No. 03-3331

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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ONETA S. COLE, Plaintiff-Appellant,

v.

U.S. CAPITAL, INC., AUTONATION USA CORPORATION, and
JERRY GLEASON CHEVROLET, INC., Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION
THE HONORABLE JOHN DARRAH

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# BRIEF OF AMICUS CURIAE, FEDERAL TRADE COMMISSION IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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WILLIAM E. KOVACIC
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448

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## INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission ("FTC" or "Commission") submits this brief pursuant to this Court's Order of February 18, 2004, which invited the Commission's views regarding the issues in this case.

The Fair Credit Reporting Act ("FCRA" or "the Act"), 15 U.S.C. §§ 1681 *et seq*., seeks to ensure the "[a]ccuracy and fairness of credit reporting," § 1681(a). The Commission has primary responsibility for governmental enforcement of the FCRA. § 1681s. Consumers may also bring private actions. §§ 1681n, 1681o. The Commission has issued interpretations regarding the Act, 16 C.F.R. Part 600, and has promulgated a Summary of Consumer Rights, Notice of User Responsibilities, and Notice of Furnisher Responsibilities, 16 C.F.R. Part 601. Recent amendments, P.L. 108-159, 117 Stat. 1952 (2003), give the Commission significant rulemaking responsibility in connection with the implementation of those amendments. In the context of another consumer credit statute, this Court has found it appropriate to give "due weight" to the Commission's analysis of the laws it enforces. *See Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327 n.8 (7th Cir. 1997) (giving weight to the Commission's interpretation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692).

The FCRA imposes distinct obligations on the entities that compile and use

consumer reports: consumer reporting agencies that assemble and disseminate reports[1] (§ 1681(b)); "furnishers," who provide the data to be compiled (§ 1681s-2); and those who use consumer reports to make decisions regarding credit, employment, insurance, or other matters (§§ 1681b(f), 1681m). The requirements imposed on "users" -- *e.g.*, that they obtain consumer reports only for a permissible purpose, § 1681b(f), and that they make certain disclosures to consumers, § 1681m -- serve a pivotal function in protecting consumer privacy by restricting the dissemination of the information maintained by consumer reporting agencies.

In this case, a district court has improperly dismissed plaintiff's complaint for failure to state a claim. The complaint alleged that 1) defendants lacked a permissible purpose for obtaining the plaintiff's consumer report because the credit they offered her was a sham, and 2) defendants failed to make mandatory disclosures in a clear and conspicuous manner. In dismissing the allegation that defendants lacked a permissible purpose, the court looked only at the form and ignored the substance of defendants' offer of credit. This decision would, if upheld, undermine the Act's protection of consumer privacy and could permit persons to obtain consumer reports for the impermissible purpose of target marketing by merely including a sham offer

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[1] Consumer reporting agencies are often called "credit bureaus," and consumer reports are called "credit reports."

of credit in any advertising they send to the consumer. *See Trans Union Corp. v. FTC*, 81 F.3d 228, 233-34 (D.C. Cir. 1996) (holding that target marketing is not a permissible purpose for receiving a consumer report). Furthermore, by dismissing (without discussing) plaintiff's claim that defendants failed to make mandatory disclosures in a clear and conspicuous manner, the court undermined the important consumer protections that those disclosures provide.

## STATEMENT OF THE ISSUES PRESENTED

1) Whether it was proper for the district court to grant a motion to dismiss plaintiff's complaint where plaintiff alleged that defendants' ostensible firm offer of credit was a sham, and further alleged that, as a result, defendants lacked a permissible purpose for obtaining her consumer report.

2) Whether it was proper for the district court to dismiss plaintiff's complaint without addressing her claim that mandatory disclosures made by defendants were not "clear and conspicuous" where defendants placed those disclosures amidst other information in a tiny-type footnote.

## STATEMENT OF THE CASE

### 1. The Fair Credit Reporting Act

Congress passed the FCRA in 1970 after extensive hearings. Those hearings showed the importance of credit reporting to the economy but revealed several areas

of abuse. Among those was that consumer reporting agencies did not consistently protect the confidentiality of the information they collected regarding consumers. To address this problem, the FCRA permits consumer reporting agencies to disseminate consumer reports only to those who have a statutorily designated "permissible purpose" for obtaining such reports, 15 U.S.C. § 1681b, and it prohibits persons from obtaining consumer reports unless they have a permissible purpose for doing so, § 1681b(f). For the most part, a "permissible purpose" arises only in connection with transactions initiated by consumers. *See* § 1681b(a)(3)(A)-(F) (authorizing the release of consumer reports when a consumer has applied for credit, a job, insurance, a license, etc.). Each "permissible purpose" reflects a congressional determination that the benefits of that use of information are sufficient to justify the intrusion on the consumer's privacy that release of the information entails.

