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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 602803/2007
ALDRICH, BRADLEY C.
VS.
NORTHERN LEASING SYSTEMS, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 602803/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits .. A-D | 1 |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 13, 2009

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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BRADLEY C. ALDRICH, et al.,

Plaintiffs,

Index No.: 602803/07

-against-

**DECISION/ORDER**

NORTHERN LEASING SYSTEMS, INC., et al.,

Defendants.

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**Martin Shulman, J.**

The complaint in this action alleges a purported class action against defendants Northern Leasing Systems, Inc. ("NLS"), Jay Cohen, Steve Bernadone, Rich Hahn and Sara Krieger[1] (collectively "defendants") based upon defendants' alleged practice of unlawfully accessing and/or making adverse entries in plaintiffs' credit reports. Plaintiffs' complaint alleges violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, *et seq.*; General Business Law ("GBL") §380, *et seq.* ("NY FCRA"); and GBL §349. The complaint also alleges a cause of action for defamation.

Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiffs oppose the motion.

**Factual Background**

The complaint alleges that defendant NLS and the individual defendants are "in the business of financing equipment for small businesses" via equipment finance leases which contain personal guarantees. Plaintiffs generally are proprietors of businesses that either entered into such leases or guaranteed the obligations thereunder. The

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[1] The four individual defendants are officers of NLS.

complaint alleges that plaintiff Aldrich never had any transactions with defendants.[2] Central to plaintiffs' claims is the allegation that the leases are a nullity due to fraud or forgery and that defendants engage in a scheme of harassment, threats and intimidation to coerce plaintiffs and those similarly situated "into paying undeserved sums."[3] As part of their alleged scheme, the complaint alleges that defendants "routinely access, and/or make adverse entries in, the ***personal*** credit reports" of the individuals who signed the lease guarantees, thereby adversely affecting their credit scores.

**Analysis**

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211(a)(7), a court must take all allegations of the complaint as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Caron v. Hargro Fabrics*, 91 N.Y.2d 362 (1998); *Marini v. D'Atolio*, 162 A.D.2d 391 (1st Dept., 1990). The court must assume that the complaint's allegations are true and must deem the complaint to allege whatever can be reasonably inferred therefrom however imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 A.D.2d 105 (1st Dept.,

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[2] Defendants allude to the possibility that Aldrich's brother used his social security number on the lease and guaranty at issue. See defendants' memorandum of law in support at fn. 3. With respect to plaintiff Salas, plaintiffs' opposition contradicts the complaint's allegations by stating that Salas also never had any transactions with defendants. It appears this confusion may arise from the fact that Salas' lease is alleged to be between her business and non-party MBF Leasing, LLC, rather than defendant NLS.

[3] Defendants' alleged fraudulent scheme is the subject of Pludeman, et al. v. Northern Leasing Systems, Inc., N.Y. Index No. 101059/04 ("Pludeman"), for which a motion for class certification is presently pending before this court.

1985); *see also, McGill v. Parker*, 179 A.D.2d 98 (1st Dept., 1992); *Blitman Constr. Corp. v. Kent Village Hous. Co.*, 91 A.D.2d 173 (1st Dept., 1983). Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts. *Abrams v. Richmond County S.P.C.C.*, 125 Misc.2d 530 (Sup. Ct., Rich. Co., 1984).

**FCRA and NY FCRA Claims**

The complaint's first eight causes of action allege violations of the FCRA and NY FCRA[4] based upon the following alleged acts: (1) willfully obtaining consumer reports without a permissible purpose (1st and 5th causes of action); (2) negligently obtaining consumer reports without a permissible purpose (2nd and 6th causes of action); (3) negligent refusal or failure to investigate and/or rectify errors in reporting (3rd and 7th causes of action); and (4) willful refusal or failure to investigate and/or rectify errors in reporting (4th and 8th causes of action).

