UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KYRA MOORE, on behalf of herself and others similarly situated,	:	
Plaintiffs	:	**C.A. No. 13-cv-1515**
v.	:	
	:	**CLASS ACTION**
RITE AID HDQTRS CORP. d/b/a RITE AID CORPORATION,	:	
Defendants	:	
	:	

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Kyra Moore, by counsel, pursuant to Federal Rule of Civil Procedure 23, hereby moves for class certification under Rule 23(b)(3). In support thereof, Plaintiff submits the attached Declaration of James A. Francis and the accompanying Memorandum of Law.

Dated: August 2, 2016

By: *s/ James A. Francis*

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

REDACTED PORTIONS FILED UNDER SEAL
PURSUANT TO CONFIDENTIALITY ORDER, DOCKET 50, PARAGRAPH 8

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

This is a consumer protection class action brought under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, against a large national employer that, as a tool in its high-volume, high-speed hiring operation, uses background screening reports it purchases from a third-party vendor to disqualify candidates for hire. The FCRA imposes "grave responsibilities" on users of commercially obtained employment background information. 15 U.S.C. § 1681(a)(4). Among these important responsibilities, the FCRA obligates any "person" who uses a "consumer report" to take an adverse employment-related action to provide the consumer a copy of the report *before* taking the adverse action. 15 U.S.C. § 1681b(b)(3). The "clear purpose" of this legal requirement "is to afford employees time to 'discuss reports with employers or otherwise respond before adverse action is taken.'" *Goode v. LexisNexis Risk & Info. Analytics Group, Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012) (citations omitted). Employers who willfully violate this provision are subject to statutory damages of $100-$1,000 per affected consumer, plus punitive damages, and reasonable attorney's fees and costs. 15 U.S.C. § 1681n.

Plaintiff Kyra Moore and the class of excluded job applicants she seeks to represent allege that Defendant Rite Aid Headquarters Corp. d/b/a Rite Aid Corporation's ("Rite Aid"), far from complying with 15 U.S.C. § 1681b(b)(3) and giving them a meaningful opportunity to challenge an inaccurate or misleading background report, stacked the deck against them by sending them the report *after* they had already been rejected for employment based on such a report. Rite Aid conditionally hired them but then used these reports to "adjudicate" them as "Non-Competitive," a classification that, as a practical matter, had the effect of removing them from consideration for hire. No one outside Rite Aid's top management has the authority to alter or override a "Non-Competitive" decision, and such overrides are rare.

Not only did Rite Aid delay mailing copies of the disqualifying report until *after* this adverse action occurred, it also accompanied the report with a form letter that contained confusing and misleading information about the applicant's FCRA rights, thereby further undermining the purpose of the § 1681b(b)(3) advance notice. Among other things, this form letter (a) misrepresented to applicants that an adverse employment action *might* occur based on the enclosed report when, in fact, the Non-Competitive decision had already been made; (b) misinformed applicants that they had five business days from their *receipt* of the mailed pre-adverse action package to contact the vendor that conducted the background search in order to initiate an FCRA inaccuracy dispute, when a second, final letter is automatically generated and mailed five days after the date the first letter is *mailed* and (c) also misleadingly advised them to contact Rite Aid personnel to discuss the report, a largely futile effort, coming after, rather than before, the report was used to classify the applicant as Non-Competitive. In short, the supposed "pre"- adverse action mailing that Rite Aid sends to Non-Competitive job candidates functions as little more than a pretense of compliance with § 1681b(b)(3).[1]

This case fits perfectly within the requirements of Rule 23. Thousands of ascertainable individuals were scored Non-Competitive by Rite Aid based on purchased background reports. The practical consequence of a Non-Competitive classification within Rite Aid's hiring system is a factual issue that will be proved with evidence about Rite Aid's uniform practices and procedures. Similarly, once the Non-Competitive score was entered into the system of Rite Aid's vendor, each class member was sent Rite Aid's "pre-adverse action" package, mailed in

[1] In her Amended Complaint, Plaintiff added a claim under 15 U.S.C. § 1681b(b)(2), after learning through discovery that Rite Aid had no evidence that she had signed the "stand-alone" consent to conduct background screening required by that section. Following discovery, Plaintiff has elected not to seek class certification of that second claim.

accordance with a standardized and largely automated sequence of events, including the same form letter. At trial, Plaintiff will be able to submit evidence common to the class concerning all of these facts. Through such evidence, the jury will be able to decide whether, taken together, these facts prove a "willful" violation of 15 U.S.C. § 1681b(b)(3) by Rite Aid, and, if so, what amount of statutory and punitive damages class members should be awarded. Through such a trial procedure, the liability and damage issues common to the class are plainly capable of resolution "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

II. FACTUAL BACKGROUND

A. Rite Aid's Treatment of Plaintiff Kyra Moore

For the first four years following her graduation from a Philadelphia high school, Plaintiff Kyra Moore worked in a CVS store; she began as a cashier and then was promoted to a shift supervisor. Exhibit 1, Excerpt of Transcript Kyra Moore Deposition ("Moore Dep.") at 9:7-19:4.[2] As a shift supervisor, she was responsible for closing the store, supervising five to six people and taking care of bank deposits. *Id*. at 20:14-21. Unfortunately, this young, promising career fell victim to the "Esteem" database, well known to this Court as a result of the *Goode v. LexisNexis* litigation. In July of 2010, Ms. Moore was terminated following a surprise interrogation by CVS loss prevention agents, who turned vague questions about forgetting to pay for snacks left behind the front counter into a false accusation of theft of merchandise. The loss prevention agents then induced her to sign a statement that they directed her to write and sign, and submitted the signed statement to LexisNexis Screening Solutions, the consumer reporting agency that operated the Esteem database. *Id*. at 39:8-73:13.

