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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHULMAN Justice PART 1

ALDRICH, BRADLEY C., ET AL.

-v-

NORTHERN LEASING SYSTEMS, INC., ET AL.

INDEX NO. 602803/07

MOTION DATE

MOTION SEQ. NO. 10

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for certify class

	PAPERS NUMBERED
~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits 1-7	1, 2, 3, 4
Notice of Cross-Motion; Answering Affidavits — Exhibits	5, 6, 7, 8, 9, 10
Replying Affidavits — Exhibits 1-6	11

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

AUG 20 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: August 16, 2012

MARTIN SHULMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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BRADLEY C. ALDRICH, MICHAEL ARNOLD, ESTELA SALAS and STEPHANIE WEIER, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN STEVE BERNARDONE, RICH HAHN, SARA KRIEGER AND JOHN DOES 1-50,

Defendants.

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Index No: 602803/07

Decision and Order

Hon. Martin Shulman, JSC:

After three successive rounds of motion practice,[1] plaintiffs now move by order to show cause ("OSC") for an order: (1) granting class certification solely with respect to Counts I, II, V and VI of the Complaint[2] (Exhibit 1 to OSC) filed against Northern Leasing Systems, Inc. ("NLS" or "Corp. Defendant") and the individually named defendants, Jay Cohen, Steve Bernardone, Rich Hahn and Sara Krieger ("NLS officers")(collectively, "Defendants"); (2) designating Bradley S. Aldrich ("Aldrich"), Michael Arnold ("Arnold") and Estela Salas ("Salas")(collectively, "Plaintiffs") as adequate representatives for the class; (3) appointing Krishnan S. Chittur, Esq., of

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[1] *See Aldrich v Northern Leasing Sys., Inc.*, 2009 NY Misc LEXIS 4752 (Sup Ct NY Co) (dismissal of plaintiffs' claims for defamation and violation of GBL §349), 2010 NY Misc LEXIS 1631 (Sup Ct NY Co)(discovery directive order) and 2011 NY Misc LEXIS 5151 (NY Sup Ct 2011)(further discovery directive order).

[2] These causes of action allege violations of the Fair Credit Reporting Act ("FCRA"), 15 USC §§1681, *et seq.* and General Business Law ("GBL") §380, *et seq.* ("NY FCRA") based upon the named defendants accessing consumer credit reports ("CCRs") of plaintiffs-lease guarantors without a statutorily permissible purpose.

Chittur & Associates, P.C. ("Chittur"), as counsel for the class; (4) directing NLS to serve the court-approved notice to all members of the class and fully bear those costs; and (5) granting partial summary judgment as to liability under Complaint Counts II (negligently obtaining CCRs without a permissible purpose in violation of FCRA 15 USC §1681[o])(civil liability for negligent non-compliance) and VI (negligently obtaining CCRs without a permissible purpose in violation of NY FCRA GBL §380-b). Defendants oppose Plaintiffs' OSC and cross-move for partial summary judgment dismissing Count I (first cause of action), Count II (second cause of action), Count V (fifth cause of action) and Count VI (sixth cause of action) of the Complaint ("unlawful access" claims).

Brief Factual Background

As summarized in this court's earlier related decision,[3] NLS is a New York-based company "in the business of micro-ticket leasing, [and] finances credit card point-of-sale (POS) terminals and other business equipment. Specifically, NLS, as lessor, enters into finance lease agreements with small businesses [lessees] for certain equipment. Under the terms of these leases, NLS purchases the equipment from third-party vendors solely for the purpose of leasing it." *See Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 489, fn 1 (2008). Plaintiffs, who are alleged to be individual guarantors under credit card processing equipment leases entered into between their small businesses and NLS and/or its affiliates, claim *inter alia* that their individual credit scores were adversely lowered because of Defendants' alleged unlawful access actions.

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[3] *Pludeman v Northern Leasing Sys., Inc.*, 24 Misc3d 1206(A) [*1](Sup Ct NY Co 2009), *affd* 74 AD3d 420, 425 (1st Dept 2010).

Motion via OSC for Class Certification/Partial Summary Judgment

In a broadly worded salvo at Defendants to support class certification, Plaintiffs contend the central and common harm done to them and the putative class was when NLS and the NLS officers impermissibly accessed their respective CCRs in violation of the FCRA and NY FCRA. The manner in which Defendants are alleged to have routinely violated these statutes since 2000 (on an average, about 8000-9000 CCRs allegedly were pulled each month) are uniform to Plaintiffs and the class, justifying their motion for class certification.

Plaintiffs' counsel highlighted case law principles (as was done in a related action) to advance Plaintiffs' application for certification of the class pursuant to CPLR §901(a)[1]-[5] ("*certification provision*"): liberal construction of the certification provision with allowances for any cautionary error in favor of same; limited inquiry for assurance claims of the class are not a sham; numerosity requirement met rendering joinder of hundreds of thousands of guarantors of these equipment finance leases impractical; commonality of questions of law and fact predominate over questions affecting individual putative class members (uniform, unlawful access to guarantors' CCRs in violation of law[4]); Plaintiffs' claims are typical of those of the class (same type of form lease, similar commercial transactions with executed written authorizations by lessees for business history reports as well as separately executed guaranties [see Exhibit 4 to Chittur Aff. in support of OSC] and the same legal theory of liability against NLS); Plaintiffs, represented by qualified, experienced counsel in the prosecution of class actions *(see*

[4] Plaintiffs' identically worded affidavits attest to Defendants impermissibly pulling their consumer credit reports without being authorized to do so.

