaintiff, Melissa Somosky ("Somosky" or "Plaintiff"), in opposition to the Motion to Dismiss the Amended Complaint (Dkt. 26) ("CDIA's Motion") filed by the defendant Consumer Data Industry Association ("CDIA" or "Defendant") under Fed.R.Civ.P. 12(b)(6).

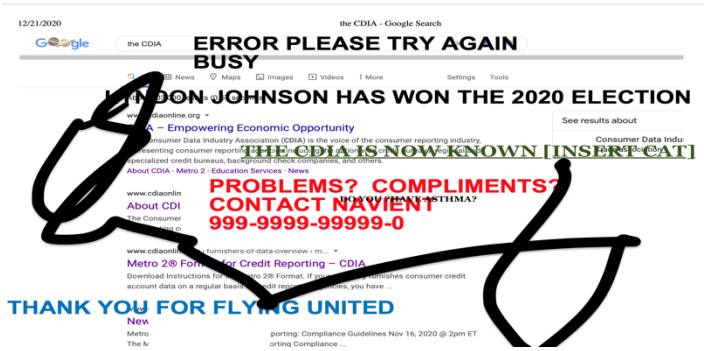
INTRODUCTION

At the time this action was filed in June 2020, one might have been justified in characterizing it as an exotic theory of liability. But since this action was filed, the federal government, thirty-eight (38) state attorneys general, and the largest law firms in America have descended upon the progenitors of what is now being called the "Attention Economy:"

> "The attention economy differs from Industrial Age markets of the 19th and 20 centuries. Cash is no longer the only form of currency, and rather than mining and monetizing a scare resource such as oil, the attention economy is based on mining and monetizing knowledge about what is inside the minds of individual users." *Colorado v. Google*, Case No. 1:20-cv-03715, Complaint ¶ 6 (D.D.C. 2020).

It seems rather a coincidence that this Attention Economy – now the subject of the largest collective antitrust action in a generation – is the progeny of none other than that "highly organized grocer" described in Somosky's complaint. See Amended Complaint ("Am. Compl.") ¶ 23. The Credit Reporting Market is the Homo Erectus to the Attention Economy's Homo Sapien; a useless appendage kept alive by the disingenuous advocacy of the CDIA, and the passive lack of concern of the Federal Trade Commission ("FTC") and Consumer Finance Protection Bureau ("CFPB"). Credit reporting has so ossified under the CDIA's stewardship that it can scarcely be recognized as of the same species as what the Enterprise Procedures and Google are doing: harvesting microscopic information on persons and transforming them into wealth.

The CDIA's chief defense seems to be that it's very hard to process 1.8 billion trade lines. MTD at 4. The CDIA seems to think that is an impressive number. But Google processes 1.275 *trillion* searches per year with near perfect accuracy. And the average person's google search is a bit more complicated than recording whether a payment was "made" or "not made." Imagine for a moment if you Googled "the CDIA," and this is what appeared:



This is a parody but not a very great one. And one "cannot expect perfection." Am. Comp. at 7.

The CDIA's other defense seeks is a red herring: are the CRA's Enterprises Procedures part of the Credit Reporting Market or not? First of all, the question itself comes dangerously close to admitting that the CDIA is the puppet master for Experian, Equifax, and Transunion (the "Big Three"). The CDIA cannot use the Enterprise Procedures as proof of competition, while at same time insisting it is merely a trade association engaged in state sponsored standard setting under the FCRA. The Motion reads almost as though it were written in anticipation that antitrust charges would be brought against the Big Three, and all it needed to do was Control F the parties names. Second of all, Plaintiff is not suing any of the Big Three. The Big Three have refused to lift a finger to help Somosky over the last two years, and their experts and attorneys have stated none of the CRAs can do anything to help without the CDIA's authorization. Therefore, Plaintiff

is suing the CDIA for creating and preserving a monopoly over the means by which Somosky's financial life was ruined and could be repaired.

Experian, Equifax or Transunion do indeed compete with each other, and with Google and Facebook, in the unregulated market for data harvesting. This Attention Economny is the progeny of the "Consumer Lists." Am. Compl. At 39. And the irony here is that Somosky was never able to benefit from the highly developed methods that have now become the object of outrage. But in all seriousness, whether or not Google used its market position to stifle competition and whether the leaders of Silicon Valley are monopolists, one thing should be said at least in their defense: they are very good at their jobs. Google created a technological revolution that has only a handful of comparisons in all of human history. Brin, Page and Pachi could most likely design a superior credit reporting system on the back of a napkin. And this achievement should not be ignored. What used to be called an "education," a thing no longer offered at any college or university in the United States, consisted of access to the important works of literature, science and philosophy. But for most of recorded history, these texts were simply out of reach for 99% of people because the books cost too much. And then Google digitalized it, made it searchable and available to everyone on the planet for what those in the Industrial Age would call "free." And perhaps even more remarkably, Google did this without diverting wealth from any other sector of the economy: Google financed the dissemination of the entire body of human knowledge by identifying a natural resource that had been ignored by every economist on earth: information about people's tastes and habits. That is, they gave the world access to the collective knowledge of humanity, and at the same time found trillions of dollars sitting in the attics of our personalities and asked if they could have a yard sale with all the" junk."

