UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| TODD WALKER,<br>Plaintiff,<br><br>vs.<br><br>CALUSA INVESTMENTS, LLC,<br>d/b/a NEXT DAY LOAN,<br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | 1:06-cv-508-LJM-WTL |

**ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

This cause is before the Court on Defendant's, Calusa Investments, LLC, d/b/a Next Day Loan ("Calusa"), Motion for Judgment on the Pleadings. Plaintiff, Todd Walker ("Walker"), initiated this lawsuit claiming that Calusa accessed his credit report without his consent or any lawful reason, all in violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. Calusa contends that it is entitled to judgment on the pleadings because it extended a "firm offer of credit" to Walker as that term is defined by the FCRA. The parties have fully briefed this matter and it is now ripe for ruling.

For the reasons stated herein, Calusa's motion is **DENIED**.

## I. BACKGROUND

Walker asserts in his Complaint that he received a mailer from Calusa stating that it was a "'prescreened' offer of credit based on information in [his] credit report." Compl., ¶ 7 and Ex. A. Walker contends that the mailer he received was one of more than 200 sent to residents in Indiana. *Id.*, ¶ 16. He claims that Calusa's "prescreening" was intended to identify persons with poor credit

or who had recently obtained bankruptcy discharges in order to target them for subprime credit. *Id.*, ¶ 17. Walker alleges that Calusa accessed his consumer report without authorization and without any permissible purpose. *Id.*, ¶¶ 18-20, 26. More specifically, Walker contends that the mailer does not qualify as a "firm offer of credit" within the meaning of the FCRA. *Id.*, ¶ 27. Accordingly, Walker claims that Calusa willfully violated the FCRA. *Id.*, ¶¶ 28-29. He brings this lawsuit on behalf of himself and a class of similarly situated individuals. *Id.*, ¶¶ 32-39.

Calusa admits that it sent the mailer to Walker and more than 200 Indiana residents. Answer, ¶¶ 6, 16. Calusa also admits that "prospective borrowers" were prescreened based upon information received from consumer reporting agencies and that based on that "prescreening" it caused the mailers to be sent to Walker and other Indiana residents. Answer, ¶¶ 9-10. However, Calusa denies that it has violated the FCRA. Answer, ¶¶ 27-29.

The front of the mailer sent to Walker and attached as Exhibit A to his Complaint contains a faux check for the sum of $102,850.00 that states at the bottom "Non-Negotiable This Is Not A Check." Compl., Ex. A. The faux check is made out to Walker and indicates that his status is "pre-approved" and provides a number for contacting Calusa. *Id.* Additional information is printed below the faux check. *Id.* In large bold letters the mailer states "Change your financial future in just 24 hours with your NEW Next Day Loan!*," and informs Walker that he has been pre-approved and that Calusa can lend him up to 115% of the value of his home. *Id.* The mailer suggests that Walker can save $865.00 a month by consolidating his debt into a single loan and states that he can spend the money however he wishes. *Id.* The mailer advises that the process is "fast and easy" and only takes a free ten-minute phone call. *Id.*

In addition, the front of the mailer provides an example to illustrate the amount of money that can be saved via consolidation. *Id.* The example is based on various assumptions explained in the mailer and included in the fine print. *Id.* The fine print also states that the example is based on an arm loan of $102,850.00 with a rate of 5.99%, an Annual Percentage Rate ("APR") of 8.453%, and a term of 360 months. *Id.* Further, the fine print advises that "[y]our rate may vary according to your credit history, and other factors." *Id.* Finally, the fine print indicates that origination fees and closing costs are included in the APR and may vary by state, that actual savings may vary based on actual debt owed and time left on installment loans, and that while a debt consolidation loan may lower a monthly payment it can result in an increased number of monthly payments and amount paid over the term of the loan. *Id.*

Finally, the back of the mailer states, *inter alia*, the following:

> *OFFER TERMS AND CONDITIONS
> You have received this offer because you satisfy our initial criteria for creditworthiness. This offer is contingent on our receiving a valid first or second lien on an owner-occupied one to two family residence, excluding mobile homes, manufactured homes and co-ops, with a value that is within our minimum and maximum property value requirements. An appraisal of your residence may be required. This offer is subject to minimum and maximum loan amounts. Approval is subject to verification of employment and acceptable income, credit history and collateral. This offer may not be extended if, after responding to this offer, it is determined that you no longer meet the criteria used to select you for this offer or other specific criteria bearing on your creditworthiness in effect at the time of this mailing.

