CASE NO. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TRANS UNION, LLC

Defendant-Petitioner,

v.

CAROLYN CLARK, on behalf of herself and all similarly situated individuals,

Plaintiff-Respondent.

On Appeal from the United States District Court for the Eastern District of Virginia, Richmond Division, Civil Action No. 3:15-cv-00391-MHL, the Hon. M. Hannah Lauck, Presiding

DEFENDANT'S PETITION FOR LEAVE TO APPEAL CLASS CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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March 15, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. _____ Caption: Trans Union, LLC v. Carolyn Clark

Pursuant to FRAP 26.1 and Local Rule 26.1,

Trans Union, LLC
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☒ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Petitioner is wholly-owned by TransUnion Intermediate Holdings, Inc. TransUnion Intermediate Holdings, Inc. is wholly-owned by TransUnion, a publicly-traded company with the ticker symbol TRU.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☒ YES ☐ NO
If yes, identify all such owners:

Advent International Corp. and GS Capital Partners, an affiliate of Goldman Sachs Group, Inc., a publicly-traded entity with the ticker symbol GS, together own a majority of the stock in Petitioner's ultimate parent, TransUnion. GS Capital Partners owns more than 10 percent of TransUnion's stock.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☒ YES ☐ NO
If yes, identify entity and nature of interest:

Advent International Corp. and GS Capital Partners, an affiliate of Goldman Sachs Group, Inc., a publicly-traded entity with the ticker symbol GS, together own a majority of the stock in Petitioner's ultimate parent, TransUnion. GS Capital Partners owns more than 10 percent of TransUnion's stock.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: */s/ Stephen J. Newman* Date: March 15, 2017

Counsel for: Petitioner Trans Union, LLC

CERTIFICATE OF SERVICE

****

I certify that on March 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Stephen J. Newman March 15, 2017
(signature) (date)

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INTRODUCTION

Defendant-Petitioner Trans Union LLC ("TransUnion"), respectfully petitions for permission to appeal the class certification order entered by the United States District Court for the Eastern District of Virginia on March 1, 2017. (Doc. 131, Addendum Ex. C.)

Like many companies, law firms and government agencies, TransUnion often uses LexisNexis to assist it in retrieving information about public records from courthouses and other public records sources. Based on TransUnion's failure to specifically disclose this to consumers, Plaintiff-Respondent Carolyn Clark ("Plaintiff") seeks to force TransUnion to pay statutory damages of between $100 and $1,000, pursuant to the Fair Credit Reporting Act ("FCRA"), to each consumer who received a credit file disclosure describing a public record retrieved for TransUnion by LexisNexis. See 15 U.S.C. § 1681n(a). The District Court certified a massive class of such consumers, without considering undisputed evidence that this lack of information had no impact on their ability to correct errors in their credit files, or any other real-world impact on them whatsoever. Nor was there any evidence that the alleged non-disclosure created any risk of material harm. For an alleged technical violation of a statutory disclosure requirement that actually harmed no one – if a violation even occurred at all, something that remains disputed on the merits – TransUnion is now exposed to massive litigation risk out

of all proportion to any impact on anyone. The Supreme Court's decision in Spokeo v. Robins, 136 S. Ct. 1540 (2016), was designed to restrict claims under the FCRA to persons with "concrete" injury, yet no such injury was identified in relation to the class claims here. The combination of a novel interpretation of the FCRA and a huge, albeit uninjured, statutory damages class, threatens to coerce TransUnion into abandoning its lawful defenses to the claim, thereby meriting immediate appellate review. See Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 144 (4th Cir. 2001); Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274 (11th Cir. 2000).

This petition presents important questions of class action jurisprudence and the application of Spokeo. Plaintiff asserts a violation of one of the FCRA's procedural protections, 15 U.S.C. § 1681g(a)(2) (relating to disclosure of sources of information used to prepare credit reports), but Plaintiff presented no evidence of how the alleged violation impaired the substantive goal of the statute – accuracy of credit reports – or actually affected either herself or the class she seeks to represent. In spite of TransUnion's evidence, including unrebutted expert testimony, that the alleged violation had no impact on Plaintiff or virtually the entire class population, the District Court erroneously certified a massive class of all persons hypothetically affected, rather than require Plaintiff to limit the class to those likely to have suffered injury-in-fact, as Spokeo directs. In so doing, the

District Court erroneously dispensed with any injury-in-fact analysis at all as to the class, finding (contrary to Spokeo) that simply because Plaintiff relied upon a statute, Plaintiff did not have to show any real-world impact on herself, on any particular class members or on the class as a whole. This is both legal error and is prejudicial to TransUnion. Immediate review is warranted because the massive statutory damages now threatened will create such pressure to settle that, as a practical matter, the merits will never be tested, thus depriving TransUnion of due process of law if it cannot obtain review of the class certification order now. See In re Rhone Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

STATEMENT OF FACTS

The FCRA requires national consumer reporting agencies like TransUnion to disclose to consumers the contents of their credit files, for free, once per year upon request and at certain other times. See 15 U.S.C. § 1681j. Among other things, the free disclosure must describe "[t]he sources of the information" contained in the consumer's file. 15 U.S.C. § 1681g(a)(2). The purpose is "to provide the consumer with an opportunity to dispute the accuracy of information in his file." Hauser v. Equifax, Inc., 602 F.2d 811, 817 (8th Cir. 1979); see also Gillespie v. Equifax Info. Servs., L.L.C., 484 F.3d 938, 940 (7th Cir. 2007) (purpose is to permit the consumer "to check the accuracy of the information possessed").

With respect to public records like court judgments, TransUnion has always understood § 1681g(a)(2) to refer to the originator of the record (i.e., the courthouse where the judgment is entered), not an intermediary who may retrieve data from its originator. See Henson v. CSC Credit Servs., 29 F.3d 280, 287 (7th Cir. 1994) ("a credit reporting agency may be required, in certain circumstances, to verify the accuracy of its initial source of information, in this case the Judgment Docket"); *Source*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "source" as "[t]he originator or primary agent of an act, circumstance or result"). Plaintiff contends that this is not a sufficient disclosure, that TransUnion's use of the public records collector LexisNexis also should be formally disclosed to consumers as a "source" and that TransUnion's nondisclosure willfully violated the FCRA. This Court has never construed the "sources" provision of the FCRA, but it may do so soon in connection with an unrelated appeal scheduled to be argued on March 21, 2017. See Dreher v. Experian Info. Sols., Inc., No. 15-2119 (4th Cir. appeal docketed Sept. 23, 2015). No other Circuit Court has construed § 1681g(a)(2) in the manner argued by Plaintiff. Nor is there any formal regulatory guidance on the subject.

Plaintiff claims that between 2009 and 2014 an invalid judgment wrongfully appeared on her TransUnion credit report. However, it is undisputed that her lack of knowledge of LexisNexis's involvement in records collection had no impact on

her ability to have the item removed from her report. In 2008, Plaintiff suffered a judgment for $575 and court costs. (Plaintiff's Depo. Ex. 4.)[1] She appealed, and when the judgment creditor failed to appear in the appellate proceedings, the appellate court summarily dismissed the judgment. (Id. 53:5-14 & Ex. 6.) However, the order dismissing the judgment did not specifically reference the case number of the original judgment, and the original court clerk never processed the dismissal. (Compare id. Ex. 4 with id. Ex. 6.) As late as 2016, the original court issued an abstract of judgment declaring the judgment to be due and owing. (Brian Frontino Decl. ¶ 4 & Ex. 6.)

In 2009 (outside the FCRA's five-year statute of repose for this lawsuit, which was filed in 2015, see 15 U.S.C. § 1681p), Plaintiff disputed the presence of the judgment on her TransUnion credit report, sending TransUnion a copy of the appellate order. (Plaintiff's Depo. 72:15-73:20 & Ex. 7.) However, like the judgment-entering court, because the appellate order failed to set forth the original docket number, TransUnion could not determine that the appellate order pertained to the original judgment, and Plaintiff's dispute was declined. (Id. Ex. 8.)

[1] TransUnion's evidence in opposition to class certification was appended as exhibits to the Declaration of Brian C. Frontino, filed on October 12, 2016. (See Doc. 82-1.) Much of this was filed under seal as it contained confidential information about Plaintiff and about TransUnion. (See Docs. 83-88.) Subsequently, the deposition of TransUnion's expert, Dr. Victor Stango, was taken by Plaintiff. TransUnion filed this deposition transcript on February 3, 2017. (See Doc. 117-1.)

In 2013, Plaintiff obtained her credit file disclosure, and sent TransUnion a letter stating that she paid the judgment and asking TransUnion to update her file accordingly. (Id. 104:2-107:8 & Ex. 15.) TransUnion updated Plaintiff's file, exactly as she requested, showing that the judgment was paid. (Id. Ex. 16.)[2] In 2014, again after obtaining her disclosure, Plaintiff wrote to TransUnion explaining that the judgment was dismissed on appeal and should be deleted. (Id. 111:10-113:4 & Ex. 19.) In response, TransUnion again did what Plaintiff asked, deleting the judgment entirely from her credit file. (Id. 113:8-114:5 & Ex. 20.)[3]

The next year, Plaintiff sued TransUnion under the FCRA. On September 14, 2015, Plaintiff filed an amended complaint pleading a class claim under § 1681g(a)(2) on behalf of consumers to whom TransUnion did not disclose public records vendors as sources of information. Plaintiff asserted subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question). Plaintiff also alleged individual claims not at issue on the present petition. TransUnion filed a motion to dismiss the class claim under Rule 12, which was denied on December 9, 2016. (See Addendum Ex. A ("MTD Opinion").)

In connection with the class certification proceedings, Plaintiff presented no evidence to show how her lack of knowledge of how the judgment was originally

[2] TransUnion did this within the 30-day time limit set forth in 15 U.S.C. § 1681i(a)(1) to reinvestigate a credit reporting dispute.

[3] This also occurred within the § 1681i(a)(1) time limit.

retrieved from the entering court affected her ability to dispute and eventually correct her credit file. Conversely, TransUnion's expert testified that no additional information about how the court record was retrieved could have assisted Plaintiff in correcting her credit file, because the judgment-entering court itself refused to take into account the subsequent appellate proceedings that supposedly dismissed the judgment, continuing to show it as valid well into 2016. (See Victor Stango Decl. ¶¶ 20, 65 & 90-91.) Plaintiff corroborated this at her deposition, testifying that a clerk of the judgment-entering court refused to correct the record. (Plaintiff's Depo. 60:23-61:24, 63:12-25, 117:16-21, 119:16-24 & 125:25-126:4.) The judgment-entering court was accurately identified as the source of the alleged reporting error.

Similarly, Plaintiff presented no evidence whatsoever, expert or otherwise, as to how lack of knowledge of TransUnion's use of an outside public records collector may have affected the proposed class, or even how to identify which particular consumers might have been affected by the nondisclosure. Again, TransUnion's unrebutted evidence showed no classwide impact. Most obviously, when the reporting of the record is accurate, knowing more about how the record was gathered cannot improve accuracy. But even when a record is not accurate, additional information to consumers about the manner of collection will rarely if ever have any impact on improving accuracy. (See Stango Decl. ¶¶ 144-47.)

TransUnion's data showed that even when public records disputes are received, most are resolved in the consumer's favor simply on the basis of the information provided by the consumer directly to TransUnion at the time of the dispute. (Kimberly Bye Decl. ¶¶ 3-7.) Knowledge of LexisNexis's involvement in records gathering might affect accuracy only in the hypothetical circumstance when an error committed by LexisNexis during the collection process introduced inaccuracy into the system, yet Plaintiff offered no evidence that this ever happened. (Stango Decl. ¶¶ 45, 112-115 & 130-32.) Moreover, error during the records-collection stage has never been identified as a significant cause of credit reporting inaccuracy in government and academic studies of the credit reporting system. (Id. ¶ 19.)

Thus, TransUnion's unrebutted evidence showed that to certify a class of everyone who received an allegedly noncompliant FCRA disclosure would necessarily include many completely uninjured persons – perhaps even the entire class. (Id. ¶ 7.) Plaintiff made no effort to confine the class to those who might have been concretely affected by the nondisclosure of LexisNexis's involvement in records gathering. For example, the class is so broad it includes persons whose records were perfectly accurate and who never disputed a public records item. No theory was presented as to how these consumers suffered concrete, real-world harm by lack of information about the records-collection process.

On March 1, 2017, the District Court certified a class. (See Addendum Exs. B ("Opinion") & C ("Order").) In its rulings (on class certification and in connection with the motion to dismiss), the District Court found that because Congress included the disclosure requirement within § 1681g(a)(2), no separate injury needed to be established to satisfy Article III of the Constitution. Nor was Plaintiff required to show any particular impact of the deprivation of information on the accuracy or potential accuracy of any particular credit report.

This Petition is timely filed under Federal Rule of Civil Procedure 23(f) on March 15, 2017, within fourteen days of the District Court's Order.

QUESTIONS PRESENTED

1. Is 15 U.S.C. § 1681g(a)(2) a "procedural" provision of the FCRA, such that a consumer lacks standing to pursue a claim under this provision if she cannot show "concrete" injury from the alleged violation?

2. May a class be certified when there is no evidence that every class member – or even a substantial number of class members – sustained any injury-in-fact as a result of the alleged statutory violation?

3. At the class certification stage, must the proponent of the class present a plan to identify and exclude from the class those persons who lack injury-in-fact, when the opponent of the class presented evidence that many class members were not injured?

REASONS FOR GRANTING THE PETITION

A. Standard for Granting a Petition Under Rule 23(f)

Federal Rule of Civil Procedure 23(f) provides that this Court "may permit an appeal from an order granting or denying class-action certification." When analyzing a petition under Rule 23(f), this Court considers: "(1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court (such as the presence of outstanding dispositive motions and the status of discovery); and (5) the likelihood that future events will make appellate review more or less appropriate." Lienhart, 255 F.3d at 144. These factors are considered on a sliding scale, and a strong showing on even one factor may justify immediate review. Id. at 145-46; see also EQT Prod. Co. v. Adair, 764 F.3d 347, 357 (4th Cir. 2014) (Lienhart factors considered "on a holistic basis").

Each of these factors justifies immediate review.

B. As a Practical Matter, the Certification Ruling Is Likely to Be Dispositive of the Litigation.

The class certified here is so broadly defined as to expose TransUnion to a severe risk of a massive statutory damages award, grossly out of proportion to any impact on the public. This Court recognizes that this circumstance "effectively

ends the litigation because it produces irresistible pressure on the defendant to settle" particularly in cases "when the certification decision turns on a novel or unsettled question of law." Lienhart, 255 F.3d at 143 (quoting the Advisory Committee notes to Rule 23).

This factor favors immediate review.

C. The District Court's Ruling Contains Substantial Weaknesses.

1. The District Court's Interpretation of Spokeo's Injury-in-Fact Requirement Was an Error of Law.

The next factor under Lienhart is whether the ruling below contains legal weaknesses. This factor also favors immediate review. The District Court misapplied Spokeo, permitting creation of a massive class of persons who lack Article III standing to recover under the FCRA.