One of the few circumstances in which the FCRA allows the release of a consumer report in the absence of a consumer-initiated action is when the recipient of the information undertakes to make a "firm offer of credit or insurance" to the consumer. 15 U.S.C. § 1681b(c).[2] Because such offers do not involve any action

[2] There are certain other limited situations that do not involve transactions initiated by the consumer when a consumer report may be released. *See, e.g.*, § 1681b(a)(1) (consumer report may be released in response to a court order or grand jury subpoena); § 1681b(a)(4), (5) (consumer report may be released to enforce child support payments); § 1681b(a)(2) (consumer report may be released to anyone in

by the consumer (*i.e.*, firm offers of credit or insurance normally come to consumers in the form of unsolicited advertisements), the FCRA imposes strict conditions on the offers that qualify for such treatment. In particular, the offer must be one "that will be honored" if the consumer meets the specific criteria used to select the consumer for the offer based on consumer report information. § 1681a(*l*). There are only three circumstances under which the offer need not be honored after it is made: First, the creditor (or insurer) may apply additional criteria bearing on creditworthiness to information (such as income) contained in the consumer's application if these criteria were selected in advance of making the firm offer. § 1681a(*l*)(1). Second, a creditor or insurer may also condition the credit or insurance on verification that the consumer continues to meet the specific criteria that were used to select the consumer for the firm offer. § 1681a(*l*)(2). Third, a creditor may require a consumer to post collateral as a condition to consummating a firm offer of credit if that collateral requirement was established in advance, and was disclosed in the firm offer. § 1681a(*l*)(3).

The FCRA imposes other requirements on those who invoke the "firm offer of credit or insurance" permissible purpose. Pursuant to § 1681m(d), such users must provide to each consumer who receives an offer a "clear and conspicuous statement" that discloses 1) that information in a consumer report was used; 2) that the offer was

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accordance with written instructions from the consumer).

conditioned on certain criteria; 3) that the offer may not be extended if the consumer does not continue to meet those criteria or does not provide required collateral; and 4) that the consumer has the right to prohibit the future use of her consumer report in connection with unsolicited firm offers of credit or insurance (*i.e.*, to opt-out of future offers). The statement must also provide the consumer with a toll-free number to call if the consumer wants to preclude the use of her report for such offers.

**2. Factual Background**

In December 2001, plaintiff Oneta Cole, an Illinois resident, received an unsolicited advertisement in the mail. Complaint Exhibit A. The ad, which was captioned "CONGRATULATIONS ON YOUR PRE-APPROVAL STATUS!," was unclear and confusing. It appeared to contain two separate offers of credit. (The advertisement is replete with words printed in all upper-case letters.) First, the ad offered Ms. Cole "a Visa or MasterCard with limits up to $2000," and second, it offered "up to $19,500 in AUTOMOTIVE CREDIT." With respect to the car loan, the text advised Ms. Cole that "your pre-approved auto loan status allows you to CHOOSE FROM A NEW OR PRE-OWNED VEHICLE * * *." With respect to the credit card offer, the text urged her to "ACTIVATE YOUR PRE-APPROVAL TODAY!" To do this, Ms. Cole had to come to Jerry Gleason Chevrolet in Forest Park, Illinois.

At the base of the ad, there were nine lines of disclosures in tiny type (approximately 6 point) that apparently qualify both the automotive credit and the credit card offer. The first two lines informed Ms. Cole that she had been "selected based on information obtained from your consumer report from Trans Union L.L.C., and final acceptance is subject to your ability to meet our full eligibility requirements." The next portion of the disclosures related to the car loan, and disclosed the limits of the loan she could obtain and the criteria she had to meet:

> Your monthly car payment cannot exceed 50% of your gross income (before taxes). All bankruptcies must be discharged. You must prove one-year residence and one year employment. You must be at least 18 years of age and your annual income must be $18,000 per year or higher. Security of credit can affect down payment and APR. Dealer has the right to determine down payment, terms and specific vehicle. This credit offer is not valid if a current credit report shows you are currently involved in a bankruptcy or foreclosure, have excessive tax liens or there has been a credit deterioration. Lender reserves the right to require consumer to pay off currently financed vehicle and may require consumer to increase down payment, which will affect equity and collateral. * * * If at the time of offer consumer no longer meets the initial criteria, offer may be revoked.

