No.

IN THE

United States Court of Appeals for the Fourth Circuit

MICHAEL T. DREHER,

Plaintiff-Respondent,

- v. -

EXPERIAN INFORMATION SOLUTIONS, INC.,

Defendant-Petitioner.

On Petition for an Order Granting Interlocutory Review Pursuant to Federal Rule of Civil Procedure 23(f) in *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-cv-00624 (E.D. Va.)

PETITION OF EXPERIAN INFORMATION SOLUTIONS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1, Experian Information Solutions, Inc. provides the following corporate disclosure statement:

Experian Information Solutions, Inc. is a wholly-owned subsidiary of Experian plc. Experian plc is publicly traded on the London Stock Exchange. No other publicly traded corporation owns 10% or more of Experian Information Solution, Inc.'s stock.

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INTRODUCTION

Michael T. Dreher filed this statutory damages class action alleging that Defendant Experian, a credit reporting agency (CRA), willfully violated the Fair Credit Reporting Act. He alleges that Experian violated the Act by providing consumers with disclosures of their credit files that continued, after Advanta Bank entered FDIC receivership in 2010, to list credit card accounts opened with Advanta under Advanta's name. Dreher contends that Experian was required by 15 U.S.C. § 1681g (which specifies the contents of consumer disclosures) to identify CardWorks, the servicer of the Advanta accounts, as the "source" of the account information. Dreher further alleges that he experienced emotional harm as a result of this alleged mislabeling when he attempted to dispute the account.

In certifying an 88,000-member nationwide class of recipients of such consumer disclosures that included an "Advanta" account, the court erred in at least two fundamental ways. First, as the court expressly recognized, the class overwhelmingly comprises individuals who—unlike Dreher, who alleges harm—"suffered [no] actual injury" (Ex. 2 at 6) from receiving a document that listed one of their credit accounts under Advanta rather than CardWorks.[1] Such individuals who have suffered no injury in fact—here, the vast majority of the class—have no Article III standing, and cannot be included in a certified class; nor could they be

[1] All exhibits referenced in this petition are attached hereto. A list of exhibits also is appended to the petition.

appropriately represented by Dreher, who claims injury. The district court, without explanation, ignored this argument—contrary to the "rigorous analysis" required by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Second, in an apparent effort to avoid the "individualized inquiry" required for FCRA statutory damages by *Soutter v. Equifax Info. Servs.*, 498 F. App'x 260, 265 (4th Cir. 2012), the district court announced that it would exclude all individual damages evidence and instead adopt a "mathematical calculation" that precludes consideration of "the varying actual effects the violation may have had on individual plaintiffs." (Ex. 2 at 8-9.) This tailoring of the measure of damages not only squarely conflicts with this Court's opinion in *Soutter*, it runs headlong into *Wal-Mart*'s admonition against a "Trial by Formula" that facilitates class adjudication by eliminating plaintiff-specific arguments and defenses that defendants could raise in an individual case. *See Wal-Mart*, 131 S. Ct. at 2561.

In addition, the district court gave short shrift to evidence of individual issues bearing on the willfulness of Experian's alleged violation of § 1681g(a)(2).

The district court's certification order is manifestly erroneous, and for that reason alone it satisfies the Court's criteria for a Rule 23(f) appeal. *See Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144-45 (4th Cir. 2001) ("[W]here decertification is a functional certainty, the weakness of the certification order may alone suffice to permit the Court … to grant review."). Further, the other *Lienhart* factors also

favor granting review. The potential damages—an extraordinary $88 million—are so substantial as to be effectively dispositive of the litigation; this case raises several legal issues of broad significance; the posture of the case is ideal for immediate review; and interlocutory guidance will help to resolve related actions.

QUESTION PRESENTED

Whether this Court should hear an immediate Rule 23(f) appeal of the order (1) certifying a nationwide class of 88,000 members that received allegedly inaccurate consumer disclosures despite the court's conclusion that few if any class members "suffered any actual injury," and (2) ordering that damages be determined by a "mathematical calculation" that precludes any consideration of "the varying actual effects the violation may have had on individual plaintiffs."