Exhibit 7 to Chittur Aff. in support of OSC), are fair and adequate protectors of the class' interests; class action superior to any other methods for the fair and efficient disposition of these claims; and individualized litigation burdensome and expensive when weighed against each potential prevailing class member's damage award.

Because Plaintiffs and the putative class members have limited financial resources and relying on this court's earlier directive in a related class action *(see Pludeman v Northern Leasing Sys., Inc.*, 24 Misc3d 1206(A) at [*8], *supra*), Plaintiffs request an order directing Corp. Defendant to serve the court-approved notice of class certification to all affected members of the class and bear the costs thereof, because this multi-million dollar company can more easily bear the financial burden of this mass-mailing.

Believing they have a real likelihood of success here, Plaintiffs concomitantly seek partial summary judgment against NLS and the NLS officers under Counts II and VI of the Complaint claiming Defendants' unlawful access activity indisputably violated 15 USC §1618[b](f) as a matter of law *inter alia* because: (1) The parties' negotiation/execution of these equipment finance leases involve business transactions and not consumer ones, thus, Defendants' use of Plaintiffs' CCRs to check their credit worthiness was impermissible; (2) Plaintiffs and the putative class members never executed appropriately worded, written authorizations to permit Defendants to pull their individual CCRs, rather, these pre-printed authorizations, if/when signed, granted NLS permission to solely access the business-lessees' investigative business history reports; and (3) Defendants routinely pulled guarantors' CCRs in connection with their equipment

leases at the time of their origination and subsequently for skip tracing,[5] negotiations, lawsuits and collections, without giving prior written notice to such guarantors as required pursuant to NY FCRA GBL §380-b(b).

Defendants' Opposition/Cross-Motion for Partial Summary Judgment

Aggressively opposing Plaintiffs' motion for class certification and cross-moving for partial summary judgment dismissing Plaintiffs' unlawful access claims, NLS and the NLS officers highlight certain claimed facts and legal points in their defense:

- Because Plaintiffs' OSC also seeks partial summary judgment as to liability against Defendants under Complaint Counts II and VI for unlawful CCR access activity, the court must eschew the requisite "limited inquiry" analysis and perform a more searching one as to the merits of these claims before allowing this action to proceed as a class action;

- Without any need for written authorizations, NLS was lawfully permitted to initially obtain access to Plaintiffs' CCRs pursuant to 15 USC §1681[b](a)(3)(A), because its intended use of this information was to determine whether to extend credit to Plaintiffs who signed personal guaranties for these equipment finance leases;

- After these initial credit pulls, this same statutory provision permitted NLS to also access Plaintiffs' CCRs without any need for written authorizations for purposes of skip tracing, account review, negotiations, collections, etc.,and because NLS had a "legitimate business need" for this information;[6]

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[5] "Skiptracing (also skip tracing) is a colloquial term used to describe the process of locating a person's whereabouts for any number of purposes. A skip tracer is someone who performs this task, which may be the person's primary occupation. The term comes from the word 'skip' being used to describe the person being searched for, and comes from the idiomatic expression 'to skip town,' meaning to depart, perhaps in a rush, and leaving minimal clues behind for someone to 'trace' the 'skip' to a new location." See http://en/wikipedia.org/wiki/Skip_trace.

[6] *See* 15 USC §1681[b](a)(3)(F).

- By signing personal guaranties for their business lease obligations, Plaintiffs engaged in credit transactions as consumers which implicated the FCRA, permitted NLS to access Plaintiffs' CCRs and constituted Federal Trade Commission ("FTC")-approved credit investigation activity;[7]

- Regardless of the foregoing permissible purposes that allowed NLS to gain access to Plaintiffs' CCRs, Plaintiffs furnished NLS with written authorizations to pull these CCRs rendering Corp. Defendant's activity otherwise lawful under 15 USC §1681[b](a)(2);

- Five years after initiating this action in August 2007 and completing extensive discovery, Plaintiffs' memorandum of law in support of partial summary judgment, in a severely prejudicial maneuver, for the first time introduces Plaintiffs' unpleaded claim that NLS violated the NY FCRA by failing to give notice before accessing Plaintiffs' CCRs;

- It is Defendants who are entitled to summary judgment dismissing all of Plaintiffs' unlawful access claims as NLS's access to Plaintiffs' CCRs was for permissible purposes warranting dismissal of Complaint Counts I, II, V and VI as a matter of law;

- Putting aside the merits of Plaintiffs' unlawful access claims, class certification would still be inappropriate because predominant, individualized issues of fact will need to be resolved as to NLS's true intent to use the CCRs for permissible purposes in each case;

- Class certification must also be denied because each proposed class representative seeking to represent the putative class pleads unique factual circumstances that are not typical of the putative class sought to be certified (*viz.*, Aldrich claims someone forged his signature on the lease and guaranty and both Arnold and Salas claim an NLS agent fraudulently induced them to sign their respective leases and guaranties), and these claims unique to each Plaintiff will require individualized inquiries as to what and when NLS learned about these problematic lease executions as of the time Corp. Defendant accessed Plaintiffs' CCRs; and

- After mutual discovery, Plaintiffs cannot prove the individual NLS officers violated the FCRA by pulling their CCRs for personal

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[7] *See* Defendants' Memorandum of Law *inter alia* in Support of Cross-Motion for Partial Summary Judgment at p 9, fn 7.

purposes, other than in the ordinary course of NLS's business, thus, their claims against the NLS officers should be dismissed as a matter of law, or at the very least, their request for class certification should be denied as to these individual defendants.