To certify a class, the proposed class representative must establish, among other things, the elements of commonality and typicality, and that common issues predominate over individualized issues. See Fed. R. Civ. P. 23(a)(2), (a)(3), (b)(3). Here, the lack of a common injury-in-fact across the class from the alleged disclosure violation defeats these class certification elements. See Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013) (Rule 23(b)(3) requires proof that "damages are susceptible of measurement across the entire class"); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (critical component of commonality element is whether the proposed class

members "have suffered the same injury") (internal quotation marks and citation omitted); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (proposed class representative must "suffer the same injury as the class members") (internal quotation marks and citations omitted); Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 342 (4th Cir. 1998) (class member damages claims can be "inherently individualized and thus not easily amenable to class treatment"); Soutter v. Equifax Info. Servs., 498 F. App'x 260, 265 (4th Cir. 2012) (reversing order certifying overbroad FCRA class, in part because the "problems" with the predominance element under Rule 23(b)(3) were "exacerbated because [plaintiff] is claiming only statutory damages, which typically require an individualized inquiry").

Spokeo explains that only claims resulting from "concrete" injury-in-fact may be pursued under the FCRA, and only persons with such concrete injury have standing to sue under Article III of the Constitution. The "injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete and particularized.'" 136 S. Ct. at 1545 (citation omitted; emphasis in original). A "bare procedural violation" alone does not confer standing. Id. at 1549. To satisfy Article III, a plaintiff must establish "a concrete injury even in the context of a statutory violation." Id.; see also Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63-64, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (requiring proof of "some practical

consequence" of the alleged FCRA violation); Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 176 (3d Cir. 2001) (plaintiffs lacked standing because they suffered no "injury in fact" resulting from the alleged statutory violation) (Alito, J.). Spokeo also recognized that "violation of one of the FCRA's procedural requirements may result in no harm," for example, "even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate." Spokeo, 136 S. Ct. at 1549, 1550.

The District Court erroneously found that "informational injury" was enough to satisfy the standing requirement. "[I]rrespective of the accuracy of the information those sources provided," the District Court found, failure to disclose the sources of information results in injury as a matter of law. (Opinion at 10 & n.14.) The District Court characterized its ruling as a decision on "a *legal* question of what constitutes an injury in fact." (Id. at n.14; citing MTD Opinion.) This was error because Spokeo does not recognize a general "informational injury" exception to Article III. All the Supreme Court recognized is that sometimes intangible harm can be sufficiently concrete to satisfy Article III, and that sometimes a person can be harmed by receiving inaccurate or incomplete information. Nothing in Spokeo relieves the plaintiff from having to prove that some real-world harm actually resulted from the lack of information. See Spokeo,

136 S. Ct. at 1550; see also Perron v. J.P. Morgan Chase Bank, N.A., 845 F.3d 852, 857 (7th Cir. 2017) (rejecting claim based on alleged statutory disclosure violation because plaintiffs showed no damages resulting from the alleged nondisclosure); Nader v. Fed. Election Comm'n, 725 F.3d 226, 230 (D.C. Cir. 2013) ("litigants who claim a right to information" still must show evidence of "concrete injury" resulting from deprivation of the specific information at issue). Here, the information at issue serves only a procedural purpose – to help consumers identify potentially inaccurate items on their credit files, so they may seek correction. See Gillespie, 484 F.3d at 940; Hauser, 602 F.2d at 817. Plaintiff presented no evidence that the information has any inherent value outside its potential use to correct an inaccurate item.

This Court applied Spokeo recently in Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017). Beck recognized, unlike the District Court below, that each plaintiff must make a particularized showing of how the alleged violation actually resulted in some concrete real-world impact. In Beck, a laptop computer containing patient records, "including names, birth dates, the last four digits of social security numbers, and physical descriptors" was "likely stolen" from a hospital. Id. at 267. Plaintiffs sought class relief for more than 7,000 patients whose data was on the computer. Among other things, plaintiffs alleged that defendants' legal violations created the conditions for the theft to occur, placing the data at risk. Plaintiffs

asserted that they and other class members purchased credit monitoring to protect themselves against risk of identity theft. The District Court found, however, and this Court affirmed, that plaintiffs' claims of potential future injury were too speculative to satisfy Spokeo: "not all threatened injuries constitute an injury-in-fact. Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.'" Id. at 271 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)).

Other Circuit Courts of Appeals similarly require strong showings of concrete injury under Spokeo, contrary to the approach taken below. See Eike v. Allergan, Inc., --- F.3d ---, No. 16-3334, 2017 WL 881834, at *2 (7th Cir. Mar. 6, 2017) (vacating class certification under Spokeo and remanding with directions to dismiss suit) (Posner, J.); Wall v. Mich. Rental, --- F. App'x ---, No. 16-1988, 2017 WL 888322, at *2 (6th Cir. Mar. 6, 2017) ("claimant must connect the violation to a concrete injury in fact"); Meeks v. Ocwen Loan Servicing LLC, --- F. App'x ---, No. 16-15536, 2017 WL 782285, at *2 (11th Cir. Mar. 1, 2017) (plaintiff "suffered at most 'a bare procedural violation,' and he cannot show that he suffered a real, concrete injury from [defendant]'s actions"); Ross v. AXA Equitable Life Ins. Co., --- F. App'x ---, No. 15-2665-cv, 2017 WL 730266, at *2-3 (2d Cir. Feb. 23, 2017) ("Appellants cannot rely solely on a violation of [the statute] in order to satisfy

Article III's injury-in-fact requirement"); Gubala v. Time Warner Cable, Inc., 846 F. 3d 909, 911 (7th Cir. 2017) (no standing where plaintiff "has not alleged any plausible (even if attenuated) risk of harm to himself from" alleged violation); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724 (7th Cir. 2016) (alleged statutory violation alone could not confer standing to seek statutory damages under § 1681n(a); rather, some actual harm separate and apart from the violation must be shown); Nicklaw v. Citimortgage, Inc., 839 F.3d 998, 1002-03 (11th Cir. 2016) (no standing where plaintiff did not allege harm flowing from defendant's alleged failure to timely record satisfaction of judgment); Lee v. Verizon Commc'ns, Inc., 837 F.3d 523, 529–30 (5th Cir. 2016) (no standing for ERISA claims where no harm alleged); Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925 (8th Cir. 2016) (claim based on wrongful retention of data barred by Spokeo because the data was not actually used in a manner that harmed plaintiff).

As this Court explained in Beck, an "attenuated chain" leading hypothetically to some injury does not satisfy Spokeo. 848 F.3d at 275; see also Perron, 845 F.3d at 858 (rejecting claim of injury based on harm that was "far too attenuated from the alleged violation"). Yet TransUnion's unrebutted expert testimony from Dr. Stango showed that injury could not be tied to the alleged disclosure violation without such attenuated reasoning. First, there must be an error of some kind. Second, the error must not have been correctable through

ordinary dispute channels with TransUnion directly, even though the statistical evidence – again unrebutted by Plaintiff – showed that consumers pursued these channels with a high rate of success. Third, the cause of the error must have been something inherent in the data collection process, and that could be addressed only through examination of that process, something that no prior government or academic study has shown to be a significant cause of error in the credit reporting system. The unrebutted evidence showed that the number of people who might have suffered some concrete, real-world impact as a result of the non-disclosure was minuscule and perhaps non-existent.

Plaintiff also did not challenge TransUnion's evidence that Plaintiff herself was not affected concretely by her lack of knowledge of LexisNexis's involvement in the collection process. For the claims within the statute of limitations, TransUnion corrected Plaintiff's credit file exactly as she requested. The error persisted, however, in the courthouse records themselves, with the court clerk refusing to correct them, and even issuing an abstract of judgment as late as 2016, two years after the judgment ceased appearing on TransUnion credit reports. None of this had anything to do with how anyone gathers records from courthouses, and Plaintiff proffered no evidence that her lack of knowledge of how records were collected had any impact on her whatsoever. Because Plaintiff presented no evidence of harm or even any "increased risk" of harm from the nondisclosure,

either to herself or to the class as a whole, the District Court erred as a matter of law in permitting the claim under § 1681g(a)(2) to proceed on a classwide basis.

2. The District Court Erred in Certifying a Class That Necessarily Will Include Large Numbers of Persons Who Sustained No Concrete Injury-in-Fact.

Relatedly, the class certification order is erroneous because even if some people (other than Plaintiff) can be hypothesized who might have been affected by the nondisclosure of LexisNexis, neither Plaintiff nor the District Court made any effort to define the class in a manner likely to exclude unaffected persons from the class. For example, persons whose reports were accurate and who never disputed a public records item could not have been affected. Likewise, those who successfully employed TransUnion's dispute process to correct an inaccuracy could not have been affected. The class as defined is therefore vastly overbroad, and cannot be sustained.

Each class member, and not simply the named plaintiff, must individually have standing, because "standing is not dispensed in gross." See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010) ("[A] named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."). Rule 23 cannot confer Article III standing on someone who would not ordinarily have a right to sue in the absence of class certification, because the

Rules Enabling Act states that procedural rules cannot enlarge substantive rights. See 28 U.S.C. § 2072(b). Likewise, the Rules themselves disclaim any intent to enlarge substantive federal court jurisdiction. Fed. R. Civ. P. 82. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1050 (2016), recognizes the importance of the question "whether uninjured class members may recover." Nevertheless, the Tyson majority declined to answer it, noting that the question was not "fairly presented" in that case. Id. The Court nevertheless cautioned that class counsel ultimately would have to establish whether any "methodology will be successful in identifying uninjured class members," presumably to remove them from the class. Id. Significantly, Chief Justice Roberts' concurring opinion explains that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." Id. at 1053 (Roberts, C.J., concurring). Basic fairness dictates that a federal court may order money paid "only to injured class members." Id. Persons without concrete injury may not recover money in federal litigation. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 857-58, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (error to include in a proposed class persons who presently lack standing to assert claims); Lewis v. Casey, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (same).

In Beck, this Court found it significant that more than 66 percent of persons allegedly affected by a data security breach could not have suffered harm in the

form of increased fraud risk. That figure is lower than what TransUnion's evidence showed here. Most consumers – perhaps all – could not have been affected in any concrete way by their alleged lack of knowledge of LexisNexis's involvement in the records collection process. (See Stango Decl. ¶ 7.) Nor did Plaintiff make any effort to show any instances of concrete impact on anyone. Plaintiff's failure to attempt to confine the class to persons with concrete injury renders the certification order fatally deficient. Similarly, it was erroneous for the District Court to state that this evidence was irrelevant because injury could be shown as a matter of law, uniformly across the class, regardless of actual impact, simply by reason of the alleged statutory violation. (See Opinion at 14-15 n.21.) The District Court's reliance "solely on a violation of [the statute] in order to satisfy Article III's injury-in-fact requirement" was error. Ross, 2017 WL 730266, at *2-3.

D. Allowing an Immediate Appeal Will Resolve Unsettled Legal Questions of General Importance.

Immediate appeal also should be allowed because this case presents unsettled legal questions of general importance. This Court has not yet construed Spokeo in the context of class certification proceedings. As noted above, how to apply Spokeo has significant implications for many kinds of cases, and is attracting attention from other Circuit Courts. Even the District Court below recognizes that other district courts are applying Spokeo's injury-in-fact requirement

inconsistently. (See Opinion at 5-6 (discussing and disagreeing with In re Michaels Stores, Inc., Civ. No. 15-2547 (KM) (JBC), 2017 WL 354023 (D.N.J. Jan. 24, 2017), and Cruper-Weinmann v. Paris Baguette Am., Inc., No. 13 CIV. 7013 (JSR), 2017 WL 398657 (S.D.N.Y. Jan. 30, 2017) (Rakoff, J.)); MTD Opinion at 19 n.21 (disagreeing with Smith v. Ohio State Univ., No. 2:15-cv-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016)).) Guidance on the core legal questions of standing is critically important here, across a wide range of cases. See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation [and] class actions … courts must be more careful to insist on the formal rules of standing, not less so.").

This factor also speaks in favor of immediate review.

E. Resolution of the Appeal Now is Not Dependent on Events in the District Court; Rather, it is Essential That the Legal Issues Relating to Class Certification Be Resolved Definitively Before Dispositive Motions and Trial.

It is clear from the District Court's rulings that its conclusions were based on core principles of law. No further factual development is necessary to decide the legal questions presented in this Petition. Indeed, the District Court said repeatedly that TransUnion's evidence just did not matter, because injury-in-fact was shown simply by Congress's inclusion of the disclosure requirement in §1681g(a)(2). Nor did Plaintiff argue that more discovery or other evidence would permit him to challenge TransUnion's unrebutted evidence that most consumers could not have

suffered any concrete, real-world injury as a result of the alleged non-disclosure. This factor also favors immediate review.

F. No Future Events Are Likely to Undermine the Justifications for Review Now. To the Contrary, the Settlement Pressure That Results From a Massive Class Certification Order Favors Immediate Review.

The final Lienhart factor also favors review. No future events are likely to undermine the justification for review now. To the contrary, as time passes, TransUnion's possibility of obtaining meaningful review will dim, due to the enormous settlement pressure exerted by overbroad class certification orders. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); Coopers & Lybrand v. Livesay, 437 U.S. 463, 476, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978).

CONCLUSION

Accordingly, Defendant-Petitioner Trans Union, LLC respectfully requests that this Petition be granted.

Respectfully submitted this 15th day of March, 2017.

/s/ Stephen J. Newman

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

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(s) Stephen J. Newman

Party Name: Trans Union, LLC

Dated: March 15, 2017

CERTIFICATE OF SERVICE

I certify that on March 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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ADDENDUM

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CAROLYN CLARK,
on behalf of herself and all similarly situated individuals,

Plaintiffs,

v. **Civil Action No. 3:15cv391**

TRANS UNION, LLC,

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on two motions filed by Defendant TransUnion, LLC ("TransUnion"): (1) TransUnion's Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1)[1] and 12(f)[2] (the "Motion to Dismiss"), (ECF No. 52); and, (2) TransUnion's Motion Requesting Judicial Notice of Exhibits A Through H (the "Motion Requesting Judicial Notice"), (ECF No. 54). Carolyn Clark, on behalf of herself and all similarly situated individuals, has responded to those motions, (ECF Nos. 56, 57), and TransUnion has replied, (ECF Nos. 58, 59).

The Court dispenses with oral argument because the materials before it adequately present the facts and legal contentions, and argument would not aid the decisional process. Accordingly, the matters are ripe for disposition. The Court exercises jurisdiction pursuant to

[1] "[A] party may assert the following defense[ ] by motion: (1) lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1).

[2] "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

28 U.S.C. § 1331.[3] For the reasons that follow, the Court will: (1) grant in part and deny in part the Motion Requesting Judicial Notice; and, (2) deny the Motion to Dismiss.[4]

The Court also has several motions before it regarding scheduling, discovery, or other administrative matters. The Court will address the other pending motions at the conclusion of this Memorandum Opinion.

I. Procedural and Factual Background

Clark, the named plaintiff, asserts six counts against TransUnion: one proposed class claim, and five individual claims. Count I, the "Disclosure of Source Claim," alleges a putative class action arising out of TransUnion's violations of 15 U.S.C. § 1681g(a)(2)[5] of the FCRA,

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[3] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The First Amended Class Complaint alleges violations of 15 U.S.C. § 1681g(a)(2) of the Fair Credit Reporting Act (the "FCRA").

