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and on behalf of all others similarly situated

CHRISTINA ATTERBURY, Individually and on behalf of all others similarly situated, Plaintiff, v. EARN COMPANY, et al., Defendants.	**COURT OF COMMON PLEAS** **PHILADELPHIA COUNTY** CIVIL ACTION APRIL TERM 2021 NO. 00637 Control No. 22053801

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

In moving for class certification, Plaintiff provided reams of evidence demonstrating how each named Defendant played a role in fleecing the Class members out of money through their credit repair operations. Nakia and Dana founded Credit Exterminators/ Earn Company and continued to market it through its entire existence; its "first investor" was Sprinkle of Jesus; Donnell pushed credit repair over social media; and April ran the company after Dana "gave" it to her. All profited from the family credit repair operations, with Dana boasting sales of $7,000 per day "before I even wake up." (Pl.'s Br. at p. 5.) Nakia and Dana admit in a YouTube video that "[i]f you look at all the checks, we get paid the same amount"—the "same salary." (*Id.* at p. 6.)

Yet in opposing class certification, Defendants have not put forth any evidence whatsoever disputing this or the mountain of other evidence demonstrating Defendants' enrichment from and involvement in the credit repair scheme. Instead, Defendants resort to mischaracterizing Plaintiff's class claim as requiring proof of *fraud*, even though the statute plainly prohibits "fraud *or*

deception[.]" 15 U.S.C. § 1679b(a)(4) (emphasis added).[1]

At bottom, Plaintiff's class claim arises from Defendants' direct and indirect involvement in this credit repair scheme that funneled illegal upfront fees to them by means of form contracts that required payment before the performance of any services, in violation of the CROA. Indeed, Defendants required that consumers pay first before they even received the contracts to sign. (Pl.'s Br. at pp. 13–14.) None of this has been disputed by Defendants, and Defendants' few arguments against certification are far from convincing. Defendants' family business readily presents a common course of conduct as to all class members, making class treatment a fair and efficient method of adjudication. The Rules liberally allow for class certification, and Plaintiff's motion should be granted.

I. The CROA does not condition liability on proof of fraud or individual reliance

In opposing class certification, Defendants spend the majority of their 38-page brief attempting to recast and mischaracterize Plaintiff's class claim as a "fraud" claim, which would require proof of reliance. (*See, e.g.*, Def.'s Br. at p. 6.) Defendants' argument ignores Plaintiff's actual theory of liability for her class claim, which is based on each Defendants' involvement, "directly or indirectly," in a "deceptive" course of business in connection with the offer or sale of credit repair services. 15 U.S.C. § 1679b(a)(4). This provision makes it unlawful to commit "a fraud *or* deception…." *Id.* (emphasis added). Defendants conspicuously ignore the "or deception"

[1] To be sure, Plaintiff's *class* claim is based on the same legal theories and evidence as that of the Class. But, as borne out in discovery, Plaintiff's individual claim also arises from failing to send disputes to the credit reporting agencies, and other misrepresentations regarding the services offered. The credit reporting agencies ("CRAs") confirmed that no disputes were sent on her behalf, as attested to by the CRAs' witnesses and credit reporting expert Evan Hendricks. (Pl.'s Br. at p. 15.) This provides important context as it demonstrates that Defendants did nothing for Ms. Atterbury, despite taking over $1,000 in illegal upfront fees. Defendants had over two months before filing its Opposition to request discovery on the issue, but they chose not to broach the issue with Plaintiff. Plaintiff does not object to the depositions of these credit bureau witnesses. In any event, if this case is certified as a class action, Plaintiff is willing to forego her individual claim to the extent it arises from such misrepresentations or failure to send disputes.

in the statute.

Deception is a term of art that our Supreme Court has clarified imposes strict liability, making the focus on whether the challenged conduct has the "tendency or capacity to deceive," not whether it *actually* deceived or was *intended* to deceive. *Gregg v. Ameriprise Fin., Inc.*, 245 A.3d 637, 646–48 (Pa. 2021) (interpreting term "deceptive" under Pennsylvania's consumer protection law). Plaintiff's class claim and the claims of the class members all arise from Defendants' deceptive course of conduct of receiving illegal upfront fees pursuant to credit repair contracts that violate the CROA.

