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

LARKAY D. WESLEY on behalf of herself and all others similarly situated Plaintiff	:	CIVIL ACTION
v.	:	
CAVALRY INVESTMENTS, LLC and CAVALRY PORTFOLIO SERVICES	:	
Defendant	:	No. 05-3523

MEMORANDUM AND ORDER

I. INTRODUCTION

The instant action has been brought by Larkay D. Wesley, on behalf of herself and all others similarly situated, against Defendants Cavalry Investments, LLC and Cavalry Portfolio Svcs ("Cavalry"). Wesley filed this action as a consumer class action under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq., ("FDCPA"), alleging that Cavalry violated section 1692e(8) of the FDCPA by communicating to third parties information which is known to be false, including the failure to communicate that a disputed debt is disputed. Currently pending are Plaintiff's Motion for Class Certification and Defendant's Motion for Summary Judgment. For the reasons which follow, both motions are denied.

II. FACTS AND HISTORY

Plaintiff alleges that both Cavalry Investments, LLC and Cavalry Portfolio Services are business entities whose principle purpose is the collection of debts. Cavalry reports its accounts to national consumer reporting agencies, such as Trans Union, LLC, Experian Information Solutions and Equifax Information Services, Inc. According to plaintiff, as debt collectors

regulated by the FDCPA, Cavalry is legally required to communicate to the credit reporting agencies that a collection account is disputed when they are notified that a consumer disputes the validity of a debt or the accuracy of information. She asserts that instead, as a matter of policy, unless the situation involves fraud or identity theft, Cavalry does not mark the debts disputed to the credit reporting agencies after being notified of a dispute.

Plaintiff's individual claim involves a Mitsubishi car loan that was initiated using her Social Security number in October of 2000. During her deposition, plaintiff stated that she initially learned of the car loan sometime in late 2000 or early 2001, when viewing her credit report. In May 2004, she contacted Cavalry directly to discuss her account. She stated that she told Cavalry that the car loan was not hers and that she suspected her aunt used her Social Security number to get the car. She did, however, direct Cavalry to her mother to set up a payment plan for $265.00 monthly. The collector's screen notes provided by Cavalry also reflect these conversations and the subsequent payment plan initiated by her mother.

In May 2005, plaintiff sent a letter to Trans Union, Experian, and Equifax consumer reporting agencies, stating:

> After reviewing my credit report, I am writing to dispute the following information, Cavalry Portfolio Services #3418076. This item is inaccurate because Cavalry had possession of the car and car loan that was open [sic] fradulently under my name, when I was the victim of Identity Theft.

According to Trans Union's records, plaintiff's letter was received by Trans Union on June 1, 2005 and was processed and "verified as reported per documentation"on Saturday, June 4, 2005. The response was processed on Monday, June 6. (Plaintiff's Exhibit B). Cavalry's screen notes dated June 6, 2005 denote that a representative from Trans Union called Cavalry concerning

plaintiff's account. The screen notes state "Brenda from Trans Union cld.....ver acct not in dispute." On June 6, 2005, plaintiff was sent a revised disclosure from Trans Union which described the results of her dispute, stating that defendants had verified the account and made no changes. (Complaint at par. 18). On June 10, 2005, Cavalry received a telephone and written verification from Equifax of plaintiff's dispute involving fraud and identity theft and Cavalry marked plaintiff's account disputed.

III. DISCUSSION

A. MOTION FOR CLASS CERTIFICATION

Federal Rule of Civil Procedure 23 sets forth four general preconditions that a putative class complaint must satisfy before any case is certified as a class action: (1) the class must be so numerous that joinder of all members is impracticable, (2) there must be questions of law or fact common to the class, (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and (4) the representative parties must fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).[1] The requirements of Rule 23(a) are meant to assure both that "class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994). A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Federal Rule of Civil Procedure 23(a) have been satisfied." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 102 S. Ct. 2364,

[1] Rule 23(a) specifically provides that:
[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

2372 (1982).