[4] Both parties have also filed multiple motions seeking leave to file supplemental authority. (ECF Nos. 60, 62, 93, 97.) The Court granted the first two motions seeking leave to file supplemental authority on August 15, 2016. (ECF No. 64.) In the interest of justice, and for good cause shown, the Court will grant the other motions seeking leave to file supplemental authority. (ECF Nos. 93, 97.) The Court will give the supplemental authorities due weight in light of the parties' arguments.

[5] Section 1681g(a)(2) provides, in full:

> **(a) Information on file; sources; report recipients**
>
> Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:
>
> . . . .
>
> **(2)** The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: ***Provided***, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

15 U.S.C. § 1681g(a)(2).

which requires that consumer reporting agencies "clearly and accurately" disclose to consumers "[t]he sources of information" in their credit files. 15 U.S.C. § 1681g(a)(2). Here, the parties do not dispute that TransUnion constitutes a consumer reporting agency. Nor do they disagree, at this procedural juncture, that data regarding civil judgments, tax liens, and bankruptcies comprise the "information" undergirding this case. (First Am. Class Compl. ¶¶ 2–3, ECF No. 10.)

The parties diverge when discussing what this Court should deem to be the "source" of the information. Clark contends that TransUnion runs afoul of § 1681g(a)(2) because it never identifies LexisNexis, a third-party vendor, as the source of the public record information "that makes its way into the consumer credit files it sells." (*Id.* ¶ 4.) Clark contends that this systematic misrepresentation deprives consumers of receiving congressionally-mandated information and makes it more difficult for consumers to correct errors. TransUnion, in briefing, suggests that it appropriately reports the place where consumer data originated, such as a courthouse, and that any additional information about how the data was collected or who collected it is either immaterial to this case or does not implicate § 1681g(a)(2).

Clark alleges that TransUnion's violations of § 1681g(a)(2) entitle each consumer who received his or her credit file to statutory damages under § 1681n(a) between $100 and $1,000.[6]

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[6] Section 1681n(a) provides, in relevant part:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000;
>
> . . . .
>
> (2) such amount of punitive damages as the court may allow . . . .

15 U.S.C. § 1681n(a).

A. The Named Plaintiff's Individual Claims (Counts II through VI)

Clark's five individual claims provide context to the entire action, so the Court will first discuss the facts giving rise to them. Clark alleges that on August 7, 2014, TransUnion provided to her a credit file that incorrectly listed two civil judgments entered against her. TransUnion listed the sources of the judgments as "Henrico District Court" and "Virginia Federal Court," respectively. (First Am. Class Compl. ¶ 27.) Clark, however, contends that the actual source of the judgments was LexisNexis, the third-party vendor that retrieved the data.

Quik Cash allegedly entered one of the judgments against Clark in November 2008 in the amount of $575, even though that judgment had been appealed and dismissed. Clark submitted multiple demand letters requesting that TransUnion correct its error. TransUnion, however, purportedly failed to conduct a "timely and reasonable reinvestigation" and continued to report the Quik Cash judgment as unpaid. (*Id.* ¶ 35.)

These events, according to Clark, give rise to five individual claims. Count II, the "Reasonable Procedure Claim," proceeds under 15 U.S.C. § 1681e(b).[7] Count III, the "Reasonable Reinvestigation Claim," invokes 15 U.S.C. § 1681i(a)(1).[8] Count Four, the "Failure to Send Furnisher all Relevant Information Claim," cites 15 U.S.C. § 1681i(a)(2).[9] Count Five,

[7] In Count II, Clark alleges that TransUnion failed "to establish and/or to follow reasonable procedures to assure maximum possible accuracy in the preparation of [her] credit report and credit filed it published and maintained." (First Am. Class Compl. ¶ 75.)

[8] In Count III, Clark contends that TransUnion failed to "conduct a reasonable reinvestigation to determine whether the disputed information was inaccurate and to subsequently delete the information from the file." (First Am. Class Compl. ¶ 81.)

[9] In Count IV, Clark claims that TransUnion failed to send to the furnishers all relevant information that it received in [her] dispute letter." (First Am. Class Compl. ¶ 86.)

the "Failure to Review Consumer Communication Claim" relies upon 15 U.S.C. § 1681i(a)(4).[10] Finally, Count Six, the "Failure to Delete Claim," proceeds under 15 U.S.C. § 1681(a)(5).[11] For each of these five individual claims, Clark seeks actual damages, statutory damages, punitive damages, costs, and attorneys' fees under §§ 1681n and 1681o.[12]

B. The Class Claim (Count I)

Clark submits that TransUnion violated § 1681g(a)(2) by failing to convey on her credit file that LexisNexis was the source of the judgment information. To advance the claims of similarly situated individuals, Clark proposes to certify a class as follows:

> All natural persons residing in the Fourth Circuit[:] (a) who requested their consumer file from Trans Union or any of its affiliated companies, subsidiaries, or any other Trans Union entity, (b) within five years preceding this filing of this action and during its pendency, and[,] (c) to whom Trans Union provided a response that did not include any reference to its public records vendor as the source of public records information within the consumer's file disclosure. Excluded from the class definition are any employees, officers, or directors of

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[10] In Count V, Clark asserts that TransUnion failed to" review and consider all relevant information that it received in [Clark's] communications." (First Am. Class Compl. ¶ 91.)

[11] In Count VI, Clark alleges that TransUnion failed to "delete any information that was subject to [her] disputes that was inaccurate or could not be verified." (First Am. Class Compl. ¶ 96.)

[12] Section 1681o provides, in relevant part:

> **(a) In general**
>
> Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1) any actual damages sustained by the consumer as a result of the failure; and[,]
>
> (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681o.

> Trans Union, any attorney appearing in this case, and any judge assigned to hear this action.

(First Am. Class Compl. ¶ 62.) Clark seeks statutory and punitive damages in the amount of not less than $100 and not more than $1,000 per violation per class member, as set forth in 15 U.S.C. § 1681n(a). Clark does not appear to allege any injury beyond the "informational injury" purportedly suffered as a result of TransUnion's failure to convey the source of the judgment information, as Clark maintains that the FCRA requires. (First Am. Class Compl. ¶¶ 38–39 (contending that Clark "has suffered actual damages" because "Trans Union deprived [her] of . . . valuable information despite the requirements of the FCRA").)

II. Analysis: Motion Requesting Judicial Notice

TransUnion asks the Court to take judicial notice of eleven exhibits, Exhibits A through H, filed in support of the Motion to Dismiss. Clark does not object to TransUnion's request with respect to Exhibits A through G. Exhibits A through F are copies of documents, with docket entry numbers indicated, in a class action mediated by the undersigned judge and approved by the Honorable Henry E. Hudson, United States District Judge, in a 2014 case: *Soutter v. TransUnion, LLC*, No. 10cv514 (E.D. Va.). Exhibit G is a transcript from a preliminary approval hearing in a case presided over by the undersigned judge: *Jenkins v. Equifax*, No. 3:15cv443 (E.D. Va. June 14, 2016). Neither party disputes the accuracy or authenticity of these documents. Absent objection from Clark, the Court will grant the Motion Requesting Judicial Notice as it pertains to Exhibits A through G.

As to Exhibit H, however, the Court will decline to take judicial notice. Clark objects to this Court taking judicial notice of Exhibit H, which appears to be a copy of a printout entitled "Henrico County General District Court" "Civil Case Details" that came from Virginia's Court System website. TransUnion submits that Exhibit H is the "[o]nline court docket" from *Quik*

Cash v. Carolyn Clark-Bruce, Henrico County Virginia District Court Case No. GV0823896-00. (Def.'s Mem. Supp. Mot. Requesting Judicial Not. 2, ECF No. 55.) Clark contends that Exhibit H lacks a proper foundation. The Court agrees.

Under Federal Rule of Evidence 201, the Court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or[,] (2) can be accurately and readily determined from sources whose *accuracy cannot reasonably be questioned.*" Fed. R. Evid. 201(b) (emphasis added). TransUnion suggests that Exhibit H fits the latter category.

Contrary to TransUnion's position, the Virginia Courts' own website cautions users about the accuracy of its content. The website's "Terms and Conditions of Use" provide:

> The information in this system *does not constitute the official record* of judicial or administrative actions of the respective courts of the Commonwealth of Virginia, and this information is *subject to change or correction* at any time without notice. *If the official records or official printed publications of the individual courts differ from the contents of records or publications included in this system, the official records or written publications should be relied upon.*

General District Court Online Information System, Virginia's Judicial System, https://eapps.courts.state.va.us/gdcourts/captchaVerification.do?landing=landing (emphases added). No dispute appears to exist that someone for TransUnion conducted a search on the Virginia Court System website and that Exhibit H reflects an authentic copy of the result. The website's own disclaimer, however, prevents this Court from concluding that the accuracy of its content "cannot reasonably be questioned." Fed R. Evid. 201(b). TransUnion made no attempt to certify this docket sheet as a public record, or to offer any witness regarding its authenticity. *See* Fed. R. Evid. 902(4). Nor did TransUnion attempt to authenticate any underlying documents

to which the docket refers. Absent this evidentiary grounding, the Court will deny the Motion Requesting Judicial Notice as it pertains to Exhibit H.[13]

III. Analysis: Motion to Dismiss

TransUnion files the Motion to Dismiss under two theories: (1) that the class certification should be struck for failure to state a claim; and, (2) that, given the recent Supreme Court of the United States decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016), Clark and the proposed class lack standing to bring this lawsuit. For the reasons that follow, the Court will deny TransUnion's Motion to Dismiss.

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[13] Based on inferences drawn from proposed Exhibit H, the parties expend significant resources prematurely briefing the merits of this action. TransUnion uses the inadmissible Exhibit H to "show" that the Henrico court TransUnion identified as a "source" *still* reports an extant debt, meaning that "to the extent . . . subsequent credit reporting fails to tie a subsequent Circuit Court dismissal to the original General District Court judgment, the fault lies entirely with the court itself, or perhaps with [Clark's] counsel for failing to follow through and make sure the General District Court clerk updated its records properly." (Def.'s Mem. Supp. Mot. Dismiss 6–7, ECF No. 53.) LexisNexis, TransUnion contends, does not qualify as a "source" of the information, thereby depriving Clark of standing on Count I. In response, Clark proffers inadmissible documents from the Circuit Court for the County of Henrico to support a factual contention that, on appeal, the debt had been erased. Clark contends that TransUnion's failure to identify LexisNexis as that source prevented her from taking additional steps to correct her consumer file.

The Court declines to address these arguments at this time. The parties disagree about what could be material facts and do so citing inadmissible documents. Moreover, "[t]he question whether Plaintiffs have a cause of action is a merits issue that is 'analytically distinct from the question whether a federal court has subject-matter jurisdiction.'" *Galaria v. Nationwide Mut. Ins. Co.*, No. 15-3386, 2016 WL 4728027, at *5 (6th Cir. Sept. 12, 2016) (quoting *Roberts v. Hamer*, 655 F.3d 578, 580 (6th Cir. 2011)) (addressing appeal of standing issue in post-*Spokeo* FCRA case); *see also Patel v. Trans Union, LLC*, No. 14cv00522-LB, 2016 WL 6143191, at *7 (N.D. Cal. Oct. 21, 2016) ("Whether the plaintiffs can prove liability is one question; whether they are claiming a sufficient Article III injury is another. *Spokeo* does not turn every Rule 23 issue into a standing issue; put differently, *Spokeo* does not infuse Article III considerations throughout Rule 23.").

A. TransUnion's Motion to Strike Class Allegations Will be Denied Without Prejudice

One theory of TransUnion's Motion to Dismiss relies on Federal Rule of Civil Procedure 12(f) and asks that the Court strike Clark's class allegations. TransUnion's arguments take the form of a challenge to class certification. Clark's newly ripe Motion for Class Certification, (ECF No. 66), also remains pending before the Court. A determination about class certification will be more appropriately made on the more complete record that the parties' briefing on the Motion for Class Certification provides. The Court will deny, without prejudice, the Motion to Dismiss to the extent it seeks to strike Clark's class allegations. For the same reason, TransUnion's sweeping policy arguments regarding the propriety of consumer class actions are of no moment.

B. TransUnion's Motion to Dismiss for Lack of Standing Will be Denied

In *Spokeo,* the Supreme Court discussed the manner in which a plaintiff must allege "injury in fact" in order to establish standing for what courts call a "statutory violation" resulting in an "informational injury." In light of *Spokeo*, TransUnion moves to dismiss Count I pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because Clark does not have standing under Article III of the Constitution of the United States.[14] TransUnion

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[14] Article III provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

specifically contends that Count I's allegations fail to set forth any "concrete" injury in fact caused by the alleged statutory violation. Clark contests that assertion, arguing that, even after *Spokeo*, an "informational injury" may be both particularized and concrete.

The Court offers background regarding Article III standing and what could constitute an injury in fact under *Spokeo* to explain why it will deny the Motion to Dismiss.

1. The Three-Part Test Used to Evaluate Article III Standing

Federal district courts are courts of limited subject matter jurisdiction. *United States ex rel. Vuyvuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009) (citing *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005)). This Court must, as a result, determine whether it has jurisdiction over the claims at issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'") (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation . . . ." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing Fed. R. Civ. P. 12(b)(1)).

Article III, Section 2, clause 1 of the Constitution limits federal court jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. As the Supreme Court has explained, an "essential and unchanging part of the case-or-controversy requirement" is that a plaintiff must establish Article III standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Spokeo*, the Supreme Court reiterated that, in order to establish standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged

conduct of the defendant;[15] and[,] (3) that is likely to be redressed by a favorable judicial decision.[16]" 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

As the party invoking federal jurisdiction, Clark bears the burden of properly alleging standing. *Lujan*, 504 U.S. at 560; *see also Balzer & Assoc., Inc. v. Union Bank & Trust*, 3:09cv273, 2009 WL 1675707, at *2 (E.D. Va. June 15, 2009) ("On a motion to dismiss pursuant to Rule 12(b)(1), the party asserting jurisdiction has the burden of proving subject matter jurisdiction." (citing *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 764, 768 (4th Cir. 1991)). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

The parties here dispute only whether, post-*Spokeo*, Clark and the class she seeks to represent allege an injury in fact. This Court, then, must determine to what extent *Spokeo* redefined rather than refined the injury-in-fact analysis, and whether any change *Spokeo* announced prevents this Court from concluding that standing exists for plaintiffs to pursue their claim.

2. Standard to Demonstrate an Injury in Fact Post-*Spokeo*

TransUnion and Clark present conflicting portraits of the effect *Spokeo* had on the requirements to allege an injury in fact. TransUnion contends that, because *Spokeo* emphasized

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[15] To show a causal connection, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

[16] A party may establish the third element of standing by showing "that the injury will be [likely] 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). A plaintiff cannot have standing where redressability of an injury is merely "speculative." *Id.*

the need to establish that an injury is concrete, and not just particularized, "*Spokeo* constitutes a substantial change in the law." (Def.'s Mem. Supp. Mot. Dismiss 10 (citing cases).) Clark, on the other hand, argues that, "*Spokeo* did not change the basic requirements of standing," (Pl.'s Opp'n to Mot. Dismiss 5), noting that "[b]oth commentators and courts have recognized that none of the principles set forth in *Spokeo* are new," (*id.* at 5 n.3 (citing cases and secondary sources)).