[2] Reference to Exhibits herein refer to those exhibits attached to the Declaration of James A. Francis, Esquire in Support of Plaintiff's Motion for Class Certification, filed herewith.

In April 2011, trying to get her retail career back on track, she sought employment with Rite Aid, and was encouraged when she got a call back from the manager of a store in South Philadelphia, asking her to come in for an interview. *Id*. at 101:6-104:20. The interview went well and she returned for a second interview with a Rite Aid district manager, who asked her whether she could start as a shift supervisor the following week, subject to passing a drug test and background screen. *Id*. at 114:4-116:16. Soon thereafter, however, she received a mailing that appeared to come from Rite Aid. It contained a cover letter dated April 25, 2011, Exhibit 2, and a copy of a "LexisNexis Background Report." Exhibit 3. The cover letter consisted of a single-spaced text that included phone numbers for LexisNexis and Rite Aid. The letter appeared exactly as follows:

> Dear KYRA MOORE
>
> This letter is a letter that is sent to both applicants and associates. If you are an applicant, the issue is whether you will be denied employment. If you are an associate, the issue is whether your employment will be terminated. The contact person referenced below if you are an applicant is the hiring manager with whom you have been in contact. The contact person referenced below if you are an associate is your region human resources manager.
> We have recently requested a criminal background report on you per your authorization. Attached is a copy of your background report, as well as a summary of your rights under the Federal Fair Credit Reporting Act and any additional rights under state laws (if applicable).The background report may result in your not being offered the job for which you are applying/the termination of your employment, whichever is applicable. The background report was prepared by: LexisNexis Screening Solutions Inc. PO Box 105108 Atlanta, GA 30348 1- (800) 845-6004. If any information on the attached report is inaccurate or incomplete, you have the right to dispute the information directly with LexisNexis Consumer Dispute line at (800) 845–6004.
> If there is any information that you believe we should consider, in light of the attached report, before we make our decision whether to employ/terminate you whichever is applicable, you may contact the hiring manager with whom you have been in contact/your region human resources manager. If you are an applicant, the hiring manager will give you contact information for the human resources manager, with whom you may share applicable information. If you have any questions about whom your hiring manager is and/or how to reach him or her, please call: 717-761-2633, extension 2630 or email: WHOISMYHRM@RiteAid.com. If you have any questions about whom your human resources manager is and/or how to reach him or her, please call: 717-761-2633, extension 2630 or email: WHOISMYHRM@RiteAid.com.
> If Rite Aid does not hear from you within five (5) business days from the date of your receipt of this letter, then you will not be offered employment/your employment will be terminated, whichever is applicable. If we hear from you within five (5) business days from the date of your receipt of this letter, we will consider whatever information you provide to us in making our final decision whether to employ/terminate you. So that there is no confusion, if you wish to dispute the attached report in any way, it is solely your (not Rite Aid) responsibility to contact LexisNexis directly.
> Included with the copy of your background report are additional state specific summary of rights notices.

Exhibit 2.

The LexisNexis Background Report that was enclosed with this confusing and barely intelligible form letter stated that Plaintiff had applied for a shift supervisor position at Rite Aid store #3227; that Rite Aid had ordered the report on April 22, 2011; and that the report had been "completed" on April 25, 2011, *i.e.*, the date of the letter. Exhibit 3 at RITE 000162. The report revealed that she had been scored "In-Eligible" in the Esteem portion of the background search and, as a result, received an overall score of "Non-Competitive." *Id.* at RITE 000163. Included in the report was an Esteem incident summary, which stated that she had committed a theft of $60 in merchandise from a CVS store on July 26, 2010. *Id*. at RITE 000167. As instructed in the form letter, Ms. Moore contacted the Rite Aid managers who had hired her, but to no avail. Exhibit 1, Moore Dep. at 123:14-127:10.[3]

Soon after receiving the letter dated April 25, 2011, she got a second letter addressed to her from Rite Aid. This second letter stated that "[b]ased on the results of the background check, we will not be offering you employment," and again directed her to LexisNexis if she wanted to dispute the accuracy of the information in the report. Exhibit 4, RITE 000170. The date printed on this second letter was May 2, 2011. *Id.* A review of the 2011 calendar reveals that the April 25, 2011 date printed on the first letter was a Monday, and that May 2, 2011, the date appearing on the second letter, was the following Monday, *i.e.*, five business days after the first one. Ultimately, with the help of Community Legal Services in Philadelphia, Ms. Moore succeeded with an FCRA dispute with LexisNexis, resulting in the Esteem record being removed and her score being revised to Competitive. Exhibit 1, Moore Dep. at 148:15-149:2. But that did not happen until October

[3] Five years later, the store manager who first brought her in for an interview, not only remembered Ms. Moore as "a good candidate" for shift supervisor, but also remembered her calling the store "constantly" to find out why her conditional hire was not proceeding. Exhibit 5, Excerpt of Transcript Deposition of Robert Helms ("Helms Dep.") at 53:20-56:2.