Even though the amount of the loan Ms. Cole would receive was limited (her monthly payment on the loan could not exceed 50% of her gross income), the disclosures assured her that she would receive a loan:

> In any event, you are guaranteed to receive a credit line of at least three hundred dollars for the purchase of a vehicle, GRSI, Coral Springs, FL.

Thus, as only a keen-eyed reader would discern, the offer of "up to $19,500 in AUTOMOTIVE CREDIT," could, in fact, be as little as $300. There was no explanation of the abbreviation "GRSI," or of why an Illinois car dealership offered vehicles "GRSI, Coral Springs, FL." Nor did the ad explain why what appeared to be a car loan, which would normally be closed end credit, *i.e.*, a fixed loan for a fixed period of time, was referred to as a "credit line," a term normally used to describe open-end, credit-card-type credit.

Finally, the car loan portion of the disclosures contained a sentence that appeared to be an attempt to comply with § 1681m(d)(1)(D) of the FCRA. It informed Ms. Cole that she could put a halt to the use of her consumer report in connection with similar offers:

> If you prefer that your name be omitted from future offerings, please contact Trans Union, Marketing Opt Out, and PO Box 97328, Jackson, MS 39288-7328 or call 1-888-546-8688.

The remainder of the disclosures related to the credit card offer and were captioned "CREDIT CARD DISCLAIMER":

> Customer agrees and authorizes US Capital Financial Services to act as agent to obtain for the customer a credit card. Guaranteed approval is neither expressed nor implied. Interest rates may vary from 2.9% to 24.9% based on individual credit worthiness and lenders (sic) credit parameters. Customer agrees to hold harmless the named automobile dealer, US Capital Financial Services and the marketing company and/or its agents for any actions or claims regarding credit card acceptance,

terms of acceptance, denials or any marketing of this promotion. Customer required to complete application, see application for terms and conditions. Subject To Final Lender Approval.

There is no indication in the record that Ms. Cole purchased a car, received a car loan, or obtained a credit card as a result of this ad.

**3. Proceedings Below**

On January 21, 2003, Ms. Cole filed her Second Amended Complaint before the United States District Court for the Northern District of Illinois. D. 37. She alleged that, in December 2001, she received the ad, and that all three defendants were responsible for sending it to her.[3] The complaint stated that Ms. Cole had not authorized any of the defendants to obtain her consumer report. It further alleged that the ad did not constitute a firm offer of credit that would provide any of the defendants with a permissible purpose under the FCRA for obtaining her consumer report. In particular, it alleged that the ad did not constitute a firm offer of credit because "[a]n offer of a $300 line of credit useable only to finance the purchase of an automobile is a sham." It further alleged that the disclosure required by § 1681m(d) was not clear and conspicuous. The complaint sought class certification, statutory

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[3] The three defendants include Jerry Gleason Chevrolet, AutoNation USA, a corporation that owns or is affiliated with various auto dealerships (including Jerry Gleason Chevrolet), and U.S. Capital Corp.

damages of $1000 per person, punitive damages, and attorney's fees.

The defendants moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failing to state a claim upon which relief could be granted. On April 30, 2003, the court (per Judge Darrah) granted that motion.

With respect to plaintiff's contention that the defendants' offer was a sham, the court focused on the fact that the ad specifically stated that Ms. Cole was "guaranteed" to receive at least a $300 line of credit.[4] The court noted that, "[p]laintiff has not alleged that she or any other consumers attempted to accept the offer and that it was not honored nor does the mailing itself indicate that such an offer would not have been honored." Based on this, the court concluded that defendants' offer was not a sham. Further, the court held that, because the offer of credit was not a sham, and because defendants obtained Ms. Cole's consumer report in connection with making her this offer, defendants had a permissible purpose under the FCRA for obtaining her report. Thus, the court dismissed plaintiff's complaint. It did not, however, address plaintiff's allegation that defendants failed to make the disclosures required by § 1681m(d) in a clear and conspicuous manner.

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[4] The Commission agrees with the court's holding that it must rely on federal, not state, law when interpreting the FCRA.

## SUMMARY OF ARGUMENT

Although the FCRA permits a business to obtain a consumer report if it provides the consumer with a firm offer of credit or insurance, the law is not satisfied if the business provides the consumer with an offer that is merely a sham. When the offer is not genuine, the consumer does not receive any benefit to offset the infringement of privacy that results from the release of the report. The district court failed to appreciate that, if the offer is a sham, then the business may simply be engaged in target marketing, which is not a permissible purpose for obtaining a consumer report. (Part I.A, *infra*.)

The district court improperly dismissed Ms. Cole's challenge to defendants' offer, which went not just to whether the offer was guaranteed, but to the substance of the offer. On remand, Ms. Cole should be permitted to present evidence showing that the offer was, in fact, illusory. (Part I.B, *infra*.)