In addition to these elements, Rule 23(b) defines four different types of class actions, one of which the party seeking certification must fulfill. FED R. CIV. P. 23(b).[2] Plaintiffs in this case seek certification under both Fed. R. Civ. P. 23(b)(2), where the primary relief sought is injunctive or declaratory, and 23(b)(3), where questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The plaintiffs bear the burden of proving that the proposed class action satisfies each of the requirements of Rule 23(a) and one of the prerequisites of Rule 23(b). See Baby Neal, 43 F.3d at 55. A motion for class certification should not turn on the court's evaluation of the merits of the parties' legal or factual claims. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178,

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[2] Rule 23(b) sets forth the following categories of maintainable class actions:
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular
forum; (D) the difficulties likely to be encountered in the management of a class action.
FED. R. CIV. P. 23(b).

94 S. Ct. 2140, 2152-2153 (1974); Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998), cert. denied, 526 U.S. 1114, 119 S. Ct. 1760 (1999). However, to some degree, "[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001) (quoting Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

Turning to the case before us, plaintiff originally sought certification of the following class:

> All consumers in the United States and its Territories who: (a) disputed an account reported by the Defendants through a consumer reporting agency; and (b) provided a reason other than fraud or identity theft for the dispute.

(Plaintiff's Motion for Class Certification, p.1). In her reply to the Motion for Class Certification, however, she now indicates that she has modified and refined the definition of the proposed class in light of discovery, and seeks certification of the following class:

> All persons in the United States and its territories who, beginning July 12, 2004 and continuing through the date of the resolution of this action, (a) disputed to a consumer reporting agency an account reported by Defendants; (b) whose dispute was communicated to Defendants; and (c) for whom Defendants did not mark the account as disputed.

Plaintiff states in her response that:

> "Through discovery of Defendants' internal practices regarding the way they handle credit disputes, Plaintiff has learned that, as initially contemplated in the Complaint, Defendants divide up the credit disputes they receive into two groups, one group whose disputes they will mark as disputed, and the other whose they will not. Plaintiff's Complaint alleges that the distinction is determined by whether the disputes are in the nature of identity theft or fraud. (Complaint at par. 15). The Class that plaintiff seeks to represent, under both the original proposed class definition as

> well as the refined class definition is the second group- those consumers whose debts defendants did not mark as disputed- upon the theory that defendants are required to mark all disputed debts as disputed pursuant to FDCPA section 1692e(8)."

(Plaintiff's Reply Memorandum of Law in Support of Motion for Class Certification at p. 4). Plaintiff alleges that the change to the definition is due only to the fact that Cavalry's determination of whether or not to mark a debt as disputed is determined when the CRA contacts Cavalry, rather when the consumer contacts the CRA. Plaintiff also notes that Cavalry's record keeping system tracks and records each time it is contacted by a CRA regarding a dispute rather than when a CRA is contacted by a consumer. Accordingly, plaintiff claims the refined definition coincides with this system.

The Court now considers whether plaintiff's proposed class, as the description has now been refined, complies with the preconditions of Fed. R. Civ. P. 23(a) and (b).[3]

1. Commonality and Typicality

"The concepts of commonality and typicality are broadly defined and tend to merge." Baby Neal, 43 F.3d at 56. "Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Falcon, 457 U.S. at 158 n. 13. These prerequisites do not require that all of the putative class members share identical claims. Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.), cert. denied,, 474 U.S. 946, 106 S. Ct. 342 (1985). Rather, they mandate only that the complainants' claims be common, and not in conflict. Id. "[F]actual differences among the

[3] As stipulated on February 22, 2006, defendants do not challenge the numerosity requirement under 23(a)(1).

claims of the putative class members do not defeat certification." Baby Neal, 43 F.3d at 56.

The Third Circuit has generally required a low threshold for satisfying the commonality requirement. See Baby Neal, 43 F.3d at 56 ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class"). Specifically, in cases involving class certification under the FDCPA, Third Circuit courts have found commonality satisfied by allegations of common unlawful violations of fair debt collection practices. See Jordan v. Commonwealth Financial Systems, Inc., 237 F.R.D. 132, 2006 WL 2294855, *5 (E.D.Pa. July 25, 2006) (commonality satisfied when case involves standardized collection letter); Saunders v. Berks Credit And Collections, Inc., 2002 WL 1497374, at *6 (E.D. Pa. July 11, 2002) (commonality established when substantially similar debt collection letters sent to class and when plaintiff alleges that debt collection letters violate FDCPA); Thomas v. NCO Financial Systems, Inc., 2002 WL 1773035, *2 (E.D. Pa. July 31, 2002) (alleged existence of a common unlawful practice generally satisfies the commonality requirement).