*Id.*

## II. STANDARD

When a party moves for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, the standard is the same as for a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs*, 335 F.3d 643, 647 (7th Cir. 2003). The Court may consider only the pleadings and must view the allegations in the light most favorable to the non-moving party. *See id.* The pleadings include the complaint, answer, and any documents attached thereto as exhibits. *See N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452-53 (7th Cir. 1998). Moreover, "documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." *Wright v. Assoc'd. Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994). The motion may be granted only if it appears beyond any doubt that the plaintiff cannot prove any facts consistent with the complaint that would support a claim for relief. *See Guise v. BWM Mortgage, LLC*, 377 F.3d 795, 798 (7th Cir. 2004).

## III. DISCUSSION

As the Seventh Circuit has noted, the FCRA was designed to preserve consumers' privacy in the information maintained by consumer reporting agencies. *See Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725 (7th Cir. 2004) (citing 15 U.S.C. § 1681(a)(4)). Under the FCRA, a consumer's credit report may only be obtained with the consumer's written consent or for certain permissible purposes. *See* 15 U.S.C. § 1681b(f). One such permissible purpose for obtaining a consumer's credit report is to make a "firm offer of credit" to the consumer. 15 U.S.C. § 1681b(c)(1)(B)(1). Here, the sole

issue presented by the instant motion is whether Calusa made a firm offer of credit in the mailer it sent to Walker.

The term "firm offer of credit" is defined in the FCRA as "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information contained in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer." 15 U.S.C. § 1681a(*l*). The offer may be conditioned on three specific requirements. First, a creditor may apply additional pre-selected criteria bearing on a consumer's creditworthiness. *See* 15 U.S.C. § 1681a(*l*)(1). Second, the offer may be conditioned on verification "that the consumer continues to meet the specific criteria used to select the consumer for the offer." 15 U.S.C. § 1681a(*l*)(2). Finally, the offer may be conditioned on the consumer's furnishing of any collateral that was both established before the selection of the consumer for the offer and disclosed to the consumer in the offer. *See* 15 U.S.C. § 1681a(*l*)(3).

Although the statute itself does not specifically articulate what language an offer must contain in order to be considered a "firm offer of credit," the Seventh Circuit has provided guidance in this area. In *Cole*, the Seventh Circuit observed that "a 'firm offer' must have sufficient value for the consumer to justify the absence of the statutory protection of his privacy." *Cole*, 389 F.3d at 726. Therefore, the Seventh Circuit instructed that "a court must consider the *entire* offer and the effect of *all* the material conditions that comprise the credit product in question. If, after examining the entire context, the court determines that the 'offer' was a guise for solicitation rather than a legitimate credit product, the communication cannot be considered a firm offer of credit." *Id.* at 728 (emphasis in original). The Seventh Circuit also identified three factors to assist in making this assessment, specifically (1) whether it is clear that credit approval is guaranteed; (2) whether the

precise rate of credit and other material terms are included in the solicitation; and (3) whether the amount available for the loan in relation to the known limitations of the loan are included in the solicitation. *See id.* With respect to the second factor, the Seventh Circuit further indicated that the terms of an offer can "be so onerous as to deprive the offer of any appreciable value," and that missing terms can "render it impossible for a court to determine from the pleadings whether the offer has value." *Id.*

More recently, the Seventh Circuit explained that "[t]he statutory definition of 'firm offer' does not ask about how consumers *react*, however; it asks what the offeror has done – what terms have been extended, whether they are honored if a consumer accepts." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 955 (7th Cir. 2006), *reh'g and reh'g en banc denied* (emphasis in original). Therefore, in order to decide whether a defendant has complied with the statute and made a "firm offer of credit," a court "need only determine whether the four corners of the offer satisfy the statutory definition (as elaborated in *Cole*), and whether the terms are honored when consumers accept." *Id.* at 956.

In addition to the guidance provided by the Seventh Circuit's binding precedent, the Court notes that several district courts have addressed the question of whether a firm offer of credit has been made in the context of mailers offering loans. The conclusions reached by those courts have varied according to the particular circumstances of those cases. *See*, *e.g.*, *Cavin v. Home Loan Center, Inc.*, --- F. Supp. 2d ---, 2007 WL 92509 (N.D. Ill. Jan. 10, 2007) (granting the defendant's motion for summary judgment where "prescreened" offer included a box listing sample payments for loans ranging from $100,000.00 to $600,000.00, described the terms of the loan program, and explained that rates quoted assume a credit score of 620+ with a loan-to-value of 80% on primary