2011. *Id*. at 143:19-144:8. Following this experience, Ms. Moore began pursuing an alternative career path for herself outside the retail sector.[4]

B. Rite Aid's Use Of Background Reports to Reject Job Applicants

Under Rite Aid's hiring policies and procedures, once an applicant is "conditionally hired" to work in a Rite Aid store, the "hiring manager" who makes the offer enters the applicant's personal information into Rite Aid's Applicant Screening Portal ("ASP"). This results in a background report being automatically requested from Rite Aid's vendor, First Advantage LNS Screening Solutions (previously LexisNexis).[5] Exhibit 7, Excerpt of Transcript of Deposition of Natasha Shupp ("Shupp Dep.") at 76:6-78:2; Exhibit 8, Excerpt of Transcript of Deposition of Francis Spirk ("Spirk Dep.") at 24:2-14. Applicants that pass their background screen are

[4] Rite Aid was informed by LexisNexis about the correction to Ms. Moore's background report and acknowledged that her status within Rite Aid's hiring database was updated to Competitive, Exhibit 6, Excerpt of Transcript of Deposition of Sarah Taylor ("Taylor Dep."), 169:15-171:1. But there is no indication that Rite Aid reached out to Ms. Moore and offered her any other employment opportunity once her classification became Competitive. Ms. Moore is currently employed by the Philadelphia School District. Exhibit 1, Moore Dep. at 12:19-13:8. At the time of her deposition she was a custodial cleaner in a school, but has since been promoted to building engineer. With regard to the Esteem database, the Court will recall that, as a result of the *Goode v. LexisNexis* litigation, First Advantage suspended all use of the Esteem database following its acquisition from LexisNexis in 2013. *See* Class Settlement Agreement in Case No. 11-cv-2950 JD (E.D. Pa.), Doc. No. 58, at ¶ 4.1.

[5] Up until sometime in 2012, Rite Aid exclusively used LexisNexis as its background screening vendor. Plaintiff learned through discovery that, from 2012 until the present, Rite Aid has been using a different vendor for a few components of its background searches of conditionally hired job applicants, while continuing to order reports from First Advantage (the successor to LexisNexis). Plaintiff is seeking to certify a class that is tied specifically to those who, as a consequence of being scored Non-Competitive based on a First Advantage/LexisNexis report, were sent a Pre-Adverse Action mailing by First Advantage/LexisNexis, like the one sent to Plaintiff Moore. The proposed class does not include anyone classified Non-Competitive for any reason other than a First Advantage/LexisNexis background report.

classified as Competitive by First Advantage/LexisNexis,[6] a classification that registers automatically within the ASP, thereby enabling the hiring manager to proceed with the hire. Exhibit 7, Shupp Dep. at 79:10-16.

On the other hand, an applicant scored Non-Competitive based on a negative background report is barred from further consideration for hiring for as long as the Non-Competitive classification remains. [redacted]; Exhibit 6, Taylor Dep. at 81:18-82:1 (explaining that the Rite Aid hiring manager who extended the conditional hire has *no power* to proceed with the hire as long as the Non-Competitive classification remains in place).[7] Once classified Non-Competitive, the applicant's only hope at changing this disqualifying status would be to contact LexisNexis/First Advantage, initiate a dispute and convince the vendor to revise the information being reported back to Rite Aid. Exhibit 6, Taylor Dep. at 84:7-98:13. In Kyra Moore's case, she was classified as Non-Competitive, based on the Esteem-related information LexisNexis reported to Rite Aid, and that classification is what prevented her from becoming a shift supervisor. *Id.* at 62:23-63:3 (confirming that Plaintiff was not hired "based off

[6] Plaintiff will refer to the vendor as "First Advantage/LexisNexis" to reflect the fact that the proposed class definition straddles in time the sale of the company and includes both individuals who were screened by LexisNexis, as well as individuals screened by First Advantage. As discussed below, the relevant vendor procedures remained the same following the 2013 sale.

[7] The extent to which a Non-Competitive determination would be a disqualifying event for an employment candidate, no matter how promising, was described by the store manager who had sought to hire Plaintiff Moore. "A lot of great people – a lot of well-qualified people came back non-competitive," explained Robert Helms in his deposition, and confirming that store managers would grumble to each other about being unable to hire a qualified candidate who was scored in the system as Non-Competitive. Exhibit 5, Helms Dep. at 61:12 - 63:23. "If they came back non-competitive," he explained, "you can't do anything." *Id*. at 63:18-20.

of the information provided in her First Advantage or LexisNexis background report and specific information from the Esteem database").

First Advantage/Lexis does more than merely provide Rite Aid with background reports. Rite Aid and LexisNexis entered into agreements whereby Rite Aid delegated to LexisNexis (and, subsequently, First Advantage) the task of complying, as Rite Aid's agent, with the notice requirements of 15 U.S.C. § 1681b(b)(3) for all applicants scored Non-Competitive. Exhibit 7, Shupp Dep. at 72:19-73:5. [redacted] Once the Non-Competitive classification is entered into the First Advantage system, the automated process administered by First Advantage/LexisNexis prepares and mails a standard "pre-adverse action" package to the applicant, like the one received by Plaintiff Moore. The event triggering the mailing is that entry of the score "Non-Competitive" into the First Advantage/LexisNexis system. Exhibit 7, Shupp Dep. at 70:18-73:5; 84:15-85:5. [redacted]

Up until March or April of 2013, as part of its service agreement with Rite Aid, LexisNexis itself was "adjudicating" Rite Aid applicants as either Competitive, Non-Competitive or Needs Review, based on an "adjudication matrix" negotiated between Rite Aid and LexisNexis. Exhibit 7, Shupp Dep. at 68:20-70:9; *see also Goode v. LexisNexis*, 848 F. Supp. 2d at 535. Starting in