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. CardWorks Begins to Service Advanta Accounts After Advanta Goes Into Receivership.

The Utah Department of Financial Institutions closed Advanta Bank in March 2010, and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver for the bank. (Ex. 13 at 1.) In July 2010, the FDIC approved the appointment of CardWorks as Advanta's servicer. (Ex. 13 at 2-3.)

As a CRA, Experian collects information bearing on consumer creditworthiness, including, among other things, the status of credit accounts reported to it by credit card issuers or their servicers. (Ex. 10 ¶ 4.) In a letter dated

October 4, 2010, CardWorks notified Experian of CardWorks' assumption of all servicing duties for Advanta accounts, effective August 1, 2010. (Ex. 15 at 1.) With FDIC authorization, CardWorks asked Experian, when listing Advanta "trade lines" CardWorks was servicing, to identify those trade lines with the name "Advanta Credit Cards." (*Id.*) (A "trade line" is a consumer account listed by a CRA on a consumer report or disclosure it provides.[2])

Information appearing on an Advanta trade line (*see, e.g.*, Ex. 11) may derive from one or more sources. Experian itself is the source of some information. (Ex. 16 ¶ 5.) Certain other information originally reported by Advanta before CardWorks servicing began will never change. (Ex. 10 ¶ 5.) CardWorks would only have provided new information on accounts that were not paid in full, discharged in bankruptcy, or charged off completely before CardWorks assumed reporting duties. (Ex. 10 ¶ 7.) Further, Advanta may have been the original source of some fields that are re-reported monthly. (Ex. 16 ¶ 6.)

B. Dreher Contends He Was Harmed by Experian's Identification of Advanta Alone on Advanta Accounts Serviced by CardWorks.

Dreher alleges that the Advanta credit account opened in his name was the result of identity theft, and that consumer disclosures he obtained from Experian

[2] A "consumer report" is a report concerning a consumer provided to a third party. A "consumer disclosure" is a disclosure *to the consumer*, at her request, of the information in her credit file. The class certified below relates only to the latter—disclosures to the consumer. Reports to third parties are not at issue here.

listed Advanta accounts he had not opened. (Ex. 5 ¶ 2.) He further alleges that while CardWorks was the reporting entity at the time of the disclosures, Advanta was the sole entity identified on the disclosures for those accounts. (Ex. 5 ¶ 3.) Dreher alleges that he "engaged in a frustrating ordeal in attempting to locate Advanta" to dispute the accounts on his report. (*Id.*) At deposition, Dreher claimed that not knowing if he was "dealing with the right people" created "more frustration" in resolving his dispute. (Ex. 7 at 22:12-16, 165:7-166:3.)

Dreher filed suit against Experian and asserted several class claims, including one under 15 U.S.C. § 1681g(a), which requires a CRA to, "upon request, … clearly and accurately disclose to the consumer … (1) All information in the consumer's file at the time of the request, … [and] (2) The sources of the information …." (*See also* Ex. 5 ¶ 35.) Dreher contended that Experian's alleged violation was willful, and sought statutory and punitive damages, as well as attorneys' fees and costs, under 15 U.S.C. § 1681n(a), which provides for "damages of not less than $100 and not more than $1,000" for willful FCRA violations "with respect to any consumer." (Ex. 5 ¶ 36.)

The district court denied Experian's motion for partial summary judgment on the claim for a willful violation of § 1681g(a)(2). (*See* Exs. 3, 4.)

C. The District Court's Class Certification Order.

Following briefing and argument, the district court certified a class to pursue

a claim under 15 U.S.C. § 1681g(a)(2). The class is defined as:

> All natural persons who: (1) requested a copy of their consumer disclosure from Experian on or after August 1, 2010; (2) received a document in response that identified 'Advanta Bank' or 'Advanta Credit Cards' as the only source of the information for the tradeline; (3) and whose 'date of status' or 'last reported' field reflected a date of August 2010 or later.

(Ex. 1; *accord* Ex. 12 at 2 (Dreher limiting his motion to §1681g(a)(2)).)

