

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

Janet Long, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

Fenton & McGarvey Law Firm P.S.C., a  
Kentucky corporation, and Jefferson  
Capital Systems, LLC, a Georgia limited  
liability company,

Defendants.

CASE NO.: 1:15-cv-01924-SEB-DKL

**DEFENDANT JEFFERSON CAPITAL SYSTEMS LLC'S**  
**RESPONSE IN OPPOSITION TO PLAINTIFF'S**  
**MOTION FOR CLASS CERTIFICATION**

**I. INTRODUCTION**

Plaintiff Janet Long commenced this putative class action under the Fair Debt Collection Practices Act on December 7, 2015. Doc. No. 1. The complaint alleges Defendants Fenton & McGarvey Law Firm P.S.C., (“Fenton”) and Jefferson Capital Systems LLC (“JCAP”), violated 15 U.S.C. § 1692g(a)(2) when Fenton sent letters to her that stated the name of the original creditor was Comenity Bank, and then further stated: “Please be advised that Fenton & McGarvey Law Firm, P.S.C. has been retained by Jefferson Capital Systems, LLC to **collect its account** with you.” Doc. No. 1 ¶ 7; doc. No. 1-1 PID# 8, 9 (emphasis added).

Plaintiff’s complaint alleges that the failure to explain who JCAP was, how it differed from the original creditor and why JCAP had retained Fenton to collect the debts would “cause a consumer to not know to whom the debts were currently owed...” Doc. No. 1 ¶¶ 7, 8. Plaintiff essentially asserts that the failure to expressly state “the name of the current creditor” is JCAP or

that JCAP had bought the debts, would cause a consumer to wonder whether JCAP was another debt collector, a new name for Comenity Bank, or something else. Doc. No. 1 ¶ 8. The complaint alleges this failure amounts to a violation of the requirements of 15 U.S.C. § 1692g(a)(2).<sup>1</sup>

Plaintiff's complaint concludes by praying for class certification, a finding that the letters violate the FDCPA, and an award of statutory and actual damages, costs and attorney's fees. Doc. No. 1 p. 6, ¶¶ 1-6.

In her December 17, 2015 initial disclosures, Plaintiff only identifies statutory damages available under 15 U.S.C. § 1692k(a)(2)(A) and (B) and does not reflect any intent to seek actual damages in these proceedings. Exhibit A.

Plaintiff's amended motion for class certification alleges all the requirements of Fed.R.Civ.P. 23(a) and 23(b)(3) have been met. Doc. No. 33; see also Doc. No. 2.

As set forth below, JCAP argues that Plaintiff's motion ought to be denied because: (1) she lacks Article III standing to maintain this action in her own right as - (a) Plaintiff has failed to allege any particularized or concrete injury in fact actually exists, (b) any claimed injury is entirely hypothetical and conjectural, and (c) there is no causal connection between a claimed injury and the conduct of the defendants; (2) Plaintiff fails to show commonality between her claimed injury and that of the class she purports to represent; and (3) Plaintiff fails to demonstrate predominance.

## **II. STANDARD OF REVIEW**

### **A. Article III Standing**

Before embarking on the task of evaluating the Rule 23 factors associated with a class certification decision, the Plaintiff must initially show that she has Article III standing<sup>2</sup> to pursue

---

<sup>1</sup> See Doc. No. 47, pageID 229-234.

<sup>2</sup> There are four different types of standing, Article III or constitutional standing; prudential standing, statutory standing and class standing. See *Davis v. City of Philadelphia*, No. 15-2937, \_\_\_ F.3d \_\_\_, 2016 WL 2343042, at \*2 (3d Cir. May 4, 2016)(discussing the distinctions between

a class action. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 222 (3d Cir. 2012).<sup>3</sup> This is so because if the Plaintiff does not have Article III standing in her own right, she likewise lacks standing to represent a class. “[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.” *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)(“[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm.”).

It is well settled that “[b]efore a class is certified... the named plaintiff must have standing, because at that stage no one else has a legally protected interest in maintaining the suit.” *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009). “That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n. 20 (1976) (internal quotations omitted).

In the absence of showing an Article III injury-in-fact, the case must be dismissed for lack of subject matter jurisdiction. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015).

## **B. Class Certification**

---

constitutional standing, prudential standing and statutory standing); *Keele v. Wexler*, 149 F.3d 589, 592-93 (7th Cir. 1998)(class standing).