In *Spokeo*, the plaintiff, Thomas Robins, brought suit under the FCRA against Spokeo, a company that operates a people search engine. 136 S. Ct. at 1544, 1554. Robins invoked 1681(e), alleging that Spokeo failed to "follow reasonable procedures to assure maximum accuracy of consumer reports" when, while he was out of work, it incorrectly profiled his age, marital status, education degree, and employment status. 136 S. Ct. at 1554. While ruling, the Supreme Court confirmed that, in order to establish an injury in fact, a plaintiff must demonstrate that he or she suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). The Supreme Court found that the United States Court of Appeals for the Ninth Circuit improperly "elided" the concreteness requirement. 136 S. Ct. at 1548. Because the Ninth Circuit addressed only the "particularization" aspect of the test, the Supreme Court remanded the case for further proceedings. *Id.* at 1550. In so finding, the *Spokeo* court defined both terms with specificity.

First, for an injury to be "particularized," the Court found that it "'must affect the plaintiff in a personal and individual way.'" *Spokeo*, 136 S.Ct. at 1548 (citing *Lujan*, 504 U.S. at 560 n.1). Thus, an "undifferentiated, generalized grievance" that all citizens share would not qualify as particularized. *Lance v. Coffman*, 549 U.S. 437, 442 (2007). "[T]he fact that an injury

may be suffered by a large number of people," however, "does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo*, 136 S. Ct. at 1548 n.7. The proper inquiry is whether "each individual suffers a particularized harm." *Id.*

Second, the *Spokeo* Court stated that for an injury to be "concrete," it must be "de facto," meaning that it must be "real," and not "abstract." *Spokeo*, 136 S. Ct. at 1548. That said, an injury need not be "tangible" in order to be "concrete." *Id.* at 1549. An intangible injury may constitute injury in fact. *Id.* In evaluating whether an intangible injury satisfies the "concreteness" requirement, the Supreme Court reiterated two important considerations: (1) history, which may reveal "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts"; and, (2) the judgment of Congress, which "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

With respect to this congressionally-defined, or statutory, standing, the *Spokeo* Court explained: "Article III standing requires a concrete injury even in the context of a statutory violation."[17] *Id.* Thus, a plaintiff "could not, for example, allege a bare procedural violation,

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[17] *Spokeo* favorably discussed several cases that upheld congressional power to create a legally cognizable right to specific information, the deprivation of which would constitute a concrete injury sufficient to satisfy Article III. Many courts describe this statutory standing as flowing from an "informational injury." For instance, the Supreme Court explained in *Akins*:

> The "injury in fact" that respondents have suffered consists of their inability to obtain information—[including donor lists and campaign-related contributions and expenditures]. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office . . . . Respondents' injury consequently seems concrete and particular. *Indeed, this Court has previously held that a plaintiff*

divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing.")). Regarding the FCRA, the Supreme Court noted that "not all inaccuracies cause harm or present any risk of harm." *Id.* at 1550. By way of example, the Supreme Court suggested that it would be "difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.* at 1550.

The Court also observed, however, that in cases where "harms may be difficult to prove or measure[,]" "the violation of a procedural right granted by statute can be sufficient . . . [and] a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Id.* at 1549 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989)) (emphasis in original).

> *suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.*

524 U.S. at 21 (citing *Public Citizen*, 491 U.S. at 449) (emphasis added). In *Public Citizen*, relied on by *Akins*, the Supreme Court held that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitute[d] a sufficiently distinct injury to provide standing to sue." 491 U.S. at 449.

Other pre-*Spokeo* Supreme Court cases confirm that the violation of a statutorily-prescribed procedural right can constitute injury in fact in some circumstances. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982) (finding that housing-discrimination tester had standing to bring claims under the Fair Housing Act based on the "alleged injury to her statutorily created right to truthful housing information," even though the tester "may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home"); *see also Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014) ("The Supreme Court consistently has held that a plaintiff suffers an Article III injury when he is denied information that must be disclosed pursuant to a statute, notwithstanding '[t]he fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure.'" (quoting *Public Citizen*, 491 U.S. at 449)).

3. Post-*Spokeo*, Clark Retains Standing to Pursue Her Claim Under 15 U.S.C. § 1681g(a)(2)

The Court must determine whether, by alleging a violation of 15 U.S.C. § 1681g(a)(2), Clark asserts the "invasion of a legally protected interest' that is 'concrete and particularized.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). As explained below, this Court concludes that Clark's claims satisfy *Spokeo*'s refined injury-in-fact requirement because they are both concrete and particularized. In so finding, the Court relies on the clear intent of Congress and on several well-reasoned cases that have applied *Spokeo* in the FCRA context.

Since the May 2016 Supreme Court decision, many courts have confirmed that "the proposition that '[t]he . . . injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing[,]' survives *Spokeo* subject to qualification, depending on the facts of each case and [other] considerations . . ., but nevertheless intact." *Thomas v. FTS USA, LLC*, No. 3:13cv825, 2016 WL 3653878, at *6 (E.D. Va. June 30, 2016) (evaluating a 15 U.S.C. § 1681b(2) employment claim) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). In order to evaluate standing based on "concrete" and "particularized" injury, this Court must "look to the common law and to the judgment of Congress, as reflected in the FCRA, to determine whether the violations of that statute alleged by [Clark] constitute concrete injuries that satisfy the case or controversy requirement." *Thomas*, 2016 WL 3653878, at *6. That analysis follows.

a. The Purpose of the FCRA

A central purpose of the FCRA is "to ensure 'fair and accurate credit reporting.'" *Spokeo*, 136 S. Ct. at 1545 (quoting 15 U.S.C. § 1681(a)(1)). Through the FCRA, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550. In this district, the *Thomas* court already has

correctly explained that, "Congress intended that the FCRA be construed to promote the credit industry's responsible dissemination of accurate and relevant information and to maintain the confidentiality of consumer reports." *Thomas*, 2016 WL 3653878, at *7–8.

Congress also "emphasized that 'the consumer has a *right . . . to correct* any erroneous information in his credit file." *Id.* (citing S. Rep. No. 517, 91st Cong., 1st Sess. 2 at 2). As a result, Congress sought "to 'establish [ ] the *right of a consumer to be informed* of investigations into his [or her] personal life.'" *Id.* (citing S. Rep. No. 517, 91st Cong., 1st Sess. 2 at 1). The FCRA's disclosure provisions, including § 1681g(a), promote consumer oversight of compliance with the FCRA by informing consumers of the source of the reported information, thereby advancing the broader purposes of "fair and accurate credit reporting." *See Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007) (stating that the primary purpose of disclosure requirement is to "allow consumers to identify inaccurate information in their credit files and correct this information"); *Hauser v. Equifax, Inc.*, 602 F.2d 811, 817 (8th Cir. 1979) ("The purpose of the Act's disclosure requirement [in 15 U.S.C. § 1681g(a)] is to provide the consumer with an opportunity to dispute the accuracy of information in his file.").

b. Clark Alleges an Injury in Fact Under § 1681g(a)(2)

This Court follows several others in concluding that the FCRA permits a plaintiff like Clark to establish Article III standing when alleging a non-disclosure under § 1681g(a)(2) because that failure to reveal source information reflects the type of harm, or injury in fact, that *Spokeo* recognizes as "concrete" and "particularized." When looking at Clark's Count I, the Court finds persuasive the reasoning of several courts that recognize the existence of an "informational injury," especially those that have decided that FCRA "disclosure of source" claims have alleged an injury in fact.

Despite TransUnion's depiction of aspects of the decision as "erroneous" and improperly analyzed, (Def.'s Mem. Supp. Mot. Dismiss 13 n.6), this Court finds *Thomas*, a FCRA employment-related § 1681b(b)(2) and (b)(3) decision from this district, both on point and persuasive.[18] *Thomas* correctly acknowledged that Congress enacted several substantive, and not merely procedural or technical, rights to protect specific information in the FCRA. Analyzing § 1681b(b)(2) and an unauthorized disclosure of personal information, the *Thomas* court aptly quoted *Spokeo*'s reliance on *Akins* and *Public Citizen* when stating that "the violation of a procedural right granted by statute can be sufficient in some circumstances to establish an injury in fact." 2016 WL 3653878, at *11. "In other words," the *Thomas* court explained, "a plaintiff in such a case need not allege any additional harm [e.g., actual damages] beyond the one Congress has identified."[19] *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549) (emphasis in original).

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[18] In *Thomas*, a business that purchased the company for which Thomas worked required that he undergo a background check in order to continue employment. The initial consumer report about Thomas was inaccurate and not fully disclosed to him. The *Thomas* court analyzed, *inter alia*, post-*Spokeo* standing, finding that Thomas alleged a concrete and particular informational injury.

[19] *Thomas* quoted one commentator's skilled summary of the need to confer standing in circumstances where the violation of a statute itself constitutes the harm suffered:

> In these situations, legal rights reflect social judgments about where harm has and has not occurred. Often, these kinds of injuries exist where we think the harm is in the act itself. The public disclosure of private information or defamatory falsehoods does not need downstream consequences to be hurtful; neither does differential treatment on the basis of race. Procedural wrongs are an oft-seen category where the distinction between the legal violation and the injury may be so thin as to be essentially nonexistent. Proving the injury in many of these cases just entails proving the violation itself—that certain words were spoken, certain information disclosed, or certain procedures flouted. As a result, requiring some sort of additional indicia of harm beyond the violation itself ignores the nature of the injury and the reason for the remedy.

Thomas v. FTS USA, LLC, No. 3:13cv825, 2016 WL 3653878, at *6 (E.D. Va. June 30, 2016) (quoting Daniel Townsend, *Who Should Define Injuries For Article III Standing?*, 68 Stan L. Rev. Online 76, 80–81 (2015)).

Again relying directly on *Spokeo*, the *Thomas* court also confirmed that even a *risk* of real harm might satisfy the concreteness requirement. *Id.* (citing *Spokeo*, 136 S. Ct. at 1549) (emphasis added). This Court agrees with *Thomas* that a consumer need not necessarily prove any more harm than that suffered as a result of the deprivation of FCRA information to which he or she is entitled. The purpose of the FCRA as articulated in legislative history supports this point.

Indeed, given congressional intent to allow consumers to correct inaccurate information reported by a consumer reporting agency, nearly every case addressing a Section 1681(g) "disclosure of source" claim has so found. The FCRA's disclosure requirements were generally "'designed to decrease [the] risk' that a credit-reporting agency will 'disseminat[e] . . . false information.'" *Patel v. TransUnion, LLC*, No. 14cv00522-LB, 2016 WL 6143191, at *4 (N.D. Cal. Oct. 21, 2016) (citation omitted);[20] *see also Thomas*, 2016 WL 3653878, at *8–9. Section

[20] *Patel* held that, even post-*Spokeo*, a consumer has standing to challenge non-disclosures of information under § 1681g(a)(1), which requires that consumer reporting agencies disclose "[a]ll information in the consumer's file at the time of the request." 2016 WL 6143191, at *4. In *Patel*, the plaintiff brought suit under the FCRA because his consumer report wrongly identified him as a "possible" terrorist and reported an incorrect criminal record. *Id.* at *1. When Patel sought a copy, he received an incomplete version of the offending report. The *Patel* court determined that plaintiff had standing to bring a FCRA disclosure claim because the ability for a consumer to identify, through disclosure, source information "seems exactly a device 'designed to decease [the] risk' that a credit-reporting agency will "disseminat[e]. . . false information. *Id.* at *4 (quoting § 1681(g)(a)(1)); *see also Ramirez v. Trans Union, LLC*, No. 12cv00632-JSC, 2016 WL 6070490, at *1 (N.D. Cal. Oct. 17, 2016) ("The circumstances of the nondisclosure violations alleged here created a material risk of real harm and thus constitute an injury sufficient for constitutional standing purposes."); *Larson v. Trans Union, LLC*, No. 12cv05726-WHO, 2016 WL 4367253 (N.D. Cal. Aug. 11, 2016) (holding that plaintiff had standing where he "accuse[d] Trans Union of willfully violating 15 U.S.C. § 1681g(a) by providing him with a credit report with allegedly misleading information"; also explaining that plaintiff had standing because his § 1681g "claim is based on the sort of 'informational' injury that the *Spokeo* Court implicitly recognized in citing *Public Citizen* and *Akins*").

TransUnion suggests that, given the nature of the inaccurate report (*i.e.*, wrongly indicating potential terrorism ties), *Patel* and similar California federal cases can be distinguished factually. Mere factual differences, however, do not end the analysis. The finding of injury in fact in these decisions rest in large part on the consumer's inability to monitor his or her file for falsity when not provided the relevant information. *See, e.g., Patel*, 2016 WL

1681g(a)(2), which requires a consumer reporting agency to disclose all information in the consumer file, enables the consumer to effectively investigate his or her file to look for inaccurate information.

A credit reporting agency's failure to provide a consumer with accurate information regarding the source of the information in the consumer's credit file precludes the consumer from swiftly acting to correct such errors. Because Congress sought to grant consumers the ability to correct errors, the United States District Court for the Eastern District of Pennsylvania, when denying a motion to dismiss for lack of standing under §§ 1681g(a)(2) and 1681g(c)(2), remarked that "the inaccurate or incomplete disclosure to a consumer of the source of a [consumer reporting agency's] reported information has been elevated by Congress to the status of a legally cognizable injury." *Stokes v. Realpage, Inc.*, No. CV 15-1520, 2016 WL 6095810, at *7 (E.D. Pa. Oct. 19, 2016).[21] In *Stokes*, the credit reporting agency disclosed an incorrect criminal record to a potential landlord at a senior housing facility. *Id.* at *1. After Stokes

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6143191, at *4 ("[A] consumer cannot monitor [his or] her file for falsity if [he or] she is not given the relevant information. That impediment, that non-disclosure, is thus a real injury. At the very least, preventing a consumer from monitoring [his or] her file presents a 'risk of real harm' of exactly the type that [the] FCRA seeks to prevent (*i.e.*, the dissemination of incorrect information); and this risk can itself 'satisfy the requirement of concreteness.'").