Plaintiffs' Reply in Opposition to Cross-Motion

Plaintiffs' counsel's Reply Memorandum of Law counters these defense points:

- ☐ NLS's designee, Lina Kravic ("Kravic"), in her deposition testimony, conceded the only purpose for accessing the CCRs of Plaintiffs and the putative class members was to set the commission rate to be paid to the vendors of the credit card POS terminals, a sum not based on their retail value (Exhibit 5 to Chittur Reply Aff), which is not a permissible purpose under the FCRA, and Kravic's post-deposition affidavit inconsistently offering other reasons for pulling these CCRs (e.g., the credit worthiness of the personal guarantor) does not create an issue of fact to defeat Plaintiffs' entitlement to partial summary judgment;

- ☐ The FCRA permits pulling CCRs without written authorizations in credit transactions solely involving a consumer (i.e., an individual's transaction must involve credit for personal, family or household purposes[8]), and does not cover a situation where a business entity initiates a transaction to obtain commercial credit;

- ☐ Defendants' reliance on an informal FTC Staff Opinion Letter dated June 22, 2001 (Exhibit 1 to Chittur Reply Aff) that allows a business credit grantor like NLS to obtain a CCR of an individual who "accepted personal liability for the business debt as involving a consumer [i.e., personal guarantor on an equipment finance lease]" (bracketed matter supplied) is misplaced for three reasons: (1) this opinion letter is merely one person's interpretation of the circumstances Plaintiffs challenge here that arguably would permit access to one's CCR under the FCRA; (2) because an informal staff letter is not binding on the FTC, such opinion letter is not entitled to any judicial deference; and (3) this letter, unlike the FTC Staff Opinion Letter issued July 26, 2000[9] (Exhibit 2 to Chittur Reply Aff) and otherwise supportive of Plaintiffs' foregoing

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[8] Plaintiffs' Reply Memorandum of Law at p 9.

[9] At the end of both FTC Staff Opinion Letters, there is a printed note "Last Modified: Friday, June 24, 2011", which is significant (*see* discussion, *infra*).

interpretation of the FCRA, lacks "legal reasoning or analysis, and appears more in the nature of a political payback to a lobbyist"[10];

- ☐ Plaintiffs' complaint did plead NY FCRA violations and factual evidence of Defendants' failure to give Plaintiffs and every other lease guarantor prior written notice of the former's expected CCR-access activity was not required to be specifically pleaded;[11]

- ☐ Since Defendants never provided such statutorily required, prior written notice (*see* GBL §380-b[b]), Plaintiffs are entitled to class certification on this predominant issue common to the putative class as well as partial summary judgment just on Complaint Count VI;

- ☐ The pre-printed authorization contained in the *Lease Acceptance* section of these equipment finance leases makes no reference to a "consumer" credit report and is directed to the "Lessee", *i.e.*, the business entity which initiated these commercial transactions; therefore this authorization did/does not allow NLS to gain access to any personal guarantor's CCRs (*see* 15 USC §1681[b][a][2]);

- ☐ Even if Defendants were to grasp a straw suggesting that these pre–printed authorizations are ambiguous giving credence to defendants' CCR-access actions, nonetheless, such ambiguity must be construed against NLS, which drafted these leases and may not provide any contractual authority to either justify the initial pull of Plaintiffs' CCRs at lease origination or repeatedly thereafter for claimed skip tracing, account reviews or collections;

- ☐ Dismissal of Plaintiffs' claims against the NLS officers is premature as these individuals have refused to appear at scheduled depositions, thus depriving Plaintiffs of discovery necessary to prove these individual defendants unlawfully obtained access to the lease guarantors' CCRs for personal purposes in violation of law; and

- ☐ Defendants' wilful violation, or reckless disregard of the statutory requirements, of either the FCRA (Count I of Complaint) and/or the NY FCRA (Count V of Complaint) as well as Defendants' unlawful access actions (in Complaint Counts I, II, V and VI) are issues

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[10] Plaintiffs' Reply Memorandum of Law at p 12.

[11] Plaintiffs' Reply Memorandum of Law at p 4, fn 3.

common to the putative class and warrant class certification as well as NLS's obligation to bear the costs of serving the court-approved notice to the certified class.

Defendants' Further Reply in Support of Cross-Motion

Defendants' reply brief again takes strong exception to Plaintiffs improperly injecting their unpleaded "lack of notice" claim (GBL §380-b[b], *supra*) to seek class certification and partial summary judgment. Defendants further take issue with Plaintiffs selectively quoting from Kravic's April 24, 2012 deposition transcript to reveal their perceived "smoking gun" that NLS pulled every lease guarantor's CCR only to calculate what to pay the vendor of these POS terminals, an arguably impermissible purpose. Not true, Defendants contend, as Kravic also testified (and thereafter attested in an affidavit in support of Defendants' cross-motion) that these guarantors' CCRs were pulled to determine whether to approve/decline these equipment finance lease applications (at their time of origination), and the *sine qua non* for that decision rests on the respective guarantor's personal credit worthiness.[12] Defendants also reveal that during an earlier round of motion practice, Plaintiffs argued that they were consumers and their CCRs were covered by the FCRA,[13] but "[n]ow in an abrupt reversal, Plaintiffs disingenuously take the position that Defendants violated the FCRA because Plaintiffs are not "consumers" for purposes of FCRA, since [NLS] obtained credit reports for a

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[12] Defendants' Reply Memorandum of Law at pp 3-4.