The threshold for satisfying the typicality requirement is equally low. See Zlotnick v. Tie Communications, Inc., 123 F.R.D. 189, 193 (E.D. Pa.1988), Thomas v. NCO Financial Systems, Inc., 2002 WL 1773035, 3 (E.D. Pa. 2002); See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3rd Cir. 2001) ("We have set a low threshold for satisfying both [commonality and typicality] requirements."). The representative's claims "only need be sufficiently similar to allow the court to conclude that (1) the representative will protect the interests of the class, and (2) there are no antagonistic interests between the representative and the proposed class." Duffy v. Massinari, 202 F.R.D. 437, 2001 WL 683802, *5 (E.D. Pa. June 15, 2001) (citing In Re Glassine & Greaseproof Paper Antitrust Litigation, 88 F.R.D. 302, 304 (E.D. Pa. 1980)). The typicality

requirement is satisfied where all of the claims arise from the same alleged fraudulent scheme. See In re Prudential Ins. Co. v. America Sales Litig., 148 F.3d 283, 312 (3d Cir. 1998), Piper v. Portnoff Law Associates, 215 F.R.D. 495, 502 (E.D. Pa. 2003); See also Baby Neal, 43 F.3d at 57 ("[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.").

Having read the briefs submitted by plaintiff, it is now unclear exactly what practice of defendants she is challenging. Plaintiff originally alleged a generalized practice on the part of the defendants, which involved classifying reported disputes into two categories and only marking those debts reported as involving fraud or identity theft as disputed. While plaintiff still must prove this generalized practice, the allegation of this common practice which plaintiff alleges violates the FDCPA is sufficient to satisfy both the commonality and typicality requirements for class certification.

To the extent, however, that she uses the refined definition of the class, the element of commonality among the class is lacking for several reasons. First, plaintiff now alleges "a common practice of failing to mark accounts as disputed upon notice from a CRA that there is a dispute," without identifying any specific reasoning used by defendants for marking only certain debts as disputed. (Motion for Cerification at p. 10). While FDCPA claims based on form documents or upon uniform collection practices may be eminently appropriate for class certification, see Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir. 2004), plaintiff no longer challenges such a standardized practice on the part of defendants. See also Wisneski v. Nationwide Collections, Inc., 227 F.R.D. 259, 260-261 (E.D.Pa., 2004) (class certification granted for FDCPA claim based upon

form collection letter); McCall v. Drive Financial Services, L.P, 236 F.R.D. 246, 250 (E.D.Pa., 2006) (class certification granted where FDCPA claim was based upon the representative receiving essentially the same letter as the 203 other plaintiffs). In short, with the refined class definition, plaintiff has failed to demonstrate that any of the other members of the class have similar claims or that defendant's practices are the same.[4]

Moreover, plaintiff's reliance on the oral telephone conversation between Trans Union and Cavalry to trigger Cavalry's obligation to mark her debt as disputed makes the elements of commonality and typicality become even more obscure. Courts are particularly hesitant to certify class actions based primarily on oral as opposed to written communications. See Seiler v. E.F. Hutton & Co., Inc., 102 F.R.D. 880, 888 -889 (D.N.J. 1984) (stating that actions "based substantially on oral rather than written communications [are] inappropriate for treatment as a class action."), Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1132 (D.N.J. 1989) (finding plaintiff failed to meet commonality burden by relying on "ambiguous evidence comprised almost exclusively of oral communications."). Defining a putative class around oral communications raises specific questions about the commonality of the challenged conduct. See Goldstein v. Regal Crest, Inc., 59 F.R.D. 396, 402 (E.D. Pa. 1973) ("Oral misstatements, however, do not permit the same inference of common conduct. Such statements clearly cannot be standardized, particularly when they are