2013, however, at the direction of Rite Aid, First Advantage ceased scoring any applicants Non-Competitive. Exhibit 7, Shupp Dep. at 78:13-84:13. From then until the present, it would score all applicants with potentially disqualifying background information as Needs Review. *Id.* Such review would then be conducted by one of three Rite Aid "employment practice managers," who would make the decision whether to score the applicant as Competitive or Non-Competitive. *Id*. In the case of applicants scored Competitive, the hiring process proceeds. *Id.* In the case of applicants scored Non-Competitive by the employment practice managers, they enter the Non-Competitive determination directly into the First Advantage system with which they have Web-based access (describing how the employment practice manage updates the status by clicking on a "Review" flag button and changing it to "Non-Competitive"). *Id.* at 85:17-86:2. Once a record is updated from "Review" to "Non-Competitive" in the First Advantage system, the pre-adverse action mailing is performed by First Advantage.

Around January 14, 2014, the period of time between the two adverse action letters mailed by First Advantage was, at Rite Aid's direction, extended from five to seven days. Exhibit 7, Shupp Dep. at 101:18-106:3 (change policy regarding timing of second letter was made on January 14, 2014, but stating that evidence concerning precise implementation date would have to come from First Advantage). As discussed below, Plaintiff proposes a class period that encompasses Rite Aid job applicants who were sent a "pre-adverse action" mailing during the period when the time between the two mailings was five days, *i.e*., from March 23, 2011 (two years before this action was filed) until approximately January 14, 2014. It is important to note that the transfer of responsibilities for "adjudicating" background reports from First Advantage back to Rite Aid which occurred a year earlier did not affect the timing of the adverse action mailings. Throughout the proposed class period, once a Non-Competitive determination was entered into the

LexisNexis/First Advantage system, either by Rite Aid (2013 to the present) or LexisNexis (pre-2013), First Advantage/LexisNexis prepared and mailed the section 1681b(b)(3) package for delivery to the applicant. Exhibit 7, Shupp Dep. at 72:24-73:2.

C. The Content of the "Pre" Adverse Action Letter

The form letter that First Advantage/LexisNexis sends to Rite Aid job applicants classified as Non-Competitive on account of their background reports is a form that Rite Aid drafted and supplied to First Advantage/LexisNexis. Exhibit 7, Shupp Dep. at 91:3-92.2. [redacted] although Rite Aid has made the letter more readable since the version of the form that Plaintiff Moore was sent on April 25, 2011, the content has remained "pretty static." Exhibit 7, Shupp Dep. at 91:3-23. Thus, each member of the proposed class was mailed a supposedly "pre-"adverse action letter that contained three common elements. First, each states that the enclosed background report "may result" in the recipient's not being offered a job by Rite Aid. Exhibit 2; [redacted]. Second, each states that the recipient has "five (5) business days *from the date of your receipt of this letter*" to take action. Exhibit 2; [redacted] Third, each instructs the recipient that the action that must occur during this five-day window is a contact with *Rite Aid*. Exhibit 2; [redacted]

At trial, Plaintiff will seek to establish that each of these three elements in Rite Aid's form letter is misleading. First, while the letter informs the recipient that the background report "may result" in the loss of the previously offered job position, the truth is that she had already been classified as Non-Competitive, a disqualifying status, before the letter was mailed. Absent an immediate and successful dispute initiated with First Advantage/LexisNexis, that Non-

Competitive status would not change. Second, Rite Aid's letter misstated the actual time period available for applicants scored Non-Competitive to take action and misled consumers into believing they had more time than they actually had. As this Court observed in denying Rite Aid's Motion to Dismiss the Amended Complaint, "[b]ecause it takes at least one day for the initial notice letter to reach an applicant via mail, applicants never had the full five business days to respond before the final adverse action notice denying them employment was mailed." *Moore v. Rite Aid Hdqtrs. Corp.*, 2015 WL 3444227, at *6 (E.D. Pa. May 29, 2015).

Finally, Rite Aid further diminished the likelihood that consumers would initiate an FCRA dispute with First Advantage/LexisNexis within this narrow five-day window by instructing them to contact Rite Aid directly. Should a consumer have called the Rite Aid phone number on the letter, they would have reached a voice-mailbox in the corporate office. Exhibit 7, Shupp Dep. at 93:8-95:19. Those messages are routed to the employment practice managers, who then would try to call the consumer back. *Id*. Even if they reached consumer, however, employment practices managers would merely instruct the candidate, who was already-scored Non-Competitive, to contact LexisNexis/First Advantage and initiate a dispute. Exhibit 6, Taylor Dep. at 86:19-87:2 ("So what I'm going to do as an employment practice manager is now I'm going to contact Kyra, as the example applicant, to try to understand what information is incorrect and help her find a solution to redirect her back to the vendor in this case to clarify the information that we're looking at so as a company we can make a decision on the updated or corrected information that Kyra's indicating we're not seeing").

Rite Aid personnel did not even have the power or authority to reverse Non-competitive adjudication decisions without First Advantage taking action. Exhibit 6, Taylor Dep. at 94:22-95:4 ("Rite Aid does not have the capacity to change the designation in the system."); *Id.* at 95:9-

14, 95:18-96:4 ("I cannot change a person's status from non-competitive to competitive…without First Advantage releasing the file for review."); *Id.* at 97:21-98:2 ("Q. Because what if they dispute and they give you a really good-faith reason for dispute? A. So if they dispute, then- Q. With you. Not with First Advantage. With *you*. A. I have no way to change the information in the file.") (emphasis added). Moreover, store managers or hiring managers did not even have access to the information First Advantage had reported if an applicant called to dispute what was in the background report. *Id*. at 105:5-14. As such, directing job applicants to Rite Aid served no purpose but to delay and/or undermine their ability to reverse the job decision.

