IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD J. MILLER, on behalf of himself and all others similarly situated,	**:**	**Civil No. 3:12-CV-1715**
	:	**(Judge Nealon)**
Plaintiff	**:**	
	:	**(Magistrate Judge Carlson)**
v.	**:**	
	:	
TRANS UNION, LLC,	**:**	
	:	
Defendant	**:**	

REPORT AND RECOMMENDATION

I. INTRODUCTION

This is a putative class action brought by Ronald J. Miller against Trans Union, LLC, a company that engages in the business of preparing and furnishing consumer and personal credit reports. Miller alleges that Trans Union violated section 1681g(a) of the Fair Credit Reporting Act when it provided him with a misleading and confusing online personal credit report that failed to clearly and accurately disclose all information in his file. Specifically, Miller alleges that Trans Union provided him with a report that could be read to suggest that his name came up as a possible match on a list maintained by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, money launderers and other enemies of the United States. He alleges

that the file disclosure for more than 13,000 other consumers that he seeks to represent in this class action were deficient in the same way.

On or about December 19, 2014, Miller moved for class certification. (Doc. 78.) On August 3, 2015, prior to deciding that motion, the Court stayed further proceedings in this action because the United States Supreme Court had granted certiorari in *Spokeo, Inc. v. Robins*, 742 F.3d 4098 (9th Cir. 2014) ("*Spokeo*"). (Doc. 119.) Parallel litigation pending in the United States District Court for the Northern District of California, Larson v. Trans Union, LLC, No. 3:12-cv-05726-WHO (N.D. Cal.), was also stayed pending a ruling in *Spokeo*. In *Larson*, the district court stayed further proceedings while at the same time the court stayed Trans Union's motion for summary judgment and provisionally granted the plaintiff's motion for class certification. *Larson v. Trans Union, LLC*, No. 3:12-CV-05726-WHO (N.D. Cal. June 26, 2015 (Doc. 86).)

On May 16, 2016, the Supreme Court issued its decision in *Spokeo*, vacating the opinion of the United States Court of Appeals because the court has failed to fully appreciate the distinction between "concreteness" and "particularization" with respect to the injury alleged for purposes of determining injury-in-fact for Article III standing purposes. The Court's ruling directed on remand that the appellate court consider the particular procedural violations alleged with respect to the plaintiff's credit report to determine if they entailed a degree of risk regarding

misinformation that was sufficient to meet the concreteness requirement prescribed by Article III.

Following the decision in *Spokeo*, this Court lifted the stay in this action on May 31, 2016. (Doc. 120.) In that order the Court approved the parties' proposed briefing on "the impact, if any, of the *Spokeo* decision on plaintiff's motion for class certification." (Doc. 122.) The court in *Larson* took similar action on June 1, 2016. *Larson*, No. 3:12-cv-05726-WHO (N.D. Cal.) at Dkt. 93.

On July 18, 2016, the Court heard oral argument from the parties on their respective positions regarding the impact of *Spokeo* on this case. Following the close of that hearing, the parties were invited to file additional submissions and citation to legal authority for the Court's consideration of *Spokeo*, and whether in its decision the Supreme Court had ushered in a sea change to longstanding principles governing Article III standing that may be relevant to the Court's jurisdiction over the claims brought in this case. In short, upon consideration, it is submitted that *Spokeo* did no such thing, and although relevant, the decision ultimately has only a modest impact on the Court's standing analysis. Accordingly, for the reasons explained below, it will be recommended that the Court find that the claims alleged in this case are sufficient to demonstrate that Miller has standing to bring suit in federal court, and that Miller's motion for class certification should be granted.

