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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official capacity as Attorney General of California, **HOWARD GOULD**, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, **WILLIAM P. WOOD**, in his official capacity as Commissioner of the Department of Corporations of the State of California, and **JOHN GARAMENDI**, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Case: CIV. S-04-0778 MCE KJM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS BILL LOCKYER'S AND JOHN GARAMENDI'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: June 14, 2004
Time: 9 a.m.
Courtroom: 3
Judge: Honorable Morrison C. England, Jr.

I. INTRODUCTION

The right to privacy is one of our country's most fiercely guarded protections. In California, this right gained constitutional status in 1972, following passage of a proposition to add "privacy" as one of the inalienable rights enumerated in the State Constitution. Cal. Const. art. I, § 1.[1/]

The ballot argument supporting this proposition makes clear that the inalienable right to privacy extends to the collection and dissemination of personal information by businesses, as well as government:

> "[The right of privacy] prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.
>
> *"Fundamental to our privacy is the ability to control circulation of personal information*. [Italics in original] . . . The proliferation of government and business records over which we have no control limits our ability to control our personal lives."

White v. Davis, 13 Cal. 3d 757, 774 (1975) (quoting the ballot argument).

Indeed, one of the examples given in this ballot argument of the types of information collection over which consumers have no control are applications for credit cards or life insurance policies:

> *Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a drivers' license, a dossier is opened and an informational profile is sketched.*

Proposed Amendments to Constitution: Proposition and Proposed Laws Together With Arguments, General Election, Tuesday, Nov. 7, 1972, p. 27 (emphasis in original).

California is not alone in recognizing the importance of the right to privacy. Indeed, in 1991 Congress enacted legislation to guarantee a basic level of protection for the financial privacy of consumers, while preserving state laws that provide greater protection. Title V of the Gramm-Leach-Bliley Act of 1999 (GLBA)[2/] expresses the policy of Congress "that each financial institution has an

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1. Appendix of Legislative and California Authorities ("Appendix"), filed concurrently. Copies of legislative and California authorities referenced in this brief are attached to the Appendix.

2. The privacy protections of the GLBA referred to in this memorandum are set forth in Subtitle A of Title V of the GLBA (15 U.S.C. §§ 6801-6809). For the sake of brevity, these provisions are often referred to herein simply as "Title V" or "the GLBA."

affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a).

In furtherance of that policy, Title V requires every financial institution to provide, at least annually, a clear and conspicuous disclosure of its policies and practices regarding the disclosure of customers' personal information to affiliates and to nonaffiliated third parties. 15 U.S.C. § 6803(a)(1). In that way, Congress sought to ensure that consumers would be able to make informed choices regarding which financial institutions they do, or do not, wish to entrust with some of their most sensitive personal information.

Title V further protects financial privacy by requiring that financial institutions provide consumers an opportunity to direct that their personal information generally not be disclosed to nonaffiliated third parties. 15 U.S.C. § 6802(b). To enable these basic protections to be supplemented and increased, Congress expressly preserved the ability of the states to enact consumer protection statutes providing greater privacy protection. 15 U.S.C. § 6807(b).

Bearing in mind this clearly expressed congressional intent to permit states to enact more protective financial privacy legislation, the State of California in 2003 enacted the California Financial Information Privacy Act, California Financial Code sections 4050-4059 (popularly known as "SB1," after the Senate Bill that enacted it, attached as Exhibit A to Plaintiffs' complaint). SB1, which becomes operative on July 1, 2004, provides similar but greater privacy protection than the GLBA by requiring that financial institutions give consumers the opportunity to direct that information not be disclosed to affiliates, other than those that are in the same line of business and meet other specified requirements, and obtain a consumer's express consent before disclosing personal information to any nonaffiliated third party. Cal. Fin. Code §§ 4053(a) - (c).

Despite the GLBA's express language preserving the states' rights to enact laws providing greater financial privacy protection than that set forth in the GLBA, plaintiffs American Bankers Association ("ABA"), the Financial Services Roundtable ("Roundtable") and Consumer Bankers Association ("CBA") (collectively "Plaintiffs") have brought this lawsuit seeking to enjoin defendants' enforcement of SB1.[3] In doing so, Plaintiffs claim that California's statute is preempted by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681- 1681x.