[13] *Aldrich v Northern Leasing Sys., Inc.*, 2009 NY Misc LEXIS 4752 at [*5-6], *supra*.

business purpose, rather than a consumer purpose . . . Plaintiffs cannot have it both ways. . ."[14]

Finally, Defendants re-emphasize that summary judgment dismissing all of Plaintiffs' unlawful access claims is warranted because the FCRA definition of a "consumer" controls (*see* footnote 16, *infra*), and as individual guarantors, Plaintiffs are deemed consumers enabling NLS to lawfully pull Plaintiffs' CCRs even without written authorizations for the varied permissible purposes set forth in 15 USC §1681[b](a)(3)(A) and (F).

DISCUSSION

While the ultimate decision to grant class certification is within the court's sound discretion *(see Lauer v New York Tel. Co.,* 231 AD2d 126, 130 [3d Dept 1997]), it is important that the claims on which Plaintiffs seek to certify a class must not only have merit, but must also have buttressed evidentiary support and not rest on conclusory allegations. *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481 (1st Dept 2009). In this context, the court would normally conduct only a limited inquiry to ensure that the claims are not a sham (*Pludeman*, *supra*, at 422) ("Class certification is thus appropriate, if on the surface there appears to be a cause of action . . ."). However, Plaintiffs have concomitantly moved for partial summary judgment on Complaint Counts II and VI as well as for class certification on Counts I, II, V and VI, whereas, Defendants have cross-moved for partial summary judgment dismissing all four of these unlawful

[14] Defendants' Reply Memorandum of Law at p 5.

access causes of action. Thus, it will be necessary to review the record and scratch well below the surface to determine whether Plaintiffs' claims are actually meritorious.

Alleged Unlawful Access Claims[15]

As this court previously stated, Congress enacted the FCRA "to require that consumer reporting agencies [CRAs] adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer[16], with regard to the confidentiality, accuracy, relevancy and proper utilization of such information . . ." 15 USC §1681[b]. While the FCRA primarily regulates the conduct of CRAs, this federal statute "also extends to the conduct of parties who request credit information . . ." *Stonehart v. Rosenthal*, 2001 US Dist LEXIS 11566 [*10] (SDNY 2001).

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[15] As this court noted in an earlier decision issued three years ago (*see* fn 4 in *Aldrich v Northern Leasing Sys., Inc.*, 2009 NY Misc LEXIS 4752 [*4][Sup Ct NY Co 2009]), the NY FCRA is patterned after the FCRA, its federal counterpart, and is interpreted consistently with federal law.

[16] The FCRA broadly defines a "consumer" as being "an individual" (5 USC §1681[a][c]) and does not further limit a consumer relationship with a creditor only involving personal, family or household transactions.

Where relevant here, 15 USC §1681[b](a)[17] recites the exclusive, permissible purposes for a CRA to furnish and/or someone to request an individual's CCR:

> (2) In accordance with the written instruction of the consumer to whom it relates.
>
> (3) To a person which it has reason to believe - -
>
> > (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving *the extension of credit to, or review or collection of an account of, the consumer*; or
> >
> > * * * * *
> >
> > (F) otherwise has a *legitimate business need* for the information
> >
> > > (i) in connection with a business transaction that is initiated by the consumer; or
> > >
> > > (ii) to review an account to determine whether the consumer continues to meet the terms of the account. (Emphasis added).

To obtain partial summary judgment finding NLS liable for having unlawfully gained access to/used their CCRs for impermissible purposes in violation of the FCRA, Plaintiffs have the burden of proving these willful/negligent violations. And a "showing

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[17] The NY FCRA, where relevant, parallels the federal FCRA provisions:

> § 380-b. Permissible dissemination of reports
> (a) A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> * * * * *
>
> (2) In accordance with the written instructions of the consumer to whom it relates, or
>
> (3) To a person whom it has reason to believe intends to use the information (i) in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer . . ., or (v) to a person in connection with a business transaction involving the consumer where the user has a legitimate business need for such information . . .

of a permissible purpose is a complete defense . . ." (*Id* at [*12]). *See Edge v Professional Claims Bur., Inc.*, 64 FSupp2d 115, 117 (EDNY 1999), *affd* 234 F3d 1261 (2d Cir 2000).

Against this backdrop, Plaintiffs maintain they (and the other putative class members) never furnished written authorizations as consumers to permit Defendants to gain access to their CCRs (15 USC §1681[b][a][2]). And notwithstanding a 2001 FTC Staff Opinion Letter to the contrary, Plaintiffs further maintain that as business-lessee signatories to equipment finance leases, their underlying credit transactions were not consumer financing transactions, did not involve extending credit to a consumer (15 USC §1681[b][a][3][A]) and did not constitute a business transaction initiated by a consumer (15 USC §1681[b][a][3][F][i]), foreclosing Defendants from pulling their CCRs.

Plaintiffs are misguided in believing their credit transactions with NLS were not consumer financing transactions and, more importantly, in presumptuously rejecting an informal 2001 FTC Staff Opinion Letter issued to General Counsel to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Company, the Office of the Comptroller and the Office of Thrift Supervision.[18] This agency opinion letter advised that a business credit grantor may permissibly be furnished/obtain a CCR of an individual who executes a personal guaranty to pay business lease/debt obligations. After conducting a more thorough public records search, this court learned

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[18] Notably, pursuant to 1999 federal legislation, these federal agencies were empowered to promulgate FCRA regulations for banks and other entities under their jurisdiction. *See* 76 Fed Reg 44462-44463, fn 7 (2011).

that this FTC opinion was not an isolated "political payback to a lobbyist" as Plaintiffs contend, but rather a longstanding federal agency interpretation that broadened the application of the FCRA to certain business transactions.