The Attention Economy has evolved from that grocer's village into a massive citadel.

But whatever its faults, the CDIA, by comparison, is a Potemkin Village, where 200 million consumer depend upon faulty and outdated technology to get a job or an apartment or a credit card. If there is the time and energy to scold the greatest corporation of the 21st century for overcharging merchants, then there is time and energy to fix the credit reporting system that is randomly ruining the lives of 200 million other Americans.

ARGUMENT

In considering a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true the well-pleaded factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). "When determining the sufficiency of a claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in plaintiffs' . . . complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

Antitrust claims in particular must be reviewed carefully at the pleading stage because false condemnation of competitive conduct threatens to "chill the very conduct the antitrust laws are designed to protect." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004) (internal quotation marks omitted). However, "[t]here are no heightened pleading requirements for antitrust cases," *Commercial Data Servers, Inc. v. Int'l Bus. Machines Corp.*, No. 00CIV5008(CM)(LMS), 2002 WL 1205740, at *2 (S.D.N.Y. Mar. 15, 2002) (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)), and "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly,"

Todd, 275 F.3d at 198 (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976)).

1. PLAINTIFF IS USING ANTITRUST LAWS TO EFFECTUATE ITS PREDOMINANT GOAL OF PROTECTING CONSUMER WELFARE.

Protecting consumers from anticompetitive conduct is the antitrust goal with the widest support. The predominant goal expressed in the legislative histories of the Sherman Act and the Clayton Act is the protection of consumers and small suppliers from anticompetitive conduct. *See* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2433-39 (2013) (reviewing legislative history to determine that congress aims to protect consumer welfare). The Supreme Court has identified the "traditional concern" of the antitrust laws as "consumer welfare and price competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993). The Second Circuit has stated that "Congress designed the Sherman Act as a consumer welfare prescription." *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 773 (2d Cir. 2016) (internal citations omitted).

While standard setting organizations serve important pro-competitive functions, they also bring together competitors, which creates heightened risks under the antitrust laws. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007) ("[C]onduct that undermines the procompetitive benefits of private standard setting may, at least in some circumstances, be deemed anticompetitive under antitrust law."). *See e.g.*, *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, No. 19-CV-02520-LHK, 2019 WL 6735604, at *1 (N.D. Cal. Dec. 11, 2019) ("Although standardization has benefits, it also has the potential for anticompetitive consequences."). *See also Consumer Data Indus. Ass'n v. Frey*, No. 1:19-CV-00438-GZS, 2020 WL 5983881, at *5 (D. Me. Oct. 8, 2020) ("CDIA is a trade association whose membership includes the three nationwide consumer credit

reporting agencies—Experian, Equifax, and Trans Union—and other agencies."). Somosky does not contend, as Defendant states, that standard setting is inherently or always anticompetitive. Somosky agrees with the FTC Commissioner cited by the CDIA that standards are useful as a floor or a baseline. Mot. Dismiss, p. 16. The CDIA, however, has made Metro 2 the ceiling. And as a ceiling, the Defendant's authority warns: "Standard setting may also have 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. Many courts have found conduct by standard setting organizations and trade associations to be anticompetitive. *See Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, Inc.*, 635 F.2d 118, 127 (2d Cir. 1980), aff'd, 456 U.S. 556 (1982) (disregarding more lenient treatment for a professional organization that has great economic influence and is implicated the restraint of competition to the injury of third parties and the public); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (antitrust laws appropriate as a check upon anticompetitive acts of stock exchanges which conflict with their duty to keep their operations and those of their members honest and viable); *United States v. National Ass'n of Broadcasters*, 536 F.Supp. 149 (D.D.C.1982) (finding advertising standards set by a trade association to be in violation of the Sherman Act regardless of defendants' incorrect reliance on the voluntary nature of the agreement, defendants' stated public policy reasons and defendants' reliance on governmental endorsements of its standards). *See also Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 684 (1978) (finding an ethics canon promulgated by a professional organization to be in violation of the Sherman Act); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (Sherman Act violated by publication of minimum fee schedule by a county bar association and its enforcement by the State Bar); *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 770

(1999) (explaining that under the quick-look analysis, ―an observer with even a rudimentary understanding of economics could conclude that the arrangements in question in a dentist association would have an anticompetitive effect on customers and markets). Further, the head of the DOJ Antitrust Division has stated that "membership in a standard setting organization [does not] confer immunity from serious antitrust scrutiny," and "there is a risk that members of standard setting bodies could engage in collusive, anticompetitive behavior." Assistant Attorney General Makan Delrahim Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference, November 10, 2017.

