UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NANCY R. MURRAY,	)	
	)	
Plaintiff,	)	**Case No. 04 C 7668**
	)	
v.	)	**Assigned Judge: Coar**
	)	**Designated Magistrate Judge: Ashman**
	)	
SUNRISE CHEVROLET, INC., and TRIAD FINANCIAL CORPORATION, doing business as ROADLOANS,	)	
	)	
Defendants.	)	

TRIAD FINANCIAL CORPORATION d/b/a ROADLOANS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant Triad Financial Corporation d/b/a/ Roadloans ("Triad"), by and through its undersigned counsel, and as its Reply in Support of Its Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, states as follows:

INTRODUCTION

Plaintiff's Response brief ("Plaintiff's Resp.") fails to present evidence to create genuine issues of material fact and Triad's Motion for Summary Judgment should be granted.

ARGUMENT

I. Triad is Entitled to Summary Judgment on Plaintiff's Claim for Willful Violation of the FCRA's "Firm Offer of Credit" Requirement.

Plaintiff's claims under the FCRA must fail at the outset because she cannot show that Triad's alleged conduct rises to the level of a "willful" violation of the Act as defined by the Seventh Circuit in Ruffin-Thompkins v. Experian Information Solutions, Inc., 422 F.3d 603 (7th Cir. 2005). Specifically, Plaintiff argues that Triad's reliance on R.L. Polk & Company ("Polk") to ensure the subject mailing complied with the Act is evidence that Triad was "willfully blind to

the law," and as such, Triad "willfully" violated the FCRA. (Plaintiff's Resp. 7-8.) Plaintiff's interpretation would have this Court apply what amounts to a "reckless disregard" standard which is not the law of this Circuit when determining liability for an alleged "willful" violation of the Act pursuant to section 1681n.

However, Plaintiff does not and cannot support her interpretation with authority applying this definition of "willfulness" to an alleged violation of the FCRA. Instead, Plaintiff misguidedly relies on lower standards of "willfulness" set forth in criminal cases (United States v. Nobles, 69 F.3d 172, 185 (7th Cir. 1995)), copyright infringement cases (In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003)), and cases construing the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601-9675 (In re Chic., Milw., St. Paul & Pac. R.R. Co., 3 F.3d 200, 207 (7th Cir. 1993)). (Plaintiff's Resp. 8.) Certainly, these decisions do not speak to the level of conduct necessary to constitute a "willful" violation of the FCRA.

On the contrary, conduct supporting a "willful" violation under the FCRA requires a much higher showing than the standard implied by Plaintiff. According to the Seventh Circuit in Ruffin-Thompkins, "[t]o act willfully, a defendant must knowingly and intentionally violate [the FCRA], and it must also be conscious that [its] act impinges on the rights of others." Ruffin-Thompkins, 422 F.3d at 610 (emphasis added), quoting Wantz v. Experian Information Solutions, Inc., 386 F.3d 829, 834 (7th Cir. 2004); see also Phillips v. Grendahl, 312 F.3d 357, 368 (8th Cir. 2002) (expressly rejecting the lesser "reckless disregard" standard for willful noncompliance adopted in some Circuits, and like the Seventh Circuit, requiring actual knowledge that the act or conduct in question violates the Act).

As such, Plaintiff cannot establish a "willful" violation of the FCRA by simply showing that Triad did not personally review the mailing directed to Plaintiff. Plaintiff must instead show that Triad: (1) actually knew the mailing failed to comply with the requirements of the Act; and (2) chose to permit the mailing in any event. Ruffin-Thompkins, 422 F.3d at 610. accord Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000). Plaintiff's suggestion that Triad "willfully" violated the Act by relying on Polk to ensure compliance wrongfully asks this Court to apply the "reckless disregard" standard of "willfulness" expressly rejected by the Seventh Circuit in Ruffin-Thompkins and Wantz.[1]

Similarly, Plaintiff's suggestion that Triad "willfully" violated the Act because it "knew of its duty to comply with the FCRA" and "[y]et took no action to ensure that the mailer complied with the FCRA" fails to satisfy the standard of "willfulness" set forth in Ruffin-Thompkins and Wantz. (Plaintiff's Resp. 12.) Again, such conduct is more akin to negligent non-compliance or, at worst, a "reckless disregard" for whether the mailing complied with the Act. See Crabill v. Trans Union, LLC, 259 F.3d 662, 664 (7th Cir. 2005) (negligence is a failure to exercise reasonable care). Plaintiff cannot meet her burden of showing that Triad actually knew the mailing violated the FCRA and consciously chose to proceed despite this knowledge. Ruffin-Thompkins, 422 F.3d at 610.