The district court also erred by dismissing the case without addressing the allegation of Ms. Cole's complaint that the tiny-type disclosures included in a footnote were not clear and conspicuous, as required by § 1681m(d). This Court has made clear that an allegation that disclosures are not clear and conspicuous states a claim upon which relief may be granted, and, therefore, should not be dismissed in response to a motion under Fed. R. Civ. P. 12(b)(6). On remand, the district court

should evaluate the disclosures in light of this Court's admonition that, where disclosures must be conspicuous, the requirement is not met if the disclosures are in type disproportionately small to the rest of the document. (Part II, *infra*.)

## ARGUMENT

### I. THE DISTRICT COURT IMPROPERLY DISMISSED MS. COLE'S CLAIM THAT DEFENDANTS OBTAINED HER CONSUMER REPORT IN VIOLATION OF THE FCRA

The district court went astray because it mistakenly believed that defendants could satisfy the FCRA's "firm offer of credit" permissible purpose by making *any* offer of credit so long as the offer was guaranteed. But this result undermines a crucial balance struck by the FCRA -- businesses may obtain access to consumer reports only where the consumer receives a benefit that may justify the infringement to privacy that results from disclosure of the report. An offer that is merely illusory or a sham does not comport with the purpose of § 1681b(c) -- to permit the infringement of privacy only when consumers have been offered actual credit or insurance -- and does not provide a permissible purpose for obtaining the consumer's report. Accordingly, Ms. Cole's complaint, which claimed that defendants' offer was a sham under the circumstances in which it was presented, states a claim upon which relief may be granted. On remand, she should be permitted to present evidence to show that defendants' ostensible "firm offer" was a sham.

**A. A sham offer is not a "firm offer of credit" under the FCRA**

The FCRA defines a "firm offer of credit" as "any offer of credit * * * to a consumer that will be honored" under specified circumstances. § 1681a(*l*). But to hold, as the district court essentially did, that this definition encompasses *any* purported offer, no matter how illusory, is "to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Gregory v. Helvering*, 293 U.S. 465, 470 (1935) (denying tax deduction for a sham transaction); *see Grojean v. Commissioner of Internal Revenue*, 248 F.3d 572, 574 (7th Cir. 2001) (same); *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 941 (7th Cir. 1999) (holding that the court must look to the substance of a corporate reorganization to determine whether its purpose was to evade liability under antidiscrimination laws). Moreover, "[t]he Supreme Court and many other courts * * * have applied the substance-over-form doctrine to consumer finance law." *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 436 (5th Cir. 1998) *citing Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 366 n.26 (1973). The reason for this is that a consumer credit statute such as the FCRA "is remedial in nature and the substance rather than the form of credit transactions should be examined in cases arising under it." *Clark v. Rent-It Corp.*,

685 F.2d 245, 248 (8th Cir. 1982) (internal quotation marks and citation omitted).[5] Accordingly, the district court should have considered the substance of defendants' offer, and given Ms. Cole a chance to show that the offer was not genuine, but was a sham used to avoid the FCRA's restrictions.[6]

In making this distinction, moreover, the district court should have looked to the structure and policies of the FCRA. *See Milwaukee Gun Club v. Schulz*, 979 F.2d 1252, 1255 (7th Cir. 1992), *citing K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("in ascertaining the plain meaning of the statute, the court must look not only to the particular statutory language at issue, but to the language and design of the

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[5] Although the statute at issue in *Clark* was the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, the holding of that case applies here because FCRA, like TILA, is a remedial consumer credit statute. Indeed, TILA is Title I of the Consumer Credit Protection Act and FCRA is Title VI of the same act.

[6] Defendants mistakenly contend that the FCRA does not impose any liability on users who obtain consumer reports for improper purposes. Brief of Appellees ("App. Br.") at 23 & n.2. They ignore that § 1681b(f), which was added to the FCRA in September 1996, specifically prohibits users from obtaining consumer reports unless they have a permissible purpose. Moreover, §§ 1681n, 1681o provide for civil liability by "[a]ny person" who violates "any requirement" of the FCRA.