[21] Other federal courts, including at least one court of appeals, have rejected challenges to standing in cases involving claims under the FCRA, even after *Spokeo*. *See, e.g., Galaria v. Nationwide Mut. Ins. Co.*, No. 15-3386, 2016 WL 4728027 (6th Cir. Sept. 12, 2016) (remanding case because the district court failed to consider standing issue under the FCRA apart from the merits); *Hawkins v. S2Verify*, No. C 15-03502 WHA, 2016 WL 3999458, at *5–6 (N.D. Cal. July 26, 2016) (finding standing where defendant reporting agency disclosed to a potential employer outdated criminal record information because it was "in no way" akin to other merely procedural violations). *But see Smith v. Ohio State Univ.*, No. 2:15cv3030, 2016 WL 3182675, at *4 (S.D. Ohio June 8, 2016) (without applying guidance from *Spokeo* or addressing congressional power to create an informational injury, remanding case to the Ohio Court of Claims because the plaintiffs "admitted that they did not suffer a concrete consequential damage as a result of [the defendant's] alleged breach of the FCRA").

explained to the credit reporting agency that she believed the consumer report improperly disclosed expunged information, the credit reporting agency provided Stokes with a copy that omitted the original inaccurate information. *Id.* Relying on the original report, however, the potential landlord subsequently denied Stokes's application. *Id.* When Stokes applied to live at a different senior housing facility, the credit reporting agency again disclosed a consumer report with expunged information, and Stokes's application was denied. *Id.* at *2. For the second time, Stokes requested a copy of her consumer report, and again, the consumer report reflected no criminal history. *Id.*

Eventually, Stokes obtained "a 'full file disclosure,' which showed that [the credit reporting agency] had reported the expunged cases to the two prospective landlords." *Id.* Even the "full file disclosure," however, "failed to disclose all of the information [the credit reporting agency] maintain[ed] about Stokes, including the *source of the criminal records* it previously reported to [the prospective landlords]." *Id.* (emphasis added). Ultimately, "Stokes had no opportunity to correct [the credit reporting agency's] report before [the prospective landlords] made their decisions on the rental applications." *Id.* The *Stokes* court explained that "[w]ithout accurate source information, a consumer would be left confused as to where to go to correct erroneous data contained in a report and be unable to know whether any erroneous data would find its way into future consumer reports." *Id.*

The omission of LexisNexis from TransUnion's disclosure to Clark does not equate to a typographical error in a zip code. While the inaccuracy does not label Clark a potential terrorist as has occurred in cases this Court cites, the omission of LexisNexis as a source deprived Clark of her congressionally-mandated right to correct the mistake with LexisNexis, or with anyone

else to whom LexisNexis also may have disclosed the inaccurate information.[22] Moreover, the failure to include LexisNexis in the report creates a material risk that LexisNexis could continue to report inaccurate information to others in the future. *See Thomas,* 2016 WL 365878, at *11.

TransUnion's argument that it properly disclosed the "ultimate sources" of information, but not the supposedly less pertinent LexisNexis disclosure as to how the data was collected, or by whom, does not persuade. *See Dreher v. Experian*, 71 F. Supp. 3d 572, 580 (E.D. Va. 2014) (Gibney, J.) ("Although gifted legal minds can create myriad interpretations for how many sources or what kinds of sources should be included in the disclosure, the term 'sources' clearly includes, at the very least, the entity that gave the information directly to the consumer reporting agency.").[23]

Clark's allegations reflect "a substantive *de facto* violation involving undisclosed and inaccurate information of the kind Congress required be disclosed to protect consumers, namely the source of the consumer information that the [consumer reporting agency] reported." *Stokes*, 2016 WL 6095810, at *7. TransUnion's attempt to suggest otherwise relies on unpersuasive characterizations of the extant post-*Spokeo* FCRA cases, or upon inapposite non-FCRA

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[22] One court has noted, when finding standing, that the inverse—providing too much information via unclear or prolix FCRA disclosures—may "actually make people less knowledgeable than they were before" due to phenomena such as "information overload." *Thomas*, 2016 WL 3653878 at *10 n.6 (quoting Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. Pa. L. Rev. 613, 627–28 (1999) (footnotes omitted).

[23] TransUnion's secondary attempt to sweep aside this claim by citing inadmissible evidence that the court record at issue continues to (improperly) shows a debt also founders. Any contention relying on a current court record to explain an inaccurate report about the same court record—perhaps never previously reviewed—would require awkward logical leaps at best.

decisions.[24] As such, Clark properly asserts an injury in fact by claiming that she was entitled to know the source of her consumer information, but that she received a response listing only court judgments and that TransUnion omitted the third-party vendor LexisNexis from which it directly received the information.[25] *Spokeo* refined, but did not redefine, the injury-in-fact analysis for standing. *Spokeo* admonished courts to assess both the "concrete" and the "particular" aspects of injury. Clark's Count I satisfies the injury-in-fact requirement of Article III. TransUnion's Motion to Dismiss for lack of subject matter jurisdiction will be denied.

IV. Analysis: Motions as to Scheduling and Discovery

The pendency of two other motions has caused the parties to file several motions seeking scheduling relief or oral hearing: (1) Clark's Motion to Compel, (ECF No. 65); and, (2) Clark's Motion for Class Certification, (ECF No. 67).

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[24] Despite the great weight of authority recognizing standing to bring claims under the FCRA, TransUnion relies on several non-FCRA cases to suggest that Clark mischaracterizes the scope of *Spokeo*. Those cases are readily distinguishable. *See Jamison v. Bank of Am., N.A.*, No. 2:16cv00422-KJM-AC, 2016 WL 3653456, at *4 (E.D. Cal. July 7, 2016) (explaining that a violation does not cause concrete harm "if the lender provides the omitted information through other means"); *Sartin v. EKF Diagnostics, Inc.*, No. CV 16-1816, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016) (dismissing a Telephone Consumer Protection Act case without prejudice where plaintiff only made a "bare assurance that an unspecified injury exists"); *Wall v. Rental*, No. 15-13254, 2016 WL 3418539, at *3 (E.D. Mich. June 22, 2016) (dismissing a violation of a Michigan statute regulating security deposits because "the statute does not give a tenant a right to damages for a violation"); *Gubala v. Time Warner Cable, Inc.*, No. 15cv1078-PP, 2016 WL 3390415, at *4 (E.D. Wis. June 17, 2016) (finding that no concrete harm existed under the Cable Communications Policy Act where a defendant retained information but did not publish or make that information available to a third party); *Khan v. Children's Nat'l Health Sys.*, No. CV TDC-15-2125, 2016 WL 2946165, at *4 (D. Md. May 19, 2016) (remanding a data breach case to state court where plaintiff's alleged harm was based on common law claims and claims brought pursuant to state consumer protection statutes).

[25] TransUnion's repeated theatrical claims that Clark suffered no "real world" impact based on this omission not only do not persuade, but risk improperly suggesting that a different legal standard exists. (Def.'s Mem. Supp. Mot. Dismiss 13, 15.) *Spokeo* contemplated and identified the existence of intangible harms, including those created when Congress defines an injury "where none existed before." *Spokeo*, 136 S. Ct. at 1549 (explaining Congress's "'power to define injuries and articulate chains of causation that will give rise to a case or controversy'" (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment))).

First, regarding the Motion to Compel, the parties initially asked the Court to hold that motion in abeyance while they attempted to resolve their discovery disputes in the absence of Court intervention. However, Clark now has filed a "Notice" asking "for the Court's prompt resolution of these discovery disputes and other relief available under Fed. R. Civ. P. 37." (Pl.'s Not. Re: Mot. Compel 1 (the "Motion to Compel Notice"), ECF No. 105.)

In response, TransUnion has filed a Motion for Extension of Time to File a Response Brief, (ECF No. 107), asking for an extension of time to file its response to the Motion to Compel Notice. TransUnion contends that Clark includes charts and arguments in the Motion to Compel Notice not submitted when Clark filed the Motion to Compel. TransUnion represents that Clark failed to comply with this Court's Initial Pretrial Order, which requires that discovery disputes be submitted jointly by parties, in chart form. TransUnion states that Clark would not send it the Microsoft Word version of the document, thereby preventing TransUnion from inserting its arguments into the document, as the Court requires. As a result of this logistical delay, TransUnion seeks an extension to file a response until December 9, 2016. Clark does not consent to TransUnion's modest request.

In the interest of justice and for good cause shown, the Court will conditionally grant the Motion for Extension of Time to File a Response Brief to the extent any response would comply with this Court's June 29, 2016 Initial Pretrial Order. However, the Court admonishes both parties to reexamine the June 29, 2016 Initial Pretrial Order and its directives regarding discovery disputes to ensure that any disputes now pending stand properly before this Court. The Court will not consider any improperly submitted discovery disputes.

Second, regarding Clark's Motion for Class Certification, the parties jointly seek an enlargement of time because additional discovery may become necessary after the Court decides

that motion. (ECF No. 103.) While the Court generally disfavors continuances, they may be granted for good cause. *See* Fed. R. Civ. P. 16(b)(4);[26] E.D. Va. Loc. Civ. R. 7(G).[27]

In view of this case's procedural posture, in the interest of justice, and for good cause shown, the Court will continue generally the trial date, thereby suspending all existing deadlines. The Court must address any properly submitted motion to compel before discerning what effect, if any, the outcome might have on any discovery deadlines. As such, all motions for enlargement of time will be denied as moot.

The parties will be directed to contact the Court no later than three business days from the date of this Memorandum Opinion and Order to establish a hearing to resolve the discovery issues set forth in the Motion to Compel. After that determination, a new trial date and appropriate pre-trial deadlines will issue.

V. Conclusion

For the foregoing reasons, the Court grants, denies, and otherwise addresses the pending motions as described above.

An appropriate Order shall issue.

/s/
M. Hannah Lauck
United States District Judge

Richmond, Virginia
Date 12/9/16

[26] Federal Rule of Civil Procedure 16(b)(4) provides: "**(4) Modifying a Schedule.** A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).

[27] United States District Court for the Eastern District of Virginia Local Civil Rule 7(G) provides: "**(G) Continuances**: Motions for continuances of a trial or hearing date shall not be granted by the mere agreement of counsel. No continuance will be granted other than for good cause and upon such terms as the Court may impose." E.D. Va. Loc. Civ. R. 7(G).

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CAROLYN CLARK,
on behalf of herself and all similarly situated individuals,

Plaintiffs,

v. **Civil Action No. 3:15cv391**

TRANS UNION, LLC,

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on the Motion for Class Certification filed by Plaintiff Carolyn Clark, on behalf of herself and all similarly situated individuals. (ECF No. 66.) Defendant Trans Union, LLC ("TransUnion") has responded to the Motion for Class Certification, (ECF No. 82), and Clark has replied, (ECF No. 104). The Court heard oral argument on February 23, 2017. Accordingly, the matter is ripe for disposition. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1331.[1] For the reasons that follow, the Court will grant the Motion for Class Certification.

[1] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The First Amended Class Complaint alleges violations of the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. §§ 1681 *et seq.*

I. Procedural and Factual Background[2]

A. Procedural Background

Clark, the named plaintiff, asserts six counts against TransUnion: one proposed class claim and five individual claims. Count I, the "Disclosure of Sources Claim" or the "Class Claim" alleges a putative class action arising out of TransUnion's violations of 15 U.S.C. § 1681g(a)(2)[3] of the FCRA, which requires that consumer reporting agencies "clearly and accurately" disclose to consumers "[t]he sources of information" in their credit files. 15 U.S.C. § 1681g(a)(2). Clark alleges that TransUnion's violations of § 1681g(a)(2) entitle each consumer who received his or her credit file with incorrect source information to statutory damages under § 1681n(a) between $100 and $1,000.[4]

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[2] The Court assumes familiarity with the facts and procedural background of this case as set forth in its December 9, 2016 Memorandum Opinion. *Clark v. Trans Union, LLC*, No. 3:15cv391, 2016 WL 7197391 (E.D. Va. Dec. 9, 2016) (the "December 2016 Opinion").

[3] Section 1681g(a)(2) provides in full:

> **(a) Information on file; sources; report recipients**
>
> Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:
>
> . . . .
>
> (2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: ***Provided***, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

15 U.S.C. § 1681g(a)(2).

[4] Section 1681n(a) provides that "[a]ny person who willfully fails to comply with" the FCRA "is liable to that consumer" for "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000" and "such amount of punitive damages as the court may allow." 15 U.S.C. § 1681n(a).

Following the Supreme Court of the United States' opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016), TransUnion moved to dismiss this case on the grounds that Clark and the proposed class lack standing. In its December 2016 Opinion, the Court denied TransUnion's motion, explicitly rejecting TransUnion's contention that each class member would need to prove individualized injury in fact based on harm suffered beyond the violation of § 1681g(a)(2) itself. *Clark*, 2016 WL 7197391, at *11; *see also Thomas v. FTS USA, LLC*, No. 3:13cv825, 2016 WL 3653878 (E.D. Va. June 30, 2016). The Court explained:

> *Thomas* correctly acknowledged that Congress enacted several substantive, and not merely procedural or technical, rights to protect specific information in the FCRA. Analyzing § 1681b(b)(2) and an unauthorized disclosure of personal information, the *Thomas* court aptly quoted *Spokeo*'s reliance on *Akins* and *Public Citizen* when stating that "the violation of a procedural right granted by statute can be sufficient in some circumstances to establish an injury in fact." 2016 WL 3653878, at *11. "In other words," the *Thomas* court explained, "a plaintiff in such a case need not allege any additional harm [*e.g.*, actual damages] beyond the one Congress has identified." *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549) (emphasis in original). Again relying directly on *Spokeo*, the *Thomas* court also confirmed that even a *risk* of real harm might satisfy the concreteness requirement. *Id.* (citing *Spokeo*, 136 S. Ct. at 1549) (emphasis added). This Court agrees with *Thomas* that a consumer need not necessarily prove any more harm than that suffered as a result of the deprivation of FCRA information to which he or she is entitled. The purpose of the FCRA as articulated in legislative history supports this point.

Clark, 2016 WL 7197391, at *9. In a footnote, the Court continued: "Mere factual differences . . . do not end the analysis. The finding of injury in fact in these decisions rests in large part on the consumer's inability to monitor his or her file for falsity when not provided the relevant information." *Id.* at *10 n.20 (citing *Patel v. TransUnion, LLC*, No. 14cv00522–LB, 2016 WL 6143191, at *4 (N.D. Cal. Oct. 21, 2016) ("[A] consumer cannot monitor [his or] her file for falsity if [he or] she is not given the relevant information. That impediment, that non-disclosure, is thus a real injury. At the very least, preventing a consumer from monitoring [his or] her file presents a 'risk of real harm' of exactly the type that [the] FCRA seeks to prevent (*i.e.*, the

dissemination of incorrect information); and this risk can itself 'satisfy the requirement of concreteness.'")).

When highlighting the remedial purpose of the FCRA, the Court noted that "Congress intended that the FCRA be construed to promote the credit industry's responsible dissemination of accurate and relevant information and to maintain the confidentiality of consumer reports." *Id.* at * 8 (citing *Thomas*, 2016 WL 3653878, at *7–8). Moreover, "Congress sought 'to establish [ ] the *right of a consumer to be informed* of investigations into his [or her] personal life.'" *Id.* (citing *Thomas*, 2016 WL 3653878, at *8). With respect to disclosure provisions in particular, including § 1681g(a), the Court concluded that the FCRA "promotes consumer oversight of compliance . . . by informing consumers of the source of the reported information, thereby advancing the broader purposes of 'fair and accurate credit reporting.'" *Id.* (quoting *Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007)). Looking to these purposes of the FCRA, the Court ultimately reasoned that the "failure to reveal source information reflects the type of harm, or injury in fact, that *Spokeo* recognizes as 'concrete' and 'particularized.'" *Id.* at *9.