Instead, the undisputed evidence shows that Polk did not provide Triad with a chance to review the mailing before it went out. (Triad's Statement of Undisputed Material Facts ("R. 56.1

[1] As is the case throughout her Response, Plaintiff makes this argument without citing any authority to establish that: (1) Triad was required by the Act to personally review each mailing; or that (2) Triad was prohibited by the Act from relying upon an experienced third party vendor such as Polk to ensure compliance with its provisions. Indeed, despite Plaintiff's vague conclusions, nothing in the Act or its interpreting authority addresses either issue. See Hinton v. USA Funds, No. 05 C 2311, 2005 U.S. Dist. LEXIS 6275 (N.D. Ill. Mar. 30, 2005) (defendant's use of a third party to conduct investigation of consumer disputes under 15 U.S.C. § 1681s-2(b) did not rise to the level of a willful violation of the Act).

Stat.") 20.) Accordingly, Triad could not know if the mailing violated the FCRA and could not consciously choose to proceed in the face of such knowledge. (R. 56.1 Stat. 19-20.)

Other courts in this Circuit have addressed the level of conduct necessary to find a "willful" violation of the Act and support a conclusion that no such violation occurred in this case. In Lee v. Experian Information Solutions, No. 02 C 8424, 2003 U.S. Dist. LEXIS 17420 (N.D. Ill. Oct. 1, 2003), the court declined to find that defendant credit bureau's alleged failure to perform a reasonable investigation of plaintiff's dispute was a willful violation of the Act because there was no evidence to suggest "willful concealment, misrepresentations, or systematic deprivation of consumers' rights." Lee 2003 U.S. Dist. LEXIS 17420 at *24. Similarly, in Field v. Trans Union LLC, No. 01 C 6398, 2002 U.S. Dist. LEXIS 7973 (N.D. Ill. May 2, 2002), the court found that the plaintiff failed to establish a "willful" violation of the FCRA because she did not produce evidence to show that the defendant engaged in misrepresentations, concealment, or affirmative efforts to harm her credit. Field, 2002 U.S. Dist. LEXIS 7973 at *22.[2]

As in Lee and Field, Plaintiff in this case cannot produce any evidence to establish that Triad intentionally misrepresented or concealed anything from her. Nor can Plaintiff present facts to establish a "systematic deprivation" of her rights or any affirmative effort to harm her by Triad. Without facts to establish conduct rising to the level of a knowing and conscious violation

[2] Likewise, other courts in this Circuit have consistently required a factual showing of "willful misrepresentation, concealment, or intentional disregard for a plaintiff's rights" to establish a willful violation of the Act under section 1681n. See Anderson v. Trans Union, et al., 345 F. Supp. 2d 963 (W.D. Wis. 2004) (the mere reappearance of inaccurate information on plaintiff's credit report did not constitute a willful violation of the Act); Kronstedt v. Equifax, et al., No. 01 C 0052, 2001 U.S. Dist. LEXIS 25021 (W.D. Wis. Dec. 14, 2001) (failure to report accurately after identity theft did was not a willful violation where plaintiff only produced evidence to show that defendant had inadequate procedures in place to ensure compliance).

of the Act, Plaintiff has not and cannot prove a "willful" violation under section 1681n, and Triad is entitled to summary judgment as a matter of law.

II. The Lack of Specific Terms in the Mailing Does Not Constitute a "Willful" Violation of the FCRA's "Firm Offer of Credit" Requirement.