D. <u>The Class of Consumers Affected</u>

Plaintiff seeks to represent the following class of consumers:

> All applicants for employment or promotion with Defendant Rite Aid residing in the United States (including all territories and other political subdivisions of the United States) who (a) were mailed a letter substantially similar to the April 25, 2011 letter sent to Plaintiff Kyra Moore, (b) from March 23, 2011 until the date in 2014 when Rite Aid extended the period of time between the two letters First Advantage Screening Solutions sends on its behalf to job applicants classified Non-Competitive from five days to seven and (c) were not hired by Rite Aid.[8]

[8] The Court will note that the proposed class definition varies from the definition set forth in the Amended Complaint. This tailoring is appropriate and contemplated by Rule 23 in that it results from the discovery obtained, which allows Plaintiff to more precisely define the Class, and does not result in any substantial expansion. Indeed a class representative may elect to seek to certify only some of the claims and proposed classes initially pled or modify the proposed class definition. *See Chakejian v. Equifax Info. Servs., LLC*, 256 F.R.D. 492, 497 (E.D. Pa. 2009) (neither class representative nor court bound by the proposed class definitions set in the complaint); *LaRocque v. TRS Recovery Servs., Inc.*, 285 F.R.D. 139, 152 (D. Me. 2012) (class representative may seek to certify all or only certain selected claims at her election); Fed. R. Civ. P. 23(c)(1) (class definitions may change at any time throughout the course of litigation); *Bafus v. Aspen Realty, Inc*., 236 F.R.D. 652, 655 (D. Idaho 2006).

The parties have obtained the following data from First Advantage regarding the numbers of consumers populating this class:[9]

	2011 (beginning 3-22-2011)	2012	2013	2014	2015
Topic No. 9: The number of Rite Aid job applicants about whom you prepared a background report, broken down by numbers of such reports that you scored Competitive (Eligible), Non-Competitive (Ineligible) or Needs Review (Decisional), during the following periods 2011 (beginning 3/22/2011); 2012; 2013; 2014; 2015; 2016 (clarifying the end-date).					
Competitive(eligible)	30,464	38,951	39,474	37,824	42,306
Non-Competitive	761	554	40	10	14
Needs Review	1,782	3,144	4,743	4,886	5,360
Topic No. 10: The number of Needs Review reports, for the same periods, concerning which Rite Aid, after receipt of the report, scored the applicant Non-Competitive in your system.	350	662	1,004	1,102	1,289
Topic No. 11: For the same periods, the number of Pre-Adverse Action mailings you sent to Rite Aid applicants.	1,123	1,255	1,090	1,154	1,291
Topic No. 12: For the same periods, the number of Adverse Action mailings you sent to Rite Aid applicants.	1,099	1,229	1,067	1,131	1,269

Focusing on the bottom two rows, and, using the end of 2013 as a tentative cutoff,[10] there are approximately 3,468 individuals who were sent the mailing that First Advantage/LexisNexis sends

[9] Following First Advantage's most recent cancellation of its deposition due to the illness of its counsel, First Advantage sent this data to Rite Aid. For purposes of this motion, the parties are assuming that, once the postponed deposition finally occurs, this data will be confirmed.

[10] Once the deposition of First Advantage takes place, Plaintiff anticipates being able to identify the specific date in early 2014 when the extra two days were added to the sequencing of letters sent to Non-Competitive applicants, and, with that date, being able those additional class

to Non-Competitive Rite Aid applicants.[11] It has been established in discovery that Rite Aid will be able to identify any of these individuals who, despite getting the first letter in the adverse-action sequence were nonetheless hired.[12] A class list, therefore, can be generated, consisting of the approximately 3,500 consumers who were sent the "pre-adverse action" mailing, less those who actually hired.

III. ARGUMENT

A. The Proposed Class Meets the Requirements of Rule 23

The U.S. Supreme Court has noted that "[c]lass actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Barnard*, 452 U.S. 89, 99 (1981). "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests." *In re Prudential Insurance Company America Sales Practice Litigation*, 148 F.3d 283, 308 (3d. Cir. 1998) (quoting *In re General Motors Corp. Pick-Up Truck Fel Tank Products Liability Litig.*, 55 F.3d 768, 799 (3d Cir. 1995)). For a suit to be maintained as a class action under Rule 23, plaintiff must allege facts establishing each of the four threshold requirements of subsection (a) of the Rule which provides:

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members who were notified in 2014 and who were given less than five business days to initiate an FCRA dispute before being mailed the second adverse action letter.

[11] This data from First Advantage also reveals that roughly 98% of the individuals who are mailed the first notice are also mailed the second one five days later. This provides additional support for Plaintiff's theory that the Non-Competitive determination is, in practice, an adverse action.

[12] Rite Aid's technical specialist on the Applicant Screening Portal confirmed that the ASP can produce the name and address of applicants who meet various criteria, including those scored Non-Competitive as a result of the results of background screening and those who nonetheless hired. Exhibit 8, Spirk Dep. at 31:5-13.

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir. 1975).