In support of their motion to dismiss, defendants assert that the FCRA and the NY FCRA are inapplicable because plaintiffs are not "consumers" and their claims do not involve "consumer reports" as defined in the relevant statutes. Similarly, defendants argue they are not "furnishers" of information under the FCRA. Defendants argue that: (1) plaintiffs are collaterally estopped from litigating whether the subject lease transactions were for business purposes based upon this court's (Heitler, J.) prior

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[4] The NY FCRA is patterned after its federal counterpart and is interpreted consistently with federal law. Accordingly, this court's analysis of the FCRA causes of action *infra* also applies to plaintiffs' NY FCRA claims. *See, e.g., Trikas v. Universal Card Servs. Corp.*, 351 F.Supp.2d 37, 46 (E.D.N.Y. 2005); *Ali v. Vikar Mgmt. Ltd.*, 994 F.Supp. 492, 498 (S.D.N.Y. 1998).

determination in Pludeman that the same lease transactions at issue here do not "arise out of a transaction primarily for personal, family or household purposes"; and (2) the complaint should be dismissed against the individual defendants because there is no allegation they acted outside the scope of their employment with NLS.

In opposition to the motion, plaintiffs argue that: (1) since plaintiffs Aldrich and Salas never had any transactions with defendants, it was impermissible for defendants to access their consumer credit reports, furnish false information concerning them to a credit reporting agency ("CRA") and refuse to investigate and remove the inaccurate information; (2) as to plaintiffs Arnold and Weier, defendants accessed their consumer credit reports and whether or not their business lease transactions were commercial is immaterial; (3) collateral estoppel is inapplicable to the plaintiffs' causes of action under the FCRA because the material issues raised and litigated in Pludeman were based on pure questions of law, and there is no identity of issues because the issue in Pludeman distinctively fell under the Fair Debt Collection Practices Act ("FDCPA"); and (4) the lack of specificity in the complaint as to whether the individual defendants acted outside the scope of their employment is inconsequential as a matter of law at this prediscovery stage.

**Plaintiffs' Claims Against the Individual Defendants**

At the outset, the court rejects defendants' assertion that the complaint should be dismissed against the individual defendants. The individual defendants may be liable for FCRA violations "if it is found that [they] impermissibly obtained plaintiff[s'] credit report[s] for personal purposes, rather than merely in the ordinary course of [their] employment. *Woodell v. United Way of Dutchess County*, 357 F.Supp.2d 761, 774

(S.D.N.Y. 2005), citing *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 49 (2d Cir. 1997). Defendants contend that the complaint fails to allege that the individual defendants acted outside the scope of their employment with NLS.

While the complaint lacks specific details, drawing all reasonable inferences from its allegations, the court agrees with plaintiffs that, at this pre-discovery stage, dismissal is inappropriate. See *Northrop*, *supra* (finding it premature to dismiss FCRA claims against employees prior to discovery). Unlike the case at bar and *Northrop*, *Woodell* involved a more fully developed record in the context of a summary judgment motion. Accordingly, the motion to dismiss as to the individual defendants is denied.

**Negligent/Willful Access to Consumer Reports for Impermissible Purpose**

Congress enacted the FCRA "to require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit ... in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information..." 15 U.S.C. §1681(b). The FCRA broadly defines the term "consumer" as being "an individual." 15 U.S.C. §1681a(c). Given this broad definition, the court rejects the claim that plaintiffs, all of whom are individuals, are not consumers under the FCRA.[5]

[5] By contrast, the FDCPA defines a "consumer" as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. §1692a(3). However, the definition of "debt" is restricted to obligations "arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes . . ." 15 U.S.C. §1692a(5).

Turning to defendants' argument that the FCRA is inapplicable here because the reports at issue are not consumer reports, the FCRA defines the term "consumer report" as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for – **(A)** credit or insurance to be used primarily for personal, family, or household purposes; **(B)** employment purposes; or **(C)** any other purposes authorized under section 1681b. . .

