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. 20-cv-4387

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

This Reply Memorandum of Law is submitted on behalf of CDIA in support of its Motion to Dismiss the Amended Complaint of Plaintiff.[1]

After alleging in her Amended Complaint that CDIA is a thinly funded "pawn" of the credit reporting industry (Am. Compl. ¶ 105), Plaintiff now attempts to puff up the role of CDIA as purportedly being the "puppet master" of CRAs and data furnishers with the alleged goal of stifling customer service. Yet, Plaintiff cannot dispute that: (1) CDIA is a trade association in which the Metro 2® Format was created for data furnishers to report credit information to CRAs in a standardized format; (2) the Metro 2® Format establishes a standardized set of fields and codes to be used when data furnishers report loans and consumer debt to CRAs for the purpose of promoting consistency and interoperability of consumer information so CRAs and financial institutions and lenders have a baseline upon which to understand and assess credit information; (3) any purported "harm" was caused by an alleged error on credit reports furnished by CRAs, not CDIA; and (4) such "harm," if proven, would be addressable by credit reporting laws (the FCRA), related regulations and agency oversight, irrespective of whether Plaintiff believes the key industry regulator -- the CFPB – is "passive." (Opp. Br. 1).

Instead of addressing the law or facts, Plaintiff relies on speculation, including that "CDIA has mandated that the Credit Bureaus accept whatever information the Data Furnishers report." (Am. Compl. ¶ 130). Plaintiff does not cite a solitary rule, action, or statement by CDIA suggesting that the Metro 2® Format creates a "ceiling" preventing CRAs and data furnishers from correcting inaccurate information. Moreover, such an

[1] Abbreviations from the Moving Memorandum of Law are adopted herein.

imagined "policy" is implausible because it would undercut a key goal of the Metro 2® Format – providing accurate consumer credit information.

The Opposition Brief confirms that Plaintiff's antitrust theory is a hodgepodge of out-of-context "snippets" gleaned from Internet searches. Credit reporting has nothing to do with Internet companies like Google. Not every commercial dispute or consumer grievance rises to the level of industry-wide competition concerns. The Amended Complaint should be dismissed with prejudice because:

1. Plaintiff's theory of CDIA's "central" role in allegedly preventing credit reports from being "fixed" is implausible and based on rank speculation.

2. CDIA did not urge that all standards or trade association activity is lawful. However, CDIA previously pointed to Metro 2® Format's efficiencies and standardization to assist data furnishers, conduct which regulators have found is procompetitive. Moreover, courts have held that standards and association activity will be found unlawful only where there is anticompetitive conduct impacting the standard or rule-making process itself, such as when an innovator is excluded from participating or where a dominant technology provider surreptitiously controls patent rights over an industry standard. Plaintiff does not allege such conduct occurred here; in fact, Plaintiff points to no exclusion by "innovators" such as CRAs, let alone an actual CDIA rule or policy that harms her.

3. Plaintiff has not alleged a plausible antitrust injury because: (i) her conclusory statements about CDIA are unsupported by factual allegations; (ii) Plaintiff contends that an intervening actor, the CFPB, not CDIA, caused a cessation of "innovation" (Am. Compl. ¶¶ 43-45, 47); (iii) an impacted consumer does not suffer antitrust injury merely because he or she disagrees with an industry standard; and (iv) Plaintiff's "injury" is not inextricably intertwined with CDIA's conduct.

4. Plaintiff's "market" allegations are muddled and do not plausibly support the existence of a CDIA monopoly. Plaintiff defines the "market" as "credit reporting products." CDIA does not compete in this "market" because CDIA does not issue credit reporting products – CRAs do. It is irrelevant whether Plaintiff explicitly included CRAs in its "market" definition; CRAs necessarily compete for these products. Plaintiff therefore relies on a flawed shared monopoly theory mandating dismissal.