II. BACKGROUND

This is a case that presents questions regarding the reach of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681. These questions specifically involve the completeness and accuracy of personal credit reports issued by Trans Union that included confusing and misleading statements regarding the recipient's potential match to names appearing on the OFAC list of enemies to the United States. These legal issues, in turn, come before the Court against a legal backdrop which acknowledges that a negligent and erroneous report by a credit reporting service of a potential connection between a consumer and persons on the OFAC list may state a claim under the FCRA. *See Cortez v. Trans Union, LCC*, 617 F.3d 688 (3d Cir. 2010). The defendant previously moved to dismiss the claims in this case, arguing that they failed to state a claim. By order dated September 27, 2013, the district court adopted a report and recommendation of the undersigned and denied this motion. (Doc. 57.)

In summary, the plaintiff has alleged that he obtained an online file disclosure and personal credit report from Trans Union on October 13, 2011. (Doc. 79-3, Ex. 1.) The document begins with the heading "Personal Credit Report." Below that are a series of headings such as "Personal Information" and "Adverse Accounts." Those headings are followed by the statement "End of

Credit Report." Following that concluding section, there is the following language:

-Begin Additional Information-

Additional Information

The following disclosure of information is provided as a courtesy to you. This information is not part of your TransUnion credit report, but may be provided when TransUnion receives an inquiry about you from an authorized party. This additional information can include Special Messages, Possible OFAC Name Matches, Income Verification and Inquiry Analysis Information. Any of the previously listed information that pertains to you will be listed below.

Possible OFAC Match

The OFAC Database contains a list of individuals and entities that are prohibited by the U.S. Department of Treasury from doing business in or with the United States. Financial institutions are required to check customers' names against the OFAC Database, and if a potential name match is found, to verify whether their potential customer is a person on the OFAC Database. For this reason, some financial institutions may ask for your date of birth, or they may ask to see a copy of a government-issued form of identification, such as a Driver's License, Social Security card, passport or birth certificate. Some financial institutions will search names against this database themselves, or they may ask another company, such as TransUnion, to do so on their behalf. We want you to know that this information may be provided to such authorized parties.

As a courtesy to you, we also want to make sure you are aware that the name that appears on your TransUnion credit file is considered a potential match to information

> listed on the United States Department of Treasury's Office of Foreign Asset Control ("OFAC") Database.
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> The OFAC record that is considered a potential match to the name on your credit file is:
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> For more details regarding the OFAC Database, please visit:
>
> http://www.ustreas.gov/offices/enforcement/ofac/faq/index.shtml.

Id. There was no name listed for the potential matching name, just a blank space. There is no dispute that Miller is not a criminal, is not on the OFAC list, and that his name is not a potential match to anyone on the list. (Compare Doc. 1, Compl., ¶ 39 with Doc. 58, Ans., ¶ 39.)

Miller alleges that Trans Union's file disclosure violates section 1681g(a) of the FCRA in two ways. First, Miller alleges that the form is confusing and misleading because the notice indicates that there is an OFAC record that "is considered a potential match to the name on your credit report file" and then is followed by a blank space. According to Miller, a person reading this report cannot tell whether the consumer actually matches a name on the OFAC list and that Trans Union is not disclosing the name, or that the consumer does not match anyone on the OFAC list. The undersigned previously observed that this language was "awkward, obscure and potentially confusing," noting that it was a "cryptic and enigmatic" way of stating what should have been said by "simply providing a

declarative statement regarding lack of any identifiable match between Miller and OFAC list persons and entities." (Doc. 50, at 19.) The district court, agreeing, denied the defendant's motion to dismiss the section 1681g(a) claim, finding that a disclosure that is confusing and unclear may be the basis for a violation of section 1681g(a).

Miller also alleges that the form disclosure violates section 1681g(a) by mischaracterizing OFAC information so as to confuse consumers about their right to dispute and correct the OFAC information if they disagreed with it. (Doc. 1, Compl., ¶¶31-33.) In this regard, Miller notes that in the OFAC paragraphs that are quoted above, Trans Union had represented to consumers that the OFAC information was not part of the credit report and was being provided merely as a "courtesy" and not as required by law, something that is contrary to the Third Circuit's ruling in *Cortez*, where the court held that OFAC information is part of a consumer's credit report and that Trans Union is required to clearly and accurately disclose the OFAC information when a consumer requests a copy of his file. *Cortez*, 617 F.3d 688, at 710-713.