Plaintiff must also allege that this action qualifies for class treatment under at least one of the subdivisions of Rule 23(b). *See Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 183 (3d Cir. 2001). Under Rule 23(b)(3), a class action will be appropriate where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Plaintiffs bear the burden of establishing each element of Rule 23 by a preponderance of the evidence. "[T]o certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2008). Once a plaintiff has demonstrated a preliminary legal showing that the requirements of Rule 23 have been met, the burden of proof is upon the defendant to demonstrate otherwise. 2 H. Newberg, NEWBERG ON CLASS ACTIONS (4th ed. 2002) ("NEWBERG") §7.22 at 70-71. The determinations called for by Rule 23 are questions addressed to the sound discretion of the district court. *Gulf Oil Co.*, 452 U.S. at 100.

The district court must conduct a "rigorous analysis" of the evidence and arguments in making the class certification decision. *Hydrogen Peroxide*, 552 F.3d at 318. The analysis requires "a thorough examination of the factual and legal allegations" and "may include a preliminary inquiry into the merits." *Id.* at 317 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166, 168 (3d Cir. 2001)). The Third Circuit explained in *Hydrogen*

Peroxide the permissible extent of any inquiry into the merits:

> [T]he requirements set out in Rule 23 are not mere pleading rules. The court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.... An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.

552 F.3d at 316–317 (quotations and citations omitted). The U.S. Supreme Court confirmed the Third Circuit's interpretation of the Rule 23 inquiry in *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 351 (2011) (stating that "[f]requently [the Rule 23] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim ….").

A district court, however, "may inquire into the merits of the claims presented in order to determine whether the requirements of Rule 23 are met, *but not* in order to determine whether the individual elements of each claim are satisfied." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 305 (3d Cir. 2011) (emphasis added). Further, any findings for the purpose of class certification "do not bind the fact-finder on the merits." *Id.* at 318.

1. The Requirements of Rule 23(a)

Rule 23(a) establishes four prerequisites for the maintenance of a class action:

(a) The class is so numerous that joinder of all members is impracticable;
(b) There are questions of law or fact common to the class;
(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(d) The representative parties will fairly and adequately protect the interests of the class.

a. Numerosity

Rule 23(a)(1) does not require that joinder be impossible; rather, joinder of all members is impracticable when the procedure would be "inefficient, costly, time-consuming, and probably confusing." *Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D. 105, 111 (E.D. Pa. 1992). This Court may make "a common sense determination" in order to support the finding of numerosity.

Maldonado v. Houston, 177 F.R.D. 311, 319 (E.D. Pa. 1997). There is no precise number necessary for class certification. *Anderson v. Department of Public Welfare*, 1 F. Supp.2d 456, 461 (E.D. Pa. 1998). When the class is large, "numbers alone are dispositive" of numerosity. *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986). Numerosity can be satisfied and joinder is generally considered to be impracticable when the members of a class exceed forty. *See e.g., Pabon v. McIntosh*, 546 F. Supp. 1328, 1333 (E.D. Pa. 1982) (class of forty to fifty satisfies numerosity). Here, the class will exceed 3,000 in number so the numerosity requirement is obviously met.

b. Commonality

The Third Circuit recently summarized the commonality requirement in Rule 23(b)(2) as follows:

> Commonality does not require perfect identity of questions of law or fact among all class members. Rather, even a single common question will do. A putative class satisfies Rule 23(a)'s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. A court's focus must be on whether the defendant's conduct is common as to all of the class members. Again, the bar is not a high one.

Reyes v. Netdeposit, 802 F.3d at 486 (internal quotations and citations omitted). *See also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597–98 (3d Cir. 2012). Commonality is met where the plaintiff's claim "depend[s] upon a common contention" which "must be of such a nature that it is capable of classwide resolution," so that determination of the truth or falsity of this common contention "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 350.

Courts generally find a wide variety of claims may be established by common proof in cases involving standardized procedures or practices. *See, e.g., Petrolito v. Arrow Financial*

Services, LLC, 221 F.R.D. 303 (D. Conn. 2004) (class certified for defendant's uniform practice of purchasing written-off debt for purpose of collection or instituting suit, in violation of Connecticut law); *Piper v. Portnoff Law Associates*, 216 F.R.D. 325 (E.D. Pa. 2003) (class certified for uniform collection letters and common practice of charging unreasonable attorney fees). "Common nuclei of fact are typically manifest where…defendants have engaged in standardized conduct towards members of the proposed class by mailing them allegedly illegal form letters or documents." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (class action certified under Fair Debt Collection Practices Act).

Plainly, common issues of law or fact exist here, including:

- Whether a Non-Competitive determination by Rite Aid, which is based on negative information in a background report purchased from a consumer reporting agency, is an "adverse action" within the meaning of the FCRA;[13]
- Regarding job applicants who have been scored Non-Competitive, whether Rite Aid, as a matter of its ordinary practice and procedure, provides copies of the disqualifying report before or after the Non-Competitive determination is made; and
- Whether the form "pre-adverse action" notice that First Advantage/LexisNexis mailed to class members undermined the purpose of 15 U.S.C. § 1681b(b)(3) by informing them that (a) the enclosed background report "may result in you not being offered the job" when in fact the applicant had effectively been excluded from hiring as a result of the information in the report; (b) the applicant must act within five days of *receipt* of the letter when in fact the system is designed to send the second adverse-action letter five days after the first one is *sent*; and (c) the applicant should call Rite Aid within the five-day window, when, in fact, he or she had to initiate a dispute with First Advantage/LexisNexis.