I. THE CONCLUSORY ALLEGATIONS ABOUT CDIA SHOULD NOT BE CREDITED

Plaintiff relies on old cases like *Commercial Data Servers, Inc. v. Intl' Bus. Machines Corp.*, No. 00CIV5008(CM)(LMS), 2002 WL 1205740 (S.D.N.Y. Mar. 15, 2002) (Opp. Br. 3) to urge that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." That notice pleading standard no longer applies. *Bell Atlantic v. Twombly*, 550 U.S. 544, 550 (2007) held that a district court should ignore conclusory statements and legal assertions and assess whether factual allegations support a plausible claim.

The Amended Complaint is rife with legal conclusions and speculative assertions, absent factual allegations concerning CDIA. For example, Plaintiff claims that "CDIA is a single organization that has total and complete control over the means by which the entire Industry is operated" but provides no allegations regarding how CDIA engaged in anticompetitive behavior or obtained industry "control." (Am. Compl. ¶ 98). Plaintiff contends "it is not plausible to suggest that the monopolistic control exercised by CDIA was acquired by business acumen when you examine the product, the complaints, and the near universal condemnation form anyone outside the Credit Bureaus." (Am. Compl. ¶ 110). Plaintiff then baldly alleges that "CDIA is engaged in anticompetitive behavior preventing the Credit Bureaus and other market participants from competing to develop new methodologies in credit reporting. But for the CDIA's monopolistic control over the credit reporting through 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 business." (Am. Compl. ¶ 132).

These are conclusory statements, not factual allegations. Plaintiff fails to allege any facts explaining how CDIA, a concededly small trade association, somehow exerts control over the multi-billion dollar credit reporting industry, risks flouting laws, regulations and adverse regulatory oversight, all to accomplish a purported goal of preventing CRAs and data furnishers from providing accurate credit information and reports. Plaintiff does not cite any CDIA rule or policy barring CRAs and data furnishers from correcting inaccurate credit information. There is no alleged statement or specific act by CDIA excluding anyone or conceivably engaging in anticompetitive conduct. Thus, Plaintiff's implausible assertion that CDIA must be responsible for Plaintiff's frustrating experience with CRAs and data furnishers fails to satisfy *Twombly*. *See, e.g., Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) ("Importantly, the 'plausibility' standard applies only to a complaints *factual* allegations. We give no effect at all to 'legal conclusions couched as factual allegations.'") (emphasis in original, citations omitted); *LLM Bar Exam, LLC v. Barbri, Inc.*, 271 F. Supp.3d 547, 575 (S.D.N.Y. 2017) (alterations and citations omitted) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. And once a court has excised legal conclusions from a complaint, the remaining well-pleaded facts must permit the court to infer more than the mere possibility of misconduct.").

II. THERE IS NO ALLEGED ANTICOMPETITIVE STANDARDS-RELATED CONDUCT

Contrary to Plaintiff's assertion (Opp. Br. 6), CDIA does not urge all SSO or trade association activity is procompetitive. There are instances where standards and industry-

related activities can be corrupted for anticompetitive means. That is not alleged here. In fact, Plaintiff pleads the procompetitive basis for Metro 2® Format by pointing to the need for "consistent reporting practices" so that "each consumer agency is not making arbitrary decisions about how to report and score credit information." (Am. Compl. ¶ 61).

The SSO cases Plaintiff cites (Opp. Br. 5-7) do not support her allegations. They concern inapt situations where: (1) a competitor was wrongfully excluded from the standard setting process[2]; (2) parties were adversely impacted by a patent owner that commandeered the SSO process and then refused to adhere to fair, reasonable, and non-discriminatory ("FRAND") license pricing once its patented technology had been adopted as an industry standard[3]; or (3) an entire industry subverted the standards process by jointly acting to prevent competition by SSO members.[4]

There are no facts alleged that CDIA engaged in behavior that can plausibly be characterized as excluding market participants, handing a member an illegal patent

[2] *Allied Tube & Conduit Corporation v. Indian Head Inc.*, 486 U.S. 492, 496 (1988) (trade association and its members coordinated on excluding a competitor's product as an approved type of electrical conduit in an industry code); *Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, Inc.*, 635 F.2d 118, 124 (2d Cir. 1980) (members of a trade association conspired to misrepresent the industry standard to disadvantage a competitor and discourage consumers from using the competitor's product).