Miller has engaged in discovery and through that process has purportedly learned that the misleading form file disclosure that Trans Union provided to him was used from September 22, 2011, to October 27, 2011. (Doc. 79, Ex. 3, Def.'s Resp. at No. 1.) During that time, Miller contends that 13,100 consumers who live

within the Third Circuit's geographic territory were provided with file disclosures in the same form. (*Id.*) Miller contends that none of those consumers is or was on the OFAC list and that Trans Union has acknowledged that none should have had any OFAC alert or any OFAC-related message contained within their Trans Union Personal Credit Reports. (*Id.* and Ex. 2, Rule 30(b)(6) Deposition of James Garst at 45:21-50:12.) Miller seeks to represent these consumers in this class action, and seeks certification of the following class:

> All persons residing at an address within the jurisdiction of the U.S. Court of Appeals for the Third Circuit to whom Trans Union LLC provided a Personal Credit Report, from September 22, 2011, until October 27, 2011, substantially similar in form to the one Trans Union provided to Plaintiff Ronald J. Miller dated October 13, 2011.

Trans Union has opposed Miller's motion for class certification, and has renewed its opposition to Miller's ability even to maintain this litigation at all, arguing that he has not suffered a sufficiently "concrete" injury necessary for him to have standing under Article III of the United States Constitution, a prerequisite to bringing this action in federal court. As noted, this litigation was stayed for a period pending the Supreme Court's ruling in *Spokeo*, which was believed to be potentially relevant to this threshold issue. With *Spokeo* having been decided, the Court will proceed to consider whether Miller has identified a concrete and particular injury that would give him standing to bring this claim on his own

behalf, and will then proceed to address the parties' arguments regarding class certification under Rule 23 of the Federal Rules of Civil Procedure.

III. DISCUSSION

A. Article III Standing

Federal courts are courts of limited jurisdiction, and are constitutionally limited to hearing only "cases or controversies" that fall within that limited jurisdiction. As part of this constitutional limitation, in order to invoke the Court's judicial power under Article III of the United States Constitution, a litigant must have "standing" to sue. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). The standing doctrine thus "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo*, 136 S. Ct. at 1547 (citations omitted). The plaintiff bears the burden of proving standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

To carry that burden, a plaintiff must prove three elements: (1) injury in fact (2) fairly traceable to the challenged conduct (3) that is likely to be "redressed by a favorable judicial decision." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Lujan*, 504 U.S. at 560-61). An injury in fact requires "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 561; *see also Spokeo*, 136 S. Ct. at 1545 ("[T]he injury-in-fact requirement requires a plaintiff to allege an injury that

is both concrete and particularized."). In this regard, "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

Although the *Spokeo* Court observed that an intangible injury created by statute may be sufficient to satisfy the injury-in-fact requirement, the Court also emphasized that for Article III standing purposes, that injury must nevertheless also be both particularized and concrete. *Id.* at 1549. Because the Court found that the Ninth Circuit Court of Appeals improperly conflated the concreteness requirement with that of particularity, and thereby addressed only the particularization of the injury alleged, the Court remanded the action for further proceedings. *Id.* at 1550. The Court provided some guidance as to what was expected on remand, noting that concreteness and particularization were distinct factors, and holding that a "bare procedural violation, divorced of any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III." *Id*. at 1549.

The Court went further, stating:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III

> standing requires a concrete injury even in the context of a statutory violation.

Id. The Court also provided guidance to the lower courts in terms of determining whether an intangible injury is sufficiently concrete, noting that in making this assessment "both history and the judgment of Congress play important roles." *Id.* In this regard, the Court noted that because the case-or-controversy requirement that lies at the center of the standing inquiry "is grounded in historical practice, it is instructive to consider 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." *Id.* (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)). The Court also acknowledged that Congress is "well positioned to identify intangible harms that meet minimum Article III requirements," and, therefore, has the authority to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law" as well as to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Id. (internal citations and quotation marks omitted).