[13] Plaintiff will take the position at trial that, in a real, practical sense, a determination of Non-Competitive is an adverse employment action within the meaning of 15 U.S.C. § 1681a(k)(1). *See Goode v. LexisNexis Risk & Info. Analytics Group, Inc.*, 848 F. Supp. 2d 532, 538-42 (E.D. Pa. 2012). Defendant, on the other hand, will undoubtedly try to make the case that its Non-Competitive determinations are merely "preliminary" hiring decisions and that only a "final decision" not to hire—which does not occur until after the passage of time between the two adverse action letters—is an "adverse action" within the meaning of the FCRA. *See* Exhibit 6, Taylor Dep. at 62:19-63:24. Whichever of those two positions succeeds, it will be a determination based on evidence common to class and based on common legal arguments.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). To conduct the typicality inquiry, the court must examine "whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 295–96 (3d Cir. 2006). "If a plaintiff's claim arises from the same event, practice or course of conduct that gives rise to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." *Marcus*, 687 F.3d at 598.

The threshold for establishing typicality is low. "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Markocki v. Old Republic Nat. Title Ins. Co.*, 254 F.R.D. 242, 249 (E.D. Pa. 2008) (quoting *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992)). The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and a legal perspective, are such that in litigating her personal claims she can reasonably be expected to advance the interest of absent class members. *Scott v. University of Delaware*, 601 F.2d 76, 84 (3d Cir. 1979). Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

As defined, the class consists of those individuals who, after being classified by Rite Aid as Non-Competitive, were mailed the same letter that Plaintiff Moore was mailed. If that letter was

sent *after* an adverse action was made as to her, the same applies to the other class members. If her letter was misleading, so was theirs.

d. Adequate Representation

Rule 23(a)(4) requires plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." "Whether adequacy has been satisfied 'depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.' " *McDonough v. Toys R Us, Inc.*, 638 F. Supp. 2d 461, 477 (E.D. Pa. 2009) (quoting *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007)). "The second factor 'seeks to uncover conflicts of interest between named parties and the class they seek to represent.' " *Id.* (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004)).

Both prongs of the "adequacy" test are met here. First, Plaintiff has retained highly qualified counsel experienced in class action litigation to prosecute her claims and those of the classes. The firms of Francis & Mailman, P.C., Langer, Grogan & Diver, P.C., Community Legal Services, Inc., and Consumer Litigation Associates PC have been certified to represent classes under the FCRA, as well as other consumer protection laws, by this Court and by courts in other districts, and have tried class actions to verdict as well. For a firm biography of Francis & Mailman, *see* Exhibit 11.[14] For further information on Langer Grogan & Diver, *see*

[14] Because of its experience in litigating consumer class cases, the firm has been appointed class counsel over objection and competing counsel's challenge in interim appointment litigation. *See, e.g., White v. Experian Info. Solutions*, No. 05-01070, 2014 WL 1716154, at *13, 19, 22 (C.D. Cal. May 1, 2014) (finding Francis & Mailman "FCRA specialists" and appointing firm and its team as interim class counsel over objections from competing group because their team's "credentials and experience [we]re significantly stronger in class action and FCRA litigation.");

www.langergrogan.com. The very same group of firms successfully represented the class in *Goode v. LexisNexis*.

Furthermore, any antagonism or conflict that would implicate Plaintiff's adequacy as a class representative is for Defendant to prove. *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir. 1982). Plaintiff asserts there is no such conflict or antagonism of interests, and it is the burden of Defendant to prove otherwise. Ms. Moore has demonstrated that she is seeking only for herself what she is seeking for the class. Exhibit 1, Moore Dep. at 155:16-156:14. Accordingly, Ms. Moore adequately represents the interests of the classes.

2. The Requirements of Rule 23(b)

In addition to meeting the prerequisites of Rule 23(a), an action must satisfy at least one of the three conditions of subdivision (b) of Rule 23. Plaintiff proceeds here under Rule 23(b)(3), which provides in pertinent part:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members ….

Fed. R. Civ. P. 23(b)(3).

Common issues predominate over individual issues where plaintiffs have alleged a common course of conduct on the part of a defendant. *Prudential*, 148 F.3d at 314-315. Common issues are more likely to predominate in a class action seeking only statutory damages. *Stillmock*

Berry v. LexisNexis Risk & Information Analytics Group, Inc., No. 3:11-cv-754, 2014 WL 4403524, *11 (E.D. Va. Sept. 5, 2014) (finding Francis & Mailman, P.C. and its team adequate class counsel in contested objection); see also *Barel v. Bank of America*, 255 F.R.D. 393, 398-99 (E.D. Pa. 2009) (finding Francis & Mailman, P.C. "to be competent, experienced and well-qualified to prosecute class actions" and noting that class counsel "have done an excellent job in representing the class in the instant litigation.")

v. Weis Mkts., Inc., 385 Fed. App'x 267, 273 (4th Cir. 2010) (reversing denial of certification of class seeking FCRA statutory damages, holding that "overarching issue by far is the liability of the defendant's willfulness"); *Chakejian v. Equifax Info. Servs., LLC*, 256 F.R.D. 492, 498, 500-01 (E.D. Pa. 2009) (certifying FCRA statutory damages class action); *Summerfield v. Equifax Info. Servs., LLC*, 264 F.R.D. 133, 139, 142 (D.N.J. Sept. 30, 2009) (same).

In addition to finding the predominance of common questions, Rule 23(b)(3) also requires that the Court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." It has been widely recognized that a class action is superior to other available methods – particularly, individual lawsuits – for the fair and efficient adjudication of a suit that affects a large number of persons injured by violations of consumer protection laws or common law. *Prudential*, 148 F.3d at 316. Consumer class actions such as the case at bar easily satisfy the superiority requirement of Rule 23. *See Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994) (public interest in seeing that rights of consumers are vindicated favors disposition of claims in a class action).