2. PLAINTIFF ADEQUATELY ALLEGED A PLAUSIBLE ANTITRUST INJURY

a. Plaintiff has provided legal support that Somosky has suffered an injury that was caused by the illegal anticompetitive practice of the Defendant.

There is a three-step process for determining that antitrust injury has been sufficiently pled: (1) "the party asserting that it has been injured by an illegal anticompetitive practice must identify the practice complained of and the reasons such a practice is or might be anticompetitive;" (2) the court should "identify the actual injury the plaintiff alleges;" and (3) the court should "compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges," that is, 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 [or might make] defendants' acts unlawful." *Gatt Commc'ns, Inc. v. PMC Assoc., LLC*, 711 F.3d 68, 76 (2d Cir.2013) (internal quotations marks and citations omitted).

First, at the first step of the *Gatt* analysis, Somosky need allege only that the Defendants have engaged in unlawful anticompetitive conduct and the bar for such a showing is a low one. *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 63 (2d Cir. 2019). Somosky has clearly alleged that she was injured by CDIA's illegal anticompetitive practice of "preventing the Credit

Bureaus and other market participants from competing to develop new methodologies in credit reporting." Am. Compl. ¶ 132. Somosky has also clearly stated how CDIA's behavior is anticompetitive: "But for the CDIA's monopolistic control over the credit reporting though Metro2, Somosky would not have spent the last year of her life trying to fix this problem and would have access to a competitive marketplace that would create accurate and reliable Credit Reports using reporting procedures such as those utilized by the Credit Bureaus for businesses." Am. Compl. ¶ 132.

Second, the second *Gatt* step requires us to isolate and identify Somosky's "actual injury" or the "ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct." *IQ Dental Supply*, 924 F.3d at 63. Somosky has identified her injury. Am. Compl. ¶ 11 ("Consumers have been denied credit in an era when the ability to have a credit card or borrow to buy a car is an essential part of everyday living."); Am. Compl. ¶ 129 ("[A]fter the Credit Bureaus reported the loans were discharged in bankruptcy, they also re-aged the information so that they would remain on her Credit Reports for another seven years, causing her credit score to drop by 100 points."); Am. Compl. ¶ 130 ("The Credit Bureaus will not remove the negative and inaccurate remarks because the CDIA has mandated that the Credit Bureaus accept whatever information the Data Furnishers report even when that information is patently contradicted by other information in her Credit Reports, such as her lack of any bankruptcy in the last 10 years.").

Third, at *Gatt*'s third step, Somosky must demonstrate that the Defendants' anticompetitive behavior caused its actual injury. *IQ Dental Supply*, 924 F.3d at 64-65. Somosky has sufficiently pled how her injury can be traced to the CDIA's anticompetitive behavior. Am. Compl. ¶ 116 ("But for the monopolistic of the CDIA, the plaintiff and her attorney would have successfully cleared her Credit Report and allowed her to return to normal economic activity

without resort to litigation."); Am. Compl. ¶ 132 ("But for the CDIA's monopolistic control over the credit reporting though Metro2, Somosky would not have spent the last year of her life trying to fix this problem and would have access to a competitive marketplace that would create accurate and reliable Credit Reports using reporting procedures such as those utilized by the Credit Bureaus for businesses."). Somosky has also pled how "[t]he injury … reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Somosky has clearly pled how CDIA's conduct has an anticompetitive effect on the market and is thus "of the type the antitrust laws were intended to prevent and that flows from that which makes [or might make] defendants' acts unlawful." *Gatt*, 711 F.3d at 76. *See* Am. Compl. ¶ 98-103. Uncompetitive behavior that prevents the development of better guidelines would obviously lead to a marketplace where the product is of lower quality and leads to the inability of the plaintiff to change her credit score even though it logically should be easy to do so as it is the correct response to her bankruptcy. *See* Am. Compl. ¶ 129-30.

b. Standard setting organizations can create antitrust injuries to consumers that were adversely affected by an industry promulgated standard