15 U.S.C. §1681a(d)(1). As interpreted by the Federal Trade Commission ("FTC"), the FCRA does not apply to reports "on a consumer for credit or insurance in connection with a business operated by the consumer . . ." 16 C.F.R., Part 600, App. cmt. 6(b).

Defendants primarily rely upon *Lucchesi v. Experian Info. Solutions, Inc.*, 226 F.R.D. 172 (S.D.N.Y. 2005), for the proposition that the FCRA is inapplicable to credit reports issued in connection with a business transaction. In *Lucchesi*, the plaintiff, an individual business owner, was denied a business loan which he proposed to personally guarantee based upon defendant CRA's issuance of an allegedly incorrect consumer report. Two distinct reports were at issue - one a business profile of the plaintiff's company and the other a personal report of the plaintiff's credit history. The court dismissed the plaintiff's FCRA claim as to both reports, irrespective of the fact that one of the reports was a personal credit report.

The *Lucchesi* court reasoned that "even though the [personal credit] report was a report about the Plaintiff's credit history, it was provided to [Bank of New York] in

connection with a proposal that Plaintiff guarantee [his company's] business financing for the purpose of acquiring additional equipment." *Id.* at 174 (citing the FTC comments on the inapplicability of the FCRA to reports on the consumer issued in connection with business credit). Implicit in this reasoning is that the defendant CRA clearly understood the purpose for which the report was initially collected and how it would be subsequently utilized.

However, the fact that the defendants here obtained plaintiffs' personal credit reports in connection with business transactions, to wit, the plaintiffs' alleged guarantees of the equipment leases for their businesses, does not end the court's inquiry. As explained in *Boothe v. TRW Credit Data*, 523 F.Supp. 631, 633 (S.D.N.Y. 1981):

> Whether a report collected and released by a consumer reporting agency constitutes a "consumer report" under the [FCRA], then, depends on the contents of the report and the purpose of the report. If the purpose of the report is not among the enumerated purposes which define "consumer report," the [FCRA] does not provide protection to the consumer.

Stated differently:

> if the report was collected for one of the purposes listed in section 1681a(d), it is a consumer report, **regardless of the reason for which it is subsequently disseminated**. Thus, the proper focus for determining whether a report falls under the [FCRA's] definition of consumer report is the purpose for which it was collected, and not solely the purpose for which it was released. (Emphasis added).

Id., 523 F.Supp. at 634. A particular credit report can thus be deemed a "consumer report" covered by the FCRA if:

> (1) the person who requests the report actually uses the report for one of the "consumer purposes" set forth in the FCRA; (2) the consumer reporting agency which prepares the report "expects" the report to be

> used for one of the "consumer purposes" set forth in the FCRA; or (3) the consumer reporting agency which prepared the report originally collected the information contained in the report expecting it to be used for one of the "consumer purposes" set forth in the FCRA (citations omitted).

*Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 (7th Cir. 1988). *See also Zeller v. Samia*, 758 F.Supp. 775, 780 (D.Mass. 1991) (Addressing creditor's report of a charge-off with a CRA: "[W]hether a report collected and released by a consumer reporting agency qualifies as a consumer report, depends on the expected use of the report or the purpose for which the information was collected by the agency").

On this record, the court lacks sufficient information to evaluate the reports at issue here under the above-cited criteria. For example, it is unclear how the reports relating to plaintiffs Aldrich and Salas could be non-consumer reports, as defendants claim, if those plaintiffs never in fact transacted business with defendants. It is further unclear whether defendants had a permissible purpose for obtaining the personal reports of any of the plaintiffs. Clearly, defendants' alleged business purpose for obtaining plaintiffs' reports is not dispositive of whether the reports are consumer reports.[6] Construing the complaint, as it must, in the light most favorable to plaintiffs,