[4] Plaintiff now alleges that the fact that Cavalry marked her debt disputed based upon the Equifax communication and not the communication from Trans Union bolsters her claim because Equifax considered and reported the dispute as involving fraud or identity theft and Cavalry "did not treat the Trans Union dispute as an identity theft or fraud dispute (most likely because the primary dispute description on Trans Union's dispute record classified the dispute as 'belongs to Another Individual with Same/Similar Name"). (Response to SJ motion at 13). However, since the dispute letters sent by plaintiff to both Equifax and Trans Union were identical and reported her dispute as identity theft, this is entirely speculative. Notably, Trans Union's notes also list "True Identity Fraud-Account Fraudulently Opened" as a basis for the dispute. There is therefore no uniform wording which plaintiff argues fails to trigger a response by defendant. If plaintiff is relying upon specific wording used over the telephone by the Trans Union employee there is also no indication that this would be the same for any other class member.

made by several different persons."), Stephenson v. Bell Atlantic Corp., 177 F.R.D. 279, 293 (D.N.J. 1997) (noting that the nature of oral communications does not lend itself to the same consistency as written communications). Miller v. Central Chinchilla Group, 66 F.R.D. 411, 416 (S.D. Iowa 1975) (commenting that oral statements are much more susceptible to material variation as opposed to written communications and therefore less likely to allow for common issues to predominate). "In the absence of any demonstrable standardized communications ... the nature of the representations made is a factual question which must be answered on an individual basis, plaintiff by potential plaintiff." Miller, 66 F.R.D. at 416.

Here, especially given the refined class definition, plaintiff is relying exclusively upon the oral communication between Trans Union and Cavalry, which took place on June 6, 2005. While there are notes of the communication, plaintiff will need to prove the content of the conversation. Since plaintiff's account was marked disputed only four days later after receipt of a CDV from Equifax, her case turns entirely on the prior telephone call. If plaintiff plans to maintain her theory that Cavalry does not mark accounts disputed which are not listed as fraud or identity theft, the content of the oral communication is even more crucial to her case, especially in light of the fact that her letter to Trans Union specifically lists identity theft as the basis for her dispute. As defendant has noted, the notes of the call do not make it clear whether Trans Union was actually reporting a dispute or verifying whether the account was in dispute. These individualized facts will therefore need to be determined to resolve plaintiff's case. There is also no evidence that there were similar standardized telephone communications such as this, which took place regarding the accounts of other class members. Thus, it would be nearly impossible to identify members of the class based upon similar oral communications. We therefore find that using the refined definition, plaintiff

cannot establish commonality or typicality.

2. Adequacy of Class Representation

The adequacy of representation requirement encompasses two distinct inquiries designed to protect the interests of absentee class members. First, it "tests the qualifications of the counsel to represent the class." In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litigation, 55 F.3d 768, 800 (3d Cir.), cert. denied, 516 U.S. 824, 116 S. Ct. 88 (1995). Second, it "serves to uncover conflicts of interest between named parties and the class they seek to represent." In re Prudential Ins. Co. Sales Practices Litigation, 148 F.3d 283, 312 (3d Cir. 1998), cert. denied, 525 U.S. 1114, 119 S. Ct. 890 (1999) (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 2250 (1997)).

Defendants do not contend that plaintiff's counsel fails to satisfy the first adequacy requirement under Rule 23(a)(4). Accordingly, we will not address the adequacy of plaintiff's counsel to serve as counsel for the putative class. Defendants, however, do challenge the adequacy of plaintiff to serve as a class representative. Specifically, they argue that plaintiff does not fall within the defined class and therefore will likely have interests that conflict with the putative class of unnamed plaintiffs.

Under this second prong of the adequacy of representation element, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S. Ct. 2925, 2930 (1974)). Thus, a reviewing court must query whether the named representative has interests that conflict with or are antagonistic to the interests of other class members. Duffy, 2001

WL 683802, at *5; Stewart v. Avon Products, Inc., Civ. A. No. 98-4135, 1999 WL 1038338 *4 (E.D. Pa. 1999).

As discussed above, using the refined class definition, plaintiff does not satisfy the elements of commonality or typicality, making it unnecessary to even consider the adequacy of representation requirement. Regardless, based on the facts specific to plaintiff's claim, it is unclear whether she even falls within the class as defined. As noted, plaintiff re-defined the class definition to include "All persons in the United States and its territories who, beginning July 12, 2004 and continuing through the date of the resolution of this action, (a) disputed to a consumer reporting agency an account reported by Defendants; (b) whose dispute was communicated to Defendants; and (c) for whom Defendants did not mark the account as disputed." Under the facts alleged by plaintiff, Cavalry was contacted by Trans Union on June 6, 2005 and failed to mark the debt as disputed. Admittedly, however, after being contacted by Equifax, Cavalry marked plaintiff's debt as disputed on June 10, 2005. Therefore, if at all, she satisfied the refined class definition for only four days.