The Supreme Court has held that a plaintiff can suffer antitrust injury even though she was not a competitor or customer of the defendants because her injury was "inextricably intertwined" with the injury the defendants sought to inflict on their target market. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483–84 (1982). *See also In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 161 (2d Cir. 2016) ("The upshot is that to suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained. Usually, that market is the one in which the defendant operates, such as when the plaintiff is a competitor or consumer of the defendant, but sometimes the defendant will corrupt a separate market in order to achieve its illegal

ends, in which case the injury suffered can be said to be 'inextricably intertwined' with the injury of the ultimate target. Regardless, antitrust injury is suffered by participants in the restrained market (or markets).") The Supreme Court has held: "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.*, 429 U.S. at 489.

Thus, contrary to Defendant's argument that SSOs cannot create an antitrust injury, substantial legal support exists where courts up to and including the Supreme Court have ruled against standard setting organizations for antitrust injuries to consumers that were adversely impacted by an industry promulgated standard. Courts would not have reached its findings if there was not an antitrust injury to a consumer. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (recognizing that a private standard-setting organization that abused its standard setting process may be held liable for antitrust violations). *See also Associated Press v. United States*, 326 U.S. 1, at 11 n.6, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (endorsing the district court's conclusion that "[t]he by-laws of AP are in effect agreements between the members .... [They are] contracts in restraint of commerce."); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 601–02, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (by-laws allocating market territory among chain members found anticompetitive); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 462–64, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (Guild's rules and policies found anticompetitive where purpose was to prevent sales and create a monopoly).

c. <u>No intervening conduct removes the antitrust injury caused by Defendant</u>

Finally, contrary to Defendant's assertions, Plaintiff does not state that any alleged cessation of competition was caused by an intervening actor – the CFPB – long after CDIA's 1997 promulgation of Metro 2®Format. ***First***, Defendant is mischaracterizing Somosky's statements regarding the CFPB. The cessation of competition was decided by the creation of Metro 2. Am.

Compl. ¶ 47-48. Somosky does not allege that the mere existence of the CFPB caused the cessation of competition nor that any action or conduct of the CFPB caused the CDIA's conduct. ***Second***, Defendant does not cite to any case law to back up their claim that intervening conduct can remove antitrust injury. Defendant is clearly conflating Article III standing and antitrust injury. Further, the Supreme Court's causation requirement for Article III standing notes that there must be a causal connection between the injury and the conduct complained of; that is, the Court insists that the plaintiff show that "but for" the action, she would not have been injured. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 595 (1992). Here, Somosky has clearly alleged the but for causation link between CDIA's conduct and her injury. Am. Compl. ¶ 116, 132

3. PLAINTIFF HAS SUFFICIENTLY ALLEGED A VIABLE RELEVANT MARKET TO SUPPORT HER CLAIM THAT CDIA IS A MONOPOLIST.

Somosky has sufficiently alleged that the CDIA has acquired a monopoly on the credit reporting procedures in the United States. "A plaintiff pleading monopolization, or attempted monopolization, generally must define the relevant market, because 'without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition.'" *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-56 (1993); *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."). It is important to recognize that, "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Spectrum Sports*, 506 U.S. at 455-56.

a. Somosky has sufficiently defined the market

"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). "[A] plaintiff can show the possession of monopoly power is by defining a relevant geographic and product market and showing a defendant's excess market share within it." *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 53 (S.D.N.Y. 2012) (quoting *PepsiCo*, 315 F.3d at 107).

Somosky has defined the market as "the consumer reporting market ("Credit Reporting Market"), a marketplace where commercial actors collect, organize and sell historical information on consumers' buying, borrowing and repayment history ("Data")." Am. Compl. ¶ 31. *See also* Am. Compl. ¶ 59-60. Somosky also defined the geographical location of the market as "nationwide" (Am. Compl. ¶ 101), and the percentage of it that CDIA controls as "more than 90%" (Am. Compl. ¶ 99).

Here, the relevant product market consists of the consumer credit reporting products. The CDIA is engaged in anticompetitive behavior preventing the CRAs and other market participants from competing to develop new methodologies in consumer credit reporting. In contrast to Metro 2, Somosky described the innovative credit aggregation and reporting features the CRAs deploy for a cost as part of the Enterprise Procedures. Am. Compl. ¶ 73-79, 94-97. Plaintiff is suing about one segment of the Attention Economy controlled by the CDIA, that is the consumer credit reporting products, to allow Somosky to have access to the benefits of the price competition conducted by the CRAs in the creation of the Enterprise Procedures. *See e.g.*, *Heagerty v. Equifax Info. Servs. LLC*, 447 F. Supp. 3d 1328, 1333 (N.D. Ga. 2020) ("Equifax and NCTUE are separate companies, and each maintains its own separate database of consumer credit files and account information. There is no common ownership between Equifax and NCTUE, but NCTUE—which

has no employees—uses Equifax to host and maintain NCTUE's database of consumer data and to provide certain operational services for NCTUE. Equifax does not include NCTUE's consumer data in its own consumer reports, and NCTUE does not include Equifax's consumer data in its own consumer reports."). Consumer data feeds into both consumer credit reporting and enterprise procedures.