As gleaned from its July 20, 2011 News Release, on July 24, 2011, the FTC issued an updated staff report, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* (July 2011)("2011 FTC Report").[19] The 2011 FTC Report "provide[d] an overview of the FTC's role in enforcing and interpreting the FCRA and provide[d] a section-by-section summary of the agency's interpretations of the . . . [FCRA]."[20] Regarding the disputed issue of Plaintiffs' status in their underlying business transactions with NLS, the 2011 FTC Report validated the 2001 FTC Staff Opinion Letter, and the FTC definitively concluded at pp 10 and 45):

> Commercial transactions. The issue of whether and how the FCRA applies in the context of an application for business credit arises when a creditor that is considering a credit application from a small business wants to procure a credit report on the sole proprietor or other principal in the business. In staff opinion letters from 2000 and 2001, the Commission staff addressed this question. Staff opined that (1) a report by a CRA is a "consumer report" even if it is used for commercial purposes; and (2) an application for business credit does not give rise to a permissible purpose *except for a report on an individual who will be personally liable for the debt.* Staff now adopts the interpretations expressed in these staff opinion letters, and deletes or modifies several interpretations in the 1990 Commentary to make them consistent with those views.
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[19] The FTC Staff Report and Summary of Interpretations of the FCRA is available at http://www.ftc.gov/statues/fcrajump.shtm.

[20] This FTC News Release, found at http://ftc.gov/opa/2011/07fcra.shtm, published that the FTC vote approving this staff report was 5-0, a unanimous approbation of sanctioned interpretations to enforce the FCRA.

> COMMERCIAL TRANSACTIONS – REPORTS ON PRINCIPALS OF A BUSINESS ENTITY.
>
> *A lender has a permissible purpose to obtain a consumer report on a consumer in connection with a business credit transaction when the consumer is or will be personally liable on the loan as a co-signer or guarantor, because such a transaction involves the "extension of credit to . . . the consumer" by virtue of the individual's liability.* A lender would not have a permissible purpose to obtain a consumer report on a consumer who will not be personally liable for repayment of the credit (even an individual proprietor, shareholder, director, or officer of a corporation), because this section does not include the extension of credit to commercial entities. (Emphasis added)

Generally, agency interpretations like those contained in the 2011 FTC Report, "lack the force of law. . . [but] are entitled to respect but only to the extent that those interpretations have the power to persuade . . ." (internal quotations omitted). *Christensen v Harris County*, 529 US 576, 587 (2000) quoting *Skidmore v Swift & Co.*, 323 US 134, 140 (1944). However, Associate Justice Antonin Scalia, in his concurring opinion in *Christenson*, *supra*, cites with approval to the Court's watershed decision, *Chevron USA, Inc, v Natural Resources Defense Council, Inc.*, 467 US 837, 844 (1984), for the proposition that a court should not substitute its own construction of a statute for an administrative agency's reasonable interpretation:

> The power of an administrative agency to administer a congressionally created . . . program *requires formulation of policy* and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . Quite appropriately, therefore, we have accorded *Chevron* deference not only to agency regulations, but to *authoritative positions set forth in a variety of other formats* . . . (internal quotations omitted and emphasis added)

(*Christensen*, *supra*, at 589-590). This court agrees and not only finds the relevant 2011 FTC Report persuasive, but also authoritative in adhering to FTC's decade-long interpretation to deem an individual in a business credit transaction a consumer when

he/she guarantees to be personally liable for that business's debt and covered by the FCRA.

It follows that NLS, in determining whether to execute the equipment finance leases with Plaintiffs as personal guarantors under their leases (and the other putative class members) at the time of their origination, had a permissible purpose to obtain CCRs if it intended to use this information "involving the extension of credit to . . . the consumer[s]" (15 USC §1681[b][a][3][A]) without any need for their written authorizations to do so. And as a business credit grantor, it was another permissible purpose for NLS to investigate individual lease guarantors' credit worthiness as it advanced their legitimate business needs. In interpreting the import of 15 USC §1681[b](a)(3)(F)(i), "[t]he terms 'legitimate business' and 'in connection with' refer to the needs and objectives of the individual to whom the [CCR] is furnished, not the needs of the person about whom the [CCR] is furnished . . ." *Zeller v Samia*, 758 FSupp 775, 781-782 (US Dist Ct Mass 1991); *see also*, *Velez-Colon v Caribbean Produce Exch., Inc.*, 2009 US Dist LEXIS 114169 [*29] (US Dist Ct PR 2009).

Plaintiffs' reliance on *Pintos v Pacific Creditors Assn.*, 565 F3d 1106, 1114 (9th Cir 2009) (*see* Plaintiffs' Reply Memorandum of Law at p 15) is misplaced. *Pintos*, *supra*, stands for the proposition that only a judicially established commercial debt can be transformed into a consumer credit transaction as a matter of law, and only then would a creditor be permitted to pull the judgment debtor's CCR for collection purposes. However, as personal guarantors under their respective equipment finance leases, Plaintiffs were presumably liable for "all payments and other obligations owed by

[business] lessee to lessor [NLS or any affiliate entity] . . ." (*see* black bordered *Personal Guaranty* section of Plaintiffs' Leases as Exhibits A-C to Kravic Aff in Support of Defendants' Cross-Motion). Since the unambiguous language of these personal guaranties allowed NLS, the lessor-lender, to have recourse against Plaintiffs if their respective business-lessees defaulted under their leases without first attempting to recover payments from these business-lessees, these guaranties expressly provided Defendants with additional permissible purposes to further access Plaintiffs' CCRs for "review or collection of an account, of the consumer[s]." 15 USC §1681[b][a][3][A]; *see also, Alexander v Textron Fin. Corp.*, 2009 US Dist LEXIS 6589 (US Dist Ct SD Miss 2009).