Moreover, to the extent plaintiff still intends to challenge the original policy of defendants of not marking debts disputed unless fraud or identity theft was given as a reason, plaintiff is not an adequate class representative. Plaintiff's letter to Trans Union explicitly listed "identity theft" as the reason for her dispute, thus excluding her from the class.

Even more significant is the fact that plaintiff's specific case does not help to prove the alleged general policy of defendant or that they classify debts into two separate categories based upon whether fraud or identity theft is alleged. As previously discussed, the Trans Union and Equifax disputes in this case were based upon the same letter sent by plaintiff, which included identity theft as a reason for plaintiff's dispute. Furthermore, Trans Union's communication did not

result in defendant marking the account as disputed even though Trans Union's own notes list fraud and identity theft as a basis for the dispute, while Equifax's written dispute did result in defendant marking the account disputed.

Finally, the unusual factual circumstances surrounding plaintiff's Cavalry account prior to May 2005, would likely also harm the interests of other putative class members. Plaintiff acknowledged the debt by arranging a payment plan and having multiple payments made to Cavalry on her behalf. She asserts that the common legal issue is whether defendant violated the FDCPA by failing to mark her debt as disputed. However, plaintiff's case is factually different from the cases of other members of the purported class, as the issue of whether or not plaintiff actually disputed this debt is presumably distinct. Plaintiff's case is not an ordinary case of a debt simply not belonging to her or of identity theft. Rather, it involves a family member, against whom she admittedly did not file a police report. Furthermore, while plaintiff allegedly disputed the debt, she arranged to have payments made on the account. Given the unique factual circumstances regarding this debt, the fact that a jury may not find a violation of the FDCPA for a failure to mark plaintiff's account as disputed would not necessarily equate with a finding against the other members of the class.

In light of the foregoing, we question whether plaintiff can serve as an adequate class representative. She does not clearly satisfy either of her proposed class definitions. Moreover, although the refined class definition no longer requires that another reason other than fraud or identity theft be alleged, plaintiff's case no longer seems to fit within the alleged generalized practice of defendants that is being challenged. Indeed, since plaintiff claimed that her debt was a result of fraud or identity theft, her factual scenario may prove fatal to claims by those unnamed class members who actually provided reasons other than "fraud" or "identity theft" in disputing their

claims to the consumer reporting agencies and whose debts were never marked disputed. In short, plaintiff's claim does not fairly represent the interests of other class members. Thus, we find that the adequacy of representation prong of Rule 23 has not been met.

3. Conclusion as to Certification

In light of the foregoing analysis, the Court must deny class certification. Plaintiff simply cannot establish that using the refined definition she satisfies the commonality/typicality aspects of class certification. Furthermore, using either the original or the refined class definition she fails to demonstrate that she is an adequate class representative. Having failed to meet all of the Rule 23(a) requirements, the Court finds it unnecessary to engage in any analysis under Rule 23(b). Of course, this denial of certification does not, in any way, reflect on the merits of plaintiff's individual claims. Rather, it merely indicates that her claims are best pursued separately and in a more individualized fashion, instead of as part of larger class.

B. MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56(c); see also Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986); Williams v. Borough of West Chester, 891 F.2d 458, 463-464 (3d Cir. 1989). A factual dispute is "material" only if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For there to be a "genuine" issue, a reasonable fact finder must be able to return a verdict (or render a decision) in favor of the non-moving party. Id.

On summary judgment, it is not the court's role to weigh the disputed evidence and decide

which is more probative, or to make credibility determinations. Boyle v. County of Allegheny, Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). Rather, the court must consider the evidence, and all reasonable inferences which may be drawn from it, in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987). If a conflict arises between the evidence presented by both sides, the court must accept as true the allegations of the non-moving party. See Anderson, 477 U.S. at 255.