Defendants cite *Gregg* for the proposition that reliance is required for Plaintiff's class CROA claim, but Defendants misread *Gregg* and the underlying statute, the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). As Defendants note, in *Gregg*, the Court stated that "Section 201-9.2 [of the UTPCPL] requires the plaintiff to establish justifiable reliance." (Def.'s Br. at p. 22.) Section 201-9.2 is the private action provision, which conditions enforcement on proof of an "ascertainable loss of money or property, real or personal, as a result of" the unlawful practice. 73 P.S. § 201-9.2. The term "as a result of" in the UTPCPL has been interpreted as requiring proof of justifiable reliance. *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001) ("The statute clearly requires, in a private action, that a plaintiff suffer an ascertainable loss *as a result of* the defendant's prohibited action. That means, in this case, a plaintiff must allege reliance."). In other words, justifiable reliance is a feature of the UTPCPL's private enforcement scheme, not derived from the term "deception" or "deceptive."

In arguing that § 1679b(a)(4) of the CROA requires a showing of reliance, Defendants rely primarily upon *Helms v. Consumerinfo.com, Inc.*, 436 F. Supp. 2d 1220 (N.D. Ala. 2005). (Def.'s Br. at p. 20.) But *Helms* ignored the body of federal authorities discussed in *Gregg*, which have

uniformly taken a broad view of the term "deception" under federal law. *Gregg*, 245 A.3d at 647 ("deception is a broader concept of misconduct than common law fraud"); *id.* at 648 ("Actual deception, proved by deceived consumers, is not necessary" under federal definition of deception). Indeed, our Supreme Court rejected the argument that "the terms 'fraudulent' and 'deceptive' are synonymous," *id.* at 644, yet *Helms* made no attempt whatsoever to interpret "deception" independently from the term "fraud."

Defendants also cite *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F. Supp. 2d 254 (D. Mass. 2008) in support (Def.'s Br. at p. 20), but *Zimmerman* confirms the CROA's expansive prohibition against deceptive conduct. The court in *Zimmerman* rejected the view that reliance and damages are features of a claim under § 1679b(a)(4), explaining that the broad prohibition applies to "an '*attempt* to commit ... a fraud or deception,' whether or not it succeeded." *Zimmerman*, 529 F. Supp. 2d at 280.[2]

Because § 1679b(a)(4) of the CROA applies not just to fraud but also to deceptive practices, Defendants' arguments about the need to prove individual reliance are inapposite.

II. Adequacy is met

Defendants contend that adequacy cannot be satisfied because "Plaintiff's claims are in conflict with putative class members who may have benefited from Earn/Credit Exterminators' services[.]" (Def.'s Br. at p. 28.) Defendants' speculation that consumers benefited is based on videos purportedly showing that six consumers experienced an increase in their credit scores. (*Id.* at p. 29.) The statements in the videos are inadmissible hearsay under Pa. R. Evid. 802. Moreover,

[2] The court in *Hillis v. Equifax Consumer Servs., Inc.*, No. 1:04-CV-3400, 2005 WL 8155139 (N.D. Ga. May 24, 2005) (Def.'s Br. at pp. 20-21) assumed without deciding that § 1679b(a)(4) is subject to a "heightened pleading standard," finding that the plaintiff pleaded sufficient facts necessary to prove fraud. *Id.* at *4. The court did not engage in any analysis of whether the term "deception" requires proof of reliance damages, which the Court in *Gregg* rejected. *See Gregg*, 245 A.3d at 648 ("Actual deception, proved by deceived consumers, is not necessary" under definition of deception under federal law).