residence); *Poehl v. Countrywide Home Loans, Inc.*, --- F. Supp. 2d ---, 2006 WL 3628982 (E.D. Mo. Nov. 1, 2006) (granting the defendant's motion to dismiss where mailer stated that consumer was "pre-selected" for a loan of $92,500.00 and that amount was based on 75% of the average loan balance for previous loans but amount of interest rate or other terms were not specified); *Soroka v. Homeowners Loan Corp.*, Cause No. 8:05-cv-2029-T-17MAP, 2006 U.S. Dist. LEXIS 38847 (Md. Fla. June 12, 2006) (granting the defendant's motion to dismiss where consumer was offered a loan of $55,000.00 to be used for any purpose). *But see Murray v. IndyMac Bank, F.S.B.*, 461 F Supp. 2d 645 (N.D. Ill. 2006) (granting the plaintiff's motion for summary judgment on this issue where "pre-approved" offer did not disclose the terms of the loan being offered, did not contain any information about a repayment schedule or fees or points charged along with the loan, and indicated that rates and terms were subject to change without notice); *Hernandez v. Chase Bank USA, N.A.*, 429 F. Supp. 2d 983 (N.D. Ill. 2006) (denying the defendant's motion to dismiss where mailer stated that consumer was "pre-qualified" for up to $100,000.00 and offered a loan between $10,000.00 and $100,000.00, specified that all loans were subject to credit and property approval, included multiple limitations such as the fact that a specialist would determine the amount and type of loan after speaking with the consumer, and failed to include interest rate or repayment period); *Wanek v. C.M.A. Mortgage, Inc.*, Cause No. 05 C 4775, 2005 U.S. Dist. LEXIS 40667 (N.D. Ill. Dec. 12, 2005) (denying the defendant's motion to dismiss where mailer stated that consumer was "pre-approved" for a loan up to $50,000.00 or more, stated that the minimum loan amount for offer was $15,000.00, and failed to specify the interest rate or term of the loan but did include a table of possible monthly payments based on a hypothetical APR and term length of the loan).

Turning to this case, Court initially notes that the mailer, on its face, suggests that it is no more than a solicitation claiming that a consumer can experience tremendous savings through debt consolidation in order to persuade the consumer to contact Calusa to work out the details of a loan. Of course, the Court cannot decide the issue by initial appearances and instead must examine the four corners of the mailer and consider the factors articulated by the Seventh Circuit in *Cole*. After examining the entire offer and the effect of all the material conditions, the Court concludes that the circumstances of this case are like the circumstances in those cases that have found that firm offers were not made.

The first factor is whether it is clear that credit approval is guaranteed. Here, the mailer does not contain the "waffling" language as was the case in *Cole* about whether the offer will be honored. Instead, the mailer suggests that if Walker meets all of the conditions, such as verification of employment, acceptable income, and a home with acceptable property value requirements, he can obtain a loan from Calusa. Therefore, the Court finds that this factor favors Calusa's position.

Unlike the first factor, however, the Court finds that the second and third factors cut against Calusa. The second factor requires the Court to consider the precise rate of credit and other material terms. The Court notes that the mailer is missing several terms. For instance, while the mailer does provide some terms for a sample loan of $102,850.00 based on various assumptions, there is no indication that this is an average loan from Calusa, much more whether those terms would be applicable to Walker. The mailer also lacks any helpful information about what range could be expected for an interest rate, or the average term length for a loan. In addition, while the mailer advises that the loan is subject to minimum and maximum property values, it fails to indicate what is the range of those expected values. Finally, while advising that origination fees and closing costs

apply and that they vary by state, the mailer fails to provide even a modicum of information as to how much those costs could be expected to be.

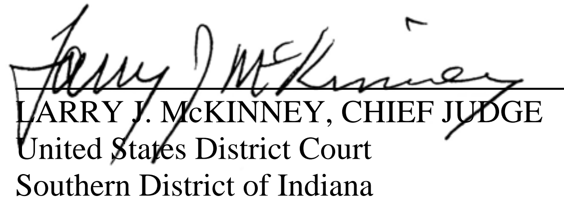
Similarly, the third factor, the amount available for the loan in relation to the known limitations, is problematic. While the mailer advises that Walker can use cash from a loan "however [he] wish[es]," the mailer fails to articulate an amount that Walker could expect to receive. The mailer does include the amount of $102,840.00, but the amount is listed on a faux check. Moreover, the mailer later indicates that this is just the amount of a sample loan that could "save" Walker $865.00 per month. There is nothing in the mailer to clarify whether Walker is actually pre-approved for that amount, much less any other specific amount. Therefore, the Court concludes that the mailer fails to indicate an amount available for the loan.

In light of the lack of specific terms and the lack of any indication as to the amount available for a loan, the Court finds that the mailer fails to have sufficient value for a consumer in order to justify the invasion of privacy to obtain the consumer's credit report. The Court cannot agree with Calusa that the mailer constitutes a "firm offer of credit," and therefore **DENIES** the motion for judgment on the pleadings.

## IV. CONCLUSION

For the foregoing reasons, Defendant's, Calusa Investments, LLC, d/b/a Next Day Loan, Motion for Judgment on the Pleadings is **DENIED**.

IT IS SO ORDERED this 27th day of February, 2007.



LARRY J. McKINNEY, CHIEF JUDGE
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