Plaintiffs' complaint misconstrues the very subject matter of both SB1 and the GLBA, and extends the scope of the FCRA beyond what Congress intended. With the FCRA, Congress intended to ensure the fairness and accuracy of "credit reporting." 15 U.S.C. § 1681(a). To that end, Congress regulated information collected and disseminated by consumer reporting agencies for purposes of evaluating consumers' eligibility for credit, insurance, employment, or other specifically enumerated purposes. 15 U.S.C. § 1681. The FCRA thus applies *only* to "consumer reports," and does not apply outside of the context of credit reporting. *See, e.g.*, 15 U.S.C. §§ 1681b and 1681c. The FCRA's preemption clause relied on by Plaintiffs (15 U.S.C. § 1681t(b)(2)) is similarly limited.

By contrast, SB1 and Title V of the GLBA address the right of states to protect their citizens' financial privacy by ensuring informed choice and consumer control over the disclosure of their personal information by the financial institutions with which they do business. The preemption clause in the FCRA on which Plaintiffs rely does not impact the right of states to enact consumer protection laws that provide greater safeguards for consumers' financial privacy than those set forth in the GLBA. That right was explicitly preserved by Congress, when it enacted the state-law savings clause within Title V of the GLBA. 15 U.S.C. § 6807(b).

Given the historic police powers granted to the states to enact and to enforce consumer protection statutes, and the presumption against preemption, the FCRA preemption provision should be limited to its intended scope, and should not be extended to eviscerate the very purpose of the state-law savings clause found in Title V of the GLBA. If Plaintiffs' preemption argument regarding the FCRA were correct, then the GLBA state-law savings clause would be significantly limited. This outcome makes no sense and is inconsistent with Congress's intent in enacting both the FCRA and the GLBA. Accordingly, defendants Bill Lockyer, the Attorney General of the State of California, and John

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3. Defendants are California Attorney General Bill Lockyer; Howard Gould, Commissioner of the California Department of Financial Institutions; William P. Wood, Commissioner of the California Department of Corporations; and John Garamendi, Commissioner of the California Department of Insurance.

Garamendi, the Commissioner of the California Department of Insurance, move to dismiss Plaintiffs' complaint, on the ground that the complaint fails to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS

A. FEDERAL AND STATE LEGISLATION REPRESENT A COORDINATED EFFORT TO ENSURE CONSUMER FINANCIAL PRIVACY.

1. Congress Enacts the Gramm-Leach-Bliley Act of 1999.

In 1999, Congress enacted the GLBA, eliminating the barriers to mergers and other affiliations among banks, insurance companies, securities firms, and other financial services providers. With the disappearance of these barriers among different types of financial services companies, concern grew regarding the unregulated disclosure of consumers' personal financial information by the anticipated new financial "supermarkets." Thus, while Congress lowered the barriers between the banking, insurance and securities industries, it also addressed consumers' increased vulnerability to the dissemination of their personal financial information that could result from the removal of such barriers. H. R. Rep. No. 106-74, pt. 3, at 98 (1999) [Appendix Exh. 13].

In order to protect consumers' financial privacy, Congress added Title V to the GLBA. 15 U.S.C. § 6801(a). Title V sets forth the basic level of financial privacy protection provided by federal law. Among other things, it requires that financial institutions (1) provide an annual notice describing their information-sharing practices with both affiliates and nonaffiliated third parties and (2) allow consumers to opt out of disclosures to nonaffiliated third parties. 15 U.S.C. §§ 6802(b), 6803(a). Under Title V, consumers need not be given the opportunity to opt out of disclosures to affiliates or disclosures made to nonaffiliated third parties pursuant to a joint marketing agreement. 15 U.S.C. § 6802(b)(2).

Recognizing the importance of the states' right to provide privacy protections for their citizens beyond the basic federal protections, Congress provided an explicit savings clause, ensuring that states could enact more protective financial privacy statutes:

> (a) **In general.** This subchapter and the amendments made to this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or

> interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.
>
> (b) **Greater protection under State law.** For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

15 U.S.C. § 6807.

2. California Enacts SB1.

In response to this explicit savings clause within the GLBA, in 2003 the California Legislature enacted SB1 to supplement the GLBA protections and to provide Californians with greater control over the disclosure of their personal information in the hands of financial institutions. Cal. Fin. Code §§ 4051, 4051.5. The Legislature determined that the GLBA provisions intended to protect financial privacy are "inadequate to meet the privacy concerns of California residents." Cal. Fin. Code § 4051.5(a)(3). Thus, in order to prevent "unwarranted intrusions into [Californians'] private and personal lives," the Legislature provided consumers "with the ability to prevent the sharing of financial information among affiliated companies." Cal. Fin. Code § 4051.5(a)(1), (b)(3).