A. Plaintiff Misapplies and Misconstrues the Seventh Circuit's Holding in Murray v. GMAC Mortgage Corp.

Plaintiff incorrectly suggests that Triad did not make a "firm offer of credit" because it did not include specific terms of its offer on the face of the subject mailing (Plaintiff's Resp. 3.) Plaintiff relies exclusively on the Seventh Circuit's recent holding in Murray v. GMAC Mortgage Corp., No. 05 C 8035, 2006 U.S. App. LEXIS 1028 (7th Cir. Jan. 17, 2006) to support this proposition.

However, Plaintiff's reliance on GMAC Mortgage Corp. is misplaced for several reasons. First, the court's analysis in GMAC Mortgage Corp. is not instructive because it was limited to a review of whether a class should be certified under Rule 23 of the Federal Rules of Civil Procedure. Thus, the Seventh Circuit in GMAC Mortgage Corp. was prohibited from performing the factual merits-based examination required of a court determining summary judgment. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974) (Rule 23 does not give a court authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action). Instead, the Seventh Circuit's ruling in GMAC Mortgage Corp. focused only on "fundamental questions about the management of consumer class actions." GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *2. The court did not address the merits of the case and thus its findings are not applicable to the fact-intensive analysis required on summary judgment in this case.

More significantly, Plaintiff misstates the holding in GMAC Mortgage Corp. as supporting the untenable proposition that a "firm offer of credit" must set forth all specific terms on the face of the initial mailing. In fact, GMAC Mortgage Corp. makes no such holding. Instead, the Seventh Circuit states only that when deciding if an offer of credit is sufficiently firm, "a court need only determine whether the four corners of the offer satisfy the statutory definition… and whether the terms are honored when consumers accept." GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *11.

GMAC Mortgage Corp. did not hold, as Plaintiff wrongly suggests, that a court must look to the four corners of the mailing to find a "firm offer." The Seventh Circuit held instead that it must look to the four corners of the offer itself. GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *11. The court explained that its objective was to "separate bona fide offers of credit from advertisements for products and services, determining from 'all the material conditions that comprise the credit product in question… [whether it] was a guise for solicitation rather than a legitimate credit product.'" GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *11, citing Cole v. U.S. Capital, Inc., 389 F.3d 719, 728 (7th Cir. 2004).

In so holding, the Seventh Circuit affirmed its conclusion in Cole that a "firm offer of credit" must be considered in light of "the entire offer and the effect of all the material conditions that compromise the credit product in question." Cole, 389 F.3d at 726-28 (emphasis in original). Despite Plaintiff's suggestion, the decision in GMAC Mortgage Corp. does not limit the determination of a "firm offer of credit" to the four corners of an initial written communication or require that all terms of a "firm offer of credit" be included on the face of a mailing. Indeed, as demonstrated below, such a requirement is unsupported by the plain language of the FCRA, contrary to the law of the Seventh Circuit and unworkable in practice.

B. The FCRA Does Not Require a "Firm Offer of Credit" to be Made in Writing on the Face of an Initial Communication.

Plaintiff's contention that a court is limited to the "four corners" of the initial mailing when ascertaining whether a "firm offer of credit" has been made is contrary to the plain language of the FCRA, which does not even require that an offer be made in writing. See 15 U.S.C. §§ 1681a(l)(1), 1681b(c) and (e), 1681m(d). Instead, the Act merely defines a "firm offer of credit" as an offer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer. Id. § 1681a (l) (emphasis added); GMAC Mortgage Corp., 2006 U.S. App. 1028, at *9.[3] Because there is no requirement that a "firm offer of credit" be communicated in writing, it follows that the Act does not require all of the material terms associated with the offer to be made on the face of the mailing sent to consumers.[4]

In Cole, the Seventh Circuit recognized that often a material term of a "firm offer of credit" can only be determined once information, in addition to what is available through prescreening, is obtained from the consumer. Cole, 389 F.3d at 727-28.[5] This recognition is especially appropriate in the context of an auto loan because necessary information about a

[3] A "firm offer of credit" may be conditioned on one or more of the following items that by necessity are not contained on the face of the mailing: (1) additional pre-selected criteria bearing on the consumer's creditworthiness; (2) verification that the consumer continues to meet the specific criteria used to select the consumer for the offer; or (3) the consumer's furnishing any collateral that was both established before the selection of the consumer for the offer and disclosed to the consumer in the offer. 15 U.S.C. §§ 1681a(l)(1), 1681a(l)(2), and 1681a(l)(3).