Defendants cite several cases in support of their argument, *see* App. Br. at 23 n.2, but *Kvalheim v. Checkfree Corp.*, 2000 WL 209058 (S.D. Ala., Feb. 18, 2000), is the only one of those cases that involves events occurring after September 1996. Although the court in *Kvalheim* questions (without deciding) whether the FCRA imposes liability on users, it is evident that § 1681b(f) was never brought to the court's attention. Further, defendants' suggestion that decisions of this Court based on the pre-1996 version of the FCRA retain vitality (despite the statutory change) unless specifically overruled, App. Br. at 23 n.2, is absurd.

statute as a whole"). A primary goal of the FCRA is to protect consumers' interest in the privacy of the information maintained by consumer reporting agencies. § 1681(a)(4); *see Trans Union Corp. v. FTC*, 245 F.3d 809, 812-13 (D.C. Cir. 2001). The FCRA achieves this goal by prohibiting persons from obtaining consumer reports unless they have a permissible purpose. Each permissible purpose reflects a congressional determination that the benefits of that use of information are sufficient to justify the infringement of privacy that it entails. As explained above, with certain narrow exceptions, a consumer reporting agency may supply a consumer report to a person involved in a business transaction with a consumer only when that transaction is initiated by the consumer. Although the consumer's privacy is infringed even when the consumer report is issued in connection with a transaction initiated by the consumer, the release of the report provides something of value to the consumer -- it facilitates the consumer's transaction. Indeed, by initiating the transaction that triggers the business's right to obtain the report, the consumer demonstrates that she values the prospect of facilitating the transaction. Thus, the benefit to the consumer from release of the report offsets the infringement of privacy. *See Trans Union Corp. v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2001).

As discussed above, the FCRA's "firm offer of credit or insurance" permissible purpose is a narrowly circumscribed use that is fully consistent with Congress's

underlying rationale that consumers should only be required to give up the privacy that the FCRA protects when they are getting something of value in return. Even though not all consumers will take advantage of a genuine firm offer of credit or insurance, the FCRA recognizes that such offers provide something of value to consumers, in return for which many consumers will be willing to yield a degree of privacy. *See Trans Union v. FTC*, 267 F.3d at 1143. The statute ensures the primacy of consumer choice, moreover, by requiring that a consumer who receives a firm offer must also receive a clear and conspicuous statement that explains how the offer was made and affords an opt-out opportunity for consumers who do *not* value the receipt of such offers enough to give up their privacy.

In contrast, as both the Commission and the D.C. Circuit have expressly recognized, the FCRA bars the release of consumer reports for other, non-"permissible" purposes, largely because Congress determined that such purposes do not provide sufficient economic value to the consumer. For example, many companies in the past sought to use consumer report information for "target marketing." When an advertiser engages in target marketing, it obtains information regarding consumers so that it can target its advertising to those consumers who possess certain characteristics. The advertiser selects characteristics that it believes make consumers more likely to respond to its advertising. For example, an auto

dealer might want to target its ads to consumers with certain credit scores who do not have recent car loans (indicating that they might soon want a new car). Consumer reporting agencies possess this and much more information regarding virtually every adult in the United States. When Congress provided in the FCRA that firm offers of credit constitute a permissible purpose, but failed to create a permissible purpose for those engaged only in target marketing, Congress determined that "people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Trans Union v. FTC*, 267 F.3d at 1143.

If the important privacy protections of the FCRA are to retain their vitality, users of consumer report information must not be permitted to evade them through the use of sham offers of credit that have no appreciable economic value to consumers. If, for example, a company obtains consumer report information to identify consumers within its target group and sends solicitations to those consumers, and includes in those solicitations an ostensible offer of credit that, although "guaranteed," is nonetheless entirely worthless -- say, an offer of a loan of one dollar, at an interest rate of 1000 percent per day -- then a court must be willing to recognize that the offer is a mere ruse, and that what has really happened is that the solicitor has obtained consumer reports for an impermissible purpose. *See* App. Br. at 16-17 (*citing Sampson v. Western Sierra Acceptance Corp.*, 2003 WL 21785612 (N.D. Ill.,

Aug. 1, 2003), and arguing that defendants would have a permissible purpose even if they offered a loan of only one dollar). The fact that the creditor would honor such an offer -- even if no rational consumer would redeem it -- should not provide the creditor with a permissible purpose for obtaining credit information. To hold that it does would provide any person with easy access to credit information regarding any consumer. Thus, the court below erred by assuming that *any* nominal "offer" of credit necessarily satisfies the statutory requirement, no matter what the circumstances and no matter how meaningless the offer may be, as a practical matter. *See Nixon v. Missouri Mun. League*, 72 U.S.L.W. 4256, 4257-58 (U.S. Mar. 24, 2004) ("any" need not be given an expansive interpretation, depending upon the context).

**B. Ms. Cole's allegations that defendants' offer was a sham set forth a claim upon which relief may be granted**

The district court erred by dismissing Ms. Cole's complaint because it properly alleges that defendants violated the FCRA by obtaining her consumer report without either her permission or a permissible purpose.[7] D.37 at ¶¶ 12-15. Plainly, Ms.