Defendants have not offered any evidence whatsoever that their own conduct resulted in any increase.[3] Defendants' sheer speculation cannot support denial of class certification. *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184, 193 n.10 (Pa. Super. 2002) (rejecting argument that had "no factual basis in the record," explaining, "[w]e will not find Appellant's claims dissimilar based upon speculation"); *Z&R Cab, LLC v. Philadelphia Parking Authority*, No. 140601394, 2019 WL 13182210, at *6 (Phila. C.C.P. June 20, 2019) (rejecting purported conflict of interest based on "mere speculation to which no evidence has been proffered").

Further, the federal case defendant relies upon is inapposite, as it involved a "fundamental" conflict where "a large segment of the class" viewed the alleged wrongdoing as beneficial. *Grimes v. Fairfield Resorts, Inc.*, 331 F. App'x 630, 633 (11th Cir. 2007). No such record is present here. Quite the opposite. Scores of consumers have flooded counsel's offices with calls about being ripped off by one or more of Defendants' businesses. The Attorney General has been inundated with complaints as well, resulting in its lawsuit against Defendants.

Defendants' remaining challenge to Ms. Atterbury's adequacy rings hollow, as the argument as to "discrepancies" is based on Defendants' self-serving view of Ms. Atterbury's deposition testimony. Ms. Atterbury is clearly familiar with the class claims. (Def.'s Ex. A, Atterbury Dep. at p. 80.) Moreover, Ms. Atterbury's view of the contracts and what they state is ultimately irrelevant to liability, as the Court will decide, upon review of the two form credit repair contracts and one form NDA, whether these documents comply with the statutory requirements.

III. Defendants' speculation about the outcome of the AG Action is no reason to deny the opportunity for class-wide relief in this first-filed action

Defendants argue the tautology that the later-filed AG Action—"if successful"—would

[3] Indeed, Ms. Atterbury testified that her credit score increased, which she attributes to her own actions of paying down her debts, and in spite of the Defendants' empty promises and non-existent disputes to the credit bureaus. (Def.'s Br. at p. 20, n.12, and testimony cited therein.)

compensate the class members in substantially the same amount sought in this action. (Def.'s Br. at p. 33.) Following Defendants' flawed tautology, the AG Action—if *un*successful—would not afford *any* compensation to class members. Moreover, class members stand to gain more in this class action because both actual and punitive damages are sought, whereas the AG Action does not seek punitive damages. (Def.s Br. at p. 34; Pl.'s Ex. 38, AG Complaint.) Nor does the AG seek relief against Sprinkle of Jesus or Donnell, two defendants integrally involved in the credit repair business. Defendants also fail to rebut Plaintiff's arguments regarding the federal policy behind the CROA, which when coupled with Pennsylvania's strong policy favoring consumer class actions,[4] only favors parallel class proceedings. Unlike this instant first-filed action, the AG Action is not a class action, and it involves different defendants, different wrongs, and different remedies under state law, not the federal CROA. Plaintiff incorporates by reference her arguments made in her opening brief. (*See* Pl.'s Opening Br. at pp. 34–35.)

IV. Proceeding as a class action is a more fair and efficient method of adjudication compared to proceeding with up to 1,329 individual CROA claims

Defendants contend that class members' claims are sufficient in amount to support individual actions by all 1,329 class members (Def.'s Br. at p. 34), yet not a single individual action has been filed by a class member. Practically, the denial of class certification would require hundreds of class members from all over the United States to file individual lawsuits in this Court pursuant to the contract's forum selection clause, which states that "[a]ny dispute, controversy, action or proceeding arising out of this Agreement shall be submitted to the Courts of the State of Pennsylvania within the County of Philadelphia for disposition." (Pl.'s Ex. 6, Declaration of April Olivera at Exs. B and C thereto.)

[4] *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 884 (Pa. Super. 2006) ("Class action lawsuits are and remain the essential vehicle by which consumers may vindicate their lawful rights.").