In reaching its decision, the district court noted Dreher's claims of emotional harm but found that as to the class members generally it was "unlikely that anyone suffered actual injury" and "difficult to see how anyone suffered any injury." (Ex. 2 at 6 & n.6.) Notwithstanding this conclusion, the court did not address Experian's arguments that this very absence of injury established a lack of Article III standing for most class members and that Dreher's alleged emotional distress rendered his claim atypical and uncommon under Rule 23(a).

The court further held that individual issues regarding statutory damages did not predominate over "the common issue of liability," concluding—despite this Court's determination in *Soutter* that FCRA statutory damages typically require an "individualized inquiry," 498 F. App'x at 265—that individual injury is irrelevant to statutory damages, and ordering that statutory damages would be determined by a "mathematical calculation" that excluded any evidence of varying effects (or the lack thereof) on individual class members. (Ex. 2 at 4-9.)

REASONS FOR GRANTING THE PETITION

In *Lienhart*, this Court identified five factors relevant to granting Rule 23(f) review, emphasizing that "the weakness of the certification order may alone suffice to permit the Court … to grant review." 255 F.3d at 145. The present order certifying a nationwide class seeking $88 million in damages is not only erroneous, but raises important Article III questions and conflicts with decisions of this Court and other Circuits. It presents a compelling case for immediate review.

I. THE DISTRICT COURT ERRONEOUSLY CERTIFIED A CLASS OF INDIVIDUALS WHO SUFFERED NO INJURY, IN VIOLATION OF BEDROCK ARTICLE III STANDING PRINCIPLES.

The district court erred fundamentally in certifying a class overwhelmingly composed of members who suffered no injury in fact—the most basic of the elements comprising "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[N]o class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *accord 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").

A. The Vast Majority of Class Members Suffered No Injury.

It is beyond dispute that unlike Dreher himself—who claimed to have suffered an "ordeal" and "mental and emotional distress"—the vast majority of class members suffered no actual injury or harm of any sort from receiving a credit

file disclosure listing one of their accounts as Advanta rather than CardWorks. The district court specifically found that "[i]t is difficult to see how anyone suffered any injury," and that "[g]iven the nature of the violation in this case, it is unlikely that anyone suffered actual injury." (Ex 2 at 6 & n.6.)

This is true for multiple reasons. The listing of Advanta or CardWorks was likely a matter of complete indifference to most class members—who may have requested credit file disclosures for any of a number of purposes, most of them wholly unrelated to that consumer's Advanta account. Even for those who had reason to focus on the Advanta trade line, the Advanta name may well have helped them to recognize the account, which they may not have recognized if listed as CardWorks—without harming them in any way. Finally, even any class members who sought to contact Advanta suffered no harm, as the district court explained, because a consumer who called Advanta with a question about her bill was automatically connected to Cardworks. (*See* Ex. 2 at 6 n.6.)[3]

Indeed, in response to Experian's argument below that the class members suffered no harm and therefore lacked Article III standing (Ex. 6 at 14-15, 17-21), Plaintiffs made no claim below that the class members suffered any injury in fact. Instead, Plaintiffs claimed only that it was sufficient that the class members

[3] To the extent any class members may have suffered emotional harm similar to the harm claimed by Dreher, that harm could be shown only on a person-by-person basis that would preclude class adjudication.

suffered an "injury in law" due to Experian's alleged mis-identification of the source for the Advanta trade lines on their credit file disclosures. (Ex. 8 at 37-38.) Because a mere statutory violation, absent injury in fact, does not satisfy Article III, the class members lack standing and the class could not properly be certified.

B. A Statutory Violation Unaccompanied By Injury in Fact Cannot Satisfy Article III.

Dreher's argument that Article III is satisfied by a mere "injury in law for violating these statutes under the Fair Credit Reporting Act" (Ex. 8 at 37-38), absent any real world injury in fact, is directly contrary to established law.[4] "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that *cannot be removed by statute*." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (emphasis added). Thus, this Court has specifically rejected the proposition that, in the absence of any concrete injury, the mere "deprivation of [a] statutory right … is sufficient to constitute injury-in-fact for Article III standing." *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013). Dreher's "theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing." *Id.*

To establish standing under Article III, a plaintiff must show, among other things, that he "has suffered an 'injury in fact' that is . . . concrete and particularized." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Article III standing is distinct from statutory