<sup>3</sup> When a motion to certify the class is pending at the time the Court addresses whether Plaintiff has standing under Article III, the Court has discretion to dispose of the standing issue before reaching other class certification issues. *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 9 CV 3690, 2015 WL 3988488, at \*25 (N.D. Ill. June 29, 2015).

To proceed with a class action, Plaintiff must satisfy the requirements set forth in Fed.R.Civ.P. 23(a) and (b). Rule 23(a) authorizes one or more members of a class to bring suit as a representative for the class if the following four requirements are met:

- 1) the class is so numerous that joinder of all members is impracticable;
- 2) there are questions of law or fact common to the class;
- 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- 4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Moreover, at least one of the three distinct elements of Rule 23(b) must also be satisfied. In this case, Plaintiff seeks to proceed under Rule 23(b)(3), which require that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”. Fed.R.Civ.P. 23(b)(3).

“[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *Wal-Mart Stores, Inc. Dukes*, 131 S.Ct. 2541, 2551 (2011). “Such an analysis will frequently entail ‘overlap with the merits of the plaintiff’s underlying claim[,]’ ... because the ‘class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)(quoting *Dukes*, 131 S.Ct., at 2551)(quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982)).

The same principles govern the determination under Rule 23(b). *Id.* “If anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a). ... Rule 23(b)(3), as an ‘adventurous innovation,’ is designed for situations ‘in which ‘class-action treatment is not as clearly called for.’” *Id.*

Plaintiff must satisfy Rule 23's requirements by a preponderance of the evidence. *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

As the Seventh Circuit has explained, "a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010).

In addition to showing the requirements of Rule 23 are met, the Plaintiff must have standing to represent the class. "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." *Keele v. Wexler*, 149 F.3d 589, 592–93 (7th Cir.1998) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982); *Schultz v. Prudential Ins. Co. of Am.*, 678 F.Supp.2d 771, 782 (N.D.Ill.2010). This rule relates to the broader principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 100 (2d Cir. 2007) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

As an additional prerequisite to class certification, a plaintiff "must show by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356 (3d Cir. 2013); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *see also Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) ("It is axiomatic that for a class action to be certified a 'class' must exist."); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) ("We and other courts

have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind. In addressing this requirement, courts have sometimes used the term “ascertainability.” ...Class definitions have failed this requirement when they were too vague or subjective, or when class membership was defined in terms of success on the merits (so-called “fail-safe” classes). This version of ascertainability is well-settled in our circuit....”). To satisfy this requirement, Plaintiff must define the class with reference to “objective criteria” and propose “a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.” *Jenkins v. White Castle Mgmt. Co.*, 12 C 7273, 2015 WL 832409, at \*5 (N.D.Ill. Feb. 25, 2015) (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)); *N.B. v. Hamos*, 26 F.Supp.3d 756, 763 (N.D.Ill. 2014). When “there is no way to know or readily ascertain who is a member of the class,” the class “lacks the definiteness required for class certification.” *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012).

Where standing is challenged, the “party invoking federal jurisdiction bears the burden of establishing” that he has suffered an injury by submitting “affidavit[s] or other evidence.” *Wittman v. Personhuballah*, No. 14-1504, \_\_\_ S.Ct. \_\_\_, 2016 WL 2945226, at \*4 (May 23, 2016)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In order to have Article III standing to sue in her own right for the violation of a statute, the Plaintiff must establish: ““(1) [an] injury-in-fact ... that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) [a likelihood] ... that the injury will be redressed by a favorable decision.”” *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) (quoting

*Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 290–91 (3d Cir. 2005); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Spokeo, Inc. v. Robins*, No. 13-1339, \_\_\_ S.Ct. \_\_\_, 2016 WL 2842447 (May 16, 2016).