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[6] This court is persuaded by the *Ippolito* court's rationale for declining to limit its inquiry to examining the report user's purpose for obtaining the report:

> the plain language of the statute, "used or expected to be used or collected in whole or in part" requires inquiry into the reasons why the report was requested and why the information contained in the report was collected or expected to be used by the consumer reporting agency. Because of the circular definition of "consumer report," § 1681b's limitations on the dissemination of consumer reports are essentially rendered meaningless if the sole determination of whether a report is a consumer report is made solely by looking at the reason for which the report is requested. Under such an analysis, if a person requests a consumer report for a purpose set forth in § 1681b, a consumer reporting agency is free to give that person the report. On the other hand, if a report is not

this court concludes that further discovery is required before this factual issue can be determined.

For all of the foregoing reasons, plaintiffs at this stage have stated a claim against defendants for negligently and/or willfully obtaining their consumer credit reports for an impermissible purpose in violation of the FCRA and NY FCRA. Accordingly, the motion to dismiss is denied with respect to the first, second, fifth and sixth causes of action.

**Negligent and/or Willful Failure to Investigate and/or Rectify Reporting Errors**

Defendants deny that they are "furnishers of information" under the FCRA. While the FCRA does not define the term "furnisher of information", courts commonly define the term as an entity which transmits information concerning a particular debt owed by a particular consumer to consumer reporting agencies. *See, e.g., Pinson v. Equifax Credit Info. Servs., LLC*, 2007 WL 211225 at *4 n.3 (N.D. Okla. Jan. 24, 2007). Defendants' argument is predicated on their claim that because plaintiffs are not consumers, they are not furnishers of information. However, for the reasons stated above, the court has rejected the assertion that plaintiffs cannot be deemed consumers under the FCRA.

As indicated in the facts above, plaintiffs allege in their complaint that defendants are "ostensibly in the business of financing equipment for so called 'equipment

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> requested for one of the purposes set forth in § 1681b, it would not, under this view, be a "consumer report" covered by the FCRA. In such a case, a consumer reporting agency would also be free to give away the same information.

*Id.*, 864 F.2d at 449, fn. 10.

financing leases,'" the subject of which "are small equipments such as credit card swiping machines..." Complaint at ¶10. The complaint further alleges that defendants "routinely access, and/or make entries in, the ***personal*** credit reports of ... [plaintiffs]." Complaint at ¶14. Although these allegations do not specifically state how defendants themselves access and make entries in the personal credit reports, by implication the defendants utilize the services of a CRA to accomplish that task. Therefore, from these allegations it appears that defendants could be deemed furnishers of information under the FCRA.

Accordingly, the complaint states a claim against defendants for negligently and/or willfully failing or refusing to rectify reporting errors and failing to investigate such errors in violation of the FCRA and NY FCRA. As such, the motion to dismiss is denied with respect to the third, fourth, seventh and eighth causes of action.[7]

**Deceptive Trade Practices (GBL §349)**

Defendants maintain that the ninth cause of action for violation of GBL §349 should be dismissed because plaintiffs are not "consumers" within the meaning of the statute, which is inapplicable to transactions between private parties not affecting the public generally. The complaint alleges that defendants violated GBL §349 by repeatedly making misleading and harassing phone calls to plaintiffs demanding payment of sums due under the leases and guarantees. In their memorandum of law in

[7] The need to address defendants' collateral estoppel argument is obviated in light of the court having based its determination of plaintiffs' FCRA and NY FCRA claims upon an analysis of these statutes and case law interpreting them.

opposition to this motion, plaintiffs further argue that defendants' furnishing of false information to CRA's is a deceptive business practice under GBL §349.