[7] In the context of their Rule 12(b)(6) motion, defendants bear the burden of showing that Ms. Cole can prove no set of facts in support of her claim that would entitle her to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). Further, this Court should draw reasonable factual inferences in Ms. Cole's favor, and should construe the allegations of her complaint liberally. *See Ricketts v. Midwest Nat'l*

Cole's complaint sets forth a prima facie violation of the FCRA. *See* § 1681b(f). With respect to the elements of the violation that Ms. Cole alleges, defendants do not deny that they obtained her consumer report, and do not contend they had her permission to do so. Instead, defendants contend that they had a permissible purpose under the FCRA because the ad they mailed to Ms. Cole, which was made a part of the complaint, constituted a firm offer of credit. *See* § 1681b(c). This is the only permissible purpose they claim. Ms. Cole's complaint challenges this, however. It alleges that the ad did not contain a firm offer of credit because the offer in the ad was a sham. Thus, her complaint alleges all the elements of an FCRA violation and responds to defendants' defense.

Four subparagraphs of the complaint challenge the offer. D.37 at ¶ 12(a)-(d). Subparagraph 12(a) alleges that defendants' offer of a $300 line of credit is a sham because Ms. Cole can only take advantage of it if she buys a car. That is, Ms. Cole contends that the $300 line of credit was worthless because it was conditioned on the purchase of a car costing many times that amount. Subparagraph 12(b) alleges the offer is too vague to be a firm offer because the ad fails to disclose the terms of the

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*Bank*, 874 F.2d 1177, 1183 (7th Cir. 1989). However, this Court need not determine whether Ms. Cole would ultimately prevail, only whether she is entitled to go forward with the merits of her case. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995).

credit, and reserves to the defendants the right (presumably when Ms. Cole buys a car) to "determine" the terms of the loan. Subparagraph 12(c) alleges that the ad does not contain a firm offer because, although the ad purports to guarantee Ms. Cole "a credit line of at least three hundred dollars for the purchase of a vehicle, GRSI, Coral Springs, FL," just a few lines later the ad also states that "[g]uaranteed approval is neither express nor implied." Finally, subparagraph 12(d) states that the offer is not firm because it may be contingent on Ms. Cole paying off any other car loans. These four subparagraphs challenge the substance of the firm offer of credit. Even though only one of the subparagraphs uses the word "sham," all of them essentially assert that the firm offer of credit was not one that Ms. Cole could or would obtain, and that, as specifically alleged in subparagraph 12(a), the offer was merely a device for obtaining her consumer report.

No one of these allegations establishes that the offer is, in fact, a sham. The FCRA allows certain conditions on a firm offer, including specific criteria established in advance, verification, and collateral. Auto credit obviously depends on the purchase of a car, and certain terms such as a the precise amount of credit, depend upon the specific car purchased. In this case, however, Ms. Cole alleges that the solicitation itself is so vague that the offer could be a sham.

If this Court remands this matter to the district court, that court should focus

its inquiry on whether there was a bona fide firm offer of credit. There are a variety of factual issues that are relevant to this inquiry: What type of credit was offered? What would be the terms of the credit? Did the creditor have a business plan in place that fully complied with the requirements for firm offers of credit under Section § 1681a(*l*), including establishing in advance the criteria for the credit? Did any consumers apply for, or actually get, this credit? If not, why not? For example, was the offer so unintelligible -- were the terms so inherently confusing, contradictory or buried in fine print -- that no one applied? Was there any "guarantee"?[8] Was the credit offer so trivial, or were there so many conditions, that it was not meaningful?

[8] In its opinion, the court confined its analysis to defendants' guarantee and ignored Ms. Cole's challenge to the substance of the transaction. *See Cole v. U.S. Capital*, 2003 WL 21003696 at *5 (N.D. Ill., May 1, 2003) (holding that defendants' offer was not a sham because "[p]laintiff has not alleged that she or any other consumers attempted to accept the offer and that it was not honored nor does the [ad] itself indicate that such an offer would not have been honored"). But even the court's analysis of the guarantee was flawed. Although the ad appeared to guarantee Ms. Cole a $300 line of credit, the complaint points out (and the court ignored) that several lines later the ad also stated that "[g]uaranteed approval is neither expressed nor implied." As discussed in the Statement of the Case, *supra*, it may be that the ad made two separate offers of credit, and the guarantee referred to one of the offers whereas the renunciation of any guarantee referred only to the other. But this is far from clear. It is particularly confusing because the guarantee referred to "a credit line," the type of credit normally provided by a credit card. A fixed payment car loan does not create a credit line. In addition, the renunciation was part of a "credit card disclaimer." Thus, even with respect to Ms. Cole's challenge to the offer, there is sufficient confusion regarding the guarantee that the court should not have dismissed the case. *GATX Leasing*, 64 F.3d at 1114.