Once the movant has carried its initial burden, Rule 56(e) shifts the burden to the nonmoving party as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e). However, to raise a genuine issue of material fact "'the [summary judgment] opponent need not match, item for item, each piece of evidence proferred by the movant,' but simply must exceed the 'mere scintilla' standard." Petruzzi's ICA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1230 (3d Cir.), cert. denied, 510 U.S. 994 (1993). Summary judgment may be granted only if, after viewing all evidence in the light most favorable to the non-movant, no jury could decide in that party's favor. Tigg Corp., 822 F.2d at 361.

Plaintiff alleges that Cavalry failed to mark her debt as disputed, in compliance with the FDCPA, upon notification of the dispute from Trans Union on June 6, 2005. Prior to plaintiff amending the class definition, and thereby changing the generalized practice being challenged, Cavalry

moved for summary judgment asserting that plaintiff reported fraud and her account was marked disputed. This request for summary judgment was contained within Cavalry's Motion for Judgment on the Pleadings filed on January 27, 2006, but by way of stipulation was separated from that motion to be addressed after additional discovery and the filing of a separate response. In support of its motion, Cavalry relies upon documentation related to plaintiff's account which was attached to its answer, including a report from Equifax indicating "consumer claims true identity fraud account fraudulently opened" (Exhibit A). Calvary's notes from their database also indicate that on June 10, 2005, they mailed a fraud packet and updated the account to disputed. (Exhibit B).

While the documentation referenced by Cavalry pertains to the same account referenced in plaintiff's complaint, her allegations in the complaint are related to the communication to Cavalry by Trans Union on June 6, 2005, rather than the later communication from Equifax. In addition, while the documentation certainly evidences plaintiff's difficulty satisfying the original proposed class definition, we agree that considering the disputed facts in favor of the nonmoving party, plaintiff, the documentation is not sufficient to warrant summary judgment. The facts that plaintiff's report included references to fraud and/or identity theft and that her account was ultimately marked disputed after Cavalry's receipt of the Equifax CDV, do not automatically relieve defendant of any obligation to mark the account as disputed, if plaintiff can prove that such an obligation was triggered by Cavalry's communication with Trans Union. Accordingly, we must deny Defendants' motion. However, we note that given plaintiff's acknowledgment that the account was marked disputed on June 10, 2005 and that the communication with Trans Union was on June 6, 2005, it appears that even assuming that plaintiff is successful in proving her claim, any damages resulting from a failure to mark the account as disputed will be limited to this four day period. In addition to proving that the

communication by Trans Union actually triggered an obligation on the part of Cavalry to mark the account disputed, plaintiff must also prove that Calvary's action in marking the account as disputed four days later was not a reasonably timed notification sufficient to satisfy the obligation. See Farren v. RJM Acquisition Funding, LLC, 2005 WL 1799413, *10 (E.D. Pa. July 26, 2005) (holding that although the statute does not expressly require a reasonably timed notification upon learning of a dispute, the Court will interpret the statute as requiring such disclosure in a reasonable time).

An appropriate Order follows.

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

LARKAY D. WESLEY	:	CIVIL ACTION
on behalf of herself and all others	:	
similarly situated	:	
Plaintiff	:	
	:	
v.	:	
	:	
CAVALRY INVESTMENTS, LLC and	:	
CAVALRY PORTFOLIO SERVICES	:	
	:	No. 05-3523
Defendant	:	

CHARLES B. SMITH
CHIEF UNITED STATES MAGISTRATE JUDGE

ORDER

AND NOW, this 27th day of September, 2006, upon consideration of Plaintiff's Motion for Class Certification (docket entry # 18), as well as the response thereto (docket entry #28), and plaintiff's reply memorandum (docket entry #32), it is hereby ORDERED that the Motion for Class Certification is DENIED

It is further ORDERED that after consideration of Defendant Cavalry's Motion for Summary Judgment (second part of docket entry # 12), as well as the response thereto (docket entry #29), the defendant's reply (docket entry #33), and plaintiff's sur-reply (docket entry # 34), Cavalry's Motion for Summary Judgment is also DENIED.

It is so ORDERED.

BY THE COURT:

/s/ Charles B. Smith
CHARLES B. SMITH
CHIEF UNITED STATES MAGISTRATE JUDGE