The California Legislature recognized the importance of making compliance as easy as possible for businesses. Cal. Fin. Code § 4051.5(b)(5). SB1 is therefore similar to the GLBA in many respects. SB1's definitions are virtually identical to those in Title V of the GLBA. *Compare* Cal. Fin. Code § 4052, *with* 15 U.S.C. § 6809. In addition, SB1 contains all of the GLBA's exemptions. *Compare* Cal. Fin. Code § 4056, *with* 15 U.S.C. § 6802(e).

SB1 requires that banks, insurance companies and securities firms obtain a consumer's express consent before disclosing his or her information to any nonaffiliated third party, and provide consumers with an opportunity to opt out of disclosures to affiliates, except those in the same line of business. Cal. Fin. Code §§ 4052.5, 4053(a) - (c). Certain specified disclosures are exempt from these requirements. These include disclosures necessary to effect, administer or enforce a transaction authorized or requested by the consumer; for law enforcement purposes or to respond to process; or to detect or prevent fraud. Cal. Fin. Code § 4056(b)(1), (3). Contrary to Plaintiffs' assertion (Complaint ¶ 2, p. 2), SB1 does not prohibit the disclosure of personal financial information to affiliates. Instead, it allows the information to be shared with affiliates unless the customer directs to the contrary by affirmatively opting out. Cal. Fin. Code § 4053(b)(1).

B. PLAINTIFFS ALLEGE THAT THE FAIR CREDIT REPORTING ACT PREEMPTS THE PROTECTIONS PROVIDED BY CALIFORNIA'S STATE FINANCIAL PRIVACY LAW.

The Fair Credit Reporting Act, as its name suggests, is intended to protect consumers from unfair or inaccurate credit reporting.[4/] Plaintiffs, however, attempt to use this inapplicable statute to erode the consumer privacy protections permitted by the GLBA and provided by SB1. Specifically, Plaintiffs claim that the FCRA expressly preempts the affiliate-sharing provisions of SB1.

The FCRA places restrictions and obligations on consumer reporting agencies, the entities that create and distribute consumer reports, as well as on those that furnish information for, and those that use, consumer reports. The scope of the FCRA is thus limited to "consumer reports," as defined in the statute:

> The term "consumer report" means any 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 . . . .

15 U.S.C. § 1681(d)(1). In 1996, the definition was amended to exclude from "consumer report" any communication "among persons related by common ownership or affiliated by corporate control" of information consisting solely of transactions or experiences between the consumer and the entity making the report. 15 U.S.C. § 1681a(d)(2)(A)(ii).

The FCRA generally provides that state laws regarding the collection, distribution or use of consumer information are not preempted unless such laws are inconsistent with the FCRA, and then only to the extent of that inconsistency:

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4. Although "credit reporting" is in the title of the FCRA and is a commonly used term, the FCRA deals with more than "credit" in the sense that a "consumer report" is defined as a communication, bearing on specified characteristics, that is used or expected to be used as a factor in establishing the consumer's eligibility for insurance or employment, as well as credit. 15 U.S.C. § 1681a(d).

> . . . [the FCRA] does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a).

The 1996 amendments to the FCRA also revised § 1681t to provide that no requirement or prohibition could be imposed under state law with respect to the subject matter regulated under select specified provisions of the FCRA, or

> . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c) (1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996) . . . .

15 U.S.C. § 1681t(b)(2). It is this provision (referred to generally herein as the "FCRA preemption provision") that Plaintiffs claim preempts SB1. As shown below, however, the purpose and scope of this 1996 amendment was to prevent information-sharing among affiliates from being regulated by *consumer reporting* laws, and not to broadly preempt *all* state laws regulating information-sharing by affiliates, whatever the purpose or context.

III. SUMMARY OF ARGUMENT

In their complaint, Plaintiffs allege that the FCRA expressly preempts SB1 because SB1 imposes requirements and prohibitions on the sharing of information among affiliates, contrary to the preemption clause in § 1681t(b)(2) of the FCRA. Complaint, ¶¶ 14, 17, 28, 29, pp. 5-6, 9. Plaintiffs' complaint, however, fails to state a claim because the FCRA does not in fact preempt SB1 for several reasons.