[4] The district court entirely failed to address Experian's Article III argument.

standing, and "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

In *David*, this Court applied these principles to a claim for breach of fiduciary duties under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), holding that even where plaintiffs had "*statutory* standing to assert claims" under ERISA, Article III precluded those claims in the absence of demonstrated injury in fact: "the deprivation of [plaintiffs'] statutory right" was insufficient to establish an injury in fact for purposes of Article III. *David*, 704 F.3d at 333, 338; *see also In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 216 (4th Cir. 2008); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1033 (8th Cir. 2014) (rejecting Article III jurisdiction "for bare statutory violations without any evidence the plaintiffs personally suffered a real, non-speculative injury in fact"); *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting argument that "a deprivation of [the plaintiff's] entitlement to [a statutory] duty," in and of itself, "constitutes an injury-in-fact sufficient for constitutional standing").

To be sure, Congress can sometimes "elevat[e] to the status of legally cognizable injuries *concrete, de facto injuries* that were previously inadequate in law." *Lujan*, 504 U.S. at 578 (emphasis added). But that is only the case when the violation at issue produces a "concrete, *de facto* injur[y]." *Id.* Here, there is no

claim that the class members suffered any injury, let alone a "concrete" one, from the alleged violation. As the district court recognized, "it is difficult to see how anyone suffered any injury." (Ex. 2 at 6 n.6.) In such circumstances, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3; *David*, 704 F.3d at 333, 338.[5]

C. Dreher's Unique Injury Allegations Show That His Claim Is Neither Typical Nor Common Under Rule 23(a).

Aside from the Article III hurdle to certification, Dreher's allegations of harm prevent satisfaction of Rule 23(a)'s commonality and typicality requirements.

Dreher has claimed that disputing the Advanta account was stressful, and he expressed his "frustration" at "not dealing with the right people," which "makes [disputing the account] harder to do."[6] (Ex. 7 at 165:4-166:3, 22:2-17, 175:5-9, 202:14-203:8; *see also* Ex. 2 at 8 (district court referring to the "horrible angst"

[5] It is worth noting that some courts, in disagreement with *David* and the other Circuit cases cited above, have held that a statutory violation alone satisfies Article III. *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 413-14 (9th Cir. 2014) ("alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III"); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009) (permitting an FRCA claim to proceed without actual injury). However, *David* is binding on this Court, and correctly interprets the binding Supreme Court authority. In addition, the existence of divergent views on this important issue makes Rule 23(f) review particularly appropriate.

[6] Experian does not concede that Dreher has standing. It merely recognizes that Dreher's allegations of frustration as a purported "harm" are unavailable to other class members that never disputed their Advanta trade lines.

Dreher claims to have suffered).) The district court recognized that Dreher's alleged harm differentiated him from other class members, but concluded that "[w]hether Dreher suffered an actual injury—in distinction to absent class members—does not detract from the typicality of his *prima facie* case that Experian willfully violated § 1681(g)(a)(2) of the FCRA." (Ex. 2 at 3.)

This analysis ignores that an injury sufficient to satisfy Article III standing is part of, or antecedent to, a *prima facie* case of a violation. *See Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); *see also Wal-Mart*, 131 S. Ct. at 2552 ("The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."). That Dreher allegedly suffered an injury "in distinction to absent class members" (Ex. 2 at 3) shows he cannot satisfy Rule 23(a), particularly since it is not enough to merely argue that he and the absent class members "suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551. For this reason, too, the district court's class certification order was erroneous and would inevitably be reversed.

II. THE DISTRICT COURT ERRED IN FINDING RULE 23(b)(3)'S PREDOMINANCE REQUIREMENT SATISFIED.

A. The District Court Improperly Adopted a Formula-Based Measure of Statutory Damages to Facilitate Class Adjudication.

The Supreme Court held in *Wal-Mart* that a court may not adopt a "Trial by Formula" to facilitate class adjudication—*i.e.*, it may not eliminate individualized

aspects of claims to permit a case to proceed as a class action. 131 S. Ct. at 2561. Yet that is exactly what the district court did here, announcing that it would exclude all evidence of harm (or lack of harm) to particular individuals, instead adopting a "mathematical calculation" that precludes consideration of "the varying actual effects the violation may have had on individual plaintiffs." (Ex. 2 at 8-9.)