Nevertheless, the Court also took care to emphasize that plaintiffs will not in all cases satisfy the injury-in-fact requirements simply because a statute grants a right of action, since a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation," such as a violation of the FCRA's procedural

requirements, since such a violation may in some cases simply not amount to a cognizable injury. *Id*. By way of example, the Supreme Court posited that providing a consumer with a report that contained an inaccurate zip code could not "work any concrete harm" that would permit the plaintiff to sue. *Id*. However, the Court "expressed no view about any other types of false information," and "t[oo]k no position as to whether the Ninth Circuit's ultimate conclusion – that [the plaintiff] adequately alleged an injury in fact – was correct." *Id*. at 1550.

As the Supreme Court instructed, precedent, history and the informed judgment of Congress are relevant to the issue of whether a plaintiff has alleged a sufficiently concrete harm under the FCRA for standing purposes. Accordingly, we follow those courts that have acted on this guidance by referring to relevant legislative history in considering the harm in this case:

> Congress emphasized that "the consumer has a right to know when he is being turned down for credit, insurance, or employment because of adverse information in a credit report and to correct any erroneous information in his credit file." [S. Rep. No. 517, 91st Cong., 1st Sess. 2 at 2] (emphasis added). Therefore, Congress wished to "establish [ ] the right of a consumer to be informed of investigations into his personal life" and to "be told the name of the agency making the report" whenever the individual "is rejected for credit, insurance or employment because of an adverse credit report[.]" *Id*. at 1 (emphasis added).
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> In sum, the FCRA reflects Congress' concern with the "need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness,

> impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). It is clear from the statute's legislative history 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.

Stokes v. RealPage, Inc., Civ. A. No. 15-1520, 2016 U.S. Dist. LEXIS 144637, *22 (E.D. Pa. Oct. 18, 2016) (quoting *Thomas v. FTS USA, LLC*, Civ. A. No. 13-825, 2016 U.S. Dist. LEXIS 85545, 2016 WL 3653878, at *7-8 (E.D. Va. June 30, 2016)) (alterations in original); *see also Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007) (observing that the principal purpose of the FCRA's 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.").

Following *Spokeo*, the Third Circuit Court of Appeals has also had occasion to apply the decision to claims that are similar to those brought in this case. In *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262 (3d Cir. 2016), the court was presented with claims that had been brought alleging violations of the Video Privacy Protection Act. The plaintiffs in that case alleged that the defendant had failed to disclose that it had placed cookies on the computers of children who

used its websites in order to monitor communications with other websites, for advertising and marketing purposes. *Id*. at 267-69. The defendant challenged the plaintiffs' standing to bring the claims, and the court of appeals disagreed. In so doing, the Third Circuit referred directly to *Spokeo* in noting that "in some cases an injury-in-fact may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," and observed that "*Spokeo* directs us to consider whether an alleged injury-in-fact 'has traditionally been regarded as providing a basis for a lawsuit,'" and that "Congress's judgment on such matters is 'instructive and important.'" *Id.* at 273-74 (quoting *In re Google Inc., Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2015) and *Spokeo*, 136 S. Ct. at 1549). Furthermore, the court of appeals concluded that nothing in *Spokeo*:

> calls into question whether the plaintiffs in this case have Article III standing. The purported injury here is clearly particularized, as each plaintiff complains about the disclosure of information relating to his or her online behavior. While perhaps "intangible," the harm is also concrete in the sense that it involves a clear de facto injury, i.e., the unlawful disclosure of legally protected information. Insofar as Spokeo directs us to consider whether an alleged injury-in-fact "has traditionally been regarded as providing a basis for a lawsuit," *Google* noted that Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private.