[4] The Federal Trade Commission, the agency charged with interpreting and enforcing the FCRA, has also opined that communications of prescreened offers of credit may be made through any medium, whether written, oral, or electronic. Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,804, 18,815 (May 4, 1990) (to be codified at 16 C.F.R. pt. 600). (Appendix, Exhibit A).

[5] Other Circuits have also recognized that a "firm offer of credit" under the FCRA is really a "conditional" firm offer of credit, or "a firm offer if you meet certain criteria." Kennedy v. Chase Manhattan Bank, 369 F.3d 833, 841 (5th Cir. 2004) (the Act permits a creditor to make a "conditional" firm offer of credit, that is, an offer that is conditioned on the consumer meeting the creditor's previously established criteria for extending credit).

consumer that bears directly on the amount and cost of the credit being offered can only be determined through direct contact with the consumer. (R. 56.1 Stat. 23.) Specifically, a lender could not offer an auto loan without knowing: (1) the consumer's employment status; (2) the consumer's income; (3) the value of the vehicle being financed; (4) the value of any trade-in vehicle; (5) the consumer's desired term for the loan; and (6) the consumer's desire for other credit products such as an extended service plan, GAP insurance, or credit insurance. (R. 56.1 Stat. 23-24). As such, it is impossible (and not required by the FCRA) to communicate a completely self-contained offer for an auto loan within the "four corners" of a mailing.

The necessity of considering consumer information unavailable from their credit report alone has also been noted with approval by the Federal Reserve System Board of Governors in the insurance context. Typically, firm offers of insurance do not normally include the price of the insurance in the initial mailing because the insurance premium charged is based on a number of factors that cannot be determined through prescreening:

> For insurance, the benefits of prescreened solicitations in providing additional information to consumers and reducing shopping costs are similar to those for credit cards. However, insurance sales typically require an extra step before the benefits can be fully realized. Prescreened solicitations for insurance generally do not contain complete pricing information tailored to a consumer because it is difficult to set the price of insurance solely based on information in [consumer reporting agency] files. Specifically, prescreening using [consumer reporting agency] files reveals something about the creditworthiness of individuals… but it does not reveal any information about the property or life to be insured. The insurance company must obtain that information through some sort of further contact with the recipient of a prescreened solicitation before the underlying insurance price can be specified completely.

Bd. of Governors of the Fed. Reserve Sys., Report to Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance 30 (December 2004) (emphasis added). (Appendix, Exhibit B).

In the case of the "firm offer of credit" extended by Triad, essential terms of the offer could only be determined by information found outside the consumer's credit report. (R. 56.1

Stat. 22.) Just as an insurance company cannot obtain information about the property or life of the insured, Triad could not obtain information about the consumer's employment status, income, vehicle preference, desired loan term, or other factors that bear on the amount and cost of credit being offered. (R. 56.1 Stat. 22.)

Under Cole, this Court may determine whether such offers are "firm offers of credit" only by examining these other material considerations. Cole, 389 F.3d at 726-28. Plaintiff's suggestion that the subject mailing did not contain a "firm offer of credit" merely because it did not include all terms of the offer on its face betrays a basic misunderstanding of what constitutes a "firm offer of credit" under the FCRA and has no validity in the context of Triad's Motion for Summary Judgment.

C. Plaintiff's Reliance on Kudlicki v. Farragut Financial Corp. is Misplaced.

Plaintiff's reliance on Kudlicki v. Farragut Financial Corp., No. 05 C 2459 (N.D. Ill. Jan. 20, 2006) is also misplaced. As in GMAC Mortgage Corp., the court in Kudlicki did not determine that a mailing fails to make a "firm offer of credit" when the terms of the offer are not set forth on its face. Instead, the court found only that no "firm offer of credit" was made because the specific mailing in that case contained the following language: "Rates and terms subject to change at any time." Kudlicki, No. 05 C 2459 at *2. According to the court, that statement, alone, was sufficient to preclude defendant's offer from being a "firm offer of credit" and examination of circumstances outside the contents of the mailing was unnecessary. Id. Thus, the lack of a "firm offer of credit" in Kudlicki was a result of equivocal language contained in the mailing, not the absence of material terms on its face.