[3] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 304 (3d Cir. 2007) (Qualcomm was accused of convincing an SSO to include its technology in the new standard by agreeing to license technology to competitors on FRAND terms, a commitment which Qualcomm then allegedly violated); *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, No. 19-CV-02520-LHK, 2019 WL 6735604 (N.D. Cal. Dec. 11, 2019) (addressing anticompetitive risks associated with incorporating patented technology in standards, a practice that is not at issue here).

[4] *Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963) (group boycott instituted by members of the New York Stock Exchange through their joint denial of private wire connections to various securities firms, a service essential to their business); *Nat.'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 681 (1978) (addressing whether a professional canon of ethics adopted by the Society that prohibited members from submitting competitive bids for engineering services was an unlawful agreement in restraint of trade).

monopoly or preventing competition. Plaintiff's allegations are focused on other actors like Navient (Am. Compl. ¶¶ 11-12) and CRAs (Am. Compl. ¶¶ 13-15). Plaintiff cites no Metro 2® Format rule or CDIA policy preventing CRAs from offering competing products.

Moreover, throughout the Amended Complaint and Opposition Brief, Plaintiff makes reference to so-called "Enterprise Procedures." It is clear from the statements that whatever Enterprise Procedures are (and they are nowhere defined in the Amended Complaint or Opposition Brief), CDIA has played no role in their development. Frankly, based on the statements in these filings, CDIA does not know to what procedures or products Plaintiff is referring. The only specific reference Plaintiff seems to provide is on page 12 of her Opposition Brief and her citation to a case involving the National Consumer Telecom & Utilities Exchange ("NCTUE"). *Heagerty v. Equifax Info. Servs. LLC*, 447 F. Supp.3d 1328, 1347 (N.D. Ga. 2020) (approving Report & Recommendation). NCTUE is a consumer reporting agency that maintains its own separate database. *Heagerty v. Equifax Info. Servs. LLC*, No. 1:18-cv-01233-CAP-CMS, 2020 U.S. Dist. LEXIS 209644, at *9-10 (N.D. Ga. Jan. 15, 2020). However, there is no common ownership between NCTUE and Equifax as Equifax is an outside vendor which provides hosting and other services to NCTUE. *Id.* at *10. There is no comingling of data between the Equifax credit database and the NCTUE database. *Id.* How any of this has any relationship to CDIA, the Metro2® Format or this lawsuit is a complete mystery to CDIA.

Thus, Plaintiff's efforts to gerrymander an SSO-related antitrust claim against CDIA is bottomed on confusing and speculative assertions. This case concerning Plaintiff's regrettable experience with how CRAs and data furnishers allegedly responded to her consumer complaint does not fit the paradigm of a market-wide antitrust claim.

III. THERE IS NO PLAUSIBLE ANTITRUST INJURY

A. Plaintiff Fails to Allege Facts Sufficient to Establish Antitrust Injury.

Plaintiff speculates that CDIA barred CRAs and data furnishers from fixing errors on credit reports, but she alleges no facts supporting this implausible theory. Plaintiff states 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 economic activity without resort to litigation." (Am. Compl. ¶ 116). There is no factual support for this speculative statement. Plaintiff also alleges that she is "a victim of the degenerated credit reporting procedures caused by the CDIA's stranglehold on the means of production" (Am. Compl. ¶ 118) and that "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" (Am. Compl. ¶ 130), but again, provides no factual support for these allegations.

These allegations are speculative. Plaintiff fails to reference a single CDIA rule or regulation in either her Amended Complaint or in her Opposition Brief. Plaintiff also broadly alleges that CDIA has engaged in "anticompetitive behavior," but at no point does Plaintiff provide a single instance of anticompetitive conduct. Plaintiff cannot tie her "injury" to any instance of anticompetitive conduct because there are no allegations of anticompetitive conduct.

B. Plaintiff Alleges that the CFPB was an Intervening Actor.

Despite Plaintiff's denials in her Opposition, her Amended Complaint alleges that the CFPB caused a cessation of innovation by CRAs for consumer credit reporting.