Despite this Court's December 2016 Opinion, TransUnion relentlessly pursues its preferred interpretation of *Spokeo*'s effect on defining a "concrete" injury. (*See, e.g.*, Opp'n Mot. Strike 10, ECF No. 117 ("*Spokeo* clarified that a plaintiff does not satisfy the 'injury-in-fact requirement by merely alleging a violation of a statutory right, but must demonstrate a concrete injury even in the context of a statutory violation." (citations omitted)).) As discussed below, to the extent TransUnion proffers more recent cases that have interpreted *Spokeo* differently, none persuade the Court to reconsider its December findings.

In re Michaels Stores, Inc.

For instance, TransUnion suggests that *In re Michaels Stores, Inc.*, No. 2:15cv2547, 2017 WL 354023 (D.N.J. Jan. 24, 2016), concluded that bare procedural violations of the FCRA do not satisfy the injury-in-fact requirement of a standing analysis. But the *Michaels Stores* decision provides no analysis on the legislative history of the FCRA, or the purpose of the statutory provision at issue. It thus ignores *Spokeo*'s requirement to consider the judgment of Congress when evaluating whether an intangible injury satisfies the "concreteness" requirement. *Spokeo*, 136 S. Ct. at 1549. *Spokeo* recognized that Congress "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* (quotation omitted). But *Michaels Stores,* without elaboration, unpersuasively dismisses *Spokeo*'s guidance in conclusory fashion. 2017 WL 354023, at *7. And *Michaels Stores* differs factually in an important way: those plaintiffs "concede[d] that they d[id] not plead any concrete harm." *Id.* at *3. Perhaps in view of this pleading error, the *Michaels Stores* court permitted plaintiffs leave to file amended complaints. *Id.* at *12.

Cruper–Weinmann v. Paris Baguette America, Inc.

Relying on *Cruper–Weinmann v. Paris Baguette America, Inc.*, No. 13 CIV. 7013, 2017 WL 398657, at *3 (S.D.N.Y. Jan. 30, 2017), TransUnion next contends that *Spokeo* created a two-part test to establish concrete injury: (1) that the case involves a specific right created by "Congress . . . to protect a concrete interest of the plaintiff"; and, (2) that "the alleged violation of [a] right presented a material risk of harm to that concrete interest." (Opp'n Mot. Strike 10.) However, TransUnion cites no Fourth Circuit cases performing such a two-step inquiry, and the Court sees none. But even assuming that *Cruper-Weinmann*'s test for informational injury was sound, Clark likely would satisfy it. This Court has recognized that Clark, and anyone not notified that LexisNexis was a source of public records information, has suffered the violation of

a right created by Congress. *See Clark*, 2016 WL 7197391, at *11. The violation of that right creates "a material risk that LexisNexis could . . . report inaccurate information to others in the future." *Id.* (emphasis added).

In Cruper-Weinmann, on the other hand, the plaintiff could not assert standing under the Fair and Accurate Credit Transactions Act (the "FACTA") because she did not suffer *a risk of harm* after a restaurant printed a receipt that displayed the expiration date of her credit card. The court explained:

> In 2007, FACTA was amended in order to provide a retrospective safe harbor to persons who had previously printed an expiration date on a receipt but otherwise complied with FACTA's requirements. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110–241, 122 Stat. 1565. That amendment contained Congress's finding that "[e]xperts in the field agree that proper truncation of the card number, by itself as required by [FACTA], regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud." § 2(a)(6).

Cruper–Weinmann, 2017 WL 398657, at *1. As such, the statutory violation in *Cruper-Weinmann*, unlike TransUnion's alleged violations of § 1681g(a)(2), resulted in no risk of harm to the plaintiff. Accordingly, even were TransUnion's standing argument before this Court properly, it likely would fail.

TransUnion also had sought to strike class certification in its Motion to Dismiss. In the December 2016 Opinion, the Court rejected that challenge as untimely because class certification would be "more appropriately [brought] on the more complete record than the parties' briefing" then provided. *Clark*, 2016 WL 7197391, at *5. Although discovery disputes continue to plague this litigation,[5] the Court now considers the Motion for Class Certification.[6]

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[5] As a result of, among other things, myriad discovery disputes, in its December 2016 Opinion, the Court continued the trial date generally and suspended all existing deadlines. The Court heard argument on the parties' discovery disputes on February 21, 2017. The Court issues its determinations regarding discovery in a separate opinion filed simultaneous to this one.

B. Factual Background

As noted in the December 2016 Opinion, although the Motion for Class Certification pertains exclusively to Clark's ability to certify the class and advance the Class Claim, Clark's five individual counts provide context to the entire action. Accordingly, the Court outlines the Class Claim, Clark's individual claims, and the facts framing all allegations below.

1. The Named Plaintiff's Individual Claims (Counts II through VI)

Clark alleges that on August 7, 2014, TransUnion provided to her a copy of her credit file that incorrectly listed two civil judgments entered against her. TransUnion listed the sources of the two judgments as "Henrico District Court" and "Virginia Federal Court," respectively. (First Am. Class Compl. ¶ 27.) Clark contends that another source of the judgments was LexisNexis, the third-party vendor that retrieved the data.

Quik Cash allegedly entered one of the judgments against Clark in November 2008 in the amount of $575, even though that judgment had been appealed and dismissed. Clark submitted multiple demand letters requesting that TransUnion correct its error. TransUnion, however, purportedly failed to conduct a "timely and reasonable reinvestigation" and continued to report the Quik Cash judgment as unpaid. (*Id.* ¶ 35.)

These events, according to Clark, give rise to five individual claims. Count II, the "Reasonable Procedure Claim," proceeds under 15 U.S.C. § 1681e(b).[7] Count III, the

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[6] Neither TransUnion nor Clark sought permission to file supplemental briefing on class certification following the December 2016 Memorandum Opinion. TransUnion also did not seek an interlocutory appeal.

[7] In Count II, Clark alleges that TransUnion failed "to establish and/or to follow reasonable procedures to assure maximum possible accuracy in the preparation of [her] credit report and credit filed it published and maintained." (First Am. Class Compl. ¶ 75.)

"Reasonable Reinvestigation Claim," invokes 15 U.S.C. § 1681i(a)(1).[8] Count Four, the "Failure to Send Furnisher all Relevant Information Claim," cites 15 U.S.C. § 1681i(a)(2).[9] Count Five, the "Failure to Review Consumer Communication Claim" relies upon 15 U.S.C. § 1681i(a)(4).[10] Finally, Count Six, the "Failure to Delete Claim," proceeds under 15 U.S.C. § 1681(a)(5).[11] For each of these five individual claims, Clark seeks actual damages, statutory damages, punitive damages, costs, and attorneys' fees under §§ 1681n and 1681o.[12]

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[8] In Count III, Clark contends that TransUnion failed to "conduct a reasonable reinvestigation to determine whether the disputed information was inaccurate and to subsequently delete the information from the file." (First Am. Class Compl. ¶ 81.)

[9] In Count IV, Clark claims that TransUnion failed to send to the furnishers all relevant information that it received in [her] dispute letter." (First Am. Class Compl. ¶ 86.)

[10] In Count V, Clark asserts that TransUnion failed to" review and consider all relevant information that it received in [Clark's] communications." (First Am. Class Compl. ¶ 91.)

[11] In Count VI, Clark alleges that TransUnion failed to "delete any information that was subject to [her] disputes that was inaccurate or could not be verified." (First Am. Class Compl. ¶ 96.)

[12] Section 1681o provides, in relevant part:

(a) In general

> Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> > (1) any actual damages sustained by the consumer as a result of the failure; and[,]
> >
> > (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681o.

2. The Class Claim (Count I)

In the Class Claim, Clark alleges that TransUnion violated § 1681g(a)(2) by failing to convey on her credit file that LexisNexis was a source of the judgment information. To advance the claims of similarly situated individuals, Clark proposes to certify a class as follows:

> All natural persons residing in the Fourth Circuit[:] (a) who requested their consumer file from Trans Union or any of its affiliated companies, subsidiaries, or any other Trans Union entity, (b) within five years preceding this filing of this action and during its pendency, and[,] (c) to whom Trans Union provided a response that did not include any reference to its public records vendor as the source of public records information within the consumer's file disclosure. Excluded from the class definition are any employees, officers, or directors of Trans Union, any attorney appearing in this case, and any judge assigned to hear this action.

(First Am. Class Compl. ¶ 62.) Clark seeks statutory and punitive damages in the amount of not less than $100 and not more than $1,000 per violation per class member, as set forth in 15 U.S.C. § 1681n(a).

II. Analysis

Clark seeks to certify a class comprised of individuals who received credit reports from TransUnion "that did not include any reference to its public records vendor as the source of public records information within the consumer's file disclosure." (First Am. Class Compl. ¶ 62.) At the heart of the Class Claim rests the straightforward allegation that TransUnion has a systemic procedure of willfully omitting its source of public records information in its consumer reports. In spite of this direct theory of liability, TransUnion opposes certification.

TransUnion's opposition to the Motion for Class Certification repeatedly highlights the factual differences regarding the purported inaccuracies on the class members' consumer reports. TransUnion proffers this argument in several ways, ultimately contending that these disparities necessarily mean that the class members suffered different injuries. According to TransUnion, such dissimilarities cannot survive the rigorous analysis this Court must undertake before

certifying a class under Federal Rule of Civil Procedure 23.[13] In so arguing, TransUnion either continues to dispute this Court's ruling on standing[14] or it erroneously adds an element of accuracy to § 1681g(a)(2)'s plain language. Both of TransUnion's arguments founder. The Class Claim seeks redress not for *inaccurate* public records information, but for TransUnion's failure to disclose *the sources* of public records information on the class members' consumer reports—irrespective of the accuracy of the information those sources provide.

For the reasons stated below, Clark readily meets the Rule 23 requirements. The Court will certify the class.

A. Standard for Class Certification

Clark, as plaintiff, bears the burden of proving all requirements of Rule 23. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). First, her proposed class must satisfy the four requirements of Federal Rule of Civil Procedure 23(a).[15] Those requirements are that: (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 class representative's claims or defenses are typical of those of the class; and, (4) the class representative will fairly and adequately represent the interests of the class. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998).

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[13] Rule 23 provides the requirements a plaintiff must satisfy in order to certify a class under the Federal Rules of Civil Procedure.

[14] Without reference to this Court's decision or the decisions of its sister courts, TransUnion continued to advance its theory on standing at oral argument and in the briefing discussed above. *See* pp. 5–6 *supra*. At oral argument, TransUnion suggested that its standing challenge at the class certification stage differs from that raised in its Motion to Dismiss because the Court no longer must accept Clark's allegations as true. The distinction raised by TransUnion ignores that the December 2016 Opinion decided a *legal* question of what constitutes an injury in fact.

[15] Rule 23(a) lists four requirements that a class representative must meet in order to sue on behalf of a class. Fed. R. Civ. P. 23(a).

Second, Clark's proposed class must align with at least one of the types of class actions delineated in Federal Rule of Civil Procedure 23(b),[16] and meet the corresponding prerequisites for certification. Here, Clark moves for certification under Rule 23(b)(3). A court may certify a class under Rule 23(b)(3) when it finds that: (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and, (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

As the United States Court of Appeals for the Fourth Circuit has explained, courts need not "accept plaintiffs' pleadings when assessing whether a class should be certified." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). Rather, "the district court must take a 'close look' at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (quoting *Gariety*, 368 F.3d at 365). "Such findings can be necessary even if the issues tend to overlap into the merits of the underlying case," but "[t]he likelihood of the plaintiffs' success on the merits . . . is not relevant to the issue of whether certification is proper." *Id.* (internal citations omitted).

The Supreme Court recently elaborated on a district court's ability to make factual determinations at the class certification stage in *Wal-Mart Stores, Inc. v. Dukes*, 541 U.S. 338 (2011). In *Dukes*, the Supreme Court explained:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, *etc.* We recognized in *Falcon* that

[16] Rule 23(b) outlines three types of class actions, including the type proposed here: one involving "questions of law or fact common to class members [that] predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

> "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

541 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982) (emphasis in original)). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."[17] *Id.* at 351.

B. Clark Satisfies the Requirements of Rule 23

As delineated above, Clark must satisfy the numerous requirements of Rule 23 before this Court may certify the proposed class. Upon review, the Court determines that Clark has done so. The Court will address the requirements of Rule 23(a) and Rule 23(b) seriatim.

1. Clark Satisfies the Four Requirements of Rule 23(a)

Clark's class satisfies the four requirements of Rule 23(a): (1) numerosity of the class makes joinder of all members impracticable; (2) there are questions of law or fact common to the class; (3) Clark's claims typify those of the class; and, (4) Clark will fairly and adequately represent the interests of the class. *See Broussard*, 155 F.3d at 337.

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[17] After *Dukes*, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court expounded upon the extent to which a court may address merits issues at the class certification stage. In *Amgen*, the Court explained that, "[a]lthough we have cautioned that a court's class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." 133 S. Ct. at 1194. The *Amgen* Court continued: "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1194–95 (internal citations omitted). In *Comcast*, the Supreme Court elucidated that the "rigorous analysis" required for class certification also reaches damages and causation. 133 S. Ct. at 1434–35.

a. Clark's Class is So Numerous That Joinder of All Members is Impracticable

Appropriately, TransUnion does not oppose Clark's assertion that numerosity makes joinder of all class members impracticable. Clark easily satisfies this requirement. Although no there is no minimum number of potential class members needed to fulfill the numerosity requirement, *see Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984), joinder usually becomes impracticable where the class exceeds 40 members, *see Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08cv00579, 2010 WL 3743642, at *3 (W.D. Va. Sept. 23, 2010).[18]

Here, Clark suggests that "the putative class will number in the hundreds of thousands if not in the millions." (Mem. Supp. Mot. Class Certification 9, ECF No. 67.) Clark demonstrates that, at a minimum, the class size exceeds 4,227 members. That figure reflects the number of class members who could have received their TransUnion consumer file via credit monitoring in the wake of the *Soutter v. Trans Union LLC* settlement.[19]

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[18] In *Kennedy*, the court explained that, although courts are reluctant to certify classes with fewer than 25 members, they are "much more willing to certify a class if it has more than 40 members." *Kennedy*, 2010 WL 3743642, at *3 (citing cases).

[19] In *Soutter v. Trans Union, LLC*, the class representative brought suit against TransUnion asserting a class claim pursuant to 15 U.S.C. § 1681e(b), which requires that "consumer reporting agenc[ies] . . . follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual[s] about whom the report[s] relate[]." Soutter sought to certify a class of individuals who received a consumer report from TransUnion reporting a judgment that had been set aside, vacated, or dismissed with prejudice. The parties ultimately agreed to settle the class claim. In a joint motion for approval of the class settlement, the class administrator declared the existence of 160,876 potential class members. *Soutter v. Trans Union, LLC*, Civ. No. 3:10cv514, ECF No. 56-1, at 2 (E.D. Va. May 31, 2014). Of those potential class members, 4,227 class members requested free crediting monitoring subscriptions—the relief obtained by the class settlement. *Id.* at 4. Given that the proposed class claim at bar requires only that class members received a consumer report from TransUnion omitting information about sources—and does not require further proof of judgments that have been set aside, vacated, or dismissed with prejudice—the number of class members in Clark's proposed class necessarily exceeds that in *Soutter*.