Here, the predominance and superiority requirements are satisfied. The core issue for each member of each class will be whether Defendant failed, in violation of 15 U.S.C. § 1681b(b)(3), to provide the required information and a copy of the background report *before* any adverse action was taken and whether it undermined the rights of Plaintiff and class members under that provision by providing them the same misleading or deceptive information. These common factual and legal issues will predominate over any individual issues.

Likewise, the superiority requirement is satisfied here. Defendant has violated the rights of large number of geographically dispersed persons to such an extent that the cost of pursuing individual litigation to seek recovery against a well-financed adversary is not feasible. Thus, the

alternatives to a class action are either no recourse for hundreds of consumers, or even in the unlikely event that they all become aware of their rights and could locate counsel, a multiplicity of scattered suits resulting in the inefficient administration of litigation. Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of this matter.

There is no question that this class action would be easily manageable and presents no difficulties that would preclude class certification.

B. Appointment and Approval of Class Counsel Is Warranted

As previously addressed above, Plaintiff has chosen counsel with vast experience in handling consumer class actions and actions brought under the Fair Credit Reporting Act. Plaintiff submits that her counsel should be designated as Class Counsel.[15]

C. Plaintiff's Proposed Trial Plan

In *Wachtel v. Guardian Life Insurance Co. of America*, 453 F.3d 179 (3d Cir. 2006), the Third Circuit, finding itself in "uncharted waters," 453 F.3d at 184, considered a matter of first impression under the amendments to Rule 23 which were effective December 1, 2003. Specifically, the Court addressed the provisions of Rule 23(c)(1)(B), which states "An order certifying a class action must define the class and the class claims, issues or defenses…." Fed. R. Civ. P. 23(c)(1)(B). The Court concluded that the plain text of Rule 23(c) as amended now:

> requires more specific and more deliberate treatment of the class issues, claims and defenses than the practice described above has usually reflected. More specifically, in our review, the proper substantive inquiry for an appellate tribunal reviewing a certification order for Rule 23(c)(1)(B) compliance is whether the precise

[15] Under Rule 23(g)(1), the ultimate question is whether the counsel under consideration will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1). If there is only one applicant for the appointment, then the Court need only determine whether that applicant meets the minimum qualifications set forth in Rule 23(g). Fed. R. Civ. P. 23(g)(2)(B). The Court's considerations include counsel's investigation of the underlying claims, counsel's experience in handling class actions and claims of the type asserted in this case, counsel's knowledge of the applicable law, and counsel's resources for representing the class. Fed. R. Civ. P. 23(g)(1)(C)(i).

> parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis are readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion.

Wachtel, 453 F.3d at 185. The Court summarized its holding as follows:

> In summary, we hold that the requirement of Rule 23(c)(1)(B) that a certification order "define the class and the class claims, issues, or defenses," means that the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issue or defenses to be treated on a class basis.

Wachtel, 453 F.3d at 187-88.

In addition, the Court of Appeals addressed the practice of submitting a "trial plan" that could be used to facilitate Rule 23(c)(1)(B) compliance. While stopping short of requiring such a plan in every case, the *Wachtel* Court expressed its belief that the pre-certification presentation of a trial plan is "an advisable practice within the class action arena." *Id*. at 188, n. 7.

Plaintiff's accompanying proposed class certification Order has been drafted to comply with the requirements of Rule 23(c)(1)(B) that the class and class claims and issues be specifically defined, in light of *Wachtel's* comment that a "sufficient certification order must, in some clear and cogent form, define the claims, issue or defenses to be treated on a class basis," *id*. at 187-88.

Further, while a trial plan is not a mandated component of a motion for class certification, *Wachtel* considers such a plan an advisable practice. As such, Plaintiff proposes the following trial plan for the Court's consideration:

> 1. Plaintiff Kyra Moore will present her individual case that Defendant violated 15 U.S.C. § 1681b(b)(3) and that Defendant's conduct was willful. This evidence will largely relate to Defendant's practices and procedures that are common to the class.
>
> 2. Unless a directed verdict is appropriate at the close of Plaintiff's individual presentation, her individual case will be presented to the jury for determination.

3. In the event the jury determines that a violation occurred and that Defendant's conduct was willful, the jury will be asked to determine an appropriate amount of statutory damages, between $100 and $1,000. The Court will enter an award of statutory damages in that amount times the number of class members.

4. The jury will also be asked to determine if the conduct of Defendant warrants punitive damages and what that amount, if any, should be.

5. If the jury returns a verdict against Plaintiff, the trial will end and judgment against Plaintiff and the classes will be entered. If the jury finds for Plaintiff, but does not find that Defendant's conduct was willful, the Court can render a judgment against Plaintiff based on the jury findings.

6. Final judgment will be based upon the jury verdict.

As shown by the above, trial of this class action will be relatively straightforward. The practice at issue is common to all members of the classes. A jury's review of that practice will result in a determination whether or not the Defendant violated the FCRA. Judgment can then be entered based on that verdict.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court grant this motion for an order certifying this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the proposed classes of individuals defined herein, certifying Plaintiff Kyra Moore as a proper representative of the classes, and appointing Francis & Mailman, P.C., Langer, Grogan & Diver, P.C., Community Legal Services, Inc., and Consumer Litigation Associates P.C. as class counsel.

Dated: August 2, 2016

By: *s/ James A. Francis*

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, a true and correct copy of the foregoing was electronically served on all counsel of record through the ECF system.

Date: August 2, 2016

s/ James A. Francis
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