Id. at 274. Following this analysis, the Third Circuit found that the plaintiffs alleged sufficient facts to establish Article III standing. *Id.*

In considering the defendant's challenge to Miller's standing in the instant case, and informed by the Supreme Court's guidance in *Spokeo* and the Third Circuit's application of that decision in *Nickelodeon*, we are also mindful that the United States District Court for the Northern District of California has already ruled on a virtually identical issue presented in a case alleging the same violations against Trans Union. In that related case, *Larson v. Trans Union LLC*, Judge Orrick had denied Trans Union's motion for summary judgment and provisionally certified the class but later stayed the case pending *Spokeo*, and after the decision was issued received supplemental briefing on the issue of standing and class certification. After reviewing the parties' arguments regarding the impact, if any, that *Spokeo* had on the case, Judge Orrick found that "Spokeo does not deprive Larson of Article III standing." *Larson v. Trans Union, LLC*, -- F. Supp. 3d – , 2016 WL 4367253, *2 (N.D. Cal. Aug. 11, 2016).

In reaching this conclusion, the court agreed with Larson that his section 1681g(a) claim stated something more than a "bare procedural violation," since it was based on precisely "the sort of 'informational' injury that the *Spokeo* Court implicitly recognized in citing *Public Citizen* and *Akins*, and that a number of other cases, from both before *Spokeo* and after, have found sufficient to support Article

III standing." *Id*. at *3 (citing and discussing cases). In addition, Judge Orrick found that it was not difficult to appreciate how the dissemination of the confusing OFAC disclosure could work a concrete harm, since it could cause emotional distress for the subject-recipient, particularly as it could be complicated by the uncertainty as to whether Trans Union was reporting the recipient as a match to the OFAC database, and because of a perceived inability to dispute the disclosure. *Id*. The court thus concluded that the dissemination of the OFAC disclosure was "not as benign as an incorrect zip code." *Id*.; *see also Hawkins v. S2Verify*, No. 15-cv-03502-WHA, 2016 WL 3999458, at *5-6 (N.D. Cal. July 26, 2016) (defendant's alleged dissemination of records of plaintiff's arrests, in violation of the FCRA, caused the plaintiff injury-in-fact, as "the harm alleged here is in no way akin to the examples given in *Spokeo* where a procedural violation would not result in concrete harm") (emphasis omitted). The court thus found that Larson had standing, and further declined to reconsider the court's provisional rulings on the ascertainability, predominance and superiority justifying class certification, since each of Trans Union's challenges was derivative of its standing arguments based on *Spokeo*. *Id*. at *4.

Upon consideration, it is recommended that the Court decline to embrace Trans Union's arguments regarding *Spokeo* and its application to this case, since the claims allege particularized and concrete harms stemming from the issuance of

an OFAC list notice that is arguably both confusing and misleading, and which present an alleged informational injury of the type that Congress sought to proscribe in enacting the FCRA, and which is substantially different than the bare procedural violations that the Supreme Court suggested may not qualify as sufficiently concrete to support Article III standing. Accordingly, it will be recommended that the Court reject Trans Union's argument that this case may be disposed of on standing grounds alone, and instead affirmatively find that Miller has standing to bring the FCRA claims alleged.

B. Class Certification

1. Overview of Rule 23's Requirements

Having recommended that the Court find that Miller has standing to bring the FCRA claims alleged, we turn next to Miller's motion for class certification, where he seeks to certify the following class, which he represents amounts to at least 13,100 consumers:

> All persons residing at an address within the jurisdiction of the U.S. Court of Appeals for the Third Circuit to whom Trans Union LLC provided a Personal Credit Report, from September 22, 2011 until October 27, 2011, substantially similar in form to the one Trans Union provided to Plaintiff Ronald J. Miller dated October 13, 2011.