GBL §349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce . . ." Under GBL §349(h), a person injured due to a violation of GBL §349 "may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages . . ., or both such actions." The court may award reasonable attorney's fees to a prevailing plaintiff. *Id.*

GBL §349's applicability to this case requires some background discussion of the statute's purpose. The Court of Appeals summarized the legislative history of GBL §349 in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24-25 (1995):

> As shown by its language and background, **section 349 is directed at wrongs against the consuming public**. General Business Law article 22-A, of which section 349 is a part, is entitled "Consumer Protection from Deceptive Acts and Practices." The structure of the law . . . speaks to its public focus. Finally, the Governor's Memorandum approving the bill (L. 1970, ch. 43) lauds its consumer-protective purpose:
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> "Consumers have the right to an honest market place where trust prevails between buyer and seller. The power to obtain injunctions against any and all deceptive and fraudulent practices will be an important new weapon in New York State's long standing efforts to protect people from consumer frauds" (Mem of Governor Rockefeller, 1970 NY Legis Ann, at 472).
>
> Thus, **as a threshold matter, plaintiffs claiming the benefit of section 349--whether individuals or entities such as the plaintiffs now before us--must charge conduct of the defendant that is consumer-oriented.** (Emphasis added).

The essential elements of a cause of action under GBL §349 are: "(1) a deceptive consumer-oriented act or practice which is misleading in a material respect,

and (2) injury resulting from such act (citations omitted)." *Exxonmobil Inter-America, Inc. v. Advanced Info. Eng'g Servs., Inc.*, 328 F.Supp.2d 443, 447 (S.D.N.Y., 2004). "A defendant engages in 'consumer-oriented' activity if his actions cause any 'consumer injury or harm to the public interest.'" *New York v. Feldman*, 210 F.Supp.2d 294, 301 (S.D.N.Y., 2002), citing to *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2nd Cir., 1995), *cert. den.*, 516 U.S. 1114 (1996).

Here, it is not necessary to determine if defendants' alleged acts are consumer-oriented because they do not have a broad impact on the public at large. Plaintiffs, whose claims here involve private transactions between themselves and defendant, are therefore not protected under GBL §349. Accordingly, defendants' motion is granted to the extent that the ninth cause of action for deceptive trade practices in violation of GBL §349 is dismissed.

**Defamation**

Defendants contend that the tenth cause of action for defamation ("Count X") based upon adverse entries in plaintiffs' credit reports should be dismissed as a matter of law for the following reasons: (1) the complaint lacks the specificity required by CPLR 3016(a) because the alleged defamatory statements are not stated *in haec verba* and the complaint does not identify the particular persons who made such statements or to whom those statements were made; and (2) because the alleged statements are not *per se* defamatory, the failure to plead special damages warrants dismissal. The court agrees with the latter argument.

The elements of a *prima facie* cause of action for defamation are: "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (citations omitted)." *Dillon v. City of New York*, 261 A.D.2d 34, 37-38 1 (1st Dept. 1999). CPLR 3016(a) further mandates that "the particular words complained of shall be set forth in the complaint. . ."

A statement may be considered defamatory if it "'tends to expose [a person] to public contempt, ridicule, aversion or disgrace, or induces an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Lewis v. Newsday, Inc.* 246 A.D.2d 434, 436-437 (1st Dept. 1998), quoting *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 379 (1977). Further, a claim for defamation requires "an adequate identification of the purported communication, and an indication of who made the communication, when it was made and to whom it was communicated." *NAS Electronics, Inc. v. Transtech Electronics PTE Inc.*, 262 F.Supp.2d 134 (S.D.N.Y. 2003); quoting *Broome v. Biondi*, 1997 WL 83295 (S.D.N.Y. Feb. 10, 1997).

In Count X of the complaint, plaintiffs allege: (1) "Defendants maliciously defamed Plaintiffs and the class by Defendants' knowing publication to third-parties of erroneous information that Plaintiffs owed money to Defendants" (Complaint at ¶129); (2) "Defendants' actual knowledge of the falsity and reckless disregard for the truth demonstrates their malice and/or willful intent to injure Plaintiffs and the class" (*Id.* at ¶131); and (3) "[a]s a direct and proximate result of such conduct, Plaintiffs and the

class suffered actual damages . . ." (*Id.* at ¶132). In opposition to defendants' motion, plaintiffs specify the phrases "charge off" and "installment loan" as setting forth *in haec verba* the alleged defamatory statements.