For example, what does it mean that the offer is conditioned on the "purchase of a vehicle, GRSI, Coral Springs, FL." What does the abbreviation GRSI stand for? All of this sort of information is relevant to determining whether defendants' offer really was a genuine firm offer of credit. All of these issues were raised by Ms. Cole's complaint, but, as a result of the dismissal, she had no opportunity to present evidence regarding any of this.

## II. THE DISTRICT COURT IMPROPERLY DISMISSED THE ALLEGATION OF MS. COLE'S COMPLAINT THAT DEFENDANTS FAILED TO MAKE DISCLOSURES CLEARLY AND CONSPICUOUSLY

The district court failed even to address the allegation in Ms. Cole's complaint that charged defendants with failing to make mandatory disclosures in a clear and conspicuous manner. Subparagraph 12(e) alleged that "15 U.S.C. § 1681m(d) requires that a 'firm offer' must contain certain statements in a 'clear and conspicuous' manner; the statements are instead included at the bottom of [the ad] in type so small as to be virtually illegible." This states a claim upon which relief may be granted, and, on remand, the district court should address the merits of the claim.

As explained in the Statement of the Case, *infra*, § 1681m(d) requires that those who use consumer reports to make firm offers of credit must provide the consumer with a "clear and conspicuous statement" disclosing 1) that information in

a consumer report was obtained; 2) that the offer was conditioned on certain criteria; 3) that the offer may not be extended if the consumer does not continue to meet those criteria or does not provide required collateral; and 4) that the consumer has the right to prohibit the use of her consumer report in connection with unsolicited firm offers of credit or insurance. The statement must also provide the consumer with a toll-free number to call if the consumer wants to preclude the use of her report for such offers. As discussed above, the provision of such notice is an integral part of the balance the FCRA strikes between consumer privacy and the economic value that firm offers may provide to consumers. Although the ad defendants sent to Ms. Cole does contain the required information, it is buried in a lengthy, complicated, tiny-type footnote.

Plainly, subparagraph 12(e) of Ms. Cole's complaint sets forth a claim upon which relief may be granted. Indeed, this Court has "made it clear that Rule 12(b)(6) is not the appropriate vehicle for [] a dismissal" of this sort of claim. *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 805 (7th Cir. 2001), *citing Smith v. Check-N-Go of Illinois, Inc.*, 200 F.3d 511, 514 (7th Cir. 1999); *Walker v. National Recovery, Inc.*, 200 F.3d 500 (7th Cir. 1999). Moreover, as this Court explained, "allegations that disclosures are not 'clear and conspicuous' state a claim upon which relief may be granted." *Lifanda*, 237 F.3d at 805; *see also Sampson v. Western Sierra Acceptance Corp.*, 2003 WL 21785612 at *3 (N.D. Ill. 2003). Thus, where (as here) the

disclosures have been made part of the complaint, the district court should rule on the merits of the allegation by converting a Rule 12(b)(6) motion to a motion under either Rule 12(c) (motion for judgment on the pleadings) or Rule 56 (motion for summary judgment). *Lifanda,* 237 F.3d at 806.

The court below erred by granting a Rule 12(b)(6) motion as to the entire complaint, without any analysis of this distinct statutory claim. The court's only explanation was that this allegation (and all the other portions of paragraph 12 except for subparagraph 12(a)) "are legal conclusions rather than factual allegations and, therefore, are improper and need not be accepted as true." 2003 WL 21003696 at *5 n.2, *citing Papasan v. Allain*, 478 U.S. 256, 286 (1986). But *Papasan* merely states that, in the context of a motion to dismiss, a court need not accept a legal allegation as true, not that such an allegation is in any way improper. 478 U.S. at 286. Accordingly, on remand, the district court should address the merits of Ms. Cole's allegation that the mandatory disclosures are not clear and conspicuous.[9]

On remand, the district court should consider whether, because they are set

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[9] Of course, the district court may not need to address the allegation of paragraph 12(e), depending on its resolution of the allegations of other parts of that paragraph. In particular, subparagraphs 12(a)-(d) allege that defendants did not make a valid firm offer of credit. The disclosures of § 1681m(d) are triggered only if defendants made a valid firm offer. Thus, if Ms. Cole prevails in establishing that defendants violated the FCRA because they failed to make a firm offer of credit, the allegation of subparagraph 12(e) becomes moot.