Class actions, which the Supreme Court has recognized "serve an important function in our system of justice," *Gulf Oil Co. v. Barnard*, 452 U.S. 89, 99 (1981),

are governed procedurally by Rule 23 of the Federal Rules of Civil Procedure. "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests." *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 308 (3d Cir. 1998) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 799 (3d Cir. 1995)). In order to maintain a suit as a class action, a plaintiff must allege facts that establish each of four threshold requirements of the rule, which provides:

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

Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir. 1975). The decision to certify a class requires that the district court make findings, and may not rest on merely a "'threshold showing' by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008). The court is required to resolve all factual or legal disputes that are relevant to class certification, even if they overlap with the merits

and include disputes that touch on elements of the cause of action. *Id.* Finally, the court must, if relevant, consider expert testimony by a party promoting or resisting class certification. *Id.* Although a plaintiff has the burden of establishing each element of Rule 23 by a preponderance of the evidence, once those requirements have been met, the burden of proof shifts to the defendant to demonstrate that class certification is not warranted. 2 H. Newberg, NEWBERG ON CLASS ACTIONS (4th ed. 2002) § 7.22 at 70-71. The determinations that must be made are committed to the discretion of the district court, *Gulf Oil Co.*, 452 U.S. at 100, and are provisional in nature and may be amended as the case moves forward. *See* Fed. R. Civ. P. 23(c)(1)(C).

The court's assessment of class suitability thus requires an examination of the factual and legal allegations at the heart of the dispute, and may include some preliminary inquiry into the merits. *Hydrogen Peroxide*, 552 F.3d at 318. The Third Circuit explained that an "overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." Id. However, the court should refrain from engaging in a merits inquiry that is not necessary to determine a Rule 23 requirement. *Id.* at 316-17 (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-69 (3d Cir. 2001)). In other words, "a district court may inquire into the merits of the claims presented

in order to determine whether the requirements of Rule 23 are met, but not in order to determine whether the individual elements of each claim are satisfied." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 305 (3d Cir. 2011).

2. The Proposed Class Satisfies Rule 23(a)

As noted above, Rule 23(a) establishes four prerequisites that must be satisfied before certification of a class. Those requirements are: (1) the class is so numerous that joinder of all members of the class is impracticable ("numerosity"); (2) there are questions of law or fact that are common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) that the representative parties will fairly and adequately protect the interests of the class. It is submitted that each of these requirements is met here, and that the proposed class should be certified.

First, with respect to numerosity, it is represented and does not appear to be disputed that the proposed class exceeds 13,000 individuals who were furnished with personal credit reports that included the allegedly violative OFAC list information. Rule 23(a)(1) does not require that joinder of all potential plaintiffs be impossible, but only that it be impracticable by being "inefficient, costly, time-consuming, and probably confusing." *Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D. 105, 111 (E.D. Pa. 1992). In order to determine numerosity, a district court

should make a "common sense determination," *Maldonado v. Houston*, 177 F.R.D. 311, 319 (E.D. Pa. 1997), but there is no magic or precise number for class certification, *Anderson v. Department of Public Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998). In this case, it is represented that the class exceeds 13,000 individuals, all of whom apparently were furnished with personal credit reports that all contained the same allegedly offending and misleading language regarding potential matches to the OFAC list. There is no real dispute between the parties that the scope of the potential class satisfies the numerosity requirement in Rule 23(a), and it is recommended that the Court find that the class is so numerous that joinder of all members would plainly be impracticable.

Second, it is recommended that the Court find that the commonality requirement is also met. To satisfy the commonality requirement, there must be "questions of law or fact common to the class," which requires that the plaintiff demonstrate that the claims "depend upon a common contention," the resolution of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Commonality is not a stringent requirement, and "a single common issue of law or fact suffices." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); *see also Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 184 (3d Cir. 2001) ("Commonality does not require an identity of claims or facts among class

members; instead, [t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."). A common issue is one that arises from "a common nucleus of operative facts." *Baby Neal*, 43 F.3d at 56.

In this case, the undersigned finds that the commonality requirement is satisfied, since there are plainly questions of fact and law that are common to the class that would predominate over any questions that affect only individual class members. That common and central question is whether Trans Union violated the FCRA by failing to provide complete and truthful information relating to consumers in the personal credit reports that were furnished to them, and whether Trans Union acted recklessly in violating the FCRA or with knowledge of the Third Circuit's decision in *Cortez* that bears on this issue with respect to OFAC list information. The plaintiff argues that each member of the proposed class was subject to Trans Union's improper activity and was harmed by the same or substantially similar conduct., and thus commonality is met. We agree.