The foregoing interpretations and proof-texts clearly demonstrate that Plaintiffs, when they negotiated and executed their equipment finance leases as lessees and as personal guarantors, engaged in consumer finance transactions which in turn afforded NLS 15 USC §1681[b] rights to lawfully access their CCRs for the statutorily prescribed purposes. Thus, Plaintiffs cannot avail themselves of the "only business transactions" prong of their arguments to establish that Defendants negligently violated the FCRA and NY FCRA as a matter of law and succeed at being awarded partial summary judgment.

Further, the principal focus of Plaintiffs' OSC for partial summary judgment on Complaint Counts II and VI is on the pre-printed authorizations contained in their leases which are located in the black bordered *Lease Acceptance* section on the first page of each of Plaintiffs' leases, which states: "INVESTIGATIVE CREDIT REPORT: Applicant authorizes . . . [NLS, MBF Leasing, LLC, etc.], its assigns or its agents *to obtain an*

investigative credit report from a credit bureau or a credit agency and to investigate the references given on any other statement or data from *Lessee*." (bracketed matter added)(Exhibit 4 to Chittur Aff in Support of OSC).

Notably, in determining the scope of the defendant-creditor's authority to investigate Plaintiffs' personal credit histories, the federal court quoted the relevant text of the written authorization referred to in *Textron Fin. Corp.*, *supra* (a case Defendants rely on) at [*3]:

> to obtain and use consumer credit reports pertaining to [his] credit history and/or credit worthiness and agreed that this permission shall be ongoing and shall relate not only to evaluation and/or extension of the business credit requested, but also for purposes of reviewing the account . . .and for any other legitimate purpose associated with the account as may be needed from time to time. . . (internal quotations omitted).

In comparing the texts of these respective authorizations, it cannot be seriously disputed that the pre-printed authorizations in Plaintiffs' leases do not constitute consumer written approval to allow NLS access to their CCRs to satisfy 15 USC §1681[b](a)(2) and/or GBL §380-b(a)(2). While Plaintiffs are correct on this score, their attainment of a partial summary judgment award against Defendants for liability on Complaint Counts II and VI remains elusive as both the FCRA and NY FCRA otherwise allow NLS to access their CCRs for any statutorily prescribed permissible purpose without a consumer's written authorization.

The third and final prong of Plaintiffs' quest for partial summary judgment against Defendants for liability on Complaint Count VI rests on Corp. Defendant's alleged non-

compliance with the NY FCRA prior written notice requirement (see GBL §380-b(b).[21] After five years of litigation and extensive motion practice (*see* footnote 1, *supra*), Defendants claim prejudice and surprise at having just been notified of this unpleaded claim in Plaintiffs' June 2012 Memorandum of Law in support of their OSC.

This court previously ruled on this identical maneuver in a related action and cited to *Weinstock v Handler*, 254 AD2d 165, 166 (1st Dept 1998), for the rule that "a party may not obtain summary judgment on an unpleaded cause of action (citation omitted) . . ." Summary judgment may only be awarded on an unpleaded cause of action where "the proof supports such cause and if the opposing party has not been misled to its prejudice (citation omitted)." *Id.*

Without pleading a single word of this NY FCRA violation in Complaint Count VI, factually particularizing this NY FCRA violation in any bill of particulars or even corroborating this NY FCRA violation with a supporting affidavit or other competent proof during this fourth round of motion practice, Plaintiffs' Memorandum of Law in Support of their OSC at p 14 makes a passing reference to this NY FCRA notice requirement (slightly expanded upon in their Reply Memorandum) five years after initiating this action, without more, and simply cites/quotes to the relevant portions thereof. More importantly, issue has not been joined on this unpleaded claim and Defendants have had no opportunity to interpose a defense. *See Primestone, LLC v*

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[21] This prior notice requirement states in relevant part: "No person shall request a consumer report, other than an investigative consumer report, in connection with an application . . . for credit . . . unless the applicant is first informed in writing . . . that (i) a consumer report may be requested in connection with such application, and (ii) the applicant upon request will be informed whether or not a consumer report was requested, and if such report was requested, informed of the name and address of the consumer reporting agency that furnished the report."

Lichtenstein, 2011 WL 1258164 [*7-8] (Sup Ct, NY Co.)("the claim that . . . [Plaintiffs are] seeking [partial] summary judgment on is new and, until . . . [Plaintiffs] brought . . . [their OSC], never an issue in this case.")(bracketed matter added).

It is unfathomable why this claimed NY FCRA violation was not raised at the nascent stages of this litigation as it is a claim that could easily have been pleaded and proven with competent evidence (*see Scott v Real Estate Fin. Group*, 183 F3d 97, 100-101 [2d Cir 1999]). This court can only conclude that Plaintiffs' unpleaded claim of Defendants' alleged violations of this NY FCRA prior written notice requirement belatedly surfaced to improve Plaintiffs' chances for class certification. Because Plaintiffs cannot legally rely on this unpleaded claim nor legally rely on their "only business transactions" and "no written authorization" contentions this court discounted as a matter of law, *supra*, the branch of Plaintiffs' OSC for partial summary judgment must be denied in its entirety.