forth in tiny type (approximately 6-point), the disclosures are clear and conspicuous. As this Court explained in *Lifanda*, although a statute does not mandate a specific type size, "it simply does not follow that type size is irrelevant to a determination of whether a disclosure is 'conspicuous.' If the term 'conspicuous' is to retain any meaning at all, it cannot be met as a matter of law by type disproportionately small to that in the rest of the document * * *." 237 F.3d at 808; *see Sampson v. Western Sierra*, 2003 WL at 21785612 at *4 (holding that disclosures in 6-point type are not clear and conspicuous where the rest of the document is printed in type ranging in size from 10.5 to 28 point); *see also Encyclopedia Britannica, Inc. v. FTC*, 605 F.2d 964, 971-72 (7th Cir. 1979) (affirming FTC order requiring disclosures to be printed in 10-point type); *In re Herb Gordon Auto World, Inc.*, 123 F.T.C. 1172, 1181 (1997) (consent order) (defining clear and conspicuous disclosures to "appear [] in a size, shade, contrast, prominence and location, [] as to be readily noticeable, readable and comprehensible to an ordinary consumer); U.C.C. § 1-201(10) (term is conspicuous if it is in larger or other contrasting type or color).[10]

Although defendants suggest that they can comply with the clear and

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[10] Nor are disclosures automatically conspicuous merely because they are on the same page as the ad. *See* App. Br. at 18. Indeed, in *Lifanda*, this Court held that disclosures on the front of the page were, nonetheless, inconspicuous. 237 F.3d at 808.

conspicuous requirement merely by making the disclosures "visible" (even if they are too tiny to be legible to all but the most sharp-eyed), App. Br. at 18, the case they cite, *Channell v. Citicorp Nat. Servs., Inc.*, 89 F.3d 379 (7th Cir. 1996), holds nothing of the sort. That case involved the Consumer Leasing Act, whose implementing regulation requires mandatory disclosures to be in 10-point type. *Id.* at 382. When this Court observed that clear and conspicuous "means visible," *id.*, it was rejecting the argument that the lessor was required to provide a simple explanation of complex financial terms. It was not justifying the use of a minuscule-type disclosure buried in a mass of unrelated verbiage at the bottom of the page.[11]

Finally, although defendants seek to diminish the importance of the disclosures required by § 1681m(d), *see* App. Br. at 20-21, these disclosures protect important consumer rights. The FCRA provides a permissible purpose for obtaining a consumer report to a person who makes a firm offer of credit, but requires that any person who obtains a report for that purpose must disclose to the consumer how to prevent her

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[11] Although defendants contend that "minuscule print can be part of a conspicuous disclosure," App. Br. at 20, the case they cite, *Transurface Carriers, Inc. v. Ford Motor Co.*, 738 F. 2d 42 (1st Cir. 1984), provides no support whatsoever for this proposition. That case involved a contract between two businesses, not a consumer transaction. Moreover, although the warranty disclaimer was printed in "small" type (the case never used the word "minuscule"), the lead clause was in larger type. 738 F.2d at 46. Although defendants claim that, in the ad Ms. Cole received, the words "U.S. Capital Credit Card Offer" are in large type, *see* App. Br. at 18, those words are part of the ad, not a heading for the disclosures.

report from being used for such offers in the future. These disclosures are important because they allow consumers to protect their privacy, an interest that is of the highest order. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (protecting consumers from unwanted solicitation); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (same); *Trans Union v. FTC*, 245 F.3d at 818 ("we have no doubt that this interest -- protecting the privacy of consumer credit information -- is substantial").

**CONCLUSION**

For the reasons set forth above, this Court should reverse the district court's dismissal and remand the matter for resolution of the merits of Ms. Cole's complaint.

Respectfully submitted,

WILLIAM E. KOVACIC
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

________________________________

LAWRENCE DeMILLE-WAGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 6967 words. I relied on my word processor and its WordPerfect 10 software to obtain this count.

## CERTIFICATE OF SERVICE

I hereby certify that, on April 15, 2004, I served the Brief of Amicus Curiae, Federal Trade Commission on appellant and appellees by sending two copies, by express overnight delivery, to:

Daniel Edelman
Edelman, Combs & Latturner, LLC
120 South LaSalle St., 18th Floor
Chicago, IL 60603

Kevin B. Duff
Rachlis Durham Duff & Adler
542 South Dearborn St., Suite 1310
Chicago, IL 60605

Daniel S. Kaplan
181 Waukegan Rd., Suite 301
Northfield, IL 60093

Gary C. Wykidal
Law Offices of Gary C. Wykidal & Assoc.
245 Fischer Ave., Suite A-1
Costa Mesa, CA 92626-4553

______________________________
Lawrence DeMille-Wagman