That consumer data can be used in a competitive manner in Enterprise Procedures but not in consumer credit reporting is purely a product of CDIA's monopoly in the relevant market: consumer credit reporting.

b. CDIA and the CRAs do not have a shared monopoly

Contrary to Defendant's assertion, Plaintiff does not allege a shared monopoly or an oligopoly. Plaintiff has asserted that it is Defendant's monopoly that is harming the credit reporting industry. Am. Compl. ¶ preliminary statement ("The credit reporting industry has become an ossified oligopoly hiding under the monopolistic policies of the CDIA."). Plaintiff's references to statements by Senator Kennedy and a CDIA agent about an oligopoly are not statements alleging an oligopoly. *See id.*; ¶ 59. In fact, Plaintiff particularly alleges that it is the monopolistic conduct of the CDIA itself that is leading to the antitrust injury. Am. Compl. ¶ 98-104.

Defendant's authorities themselves are inapposite to this case as they deal with cases where a plaintiff sues multiple defendants and allege a monopoly due to joint market share of the multiple defendants. *See In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 382 (S.D.N.Y. 2016) (rejecting a shared monopoly theory where plaintiffs alleged that multiple defendants collectively sought to dominate the LME zinc warehousing services market); *H.L. Hayden Co. of New York v. Siemens Med. Sys.*, Inc., 879 F.2d 1005, 1018 (2d Cir. 1989) (concluding that the market shares of two of the defendant-appellees could not be aggregated to establish an attempt to monopolize in violation of Sherman Act section two). Somosky, on the other hand, is alleging a monopoly by a single

entity and a single defendant: CDIA. The CDIA allows no competition in its marketplace and has acquired and kept this monopoly through control over the CRAs. Am. Compl. ¶ 98-104. This control over the CRAs has been acknowledged by the CDIA in other cases where, for example, the CDIA has stated that it is authorized to speak for its CRA members. *Consumer Data Indus. Ass'n v. Frey*, No. 1:19-CV-00438-GZS, 2020 WL 5983881, at *5 ("CDIA is a trade association whose membership includes the three nationwide consumer credit reporting agencies—Experian, Equifax, and Trans Union—and other agencies. The parties stipulate that (1) CDIA's members will have to take affirmative steps and revise procedures to comply with the Maine Amendments; [and] (2) members may be subject to both administrative enforcement and private party litigation if they fail to take such steps[.]").

c. Defendant does not provide any arguments or evidence why the case should be dismissed with prejudice

Defendant's request for a dismissal with prejudice is inapposite to the case law and arguments of this case. Contrary to Defendant's assertion and unsupported by Plaintiff's motion and memorandum in support, Plaintiff's complaint is not "as a collateral attack to rewrite the FCRA and second guess regulators' expertise and oversight." As clearly articulated above, Plaintiff's complaint adequately alleges that Defendant is monopolizing the consumer credit reporting systems in contravention of United States antitrust laws. Defendant's cited case law in inapposite because unlike the plaintiff in *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 239 n.3 (2d Cir. 2008), Somosky has clearly pleaded the relevant market for the monopolization claim.

This court's order providing leave to amend the complaint considered the *Foman* factors. Dkt. No. 13. *See Forman v. Davis*, 371 U.S. 178 (1962) ("In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant,

repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.'") By granting the leave to amend under the *Foman* factors, this Court found that the allegations as prposed in the letter would survive complaint would not be futile. "As the magistrate judge correctly noted, a court must analyze a futility argument under Rule 15(a) in the same way it would address a 12(b)(6) motion to dismiss." *Corrado v. New York Unified Court Sys.*, 163 F. Supp. 3d 1, 17 (E.D.N.Y. 2016), *aff'd sub nom. Corrado v. New York State Unified Court Sys.*, 698 F. App'x 36 (2d Cir. 2017). This Court previously found the allegations as pled were not futile when it granted leave to amend the complaint and thus, a dismissal without prejudice would go against the court's previous order.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny the Defendant's Motion to Dismiss.

Dated: December 21, 2020

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