This holding directly conflicts with *Soutter*, which expressly stated that FCRA statutory damages determinations "typically require an individualized inquiry." 498 F. App'x at 265; *see also id.* ("'[E]vidence about particular class members is highly relevant to a jury charged with this task.'") (quoting *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 277 (4th Cir. 2010) (Wilkinson, J. concurring)). It also conflicts with this Court's approach to statutory damages under other statutes, under which "actual damages suffered by" a plaintiff *are* relevant to calculating statutory damages. *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996) (interpreting Copyright Act provision that a defendant may be "liable for either … actual damages … or … statutory damages") (alteration in original); *see also Cass Cnty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996) (a defendant has the

right to present a "wide range" of facts to a jury tasked with fixing an award within a statutory damages range).[7]

The district court justified precluding any consideration of individual harm on the ground that because the statute "refers to two types of damages"—"actual damages" and "damages of not less than $100 and not more than $1000"—the failure to include the word "actual" in the latter type means actual harm must be *irrelevant* to that type. (Ex. 2 at 7-8.) This reasoning suffers from multiple flaws.

First, it was not open to the district court to address this issue *de novo*. This Court already addressed FCRA statutory damages in *Soutter* and determined that FCRA statutory damages *do* typically require an "individualized inquiry" with "evidence about particular plaintiffs." 498 Fed. App'x at 265 (internal quotation marks omitted). This Court has also addressed the same issue with respect to an analogous statutory provision in *Superior Form Builders*, 74 F.3d at 496.

Second, the notion that statutory damages are not designed to compensate for actual harm is demonstrably wrong. To the contrary, one of the most basic purposes of statutory damages has long been understood to be to provide a remedy in settings where "actual damages … are often difficult to prove." *In re Marshall*,

[7] As argued earlier, Experian believes that most class members suffered no harm at all. Experian believes it should be able to argue this lack of harm as the central damages consideration for these class members, whereas the district court's formula would multiply such a class member's award based on the irrelevant factor of how many harmless consumer disclosures that class member received.

970 F.2d 383, 385 (7th Cir. 1992) (TILA case); *see, e.g., Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (statutory copyright damages designed "to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits"); *KingVision Pay per View, Ltd. v. Boom Town Saloon, Inc.*, 98 F. Supp. 2d 958, 966 (N.D. Ill. 2000) (purpose "to ensure that a plaintiff does not lack a damage remedy . . . where damages may be difficult or impossible to quantify") (Cable Communications Policy Act).

Third, even on its own terms, the district court's reasoning, at most, would establish that FCRA statutory damages are not *limited* to actual damages; the court offered no basis for concluding that actual harm is *irrelevant* to statutory damages. And if (as the district court believed) statutory damages are meant to be entirely independent of any actual damages, it would make no sense that § 1681n permits only actual damages *or* statutory damages, but not both. This one-or-the-other choice makes sense only if statutory damages are understood as at least in part a substitute for hard-to-quantify actual damages.

Furthermore, the district court's only effort to address *Soutter* missed the point. The court noted that *Soutter* did not challenge the holding of *Stillmock v. Weis Markets* that individual damages issues do not necessarily defeat predominance. (Ex. 2 at 4-5) But that point about predominance says nothing

about the correct measure of damages, and cannot justify the district court's rejection of the "individualized inquiry" required by *Soutter*.[8] Moreover, even as to predominance, the district court failed to note that *Stillmock* preceded *Comcast Corp. v. Behrend*, which held that where damages are not capable of classwide measurement, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S. Ct. 1426, 1433 (2013).

The district court also erroneously cited *Stillmock* as support for its "abacus-like" mathematical damages formula. But *Stillmock* also preceded *Wal-Mart*'s disapproval of "Trial by Formula," and cannot support a formula-based approach after *Wal-Mart*. Further, *Stillmock* was a case in which the class was defined so each class member arguably suffered exactly the same alleged harm—exposure to a risk of identity theft due to improperly revealing credit card digits that should have been concealed. 385 F. App'x at 273. It offers no support for a damages formula here, where any harm was emotional harm that is inherently individual, and was suffered, if at all, only by some unspecified subset of class members.