### III. ARGUMENT

#### A. PLAINTIFF CANNOT SHOW ARTICLE III STANDING BECAUSE SHE HAS NOT PERSONALLY SUFFERED ANY PARTICULARIZED OR CONCRETE INJURY-IN FACT AS A RESULT OF THE PUTATIVELY ILLEGAL CONDUCT OF DEFENDANTS

If Congress had truly intended debt collectors to provide the statutorily required information in 15 U.S.C. § 1692g verbatim, one would have expected the statute to have read: “[A] debt collector shall... send the consumer a written notice ~~containing~~ stating-- ... (2) “the name of the creditor to whom the debt is owed is \_\_\_\_\_[.]” *See* 15 U.S.C. § 1692g(a)(2). The statute clearly does not require a verbatim recitation of the statutory language followed by a fill in the blank reference. *Gruber v. Creditors' Protection Services, Inc.*, No. 12–C–1243, 2013 WL 2072976, \*2 (E.D.Wis. May 14, 2013)(“to comply with § 1692g(a), a debt collector does not have to reproduce the statutory notices verbatim.”), *aff'd*. 742 F.3d 271 (7th Cir. 2014); *Barnes v. Advanced Call Center Technologies, LLC*, 493 F.3d 838, 841 (7th Cir. 2007)(§ 1692g(a)(1) does not require the debt collector to state verbatim “the amount of the debt;” debt collector complied with the requirement of § 1692g(a)(1) stating “Current Amount Due” complied).

What the statute does require is to send a written notice “containing ... the name of the creditor to whom the debt is owed.” 15 U.S.C. § 1692g(a)(2). The first sentence contained in the August 19 letters satisfies this requirement. Doc. No. 1-1. This statutorily mandated disclosure of information is a duty every debt collector owes to the public collectively, and there can be no question that Defendants satisfied the requirement by notifying Plaintiff that the debts originated by Comenity Bank belonged to JCAP. *See* Doc. No. 47, pageID 229-234.

Plaintiff has not alleged in the complaint how the absence of the statement, “the name of the creditor to whom the debt is owed is Jefferson Capital Systems, LLC,” affected her in any tangible way whatsoever. The complaint does not allege any fact of consequence befalling Plaintiff flowed from the alleged failure to clearly identify JCAP as the creditor, aside from rendering Defendants liable for statutory damages, costs and attorney’s fees. Doc. No. 1 ¶ 13.

There is no allegation, for instance, that believing her debts were still owed to Comenity Bank, she paid Comenity Bank instead and the debts remained unsatisfied despite payment. She likewise does not allege that she was led to believe that her Comenity Bank debts were owed to someone other than JCAP after she read the letters, and that she made her check payable to “someone other.” Nor does she allege that she intended her payment for JCAP but had the payment misapplied to a debt she did not intend to pay, or that she because she was unable to discern who the proper payee was, that she elected not to pay, causing the unpaid balance to increase.

As such, she does not allege and she cannot show that she suffered any pecuniary harm or loss as a result of the absence of an explicit reference to JCAP as the current creditor.

Likewise, she does not allege and she cannot show any form of injury to person or property, or even that the letter caused her any confusion because she does not allege that the absence of an explicit reference to JCAP as the current creditor led her to believe the debt was owed to anyone other than JCAP. She likewise fails to allege any facts that could plausibly explain how the alleged failure impacted her ability to choose whether to dispute the debt, or somehow affected her ability to discern whether the debts were already paid or was not owed by her. *See* S. REP. 95-382, 1977 U.S.C.A.N. 1695, 1699 (Aug. 7, 1977).

In fact, there is no tangible loss, harm or injury at all alleged in the complaint at all. Doc. No 1, *passim*.

Although the Supreme Court expressed no opinion on whether the procedural FCRA violation at issue in *Spokeo* constituted a “concrete injury” sufficient to confer standing on the plaintiff, instead “leav[ing] that issue for the Ninth Circuit to consider on remand,” the *Spokeo* Court indicated that some statutory violations could be sufficiently procedural or technical to fail the “concrete injury” requirement. *Id.* at \*8 & n. 8.

As to whether the absence of an explicit reference to JCAP as the current creditor amounts to an actionable intangible injury for which judicial redress was intended, neither the common law or Congressional intent support the view that it is. *See Spokeo at \*7.*

At common law, assignees have long been recognized as having the right to engage in collection. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008).<sup>4</sup> The common law did not require notice of assignment to be given to the obligor to validate the assignment, and lack of notice of assignment was not a basis for any common law claim unless the lack of notice prejudiced the debtor. *Stilwell v. Am. Gen. Life Ins. Co.*, 555 F.3d 572, 578 (7th Cir. 2009)(“Absent a statutory requirement to the contrary, notice to the debtor is not essential to the validity of an assignment, unless the debtor acted to his prejudice because of lack of notice or before receiving notice of the assignment.”)(quoting *Grunloh v. Effingham Equity, Inc.*, 174 Ill.App.3d 508, 124 Ill.Dec. 140, 528 N.E.2d 1031, 1039 (1988)); *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 923 (8th Cir. 2000); *Spoor v. Q. & C. Co.*, 162 F.2d 529, 532 (7th Cir. 1947). Thus,