Defendants contend there is adequate incentive to pursue individual claims because of the CROA's fee-shifting provision. (Def.'s Br. at p. 35.) Fee-shifting provisions in consumer protection statutes are typical, and the availability of such relief does not make class litigation unfair or inefficient. *Chakejian v. Equifax Info. Servs. LLC*, 256 F.R.D. 492, 501 (E.D. Pa. 2009) (rejecting argument that fee-shifting provision in federal consumer protection law makes individual litigation superior). The fact that a federal consumer law authorizes class actions "suggests that Congress did not believe that fee shifting alone would be sufficient" motivation to file suit individually. *Muse v. Holloway Credit Sols., LLC*, 337 F.R.D. 80, 87 n.38 (E.D. Pa. 2020) (certifying class under federal Fair Debt Collection Practices Act). Moreover, the consumer class members would not need to endure the "potential hassles, inconveniences, and demands on their time" in proceeding individually. *Id.* at 87. Defendants ignore these real and intangible costs of individual litigation. *Id.* ("attorneys' fees are only one type of cost involved in litigation").

Proceeding with duplicative discovery in hundreds of individual actions, which would all take place in this Court pursuant to the contract's forum selection clause, would not be cost effective or efficient. Class certification is a fair and efficient method of adjudication.

V. Defendants' arguments as to the merits of the claims against individual Defendants Dana, Donnell, April, and Nakia supports certification

Finally, Defendants assert that the individual Defendants Dana, Donnell, April, and Nakia are not liable for their involvement in the credit repair operation, so a class should not be certified. (Def.'s Br. at p. 35–36.) Of course, the Court does not decide the merits at class certification, and merits discovery is not yet under way, so it remains to be seen whether these individual Defendants are liable for their involvement in receiving illegal upfront fees pursuant to the unlawful credit

repair contracts.[5] In any event, the perceived (and wholly incorrect) argument about the inadequacy of Plaintiff's claims cannot be factored into the certification decision. *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 22 (Pa. 2011) ("trial court was prohibited from factoring the perceived adequacy of the underlying merits of the class's claims into the certification decision").

Even assuming *arguendo* Defendants are correct that the individual Defendants cannot be held accountable as "credit repair organizations," then they would be correct with respect to the CROA claims of all 1,329 class members, as this determination is objective. (Pl.'s Opening Br. at p. 28.) Defendants' argument is predicated not on a "fatal dissimilarity, but, rather, a fatal similarity – [an alleged] failure of proof as to an element of [P]laintiffs' cause of action." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013). Defendants' argument is thus not one for refusing to certify the class, but one for certifying it and then entering a judgment that would largely exonerate some Defendants – a course Defendants should welcome as all class members who did not opt out would be bound by the judgment. Such efficiency weighs *in favor* of class litigation, not against it.

VI. The revised class definition is proper

Defendants suggest that certification is improper because the instant class and subclass definition differs from the class definition in the Complaint. (Def.'s Br. at p. 10.) Not so. "Trial courts are vested with broad discretion in determining definition of the class as based on commonality of the issues and the propriety of maintaining the action on behalf of the class." *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 454 (Pa. Super. 1982). Courts readily recognize that alternative class definitions may be certified even if they differ with the definition

[5] The individual Defendants contend that they are not liable because they did not sign a contract with Ms. Atterbury. As argued extensively in prior briefing on Defendants' Preliminary Objections and Motion for Judgment on the Pleadings, a defendant's liability under the CROA as credit repair organizations is not conditioned upon whether that defendant signed a contract with the consumer. This is a red herring.

in the complaint. *See, e.g.*, *Hassine v. Simon's Agency, Inc.*, No. 18-9031, 2021 WL 2646990, at *3 (D.N.J. Apr. 29, 2021) ("it is well established that a plaintiff 'is not bound by the class definitions proposed in its Amended Complaint, and the Court can consider [p]laintiff's revised definitions . . . in its motion for class certification'").

VII. Conclusion

Plaintiff Christina Atterbury has met her prima facie burden on class certification, and Defendants fail to provide any cogent basis for this Court to decline to certify. Plaintiff's motion should be granted.

Respectfully submitted:

Date: 7/29/2022

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CERTIFICATE OF SERVICE

I, ANDREW M. MILZ, do hereby certify that on this day, a filed copy of Plaintiff's Reply in Support of Motion for Class Certification was served via electronic filing upon the following:

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