A review of paragraphs 27, 46 and 56 of the complaint (pertaining, respectively, to plaintiffs Aldrich, Arnold and Weier[8]), indicates that plaintiffs allege sufficient facts regarding the details of the alleged defamatory statements. As plaintiffs note, the complaint specifies the plaintiffs' names, the allegedly false and defamatory information communicated, and the dates of publication to a third party, to wit, credit reporting agency Experian.

However, the complaint is wholly devoid of any allegations of special damages. "Special damages require economic or pecuniary loss and must relate the alleged losses to the allegedly defamatory statements." *In re Andrew Velez Constr., Inc.*, 373 B.R. 262, 282 (Bankr. S.D.N.Y., 2007), citing *Liberman v. Gelstein*, 80 N.Y.2d 429 (1992). "Special damages must be pled with particularity and cannot merely aver general damages . . ." *Id.*, citing *L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins. Co.*, 125 A.D.2d 371 (2d Dept. 1986).

Here, plaintiffs only summarily claim to have "suffered actual damages". Complaint at ¶132. *See Bell v. Alden Owners, Inc.*, 299 A.D.2d 207, 208-209 (1st Dept. 2002); *compare Herlihy v. Metropolitan Museum of Art*, 214 A.D.2d 250, 260 (1st Dept. 1995)(plaintiff satisfied requirement of pleading special damages by alleging pecuniary damages arising from loss of employment). Accordingly, unless the statements in

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[8] As to plaintiff Salas, no claim of defamation is alleged.

question are defamatory *per se*, as plaintiffs contend, the failure to plead special damages warrants dismissal of Count X.

Under New York law, words are *per se* defamatory if they falsely impute criminal activity, impute an offensive disease, would tend to injure a party's trade, occupation or business, or impute unchastity or sexual immorality. *Liberman v. Gelstein*, 80 N.Y.2d at 435; *Rejent v. Liberation Publ'ns, Inc.*, 197 A.D.2d 240, 245 (1st Dept. 1994). When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven. *Id.*

Here, defendants' alleged adverse entries to plaintiffs' credit reports do not fall within any of the foregoing categories. Citing *In re Andrew Velez Constr., Inc.*, *supra*, plaintiffs contend the adverse entries to their credit reports are defamatory *per se* because they impugn their credit worthiness. Plaintiffs' opposing memorandum of law also appears to argue that plaintiffs have been injured in their trade, business or profession.

However, the adverse credit report entries here are analogous to statements concerning the failure to pay an alleged debt, which have been found to be business communications falling short of defamation as a matter of law. *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 111 A.D.2d 807, *aff'd* 66 N.Y.2d 988 (2d Dept. 1985); *see also*, *In re Andrew Velez Constr., Inc.*, *supra* (dismissing defamation cause of action based upon allegation that plaintiff defaulted on its obligations under an agreement where plaintiff failed to plead specific damages). Finally, plaintiffs here cannot establish *per se* defamation because they claim to be injured in their capacities as individual

consumers, rather than in their businesses, trades or professions. *See Bell v. Alden Owners, Inc., supra* (challenged remarks referring to violations of plaintiff's residential lease were not defamatory *per se* because they were unrelated to plaintiff's business).

For all of the above reasons, Count X of the complaint is dismissed. The court has considered the parties' remaining arguments and finds them lacking in merit.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that the ninth and tenth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the first through eighth causes of action alleging violations of the FCRA and NY FCRA are severed and continued.

The parties are directed to appear for a preliminary conference on April 7, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
March 12, 2009



Hon. Martin Shulman, J.S.C.