In any event, the mailing sent to Plaintiff in this case is completely different than the mailing at issue in Kudlicki. Most importantly, the mailing in this case does not contain

language found to be equivocal by the court in Kudlicki, such as: "[r]ates and terms are subject to change at any time," "[a]ll loans subject to approval," or "[o]nly funded loans will qualify for any cash back promotion." Kudlicki, No. 05 C 2459 at *2. Instead, the mailing sent to Plaintiff unequivocally states that "[y]ou have been pre-approved for an auto loan…" and instructs Plaintiff to determine her pre-approval amount by contacting Triad through its website. (R. 56.1 Stat. 21.) Without a showing that the mailing sent to Plaintiff contained similarly equivocal language, the ruling in Kudlicki is not applicable to the present case.

D. Plaintiff Cannot Establish That Triad Willfully Violated the FCRA's "Firm Offer of Credit" Requirement.

Alternatively, even assuming, arguendo, the Act required all terms to be included within the four corners of the mailing, Plaintiff cannot present facts to establish that Triad knew the mailing did not comply with the FCRA or that Triad knowingly and consciously intended to impinge upon her rights. See Ruffin-Thompkins, 422 F.3d at 610. In fact, Plaintiff cannot produce evidence to establish that Triad would not have extended a "firm offer of credit" to her because she never contacted Triad to determine her pre-approved loan amount. (R. 56.1 Stat. 8-9.) Without such evidence, Plaintiff fails to establish that Triad willfully violated the Act's requirement to make a "firm offer of credit," and summary judgment is appropriate.

III. Plaintiff Cannot Produce Evidence to Establish That Triad's Disclosures Constitute a "Willful" Violation of the FCRA's "Clear and Conspicuous" Requirement.

Plaintiff further alleges that Triad willfully failed to make requisite disclosures under section 1681m of the Act in a "clear and conspicuous" manner. However, Plaintiff makes two erroneous assertions regarding Triad's alleged violation of the "clear and conspicuous" requirement. First, Plaintiff wrongly asserts that "neither defendant challenges the fact that the disclosures on the mailer were not 'clear and conspicuous,' as required by 15 U.S.C. §

1681m(d)." (Plaintiff's Resp. 7.) Second, Plaintiff wrongly concludes that "[s]uch an effort would have been futile, given this Court's prior ruling in this case." (Plaintiff's Resp. 7.)

Plaintiff's first assertion overlooks the fact that Triad has argued at length that Plaintiff cannot produce evidence to establish a "willful" violation of section 1681m(d). (Triad's Memorandum 7-8.) On the contrary, the undisputed evidence shows that Triad could not have known if the disclosures were insufficiently "clear and conspicuous" because it was not involved in the design of the mailing, nor provided with a copy of the mailing for approval before it was distributed by Polk. (R. 56.1 Stat. 15; 20.)

More egregiously, Plaintiff conveniently overlooks her sworn testimony admitting that she read and understood the disclosures at the time she opened the mailing. Specifically, Plaintiff testified that she opened the mailing and read the entire document on the day it arrived. (R. 56.1 Stat. 7.) She noticed and reviewed the disclosure language immediately. (R. 56. 1 Stat. 7.) Plaintiff understood all of the information contained in the disclosure language, including the opt-out information. (R. 56.1 Stat. 7.)

Accordingly, Plaintiff's claim that the disclosures are not "clear and conspicuous" is expressly contradicted by her own sworn testimony. In fact, the disclosures were both "conspicuous" enough to be noticed by Plaintiff and "clear" enough to be understood by her. Plaintiff cannot seriously allege that the disclosures were not "clear and conspicuous" on one hand while testifying that she read and understood them on the other. Plaintiff's testimony undermines her "clear and conspicuous" allegations and her claims under section 1681m(d) must fail. See also Hamm v. Ameriquest Mortgage Co., et al., No. 05 C 227, 2005 U.S. Dist. LEXIS 21755 (N.D. Ill. Sept. 27, 2005) (Truth In Lending Act disclosures were not inadequate where plaintiff admitted that she read and understood them).