Complaint Counts I and V

Defendants cross-move for partial summary judgment dismissing Complaint Counts I and V (NLS and the NLS officers intentionally violated the FCRA [15 USC §1681(n)] and NY FCRA [GBL §380-b], respectively, when Defendants unlawfully received/used Plaintiffs' CCRs without any permissible purpose [15 USC §1681(b)(f)]).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a

genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

In opposition, Plaintiffs' Reply Memorandum of Law rests on the same arguments they advanced to support their OSC for partial summary judgment, but now for the first time, Plaintiffs argue that their intentional unlawful access claims are also common to the putative class warranting class certification on this more developed record (see Plaintiffs' Reply Memorandum of Law at p 20). In this vein, Plaintiffs must now demonstrate these claims also have merit.

To prove willfulness under the FCRA, Plaintiffs must "show that the defendant knowingly and intentionally committed an act in conscious disregard for the rights of the consumer." *Ausherman v Bank of America Corp.*, 352 F3d 896, 899 (4th Cir 2003).

> The willfulness requirement . . . is synonymous with the requirement of intent in criminal statutes. *See Pinner v Schmidt*, 805 F2d 1258, 1263 (5th Cir 1986) . . . Furthermore, because willful conduct allows successful plaintiffs to collect punitive damages, this requirement has been strictly applied in FCRA cases. *See, e.g., Cushman v Trans Union Corp.*, 115 F3d 220, 226-27 (3rd Cir. 1997)(reviewing willful requirement of Section 1681n and holding that "to justify an award of punitive damages, a defendant's actions must be on the same order as willful concealments or misrepresentations").

Berman v Parco, 986 FSupp 195, 199 (SDNY 1997).

On this developed record, NLS has demonstrated that it had a permissible purpose to pull the Plaintiffs-lease guarantors' CCRs at the time of lease origination (e.g., Kravic April 24, 2012 EBT Tr at 51:7-22; *see also*, Kravic Aff in Support of Cross-

Motion at ¶ 5). Moreover, based on the executed guaranties and Plaintiffs' then ongoing obligation to be directly responsible for all lease payments during the terms of these leases, NLS had the statutory right to run further personal credit checks to review accounts or for collections in the event of lease payment defaults. More pointedly, armed with the knowledge that Plaintiffs-lease guarantors, seeking credit to finance their leased equipment, were consumers, NLS, as users, had reason to believe statutorily permissible purposes existed for such receipt/use of Plaintiffs' CCRs (*see Beckstrom v Direct Merchant's Credit Card Bank*, 2005 US Dist LEXIS 16071 [*11](US Dist Ct Minn 2005).

A judicial finding as to the inadequacy of the pre-printed authorizations to otherwise allow Defendants access to Plaintiffs' CCRs without a need for a permissible purpose under the FCRA and NY FCRA, and Plaintiffs' "cherry picked" portion of Kravic's April 24, 2012 Deposition Transcript as proof of an impermissible purpose for pulling a CCR (see Kravic EBT Tr at 53:2-22 as Exhibit 5 to Chittur Reply Aff) are insufficient to defeat Defendants' cross-motion for summary judgment dismissing these causes of action. Plaintiffs still have not proffered sufficient evidence on this record to demonstrate a material issue of fact on their claims as to whether Defendants wilfully and intentionally violated the respective statutes in conscious disregard for Plaintiffs' rights. Accordingly, the branch of Defendants' cross-motion for partial summary judgment dismissing Complaint Counts I and V is granted.

Complaint Counts II and VI

Defendants also cross-move for partial summary judgment dismissing Complaint Counts II and VI (NLS and the NLS officers negligently violated the FCRA [15 USC

§1681(n)] and NY FCRA [GBL §380-b], respectively, when Defendants unlawfully received/used Plaintiffs' CCRs without any permissible purpose [15 USC §1681(b)(f)]).

At first blush, the same judicial rationale for dismissing the intentional FCRA/NY FCRA claims should equally apply to these causes of action. However, Kravic's carefully worded affidavit in support of Defendants' cross-motion conveniently does not discuss or attempt to explain her prior inconsistent, sworn statements that NLS's purpose for pulling Plaintiffs' CCRs (and those of the other putative class members) was to calculate how much to pay the vendors for the equipment it planned to lease to Plaintiffs (*see* Exhibit 5 to Chittur Reply Aff), an impermissible purpose under either the FCRA or NY FCRA. Defending against claims alleging negligent misconduct, a material issue of fact exists as to what NLS truly intended, thus foreclosing an award to NLS of partial summary judgment dismissing these causes of action. Resolution of this issue must await a trial.

Defendants further seek to dismiss these unlawful access claims as against the NLS officers. In sworn affidavits, each of the NLS officers attests to never having accessed Plaintiffs' CCRs for personal purposes (an otherwise clear violation of the FCRA and NY FCRA), but rather only in the ordinary course of their employment and/or to further NLS's business needs. Plaintiffs' Reply Memorandum of Law in opposition claims Plaintiffs' counsel made discovery requests three years ago to potentially garner the facts necessary for meaningful opposition, but the NLS officers, allegedly in possession of such evidence, resisted having their depositions taken all this time and therefore should not be rewarded with partial summary judgment.