---

<sup>4</sup> Some resources suggesting the practice of selling accounts receivable dates back 4,000 years to the time of the Mesopotamians, but the practice was clearly part of the financial landscape of England as early as the 12<sup>th</sup> century, and part of the American financial services industry of the 1800's. DAVID B. TATGE, JEREMY B. TATGE, DAVID FLAXMAN, AMERICAN FACTORING LAW, pp. 8-126 (BNA 2009); *see also id.*, 2011 supplement at p. 6; *see generally William & James Brown & Co. v. McGran*, 39 U.S. 479, 1840 WL 4612 (1840). In any case, by the 1940's, assigned accounts receivable was already a billion dollar plus industry in the United States. *Corn Exchange Nat. Bank & Trust Co., Philadelphia v. Klauder*, 318 U.S. 434, 438, n. 10 (1943).

the common law required a showing of some form of prejudice by a debtor before such debtor was allowed to make a claim related to the assignment.

The legislative history of the FDCPA shows that Congress was well aware that technical non-compliance with the requirements of the Act would rarely result in any compensable injuries. The standard ultimately adopted by Congress for assessing statutory damages reflects Congressional intent that technical non-compliance would not result in the imposition of a statutory penalty for every violation. 15 U.S.C. § 1692k(a)(2)(A).

Various drafts of the legislation Congress considered in 1975, 1976 and 1977 provided for “actual damages,” which would have departed from the common law understanding of that term, but because objections were raised, the departure from the common law was rejected. *See* H.R. 10191 §811(a)(1) 94<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1975)(providing for “any actual damage, sustained by such consumer including any incidental, consequential or special damages sustained by the consumer as a result of the failure to comply;”); H.R. 11969 §812(a)(1), 94<sup>th</sup> Cong. 2d Sess. (1976) (“any actual damage sustained by such person as a result of such failure;”); H.R. 13720 §811(a)(1) 94<sup>th</sup> Cong. 2d Sess. (1976)(same); H.R. 29 §812(a)(1) 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1977)(same); H.R. 5294 §812(a)(1) 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1977)(same); S. 656 §812(a)(1) 95<sup>th</sup> Cong. 1<sup>st</sup> Sess.(1977)(same); S. 1130 §805(a)(1) 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1975)(same); S. 918 §813(a)(1) 95<sup>th</sup> Cong. 1<sup>st</sup> Sess.(1977) (“any actual damage sustained by such person as a result of such failure, including damages for emotional distress or mental anguish suffered with our without accompanying physical injury;”).

Similarly, most of the Bill drafts also included a statutory damages component. H.R. 10191 §811(a)(2)(A) (providing for not less than \$100 or more than \$2,500 as determined by the Court); H.R. 11969 §812(a)(2)(A) (providing for not less than \$100 or more than \$1,000 as determined by the Court); H.R. 13720 §811(a)(2)(A)(same); H.R. 29 §812(a)(2)(A)(same); H.R. 5294

§812(a)(2)(A) (same); S. 656 §812(a)(2)(A)(same); S. 918 §813(a)(2)(A)(same); S. 1130 §805(a)(2)(A)(providing for punitive damages, not statutory damages in an individual case).

During the Senate Markup sessions, the Senate debated whether to mandate an award of statutory damages in every case, as was originally mandated in the Truth in Lending Act, or to adopt the standard applicable to the award of damages under the Fair Credit Reporting Act. *Senate Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation*, pp. 4-24, 46-56 (July 26, 1977); *see id.* at 19-20 (Senator Garn: "...We feel the Truth in Lending Act with its provision for automatic minimum civil penalties of \$100 has been a disaster. It's been the basis for creditor harassment, has resulted in the filing of literally thousands and thousands of civil suits in federal district courts since 1972.") (proposing elimination of the minimum and maximum). After debate, it was decided to remove a mandatory statutory minimum of \$100, so that where a technical violation occurred, the Court was given discretion to award no statutory damages at all (instead of mandating at least a minimum award of \$100 in every case). *See id.*, pp. 4-24, 46-56; S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1700 (Aug. 7, 1977).