The proposition that "*any* method of [damages] measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be … would reduce Rule 23(b)(3)'s predominance requirement to a nullity."

[8] At a minimum, even if the district court believed the individualized damages issues did not defeat predominance, it was improper to certify the entire case, including the damages determination for classwide determination; and likewise improper to order that damages be determined by mathematical formula.

Comcast, 133 S. Ct. at 1433. The district court erred by relying on an arbitrary formula to avoid the conclusion that individual damages issues predominate.

B. A "Common Issue of Liability" Does Not Predominate Over Individual Issues.

The district court also erred in concluding that liability presented a common issue that predominated over individual issues. Experian identified several material ways in which a determination of its liability will depend on individual issues, none of which was addressed, let alone rigorously analyzed, by the court. Moreover, any issues susceptible to common proof would be "qualitatively" less complex than the individual statutory damages and injury issues. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 429 (4th Cir. 2003) (citation omitted).

1. Liability Is Not a Common Issue.

Experian demonstrated that the existence and willfulness of its alleged violation of § 1681g(a)(2) as to any class member hinges on when each putative class member received a disclosure, what interactions a class member may have had with Experian regarding the source of information for the Advanta trade line in the disclosure, and whether CardWorks or Advanta was the source of all or most of the information related to an Advanta trade line in a disclosure. Each of these inquiries raises issues specific to class members and is susceptible to individual proof. (*See* Ex. 9 at 12-15; Ex. 14 at 3-7.)

In particular, whether CardWorks was the source of any, some, or most of the "Advanta" information in a disclosure will differ for every class member. CardWorks was never the source of *certain* information on the Advanta trade line, such as the "Date opened" field, the "Responsibility" field, and the "Payment history" for some dates, for *any* putative class member. (Ex. 10 ¶¶ 6-7; Ex. 16 ¶ 6.) Moreover, for class members, unlike Dreher, who paid their account balances in full by the time CardWorks began servicing Advanta accounts, Advanta was the *only* source of information, which CardWorks merely re-reported. (Ex. 10 ¶¶ 6-7.)

2. Liability Does Not Predominate.

Assuming *arguendo* that all liability issues are common, individual issues still predominate. Dreher's theory of liability is simple—Experian willfully violated § 1681g(a)(2) each time it disclosed information to a consumer with an Advanta trade line without identifying CardWorks. The primary disputed liability issue would be whether Experian's statutory interpretation was "objectively unreasonable." *Safeco, Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007). That issue does not predominate over individual issues of injury and damages.

The decisions on which the district court relies to rebut the predominance of individual injury and damages issues are inapposite. In *Stillmock*, the class definition "expressly excluded customers … who suffered actual damages due to identity theft," 385 F. App'x at 268-69, leaving no individualized facts that could

affect damages, as here. In *Gunnells*, the damages calculations did "not appear to be particularly complex," and the court noted that if individual damages became predominate after further factual development, it would reconsider its conditional certification order. 348 F.3d at 429-30. Finally, in *Ealy v. Pinkerton Government Services, Inc.*, 514 F. App'x 299 (4th Cir. 2013), the panel *vacated* a grant of class certification and did not decide whether individual issues predominated. The district court erred in relying on these cases to hold that "the common issue of liability predominates" over individual issues here. (Ex. 2 at 4.)

III. THE REMAINING *LIENHART* FACTORS SUPPORT AN IMMEDIATE APPEAL

The first *Lienhart* factor is satisfied when the potential damages are sufficiently large that "the certification ruling is likely dispositive of the litigation," 255 F.3d at 144, *i.e.*, where the potential liability creates "substantial incentives for defendants to settle non-meritorious cases in an effort to avoid both risk of liability and litigation expense." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 8 (1st Cir. 2008). Here, the district court's order exposes Experian to an $88 million liability in this case alone and sets a dangerous precedent. Under those circumstances, the certification order is "likely dispositive" under *Lienhart*.