However, Plaintiffs cannot rest on the notion that the NLS officers' "conduct in depriving [P]laintiff[s] of such opportunity smacked of unfairness . . ." (*Nelson v Bestway Coach Express*, 36 AD3d 488, 489 [1st Dept 2007]), especially when Plaintiffs made a conscious choice to move for partial summary judgment against NLS and the NLS officers as to liability under Complaint Counts II and VI as a matter of law. It cannot be credibly stated that Defendants' cross-motion was premature as Plaintiffs were presumably comfortable resting on the record thus far developed after five years of litigation. In searching the record, this court has weighed the uniform affidavits of each of the NLS officers annexed to Defendants' cross-motion against the sworn responses Aldrich, Arnold and Salas gave (see Exhibits C-E to Lillienstein Supporting Aff) wherein each proposed class representative uniformly admitted having no idea why they named the NLS officers as defendants in this action. It was simply no contest, hence, this court must grant the branch of Defendants' cross-motion awarding partial summary judgment dismissing Complaint Counts II and VI as against the NLS officers.

Class Certification

In addition to the foregoing analysis as to whether the claims on which Plaintiffs seek class certification have merit, it is equally important for Plaintiffs to meet their burden of establishing the enumerated statutory criteria (*see* CPLR §901[a][1]-[5]) to proceed as a class action, to wit: (1) the class must be so numerous that joinder of all members is impracticable; (2) common questions of law or fact must predominate; (3) the claims of the representative plaintiff must be typical of all members of the class; (4) the representative party must fairly and adequately protect the interests of the class;

and (5) a class action must be the most fair and efficient means of resolving the controversy. *Pludeman v Northern Leasing Sys., Inc.*, *supra*, 74 AD3d at 421-422.

Claiming to satisfy the typicality prerequisite (CPLR §901[a][3]) for class certification, Plaintiffs' pleaded claims in Counts II and VI are alleged to be "typical of the claims of other members of the class since it arises out of the same course of conduct as the class member's claims and is based on the same cause[s] of action . . ." *Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 22 (1st Dept 1991). Indisputably, Plaintiffs' and the putative class members' underlying consumer finance transactions involved similar types of equipment finance leases, the same pre-printed authorizations by lessees for business history reports and pre-printed personal guaranties.

But, that is as far as it goes, because each plaintiff seeking to represent the putative class pleads unique factual circumstances that raise critical concerns about their lease/guaranty-compromised executions. These proposed class representatives' individualized issues will warrant particular inquiries as to whether NLS was ever made aware of these alleged improprieties before or after obtaining access to Plaintiffs' CCRs. More importantly, the circumstances as to Plaintiffs' lease originations cannot possibly be typical of the putative class sought to be certified. And even if Aldrich's claims of forgery and Arnold's and Salas's claims of fraud are arguably typical of the putative class, nonetheless, the requisite individualized, fact-intensive analysis and need for particularized proof would perforce foreclose class certification (*see Pludeman v Northern Leasing Sys., Inc.*, 24 Misc3d 1206(A), *supra*, at [*6]).

Parenthetically, the lack of typicality raises a similar concern as to whether questions of fact common to the class predominate over factual questions affecting

individual putative class members. Even if NLS at trial is able to justify the initial pull of a guarantor's CCR at lease origination, nonetheless, Plaintiffs (and ostensibly the putative class members) also contend that during their lease terms, NLS uniformly and repeatedly pulled their CCRs in violation of the FCRA and NY FCRA as a form of harassment and adversely affected their credit scores. Since NLS was statutorily permitted to access a lease guarantor's CCR for account reviews and collections, it will "require extensive individualized inquiries into the conduct of . . . [NLS's Collection Department staff members] with respect to each individual . . . [guarantor] which, in turn, would overwhelm any issues common to the class . . ." (bracketed matter added) (*Morrissey v Nextel Partners, Inc.*, 72 AD3d 209, 215 [3d Dept 2010]).

Summarily restated, to establish typicality, commonality and issue predominance as to the putative class members' claims, Plaintiffs rely on the pre-printed authorizations contained in their equipment finance leases and a presumption that every one of NLS's credit pulls were uniform from the inception and duration of their leases and violated the law. However, there is a realistic likelihood that each and every CCR pull during the term of each putative class member's equipment finance lease is fact-specific to that guarantor[22] and was grounded on a permissible purpose and not based on any presumed identical fact pattern of alleged NLS misconduct. And while not raised, there is corollary concern that the particular damages of each putative class member are not uniform but are also fact-specific to the personal finances of that individual claiming to have been adversely affected by repeated CCR pulls and presumably will not be easily

[22] Each lease guarantor's file will have to be individually analyzed to ascertain the existence of lease defaults, if any, and the extent to which each guarantor purportedly failed to satisfy his/her personal guaranty obligations.

computed. Suffice it to say, the legal issues are common to the putative class here, but there will be nothing typical, common and/or predominant about the factual issues in dispute.

Because Plaintiffs have not met these two enumerated statutory criteria, the branch of their OSC seeking class certification is denied. Accordingly, for all of the foregoing reasons, it is hereby

ORDERED that Plaintiffs' motion via OSC to certify the class is denied; and it is further

ORDERED that Plaintiffs' motion via OSC for partial summary judgment against Defendants as to liability on Complaint Counts II and VI is denied; and it is further

ORDERED that Defendants' cross-motion for partial summary judgment dismissing Complaint Counts I and V and dismissing Complaint Counts II and VI only as against the NLS officers is granted, and the cross-motion is otherwise denied.

Counsel for the parties are directed to appear for a status conference on September 25, 2012, at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 16, 2012

HON. MARTIN SHULMAN, J.S.C.