Regarding the standard for actual damages, when H.R. 5294 passed the House, and the Senate conducted hearings on competing versions of the legislation, several objections to the language in § 813(a)(1) in S. 918 were made because it departed from the common law standard for actual damages. *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, & H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing & Urban Affairs*, 95th Cong. (May 12-13, 1977), e.g., Statement of John L. Spafford, President, Associated Credit Bureaus, Inc., pp. 107-135, p. 128-29; Statement of Julia Boyd, representing American Retail Federation, pp. 203-210:

With respect to quantum of damages, we strenuously object to two provisions of Section 813(a) of S. 918. The first would permit recovery of actual damages for ‘emotional distress’ or ‘mental anguish’ ....

Whether emotional distress or mental anguish is recoverable without physical injury is a matter of State law and should be left that way. That issue pervades the entire field of tort actions, including negligence, products liability, and the like. Moreover, the issue is one which has been developed largely on the basis of judicial precedent. We feel that it would be inappropriate to include in a Federal debt collection statute any provision which might substantially alter a judicial precedent in an unrelated field of law. Furthermore, recovery for emotional distress or mental anguish should result in untold numbers of jury trials in Federal courts each year, thus adding more congestion to that already caused by the plethora of suits under the Truth in Lending Act.

During the Senate Markup session in July, 1977, it was evident and understood that recovery for actual damages under the FDCPA would rarely occur, if at all. *Senate Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation*, p. 16 (July 26, 1977)(“Assuming that a debt collector were to violate the act and he was not able to claim the defense of bona fide error that is, there should be a recovery of some sort -,.. the problem is that in the debt collection area you have a unique situation where actual damages very, very seldom exist. If a consumer were to get a call at six o'clock in the morning or 11:30 at night, he has suffered no out-of-pocket expense. He has no actual damages.”).

When the legislation cleared the Senate, and in the version that became law, the law limited recovery to “any actual damage sustained by such person as a result of such failure.” As such, as used in the FDCPA, “[c]ompensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less \* \* \*.” *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876); *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1453 (2012); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589 (2010)(noting Congress borrowed language in TILA when enacting the FDCPA).

Moreover, the provision of the FDCPA at issue, 15 U.S.C. § 1692g, was intended to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.” S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1699. Here, Plaintiff does not allege that she was dunned for another’s debt, that she already paid, or that she was unable to discern that the debt she was dunned for belonged to JCAP and was originated by Comenity Bank.

Thus, the legislative history does not evidence an intent to award a bounty in actual or statutory damages for every technical violation of the Act, nor an intent to afford a right of action to every debtor dunned for an unpaid debt. Consequently, it cannot be said that just because the statute was allegedly violated, Congress equated claimed technical violations of the Act with a concrete injury sufficient to confer Article III standing.

Thus, neither the common law or the FDCPA reveal an intent to equate the bare violation of every substantive or procedural requirement in the FDCPA with Article III standing.

As such, Plaintiff cannot rest her claim of an Article III injury in fact on the bare violation of the statutory requirement under 15 U.S.C. 1692g(a)(2) to provide all consumers who are the object of collection activities with notice containing the name of the creditor to whom the debt is owed.

**B. PLAINTIFF CANNOT SHOW ARTICLE III STANDING BECAUSE ANY CLAIM OF INJURY-IN-FACT IS ENTIRELY CONJECTURAL OR HYPOTHETICAL**

As there are no allegations in the pleadings that reflect any concrete harm or injury befell Plaintiff, there is no present indication of any injury having already occurred or that is likely to be felt imminently. What remains is at best some mere hypothetical injury that may take place in the future.

This clearly does not satisfy the actual or imminence requirement.

Even if Plaintiff were to argue here that the statutory duties imposed on the Defendants have already resulted in a statutory violation, or that the deprivation of the statutorily required information under Section 1692g(a)(2) vested her with a right of action for this “harm” (despite the suggestion in *Spokeo* that the violation of the statutory requirements is not always enough to create Article III standing), as shown below, there has been no statutory violation here, as she was provided with all the information that Congress required.