The Court must also determine whether it can ascertain Clark's class. *See Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 196 (E.D. Va. 2015) ("In order to certify a class under Rule 23, a court must be able to readily identify the class members in reference to objective criteria. Although the plaintiff need not be able to identify every class member at the time of certification, the plaintiff must demonstrate that class members will be identifiable without extensive and individualized fact-finding or mini-trials." (internal quotation marks and citations omitted)). TransUnion has admitted in discovery that it has the ability "to determine from [its] records the identity and number of disclosures [it] sent to consumers" with "an address in the Fourth Circuit and an item in the 'Public Records' section of their report." (Responses of TransUnion to Clark's First Set of Requests for Admission No. 15, ECF No. 66-2.)[20] In light of TransUnion's own admission, the Court finds that Clark can ascertain and identify the class.[21]

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[20] The discovery response submitted to the Court did not include TransUnion's admission to Request for Admission No. 15. At oral argument, the parties confirmed that TransUnion provided a supplemental response that confirmed that it has the ability "to determine from [its] records the identity and number of disclosures [it] sent to consumers" with "an address in the Fourth Circuit and an item in the 'Public Records' section of their report."

[21] TransUnion argues that the Court cannot ascertain Clark's class because "she fails to limit her class definition to persons with 'concrete' injury, as mandated by *Spokeo*." (Opp'n Mot. Class Certification 16, ECF No. 82.) TransUnion explains that Clark makes "no effort to limit the proposed class to persons with inaccurate information in their credit files, and [Clark] fails to show how a person whose file was perfectly accurate was concretely harmed by not knowing the specifics of how TransUnion collected the accurate information." (*Id.* (citing Stango Decl. ¶¶ 50, 59–64).) Thus, TransUnion continues to argue that Clark (and the class members) must have suffered some harm beyond an informational injury in order to allege that TransUnion violated § 1681g(a)(2). In support of this contention, TransUnion repeatedly cites the "Declaration" of Dr. Victor Stango, its offered expert on consumer behavior regarding financial matters, as proof that Clark cannot make such a showing. (*See* Stango Decl., ECF No. 87.)

The conclusions in Dr. Stango's Declaration amount to four opinions: (1) only a small fraction of the putative class members could have suffered any concrete injury; (2) because each class member's injury is predicated on inaccuracies that originated with LexisNexis, it would require individualized inquiries to determine which putative class members suffered concrete injuries; (3) no objective method exists to determine which consumers would benefit from the

b. Questions of Law or Fact Are Common to the Class

Two questions underlie the proposed class action: (1) whether TransUnion's uniform policy to withhold the disclosure of LexisNexis as its source of public records information violated § 1681g(a)(2); and, (2) whether TransUnion acted willfully in withholding this information. These questions, common to the class, satisfy Rule 23(a)(2).

Rule 23(a)(2) requires that class members' claims involve common questions of law or fact. Fed. R. Civ. P. 23(a)(2). "The commonality requirement focuses on the claims of the class as a whole, and whether they turn on questions of law applicable in the same manner to each member of the class.'" *Soutter*, 307 F.R.D. at 199 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). "To satisfy this requirement, there need be only a single issue common to the class." *Id.* (citing *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992), *aff'd* 6 F.3d 177 (4th Cir. 1993)). Clark, however, cannot merely allege that the class members "have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 360. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* That is, the "common contention . . . [must be] of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

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disclosure of LexisNexis; and, (4) no objective method exists to determine whether the disclosure of LexisNexis would provide greater information value to consumers.

Even in the face of the rigorous analysis that this Court must undertake when determining whether to certify Clark's class, Dr. Stango's opinions on concrete injury do not move the needle. Indeed, Dr. Stango's opinion about what constitutes a concrete injury has no bearing on the class certification issue. To the extent it must, the Court reiterates its finding that Clark alleged a concrete injury by virtue of the § 1681g(a)(2) violation itself. No amount of expert *evidence* changes that *legal* conclusion. For the same reason, TransUnion's reliance on the Declaration of one of its employees, Kimberly Bye, attesting to the number of consumers who had disputes with TransUnion resolved in their favor, does not persuade. (Bye Decl., ECF No. 88.) Not only does her Declaration fail to articulate the foundation for its findings, at best, it attempts to refute an assertion (*i.e.*, the existence of harm beyond informational injury) that Clark need not prove.

Clark submits that FCRA cases, and specifically those involving violations of § 1681g(a)(2), have repeatedly been held to satisfy the commonality requirement of Rule 23(a)(2).[22] The Court agrees. In spite of such authority, TransUnion contends that "proving the class claim will require a review of every single credit file to determine whether *the public records information* contained therein was in fact *inaccurate*." (Opp'n Mot. Class Certification 18 (emphasis added).) TransUnion argues that "a consumer who received a credit file with accurate public record information has no need to seek correction, and therefore *could not have been affected at all* by not being told the details of how TransUnion retrieved the data." (*Id.* (emphasis added).) By making this argument, TransUnion again appears to: (1) conflate standing, which this Court has already decided, with the merits; or, (2) add an accuracy element to the statutory language of § 1681g(a)(2). Both arguments fail.

Section 1681g(a)(2) requires TransUnion to "clearly and accurately disclose to the consumer . . . [t]he sources of information" found in the consumer's credit report. 15 U.S.C. § 1681g(a)(2); *see also Dreher v. Experian Info. Sols., Inc.*, 71 F. Supp. 3d 572, 579 (E.D. Va. 2014) ("*Dreher II*"). As explained in *Dreher II*,

> The "information" contemplated by the [FCRA] is the actual content of the credit items listed on the consumer's credit report. By law, the consumer reporting agency must disclose the "sources" of that actual content. Although gifted legal minds can create myriad interpretations for how many sources or what kinds of sources should be included in the disclosure, the term "sources" clearly includes, at the very least, the entity that gives that information directly to the consumer reporting agency.

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[22] *See, e.g., Dreher v. Experian Info. Sols., Inc.*, No. 3:11cv624, 2014 WL 2800766, at *1 (E.D. Va. June 19, 2014) ("*Dreher I*") (finding commonality where the plaintiff "must show that (1) the information [the consumer reporting agency] provided was inaccurate, (2) in violation of § 1681(g)(a)(2) of the FCRA, and (3) [the consumer reporting agency's] violation was willful"); *see also, e.g., Soutter*, 307 F.R.D. at 201–02 (finding commonality on issues of inaccuracy, reasonableness of procedures, and willfulness); *Manuel v. Wells Fargo Bank Nat'l Assoc.*, No. 3:14cv238, 2015 WL 4994549, at *10, 12 (E.D. Va. Aug. 19, 2015) (finding commonality on impermissible use claim and adverse action claim).

71 F. Supp. 3d at 579–80; *see also Dennis v. Trans Union, LLC*, No. 14-2865, 2014 WL 5325231, at *7 (E.D. Pa. Oct. 20, 2014) ("A liberal reading of Section 1681g(a)(2) allows for a definition of 'sources' like that suggested by Plaintiff, which does not limit Defendant's, nor any CRA's, 'sources' to only the original source of information. Defendant's proposed definition, and its reading of 'sources' as excluding the possibility of multiple sources for one piece of information, [is] too narrow in light of the "remedial scheme" Congress intended and the fact that Congress wrote Section 1681g(a)(2) using the plural 'sources' rather than the singular 'source.'").[23] Thus, the focus of the Class Claim must remain on the "sources." No issue exists regarding whether the public record information (as opposed to the sources of information)

[23] In spite of *Dreher II* and *Dennis*, TransUnion argues against a reading of § 1681g(a)(2) that deems the direct, rather than what TransUnion calls the "ultimate," source of information in a consumer report as the "source of information" as intended by the statute. That argument falters.

"The analysis of statutory terms begins with the text of the statute." *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 431 (E.D. Va. 2015) ("*Milbourne II*") (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . .")). "If the statutory text is clear and unambiguous, the analysis need to go no further." *Id.* (citing *Caminetti*, 242 U.S. at 485 ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.")).

"'In interpreting the plain language of a statute, [courts] give the terms their ordinary, contemporary, [and] common meaning, absent an indication Congress intended [them] to bear some different import." *Id.* at 431–32 (quoting *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011)). The dictionary definition of "source" states: "a place, person, or thing from which something comes or can be obtained." *New Oxford American Dictionary* 1669 (3d ed. 2010). While the ordinary meaning of "sources" *could* be read to cover both the entity that provided information to the consumer reporting agency (*e.g.*, LexisNexis) and the place where that information originated (*e.g.*, courts), the term, at least, covers the entity, such as LexisNexis, that actually provided the information to TransUnion. *See Dreher II*, 71 F. Supp. 3d at 579–80; *see also Milbourne v. JRK Residential Am., LLC*, No. 3:12cv861, 2016 WL 4265741, at *9 (E.D. Va. Aug. 11, 2016) ("*Milbourne IV*") ("[A] lack of judicial or administrative guidance cannot salvage an objectively unreasonable interpretation where the statutory text is clear.").

requires correction.[24] Because the violation Clark and the class allege concerns the accuracy of "the *sources* of the information" found in the consumer's credit report, if TransUnion systemically failed to disclose LexisNexis as a source, that contention can be determined "in one stroke."[25] *Dukes*, 564 U.S. at 360.

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[24] TransUnion again weaves into its argument the issue of accuracy and posits that Clark's class will improperly include "uninjured consumers." (Opp'n Mot. Class Certification 18.) While the Court does not disagree that TransUnion's failure to include LexisNexis as a source of public records information may affect some consumers more than others, the statute does not require any such finding. The Class Claim rests on the plain allegation that, under § 1681g(a)(2), the class members had a statutory right to accurate information about sources. By omitting that information, Clark submits, TransUnion violated the statute. This contention proves common for all class members.

[25] This reading comports with a purpose of the FCRA. *See, e.g.*, *Spokeo*, 136 S. Ct. at 1550 ("Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk."); *see also Thomas*, 2016 WL 3653878, at *7–8 ("Congress intended that the FCRA be construed to promote the credit industry's responsible dissemination of accurate and relevant information and to maintain the confidentiality of consumer reports."). Knowing the direct source permits a consumer to correct inaccurate information with the entity that disseminated it to the consumer reporting agency. That, in turn, assists the consumer in making sure that the disseminating entity, as well as TransUnion, foregoes future, possibly harmful dissemination.

TransUnion's policy argument to the contrary does not persuade. Based in part upon Dr. Stango's testimony, TransUnion contends that including LexisNexis on consumer reports will only confuse consumers seeking to correct inaccurate public records information. (Opp'n Mot. Class Certification 18 (arguing that the disclosure of LexisNexis would not assist most consumers in reaching "a better outcome").) Whether TransUnion's inclusion of the correct source information would actually help consumers does not matter when determining the statutory damages sought here. A plain reading of the statute requires that TransUnion provide the "sources" information in all instances. To hold otherwise would require this Court to rewrite the statute, by, for instance, substituting "ultimate sources" where Congress included "sources." That, however, remains a responsibility reserved to Congress.

Even assuming, as TransUnion contends, that Dr. Stango "proves" that disclosing LexisNexis would merely "confuse" consumers and would not have allowed Clark to correct her problem as readily, this record might evince a different "harm." LexisNexis, to the extent it is covered as a furnisher under 15 U.S.C. § 1681s-2, must correct the records of all three consumer reporting agencies when finding an error. TransUnion did less than that: it corrected the error in Clark's report, but nothing shows it took any action with another consumer reporting agency. In fact, TransUnion only notified LexisNexis in 2014 and did not do so in 2013.

c. Clark's Claim Is Typical of Those of the Class

Clark contends that she satisfies typicality because, by alleging a violation of § 1681g(a)(2), proving her claim will necessarily advance the claims of all class members. The Court agrees.

For a class representative to satisfy typicality, he or she "must be part of the class and possess the same interest and suffer the same injury as the class members." *Dieter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006); *see also Soutter*, 307 F.R.D. at 208 ("[T]he typicality prerequisite focuses on the general similarity of the named representative's legal and remedial theories to those of the proposed class."). As explained by the Fourth Circuit in *Dieter*:

> The typicality requirement goes to the heart of a representative parties' ability to represent a class, particularly as it tends to merge with the commonality and adequacy-of-representation requirements. The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim. That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned. But when the variation in claims strikes at the heart of the respective causes of actions, we have readily denied class certification.

436 F.3d at 466–67. In short, "[t]he essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Id.* at 466 (quoting *Broussard*, 155 F.3d at 340).

Here, Clark's interests align with those of the class, and she alleges to have suffered the same injury. Clark's § 1681g(a)(2) claim arises from TransUnion's failure to disclose the source of information reported on her consumer report. And the Class Claim arises from the same omission. "Because there are no factual differences between claims and the members all raise the same legal issue as [Clark], there are no factual or legal differences between the class

members' claims and [Clark's] claims." *Milbourne v. JRK Residential America, LLC*, No. 3:12cv861, 2014 WL 5529731, at *7 (E.D. Va. Oct. 31, 2014) ("*Milbourne I*").

Disagreeing with this straightforward analysis, TransUnion contends that Clark cannot satisfy the typicality requirement because her claim involves experiences unique to Clark, who "'is subject to unique defenses which threaten to become the focus of the litigation.'" (Opp'n Mot. Class Certification 18 (quoting *Shiring v. Tier Techs., Inc.*, 244 F.R.D. 307, 313 (E.D. Va 2007).) TransUnion specifically argues that Clark "is an atypical and inadequate class representative because: (i) the facts surrounding her allegations are unique; (ii) her claims are subject to unique defenses; and[,] (iii) the conditions that led to this lawsuit were created by her counsel, who still represents her in this matter."[26] (*Id.*) TransUnion's argument does not affect the Court's typicality analysis.

First, TransUnion opposes typicality on the incorrect presumption that Clark's § 1681g(a)(2) claim depends on facts entirely unique to her. While TransUnion correctly identifies that Clark's case had a judgment that was appealed and dismissed, but remained on her

[26] The Court addresses this final argument only in this rare instance where an attorney accuses another of sloppy work—or worse. TransUnion suggests that the purported error on Clark's credit report originated with Clark's then-counsel. (Opp'n Mot. Class Certification 20.) TransUnion contends that the Virginia Poverty Law Center (the "VPLC"), Clark's counsel for her underlying dispute, "failed to include the [General District Court] case number in the dismissal order, the amount of judgment, or any other important detail tying it back to the [General District Court's] Quik Cash Judgment." (*Id.* at 2.) According to TransUnion, the VPLC "prevent[ed] even the courts themselves from deciphering which judgment was dismissed." (*Id.*) TransUnion's argument misconstrues basic operations of Virginia's court system.

In Virginia, a General District Court, which is not a court of record, can hear some types of cases. After a party appeals a civil General District Court civil case to a Circuit Court, that court considers the matter *de novo*. Va. Code § 16.1-106 ("Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken and shall be heard de novo."). The Circuit Court then enters its judgment as a new order. *See id.* § 16.1-113. Regardless, because this matter extends beyond the scope of certifying the Class Claim, the Court need not decide it now.

credit file, those "unique" facts have no bearing on her § 1681g(a)(2) claim (*i.e.*, the Class Claim).[27] Indeed, the Class Claim involves only whether TransUnion disclosed the "sources of information," an omission that satisfies "the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Deiter*, 436 F.3d at 466 (quoting *Broussard*, 155 F.3d at 340).