The third *Lienhart* factor is satisfied because it is clear that "the appeal will permit the resolution of [multiple] unsettled legal question[s] of general importance." 255 F.3d at 144. Those questions include: (1) whether an FCRA

violation establishes Article III standing without proof of actual injury; (2) whether a class may be certified when it is defined to include members without Article III standing; (3) whether actual harm is relevant to the calculation of statutory damages; and (4) whether the predominance criterion can be satisfied by reducing individual statutory damages issues to a formula.

As to the fourth factor, the status of the litigation makes it ideally suited for immediate review: The parties have completed discovery, and there is no factor counseling against review.

The final *Lienhart* factor looks to "future events." 255 F.3d at 144. For example, "if the case is likely to be one of a series of related actions … early resolution … may facilitate the disposition of future claims." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000). Here, another § 1681g(a)(2) case is already pending in this Circuit, which will present many of the same Article III and statutory damages issues. (*See* Ex. 17 at 3-4.) Moreover, this case will have substantial implications for Article III standing and the measure of statutory damages in other putative statutory damages class actions.

CONCLUSION

For the foregoing reasons, the Court should grant Experian's petition for an order authorizing it to file an interlocutory appeal from the order entered June 19, 2014 in *Dreher v. Experian Information Solutions, Inc.*, 3:11-cv-00624 (E.D. Va.).

Respectfully submitted,

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Dated: July 3, 2014

LIST OF EXHIBITS

Exhibit No.	Description	Dist. Ct. Dkt. No.	Date
1	Order Granting Plaintiff's Motion to Certify Class	167	6/19/2014
2	Memorandum Opinion	166	6/19/2014
3	Order Denying Defendant's Motion for Partial Summary Judgment	88	5/30/2013
4	Memorandum Opinion	87	5/30/2013
5	Second Amended Complaint	19	1/19/2012
6	Defendant Experian's Opposition to Plaintiff's Motion for Class Certification	145	3/14/2014
7	Exhibit B - Excerpts of Deposition of Michael T. Dreher	145-2	3/14/2014
8	Transcript of Proceedings Held on 4/17/2014	154	4/18/2014
9	Defendant Experian's Supplemental Brief in Opposition to Plaintiff's Motion for Class Certification	155	4/30/2014
10	Exhibit B - Declaration of Patricia A. Finneran dated April 30, 2014	155-2	4/30/2014
11	Exhibit D - Excerpt of Experian Credit Disclosure	155-4	4/30/2014
12	Plaintiff's Response to Defendant's Supplemental Memorandum in Opposition to Plaintiff's Motion for Class Certification	156	5/13/2014

Exhibit No.	Description	Dist. Ct. Dkt. No.	Date
13	Exhibit 1 - Letter from FDIC to Experian dated July 9, 2010; Notice of Termination of Advanta Bank as Servicer and Appointment of Successor Servicer dated July 20, 2010	156-1	5/13/2014
14	Defendant Experian's Supplemental Reply Brief in Opposition to Plaintiff's Motion for Class Certification	159	5/27/2014
15	Exhibit A - Email Attaching Letter from CardWorks to Experian dated Oct. 4, 2010	159-1	5/27/2014
16	Exhibit C - Declaration of Patricia A. Finneran dated May 27, 2014	159-3	5/27/2014
17	Exhibit D - Complaint in *Mostofi v. Experian*, No. 8:13-cv-02828-RWT (D. Md.)	159-4	5/27/2014

CERTIFICATE OF COMPLIANCE

I certify that, in accordance with the page limitation set forth in Federal Rule of Appellate Procedure 5(c) and the general requirement set forth in Federal Rule of Appellate Procedure 32(a) and (c)(2), this petition is proportionately spaced, has a typeface of 14-point, and does not exceed the 20 double-spaced pages exclusive of material not counted under Federal Rule of Appellate Procedure 5(c).

s/ Meir Feder
Meir Feder
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2014, I electronically filed the foregoing with the Clerk of court using the CM/ECF System. I further certify that, on this same day, I have served the petition by causing copies to be sent to the following counsel by overnight courier at the following addresses:

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