**C. PLAINTIFF CANNOT SHOW ARTICLE III STANDING BECAUSE SHE CANNOT SHOW A CAUSAL CONNECTION BETWEEN HER CLAIMED INJURY AND THE CONDUCT COMPLAINED OF**

Again, because there is no harm alleged beyond the receipt of Defendants’ letters, and because the letters contained the name of the creditor to whom the debt was owed, Plaintiff cannot show a causal connection between the failure to “identify effectively” the name of the creditor to whom the debt was owed with any harm.

**II. Plaintiff Fails To Meet Her Burden Under Rule 23(a).**

**A. Plaintiff fails to prove commonality.**

The existence of what, if any, injury the putative class members possess precludes Plaintiff from establishing commonality as required under Rule 23, given that Plaintiff has identified no injury she suffered at all.

*Wal-Mart* made clear, in examining commonality under Rule 23(a)(2), that the members of a proposed class do not establish that “their claims can productively be litigated at once” simply by alleging a single statutory violation by the same defendant. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551 (2011). Rather, it must be shown that the class claims “depend upon a common contention ... [that is] of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 131 S.Ct. at 2551.

“At the certification stage, plaintiffs must demonstrate their ability to prove liability on a class-wide basis, including that each member suffered injury and that the amount of damages is readily calculable for each class member.” 1 MCLAUGHLIN ON CLASS ACTIONS § 4:19 (8th ed.).

The Supreme Court recently confirmed that Article III standing requires a concrete injury even in the context of a statutory violation. *Spokeo, Inc. v. Robins*, No. 13–1339, 2016 WL 2842447, \*6 (U.S. May 16, 2016). For that reason, in order to establish commonality, Plaintiff must demonstrate that her injury is identical to that of every other member of the class she purports to represent, which would be anathema here given that Plaintiff fails to identify any injury at all exists. *NECA–IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012)(To establish “class standing” a plaintiff must show: “(1) that he personally has suffered some actual ... injury as a result of the putatively illegal conduct of the defendant ... and (2) that such conduct implicates the same set of concerns as the conduct alleged to have cause injury to other members of the putative class by the same defendants.”)(quoting and construing *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003)); *Ret. Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of New York Mellon*, 775 F.3d 154, 161 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 796 (2016). As *Spokeo* instructs, to establish this injury in fact, Plaintiff, and by extension, each putative class member, must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Spokeo*, 2016 WL 2842447, \*6; *Lujan*, 504 U. S., at 560 (internal quotation marks omitted).

Plaintiff cannot prove commonality because determining what, if any, injury each class member suffered riddles the class with individual inquiries.

What matters to class certification ... is not the raising of common ‘questions’— even in droves—but, rather the capacity of a classwide proceeding to generate

common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

*Wal-Mart Stores, Inc.*, 564 U.S. 338, 350, 131 S.Ct. 2541, 2551. *See Abby v. Paige*, 282 F.R.D. 576, 579 (S.D. Fla. 2012)(“Plaintiff Abby's analysis of commonality places too much emphasis on what amounts to a technical violation of the FDCPA, and not enough on the commonality of harm to the proposed class members. As the Supreme Court made clear in *Wal-Mart*, an alleged common violation by a defendant is insufficient to meet a plaintiff's burden on a motion for class certification absent evidence that the numerous, ascertainable class members were harmed in the same way by the defendant's actions.”).

To the extent Plaintiff contends that *her* injury arises by virtue of her inability to discern from Fenton's letter (stating that that Fenton was retained by “Jefferson Capital Systems, LLC to collect *its account*...,” Doc. No. 1-1 (emphasis added)), that she was being dunned for a debt belonging to JCAP, her claim is bizarre, idiosyncratic, and dissimilar to every reasonable person in her purported class that was able to objectively discern the name of the creditor to whom the debt was owed from this letter. *Cf. Easterling v. Collecto, Inc.*, 692 F.3d 229, 233-34 (2d Cir. 2012) (noting “FDCPA protection does not extend to every bizarre or idiosyncratic interpretation of a collection notice and courts should apply the standard in a manner that protects debt collectors against liability for unreasonable misinterpretations of collection notices.”); *Janson v. Katharyn B. Davis, LLC*, No. 4:14CV709NCC, 2014 WL 7027352, at \*6 (E.D. Mo. Dec. 11, 2014), *aff'd*, 806 F.3d 435 (8th Cir. 2015).