Trans Union seems to argue that the Court should find that commonality is not satisfied here because the FCRA claim requires proof that each consumer actually read and was confused or misled by the OFAC list disclosure. This argument was considered and rejected in *Larson*, and should be rejected by this Court as well. *See Larson v. Trans Union*, No. 3:12-cv-06726-WHO, 2015 WL

3945052, *9-10 (N.D. Cal. June 25, 2015) ("Section 1681g does not require, either explicitly or implicitly, a showing of actual confusion."). Judge Orrick found that the relevant question regarding commonality and predominance was whether Trans Union's disclosure format, which was identical for all class members, was sufficiently clear and accurate to meet the FCRA's requirements. As in *Larson*, it is submitted that this Court should decline to embrace the defendant's suggestion that this case is not suitable for class status because of the specter of "numerous mini-trials" with respect to which class members read the disclosures and who, among that set, "was concretely injured by them." (Doc. 125, at 22-23.) As Miller notes, informational injury alone is what is pled here, and that informational injury stemmed from allegedly inadequate statutorily-mandated disclosures, which may on their own be a concrete harm; indeed, that is precisely what we have found compels a finding that Miller has standing in this case, and it is the kind of informational injury that may work a concrete and actual harm. *See, e.g., Fed. Election Comm'n v. Akins*, 524 U.S. at 20-25; *Public Citizen v. Dep't of Justice*, 491 U.S. at 449, *Ryals*, 117 F. Supp. 3d at 751-54; *Manuel*, 123 F. Supp. 3d at 818. Accordingly, it is submitted that Miller has satisfied Rule 23's commonality requirement.

Next, Miller argues that the typicality requirement of Rule 23(a)(3), which is closely related to the commonality requirement discussed above, is satisfied.

Typicality assesses whether the interests of the class representative are "typical of the class as a whole" and are in keeping with the interests of the class "so that the [class representative] will work to benefit the entire class through the pursuit of their own goals." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998). Commonality and typicality requirements seek to ensure that the interests of the absentee parties will be adequately represented. *Id.* As with commonality, however, typicality does not require that all members of the putative class have identical claims. *Id.* Instead, typicality is satisfied if "the claims arise from the same event or course of conduct and are based on the same legal theory." *Baby Neal*, 43 F.3d at 58. It is submitted that Miller has satisfied the typicality requirement because he has made a showing that each member of the putative class was subject to the same improper form disclosure regarding OFAC list alerts, and Miller's claims and those of the class members thus arise from the same alleged course of conduct and theory of liability.

The fourth requirement of Rule 23(a) requires that plaintiffs and their representatives demonstrate that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement depends on two factors: (1) the qualifications, experience and ability of plaintiff's counsel to conduct the class litigation and (2) that the plaintiff not have any interests that are antagonistic to those of the class. *New Directions Treatment Servs. v. City of*

Reading, 490 F.3d 293, 313 (3d Cir. 2007). The second factor is essentially a requirement intended to prevent conflicts of interest between the lead plaintiff and the parties that they seek to represent. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004).

There appears to be no real challenge to the qualifications, experience and suitability of Miller's retained counsel, and counsel have represented their past experience in class action litigation, including past certifications and engagements that included trial of class actions through verdict. (Doc. 79-3, Br. in Support of Motion for Class Certification, at 20-21.) Likewise, there has been no showing of antagonism or conflict between Miller and any other potential class members, and the undersigned finds no basis upon which the court could reasonably find that such conflicts exist this juncture. Accordingly, for the foregoing reasons, it is submitted that Miller and his counsel have satisfied their burden of establishing the requirements prescribed by Rule 23(a).