Plaintiff's second assertion wrongly assumes that the Court's prior ruling on Triad's Motion to Dismiss is determinative of its ruling on summary judgment. Plaintiff forgets that the Court's ruling on Triad's Rule 12(b)(6) motion was properly confined to the allegations contained in the pleadings and sought only to determine if Plaintiff's Complaint alleged sufficient facts to state a cause of action. See Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir. 1992); Fed. R. Civ. P. 12(b). Certainly, the Court recognized the restrictions on its analysis at the time of its prior ruling. See Murray v. Sunrise Chevrolet, Inc. et al., No. 04 C 7668, 2005 U.S. Dist. LEXIS 20397, at *3 (N.D. Ill. Sept. 15, 2005) ("The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case").

Unlike the standard of review on summary judgment, the Court's ruling on Triad's Motion to Dismiss did not have the benefit of record evidence showing that Plaintiff read and understood the disclosure language. (R. 56.1 Stat. 7-10.) The reasoning applied in the Court's ruling on Triad's Motion to Dismiss was not intended to touch the merits of Plaintiff's claims and is not determinative of Triad's Motion for Summary Judgment.

IV. Plaintiff Must Incur Actual Damages in Order to Seek a Monetary Judgment Under the Act.

A. Plaintiff Expressly Denies That She Incurred Actual Damages as A Result of Triad's Alleged Violation of the FCRA.

The record shows that Plaintiff repeatedly admitted under oath that she did not suffer, and does not seek, actual damages in this action. However, Plaintiff's Response brief remarkably now contends that she did, in fact, suffer actual damages as result of Triad's alleged violations because she felt "annoyed, and was made angry, by the invasion [of her privacy] and by the increased risk of identity theft." (Plaintiff's Resp. 13.)

Plaintiff's attempt to claim actual damages for the first time in a summary judgment brief is both improper and disingenuous in light of the facts and admissions of record. See Bassiouni v. CIA, No. 02 C 4049, 2004 U.S. Dist. LEXIS 5290, at * 26 (N.D. Ill. Mar. 30, 2004) (plaintiff cannot create a genuine issue of material fact, thereby precluding summary judgment, by raising facts for the first time in response to defendant's motion for summary judgment which were not raised in the complaint).

Specifically, Plaintiff's responses to Triad's discovery requests state that she did not suffer, and does not seek, actual damages as a result of Triad's alleged conduct. (R. 56.1 Stat. 11, 12.) Plaintiff also admits in her deposition testimony that she did not lose money or opportunities as a result of Triad's alleged actions (R. 56.1 Stat. 11), did not suffer emotional distress (R. 56.1 Stat. 11), and did not suffer personal inconvenience as a result of Triad's alleged violations (R. 56.1 Stat. 11).

Even without her admissions, Plaintiff is unable to produce evidence showing that she suffered actual harm to her credit or financial status as a result of Triad's actions, or to support her bald conclusion that damages are simply "difficult or impossible to quantify" in this case.[6] Plaintiff cannot cure these deficiencies by making unsupported claims in her Response brief. and Triad's Motion for Summary Judgment should be granted.

B. Plaintiff Must Establish Actual Damages in Order to Prevail on Her Claim for a Willful Violation of the FCRA.

In response, Plaintiff suggests that she is not required to establish actual damages to prevail on a claim for statutory damages under section 1681n of the FCRA. (Plaintiff's Resp. 1.) Plaintiff again relies on the Seventh Circuit's decision in GMAC Mortgage Corp. for the

[6] Indeed, the Federal Reserve Board noted that only a "small fraction" of identity theft or credit fraud arises from prescreened solicitations. Bd. of Governors of the Fed. Reserve Sys., Report to Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance at 42 (December 2004). (Appendix, Exhibit B).

proposition that statutory damages for willfully failing to comply with the Act are available, even if actual damages cannot be established. (Plaintiff's Resp. 1.) However, again, Plaintiff misconstrues the holding in GMAC Mortgage Corp. and improperly attempts to apply that decision's narrow findings on class certification to factual issues arising from the merits of this case.