## **II. Individual Questions Predominate Which Defeat Rule 23(b)(3)'s Requirement.**

Plaintiff similarly fails to meet the exacting predominance standard under Rule 23(b)(3). Predominance under Rule 23(b)(3)(a) requires not only that common questions of law and fact

exist, but that they “predominate over any questions affecting only individual members.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). The predominance criterion of Rule 23(b)(3) is far more demanding than the identification of a single common issue, and the movant cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment when other individualized issues will dominate or be meaningfully material to the resolution of the absent class members’ claims. *Hamilton v. O’Connor Chevrolet, Inc.*, No. 02 C 1897, 2006 WL 1697171, at \*6 (N.D. Ill. June 12, 2006); *Hyderi v. Wash. Mut. Bk., FA*, 235 F.R.D. 390, 398 (N.D.Ill. 2006).

The need to make individual inquiries has been interpreted as proof that predominance has not been met. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 746-47 (7th Cir. 2008); *Foreman v. PRA III, LLC*, No. 05 C 3372, 2007 WL 704478, at \*13-14 (N.D. Ill. Mar. 5, 2007); *McGarvey v. Citibank (S. Dakota) N.A.*, No. 95 C 123, 1995 WL 404866, at \*6 (N.D. Ill. July 5, 1995). Predominance concerns whether the named plaintiff can offer proof on a class-wide basis through her individualized claims. *Fletcher v. ZLB Behring LLC*, 245 F.R.D. 328, 332-33 (N.D. Ill. 2006); *see also Blair v. Supportkids, Inc.*, No. 02 C 0632, 2003 WL 1908031, at \*4 (N.D. Ill. Apr. 18, 2003). Where liability determinations are both individual and fact intensive, class certification under Rule 23(b)(3) is improper. *Pastor v. State Farm Mut. Auto. Ins. Co.*, No. 05 C 1459, 2005 WL 2453900, at \*5 (N.D. Ill. Sept. 30, 2005), *aff’d.*, 487 F.3d 1042 (7th Cir. 2007).

Here, Plaintiff’s claims are ripe with individual inquiries. Most of the putative class, employing an objective and reasonable reading, was likely able to identify their current creditor from Fenton’s letter, while others still may not have read the letter at all, rendering the inquiry presented by Plaintiff’s claim an individualized fact intensive inquiry.

These individual examinations and determinations will be necessary among approximately 760 individuals who were sent a letter by Fenton & McGarvey similar to the one sent to Plaintiff. Thus, Plaintiff fails to show that common questions predominate, and denial of the Motion is warranted.

#### IV. CONCLUSION

For all the foregoing reasons, Plaintiff's motion for class certification ought to be denied.

Respectfully submitted,

*/s/ Michael D. Slodov*

Michael D. Slodov, Ohio SCR #0051678  
SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.C.

15 E. Summit St.

Chagrin Falls, OH 44022-2709

Tel: 440.318.1073

Fax: 216.359.0049

[msslodov@sessions.legal](mailto:msslodov@sessions.legal)

Attorneys for Defendant

Jefferson Capital Systems LLC

**CERTIFICATE OF SERVICE**

I certify that on June 7, 2016, a copy of the foregoing was filed electronically in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's electronic filing system, including Plaintiff's counsel as described below. Parties may access this filing through the Court's system.

Mary E. Philipps  
David J. Philipps  
Angie K. Robertson  
Philipps and Philipps, Ltd.  
9760 S. Roberts Road, Suite One  
Palos Hills, IL 60465  
Email: [mepilipps@aol.com](mailto:mepilipps@aol.com)  
Email: [davephilipps@aol.com](mailto:davephilipps@aol.com)  
Email: [angiekrobertson@aol.com](mailto:angiekrobertson@aol.com)

John Thomas Steinkamp  
John T. Steinkamp and Associates  
5218 S. East Street, Suite E1  
Indianapolis, IN 46227  
Email: [steinkamplaw@yahoo.com](mailto:steinkamplaw@yahoo.com)

David M. Schultz  
Katherine H. Oblak  
HINSHAW & CULBERTSON  
222 North LaSalle Street, Suite 300  
Chicago, IL 60601-1081  
Email: [dschultz@hinshawlaw.com](mailto:dschultz@hinshawlaw.com)  
Email: [koblak@hinshawlaw.com](mailto:koblak@hinshawlaw.com)

/s/ Michael D. Slodov