3. Rule 23(b)(3) is Satisfied

In addition to satisfying the requirements of Rule 23(a), a putative class action must also satisfy one of the three conditions prescribed by Rule 23(b). In this case, Miller is proceeding under Rule 23(b)(3), which provides in part as follows:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b)(3). Factors that are relevant to this determination include class members' interests in pursuing individual actions, the extent of litigation that has already been undertaken; the desirability of concentrating the litigation in a particular forum; and the likely difficulties in managing a class action. *Id*.

As noted above, Miller has alleged that Trans Union engaged in a uniform and widespread practice with respect to furnishing consumers with misleading and inaccurate personal credit reports that contained ambiguous and alarming information regarding the recipients' potential match to the OFAC list. This is a common issue that gives rise to the claims of all class members, and all flows from a singular activity on the part of Trans Union. Accordingly, it is recommended that the court find that common issues predominate over individual issues with respect to the claims in this case that allege a common course of conduct affecting all members of the putative class. *In re Prudential*, 148 F.3d at 314-15.

This rule also requires that the Court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Superiority is considered from several points of view, including those of the judicial system, the potential class members, the plaintiff, the attorneys for the litigants, the public at large and the issues presented. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 760 (3d Cir. 1974). To determine whether a class action is "the best available method of litigation, the district court must 'balance, in terms of fairness and efficiency,' the merits of a class action against the merits of 'alternative methods of adjudication.'" *In re Community Bank of Northern Virginia*, 418 F.3d 277, 309 (3d Cir. 2005) (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996).

Courts have found that in cases such as this, where the class is estimated to exceed 13,000 plaintiffs, class actions often provide a superior method of fairly and efficiently adjudicating claims. *In re Prudential*, 148 F.3d at 316. In this case, the Court should similarly conclude that the scope of the claims and plaintiffs spread throughout the territory covered by the Third Circuit makes class-action practice particularly appropriate. Moreover, there is some suggestion that the scope of likely recovery on an individual basis may be relatively low, which could have the effect of discouraging scattered individual suits, despite a large number of consumers having potential claims. Such a factor militates in favor of certification

here. *See Chakejian v. Equifax Information Servs. LLC*, 256 F.R.D. 492, 501-02 (E.D. Pa. 2009) ("This is a case where there are a large number of potential plaintiffs pursuing statutory claims with a relatively small amount of potential recovery. Rule 23(b)(3) is the best method of adjudication for situations like these in which the potential recovery is 'typically so small . . . that litigation of a single claim is, as a general matter, hardly worth the cost and effort of the litigation.'") (quoting *Seawell v. Universal Fidelity Corp.*, 235 F.R.D. 64, 68 (E.D. Pa. 2006); *cf. Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994) (finding that the class action was superior method of resolving statutory violations because "[t]he alternative to pursuing a class action is a series of state court actions by a large number of scattered plaintiffs, an inefficient allocation of judicial and public resources"). These factors in this case militate in favor of finding that the class-action form is the superior procedural vehicle to address what is represented to be widespread violations of the FCRA that flow from a uniform activity on the part of Trans Union.

IV. RECOMMENDATION

In summary, it is recommended that the Court find that Ronald J. Miller has standing to prosecute this action based on the informational injuries alleged, and find that nothing in *Spokeo* compels a different conclusion.

It is further recommended that the Court find that class certification is appropriate in this case, where the plaintiff has demonstrated by a preponderance of the evidence that the proposed class, as defined above, satisfies all four factors under Rule 23(a) and meets the requirements of Rule 23(b)(3).[1] It is, therefore, recommended that the Court grant the plaintiff's motion for class certification (Doc. 79.) and enter an order substantially in conformity with the proposed order attached thereto (Doc. 79-1).

The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive

[1] It is recommended that the class should be defined as "All persons residing at an address within the jurisdiction of the U.S. Court of Appeals for the Third Circuit to whom Trans Union LLC provided a Personal Credit Report, from September 22, 2011, until October 27, 2011, substantially similar in form to the one Trans Union provided to Plaintiff Ronald J. Miller dated October 13, 2011."

further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

Dated: January 18, 2017