Second, TransUnion argues that Clark's case is "unique" because it may assert a statute-of-limitations defense against Clark in particular. TransUnion relies on 15 U.S.C. § 1681p, which states:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—
>
> > (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or[,]
> >
> > (2) 5 years after the date on which the violation that is the basis for such liability occurs.

15 U.S.C. § 1681p. TransUnion posits that any alleged violation serving as the basis for its liability under § 1681g(a)(2) occurred prior to May 20, 2009, when Clark first disputed the Quik Cash Judgment on her TransUnion consumer report. (Opp'n Mot. Class Certification 22 (citation omitted).) TransUnion argues that, because it failed to disclose LexisNexis as the source of information regarding Clark's Quik Cash Judgment at that time, the violation occurred then—more than five years before Clark filed suit.

In reply, Clark argues that no such defense exists because "[a] consumer need not allege (or prove) either that the [consumer reporting agency] furnished an inaccurate credit report or that [the consumer] made a § 1681i(a) dispute before being afforded the right to see what is

[27] The Court does not deny that some factual differences exist between Clark and the proposed class. While those distinctions remain immaterial to certifying the Class Claim, it bears mentioning that TransUnion nonetheless misreads the facts surrounding Clark's experience as discussed above.

actually in [his or] her credit file." (Pl.'s Reply 17, ECF No. 104.) In support of her position, Clark cites *Yarish v. Downey Fin. Corp.*, No. 3:08cv380, 2009 WL 1208178 (E.D. Va. Apr. 28, 2009),[28] which pertains only to the two-year statute of limitations in § 1681p(1).

The five-year statute of repose in § 1681p(2), on the other hand, includes no discovery component. Section 1681p(2) bars any claim arising out of a violation that occurred more than five years before a plaintiff filed suit. *See Milbourne v. JRK Residential Am.*, LLC, No. 3:12cv861, 2016 WL 1071569, at *5 (E.D. Va. Mar. 15, 2016) ("*Milbourne III*") (referring to § 1681p(2) as "a five-year absolute statute of repose").

Regardless, the Court cannot find that the five-year statute of repose has run as to Clark's § 1681g(a)(2) claim. Trans Union did not rectify its failure to disclose LexisNexis immediately after the alleged May 2009 violation. In fact, the 2014 consumer credit report provided to Clark continued to state that TransUnion obtained the records only from the courthouses that maintained the records: "Virginia Federal Court" and "Henrico District Court." Even if TransUnion violated § 1681g(a)(2) as early as 2009, it violated the statute *again* in 2014. Thus, even if § 1681p bars a claim arising out of TransUnion's failure to disclose the source of information on Clark's consumer report in 2009, Clark's claim can rest on the 2014 violation or

[28] In *Yarish*, the Honorable Henry E. Hudson, United States District Judge, rejected a statute-of-limitations defense under § 1681p because "the FCRA's limitations period does not commence until a 'consumer learns information which appears to be normally within the province of the bank or credit reporting agency and not easily discovered by the consumer.'" *Id.* at *2 (quoting *Broccuto v. Experian Info. Solutions, Inc.*, No. 3:07cv782, 2008 WL 1969222 (E.D. Va. May 6, 2008)). The plain text of § 1681p(1) provides that the two-year statute of limitations does not begin to run until *discovery* by the plaintiff.

any violation within five years of the date Clark brought this case.[29] Accordingly, Clark satisfies the typicality requirement of Rule 23(a)(3).

d. Clark Will Fairly and Adequately Represent the Interests of the Class

The final requirement of Rule 23(a) requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) "is met if the named plaintiff has interests common with, and not antagonistic to, the [c]lass's interests; and . . . the plaintiff's attorney is qualified, experienced and generally able to conduct the litigation." *Milbourne I*, 2014 WL 5529731, at *8 (internal citations and quotations omitted). "[T]he adequacy inquiry itself focuses on conflicts of interests." *Soutter*, 307 F.R.D. at 213. Clark meets the adequacy requirement.

First, Clark has no interests antagonistic to the class's interests. Clark and the class share the identical interest of establishing TransUnion's liability based on the same questions of law and fact. TransUnion does not contend otherwise, and the record demonstrates no conflicts of interest.

Second, the record does not demonstrate that either Clark or her attorneys are not suited to represent the class. This Court has repeatedly found that Clark's counsel is qualified to conduct such litigation. *See, e.g.*, *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14cv238, 2016 WL 1070819, at *3 (E.D. Va. Mar. 15, 2016) ("[T]his Court would have difficulty overstating Class Counsel's experience in the area of FCRA class action litigation."); *Thomas v.*

[29] TransUnion's one-sentence alternative argument that the two-year statute of limitations has expired also fails. While Clark discovered inaccurate public records information in her consumer report as early as 2009, "the FCRA's limitations period does not commence until a 'consumer learns information which appears to be normally within the province of the . . . credit reporting agency and not easily discovered by the consumer.'" *Yarish*, 2009 WL 1208178, at *2. Because TransUnion wholly omitted reference to LexisNexis, Clark had no reason to know that TransUnion failed to disclose an unknown source.

FTS USA, LLC, 312 F.R.D. 407, 420 (E.D. Va. 2016) ("the Court finds that Thomas'[s] counsel is qualified, experienced, and able to conduct this litigation so as to fully and adequately represent both classes. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases around the country."); *Dreher I*, 2014 WL 2800766, at *2 ("Dreher's counsel is well-experienced in the arena of FCRA class action litigation."). This Court echoes the sentiments previously stated about Clark's counsel because they pertain here with equal vigor.[30]

The Court further rejects TransUnion's argument that Clark should not represent the class simply because her knowledge of the case does not rise to that of her counsel's. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) ("It is hornbook law . . . that '[i]n a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a backdrop of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative."); *see also Flores v. Anjost Corp.*, 284 F.R.D. 112, 129 (S.D.N.Y 2012) ("'Knowledge of all the intricacies of the litigation is not required and several courts have found that general knowledge of what is involved is sufficient.' While Rule 23 requires 'adequate

[30] TransUnion remarkably asserts that the VPLC should be disqualified as counsel because the VPLC: "(i) did not include the [General District Court] case number in the Order dismissing the Quik Cash Judgment; and[,] (ii) did not take action to ensure that the [General District Court] docket reflected dismissal." (Opp'n Mot. Class Certification 25.) As a result, TransUnion contends, the "VPLC *is responsible* for the very harm [Clark] claims in this action . . . because [the] VPLC failed to ensure proper documentation of the dismissal of the Quik Cash Judgment on appeal." (*Id.*) This argument fails for at least two reasons. First, nothing on the record supports the notion that the VPLC acted contrary to normal procedure in Virginia courts. *See supra* p. 20 n.26 (citing Va. Code §§ 16.1-106, 16.1-113). Second, even if the Court were to find that the VPLC harmed the viability of Clark's claim (which it does not), it cannot see how the circumstances surrounding the VPLC's representation rise to a level of a conflict with the class. The Class Claim about TransUnion's failure to disclose the sources of the public records information on the class members' consumer reports would bear no relation to whether the VPLC hindered Clark's ability to bring her individual claims.

personal knowledge of the essential facts of the case,' plaintiffs are entitled to rely on their counsel for the legal underpinning of their claims." (citations omitted)); *Barr v. Harrah's Entm't, Inc.*, 242 F.R.D. 287, 295 (D.N.J. 2007) ("A class representative need only possess 'a minimal degree of knowledge necessary to meet the adequacy standard."). Clark's counsel represents that Clark has participated in discovery and has asked appropriate questions. Clark's deposition testimony demonstrates that she has sufficient general knowledge of the case. (Clark Dep. 162:18–25 (suggesting that her responsibilities as class representative include "representing for the whole as one" and "mak[ing] sure everybody is treated fair and equally so they won't have to experience, moving forward, incorrect information being reported"). Accordingly, Clark satisfies the adequacy requirement of Rule 23(a)(4).

2. Clark Satisfies the Predominance and Superiority Requirements of Rule 23(b)

In addition to satisfying the four requirements of Rule 23(a), Clark's proposed class must also align with at least one of the types of class actions delineated in Federal Rule of Civil Procedure 23(b) and meet the corresponding prerequisites for certification. The three types of class actions in Rule 23(b) are as follows:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or[,]
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or[,]

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and[,]
> >
> > (D) the likely difficulties in managing a class action.

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

Here, Clark moves for certification under Rule 23(b)(3). Certification under Rule 23(b)(3) is appropriate where the Court finds that: (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and, (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

a. Questions Common to the Class Predominate Over Questions Affecting Only Individual Members

Clark satisfies the predominance requirement of Rule 23(b)(3). Under Rule 23(b)(3), questions common to the class "must predominate over any questions affecting only individual members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Whether common questions predominate over individual questions "is a separate inquiry, distinct from the requirements found in Rule 23(a)." *Ealy v. Pinkerton Gov't Servs.*, 514 F. App'x 299, 305 (4th Cir. 2013) (citing *Dukes*, 131 S. Ct. at 2556). This requirement is "even more demanding than Rule 23(a)," *Comcast*, 133 S. Ct. at 1432, and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623.

"Rule 23(b)(3)'s commonality-predominance test is qualitative rather than quantitative." *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 272 (4th Cir. 2010) (citing *Gunnells*, 348 F. 3d at 429). If the "qualitatively overarching issue" in the litigation is common, a class may be certified notwithstanding the need to resolve individualized issues. *See Ealy*, 514 F. App'x at 305 ("Indeed, common issues of liability may still predominate even when some individualized inquiry is required.").

Clark satisfies the predominance requirement because Clark's and the class members' claims encompass the same essential factual and legal issues. The dominant issue before the Court is the ultimate question of liability: whether TransUnion willfully failed to disclose as its source the third-party public records vendor, LexisNexis, in violation of § 1681g(a)(2). This alone, as the qualitatively overarching issue of this case, satisfies the predominance requirement and outweighs any issues particular to individual class members. As explained in *Stillmock*:

> Where, as here, the qualitatively overarching issue by far is the liability issue of the defendant's willfulness, and the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner, the individual statutory damages are insufficient to defeat class certification under Rule 23(b)(3).

385 F. App'x at 273.[31] Accordingly, Clark satisfies the predominance requirement of Rule 23(b)(3).

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[31] At oral argument, counsel for TransUnion argued that Fourth Circuit precedent precludes certification if damages remain individualized. *See Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 265 (4th Cir. 2012) (finding that statutory damages "typically require an individualized inquiry"); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342–43 (4th Cir. 1998) (finding, in an antitrust case, that "each putative class member's claim for lost profits damages was inherently individualized"). TransUnion overstates the proposition. Although a range of statutory damages may charge a jury with the task of selecting a figure within that range, *Stillmock*, 385 F. App'x at 277 (Wilkinson, J., concurring), that alone does not end the inquiry. If "common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *Id.* at 273 (citing *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003)). This is because class certification in such cases will still "achieve economies of time, effort, and

b. A Class Action is Superior to Other Available Methods for Fairly and Efficiently Adjudicating This Lawsuit

Clark satisfies the superiority requirement. Superiority requires that litigation by means of a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Superiority "'depends greatly on the circumstances surrounding each case,'" and "'[t]he rule requires the court to find that the objectives of the class-action procedure really will be achieved.'" *Stillmock*, 385 F. App'x at 274 (internal citation omitted). When making a "determination of whether the class action device is superior to other methods available to the court for a fair and efficient adjudication of the controversy . . . [the court should] not contemplate the possibility that no action at all might be superior to a class action." *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 49 (E.D. Va. 1981). In determining whether the class action mechanism is truly superior, the court should consider "the class members' interest in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and[,] the likely difficulties in managing the class action." Fed. R. Civ. P. 23(b)(3)(A)–(D).

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expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Gunnells*, 348 F.3d at 424 (citing *Amchem*, 521 U.S. at 615).

Meanwhile, TransUnion anchors its only written argument against predominance in the Supreme Court's *Spokeo* decision. TransUnion argues: "[I]dentifying those individuals who suffered *concrete injury* due to TransUnion's manner of disclosing public record sources would be impossible without individual inquiry." (Opp'n Mot. Class Certification 27 (emphasis added).) According to TransUnion, determining whether a putative class member suffered concrete harm would require a finding of several conditions, including whether "the public record section of the . . . consumer report must have contained incorrect information or omitted relevant information." (*Id.*) Again, in light of the December 2016 Memorandum Opinion, this argument fails.

TransUnion again contends that factual differences preclude certification, claiming that the supposed individualized claims would make managing the class action ineffective. (*See* Opp'n Mot. Class Certification 30 ("[T]here are incredible complexities in managing litigation on behalf of the class consisting of persons who each, individually, would need to tender proof of specific, concrete injury under Section 1681h as a result of TransUnion's manner of disclosing public record sources.").) The Court has already rejected that argument, finding that resolving the Class Claim will not require individualized inquiries concerning any inaccuracies in the class members' consumer reports. TransUnion's objection to superiority aside, Clark satisfies the requirement for two principal reasons. First, a class action could provide redress to claimants who, as a result of the technical nature of TransUnion's violation, might not otherwise know the existence of their respective claims. *See Manuel*, 2015 WL 4994549, at *18; *Soutter*, 307 F.R.D. at 218 ("'[T]here is a strong presumption in favor of a finding of superiority,' where, as here, 'the alternative to a class action is likely to be no action at all for the majority of class members.'" (citation omitted)); *Dreher I*, 2014 WL 2800766, at *5 (finding superiority where "the class members do not have a strong interest in individually prosecuting the case").

Second, a class action gives claimants incentive to pursue claims that otherwise would not be worth pursing in light of the insignificant damages that could be recovered. *See Stillmock*, 385 F. App'x at 274 ("[T]he low amount of statutory damages available means no big punitive damages award on the horizon, thus making an individual action unattractive from a plaintiff's perspective. Second, there is no reasoned basis to conclude that the fact that an individual plaintiff can recover attorney's fees in addition to statutory damages of up to $1,000 will result in enforcement of [the] FCRA by individual actions of a scale comparable to the potential enforcement by way of class action."); *see also Soutter*, 307 F.R.D. at 218 (following *Stillmock*

to find superiority where statutory damage provisions in the FCRA cannot support any meaningful number of individual suits); *Dreher I*, 2014 WL 2800766, at *5. Accordingly, Clark satisfies the superiority requirement of Rule 23(b)(3).

III. Conclusion

For the foregoing reasons, the Court finds that Clark meets the requirements of Federal Rule of Civil Procedure 23. The Court will grant the Motion for Class Certification.

An appropriate Order shall issue.

/s/
M. Hannah Lauck
United States District Judge

Richmond, Virginia
Date: 3/1/2017

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CAROLYN CLARK,
on behalf of herself and all similarly situated individuals,

Plaintiffs,

v. **Civil Action No. 3:15cv391**

TRANS UNION, LLC,

Defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS the Motion for Class Certification. (ECF No. 66.)

Let the Clerk send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/
M. Hannah Lauck
United States District Judge

Richmond, Virginia
Date: 3/1/2017