Namely, Plaintiff pleads the "Industry surrendered" when the CFPB assumed its regulatory role over the "Credit Reporting Market" in 2012 and that "CRAs collectively decided that from that day forward, everyone was going to have to settle for slightly-less-than-mediocre. The CRAs were not going to compete anymore; they were not going to try to do better under the FCRA." (Am. Compl. ¶¶ 43-45). Plaintiff therefore has alleged that the CFPB prompted the alleged cessation of competition by CRAs, not the Metro 2® Format promulgated fifteen years before the CFPB assumed its regulatory role.

Contrary to Plaintiff's contention (Opp. Br. 11), this intervening act bars Plaintiff's assertion that the Metro 2® Format caused an antitrust injury. *See In re: American Express Anti-Steering Rules Antitrust Litig.*, 433 F. Supp.3d 395, 410-11 (S.D.N.Y. 2020) (finding injury attenuated by intervening decisions of actors in determining efficient enforcer inquiry); *see also Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 402 (7th Cir. 1993) (intervening factors break the chain of causation and prevent the establishment of antitrust injury).

C. Plaintiff's Desire for Improvements to the Metro 2® Format Does Not Confer Antitrust Standing.

Plaintiff's antitrust theory is premised on her complaint that the Metro 2® Format is not "innovative" and she believes it can improve (Am. Compl. ¶¶ 105-109). Plaintiff cites no authority that she has grounds to bring an antitrust claim against CDIA merely because she disagrees with how consumer information is provided by data furnishers to CRAs. *See* Opp. Br. 10 (citing only antitrust cases brought by competitors and government actors concerning anticompetitive joint trade association / SSO conduct). To implicate antitrust laws, a challenged standard must be the result of anticompetitive conduct. Otherwise, plaintiffs' attorneys could sue any SSO for each technical standard they

promulgate by claiming that an SSO is a "monopolist" and that an impacted customer has redressable antitrust harm simply because he or she disagrees with the parameters of any industry standard. Such a result is unsupported by precedent.

D. Plaintiff's "Injury" is Not Inextricably Intertwined with CDIA's Acts.

Plaintiff claims for the first time on Opposition (Opp. Br. 9) that her "injury" is "inextricably intertwined" with the alleged injury CDIA sought to inflict on its target market. Plaintiff's cited authority belies this claim. *See In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 161 (2d Cir. 2016) (citations and alterations omitted) (the Second Circuit test is "whether the plaintiff was manipulated or utilized by defendant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets.") There is no allegation that CDIA took any action to injure competitors or market participants. Any injury suffered by Plaintiff cannot be "inextricably intertwined" with any alleged injury CDIA sought to impose on the purported market for "Credit Reporting Products."

IV. PLAINTIFF'S ARTFUL PLEADING DOES NOT INOCULATE HER FROM THE REQUIREMENT TO PLEAD A PLAUSIBLE MONOPOLIZED MARKET

Plaintiff concedes that the "market" allegedly monopolized by CDIA is the "Credit Reporting Market" in which CDIA does not compete. (Am. Compl. ¶ 67). Plaintiff urges that the Second Circuit's bar on a shared monopoly theory is not implicated simply because she did not name the "Big Three" CRAs as co-defendants (Opp. Br. 13-14).

Plaintiff's failure to identify the CRAs as "co-monopolists" does not absolve her from the requirement of pleading a monopolized relevant market. By the very nature of Plaintiff's market definition – "credit reporting" -- CRAs necessarily compete as they, not

CDIA, promulgates credit reports and related products. Plaintiff therefore relies on a shared monopoly theory, whether she explicitly identified multiple monopolists or not.

Plaintiff does not dispute that "[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." (Mov. Br. 22). Plaintiff has, in fact, alleged a shared monopoly by CDIA and the three CRAs, which cannot support a viable Sherman Act Section 2 claim in this Circuit.

CONCLUSION

For the reasons set forth herein and in the Moving Memorandum of Law, CDIA's Motion to Dismiss should be granted with prejudice.

Dated: January 5, 2021

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)*
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 January 5, 2021, I electronically served this *Reply 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