In GMAC Mortgage Corp., the Seventh Circuit reviewed a District Court's denial of class certification on grounds that the plaintiff should have sought actual damages rather than relying on the Act's statutory-damages remedy. GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *5. In finding that certification was improperly denied, the court explained, "…a representative plaintiff must be allowed to forego claims for compensatory damages in order to achieve class certification." Id. According to the court, "[r]efusing to certify a class because the plaintiff decides not to make the sort of person-specific arguments that render class treatment infeasible would throw away the benefits of consolidated treatment." GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *6.

As such, the court in GMAC Mortgage Corp., did not hold, as Plaintiff contends, that a showing of actual damages is not required to prevail on a claim for statutory damages under section 1681n. Instead, GMAC Mortgage Corp. held only that proof of actual damages is not required for class certification in appropriate cases. GMAC Mortgage Corp., 2006 U.S. App. Lexis 1028, at *5-6.

Thus, the holding in GMAC Mortgage Corp. is not inconsistent with the Seventh Circuit's ruling in Ruffin-Thompkins that expressly requires a plaintiff to establish actual harm or injury before she can prevail on any claim under the Act. Ruffin-Thompkins, 422 F.3d at 610-611 (an FCRA claim, whether for willful or negligent violation, can lie only when the plaintiff

has demonstrated actual damages). Where the ruling in GMAC Mortgage Corp. addresses the effect of requiring individual proof of actual damages in the context of class certification, the ruling in Ruffin-Thompkins addresses the broader need for proof of actual harm to prevail on the merits of a claim under the FCRA.

The Seventh Circuit's holding in GMAC Mortgage Corp. does not overrule or contradict its holding in Ruffin-Thompkins. As such, the rule set forth in Ruffin-Thompkins remains binding, applicable and explicit: an FCRA claim, whether for a negligent or willful violation, can lie only when the plaintiff has demonstrated actual harm caused by the violation. Ruffin-Thompkins, 422 F.3d at 610. Plaintiff admittedly suffered no actual damages or other harm as a result of Triad's alleged misconduct, and as a result, Plaintiff's FCRA claims fail, and summary judgment on behalf of Triad is appropriate as a matter of law.

CONCLUSION

For all of the forgoing reasons, summary judgment should be granted on behalf of Triad Financial Corporation d/b/a Roadloans on all claims asserted in Plaintiff's Amended Complaint.

Dated: February 24, 2006

Respectfully submitted,

TRIAD FINANCIAL CORPORATION

By: /s/ David T. Meehan
One of Its Attorneys

Linda B. Dubnow
David T. Meehan
McGuireWoods LLP
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601
(312) 849-8100 Telephone
(312) 849-3690 Facsimile

CERTIFICATE OF SERVICE

I, David T. Meehan, one of the attorneys of record for Defendant Triad Financial Corporation, hereby certify that I caused a copy of the foregoing *TRIAD FINANCIAL CORPORATION d/b/a ROADLOANS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT* to be served upon:

Daniel A. Edelman
Cathleen M. Combs
James O' Latturner
Thomas E. Soule
EDELMAN, COMBS, LATTURNER
& GOODWIN LLC
120 South LaSalle Street, 18th Floor
Chicago, IL 60603
(312) 739-4200 – Telephone
(312) 419-0379 - Facsimile
Attorneys for Plaintiff

Thomas R. Weiler
NORTON, MANCINI, WEILER & DEANO
111 West Washington Street, Suite 835
Chicago, IL 60622
(312)-807-4999 – Telephone
(312)–807-4998 - Facsimile
Attorneys for Defendant Sunrise Chevrolet, Inc.

via facsimile and by depositing a copy of the same in the United States First Class Mail, postage prepaid, this 24th day of February, 2006.

/s/ David T. Meehan

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