First, consumer protection statutes such as SB1 are within the states' historic police powers. As such, there is a strong presumption against preemption. Second, the preemption clause within the FCRA does not preempt SB1 because the scope and subject matter of the FCRA is limited to credit reporting. Plaintiffs grossly mischaracterize the reach of the FCRA's preemption provision which, like all preemption provisions, must be read in context. SB1 does not regulate credit reporting and thus does not fall within the preemption provision of the FCRA.

Finally, the plain language of the later-enacted GLBA expressly permits states to enact financial privacy statutes that provide greater protections than the GLBA.

IV. ARGUMENT

A. THE LEGAL STANDARD FOR A MOTION TO DISMISS.

A motion to dismiss is proper when the plaintiff has failed to plead facts sufficient to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Schmier v. U.S.C.A.*, 279 F.3d 817, 823 (9th Cir. 2001). When the motion to dismiss attacks the allegations of the complaint as insufficient to state a claim for relief, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996).

"[C]onclusory allegations of law and unwarranted inferences," however, are insufficient to defeat a motion to dismiss. *Rosenbaum v. Syntex Corp.*, 95 F.3d 922, 926 (9th Cir. 1996). Moreover, inaccurate descriptions of a statute can be disregarded.[5/] *See, e.g., Western Mining Council v. Watt*,

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5. For example, Plaintiffs incorrectly allege that SB1 "prohibits financial institutions from sharing, disclosing and using information about their customers among affiliates . . ." Complaint, p. 2, ¶ 2; see also, p. 7, ¶ 22. In fact, SB1 does not prohibit affiliate information-sharing; it allows disclosures to affiliates unless a consumer affirmatively opts out. Cal. Fin. Code § 4053(b)(1).

643 F.2d 618, 629-630 (9th Cir. 1981) (court did not accept plaintiffs' inaccurate characterizations of statute, even at the pleading stage).

B. <u>THE LAW OF PREEMPTION ESTABLISHES A STRONG PRESUMPTION THAT SB1 IS NOT PREEMPTED</u>.

1. <u>The Presumption Is Against Preemption of Consumer Protection Laws</u>.

The states' historic police powers extend to the field of consumer protection, which includes statutes such as SB1. *Cal. v. ARC Am. Corp*., 490 U.S. 93, 101 (1989). "Laws concerning consumer protection . . . are included within the states' police power, and are thus subject to this heightened presumption against preemption." *Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 926 (2001) (citing *Cal. v. ARC Am. Corp*., 490 U.S. at 101 ("appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States . . . Given the long history of state common-law and statutory remedies against . . . unfair business practices, it is plain that this is an area traditionally regulated by the States")); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area").

In *Communications Telesystems Int'l v. Cal. Public Utilities Commission*, 196 F.3d 1011 (9th Cir. 1999), for example, a telecommunications company appealed, on preemption grounds, sanctions imposed by a state agency for "slamming." The Ninth Circuit dismissed the appeal on abstention and res judicata grounds. In doing so, the Ninth Circuit noted that "[a]mong the important state interests at issue here are the protection of consumers from unfair business practices. . . ." 196 F.3d at 1017. *See also Gibson v. World Sav. and Loan Ass'n*, 103 Cal.App.4th 1291, 1300 (2003) ("The states' historic police powers include the regulation of consumer protection in general and of the banking and insurance industries in particular."); *Smiley v. Citibank*, 11 Cal.4th 138, 148 (1995) ("The 'historic police powers of the States' extend to consumer protection.") (citations omitted).

The Court should exercise this high degree of caution here, where Plaintiffs seek to prevent the State's law enforcement officials from bringing civil law enforcement actions under the State's consumer protection law. Specifically, the Attorney General sues in the name of the People of the State of California as an exercise of the State's sovereign power to enforce its laws. Cal. Bus. & Prof. Code §§ 17204, 17206(a), 17535, 17536(a) (Deering's 2004); Cal. Gov't. Code § 100 (Deering's 2004). As such, the Attorney General utilizes his powers under Business and Professions Code section 17200 to bring actions for violations of other consumer protection laws, including statutes like SB1. The Attorney General's enforcement of the State's consumer protection law is a critical component of his office. As the California Supreme Court recognizes, consumer protection "is an exigency of the utmost priority in contemporary society." *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 808 (1971).

Pursuant to SB1, the Department of Insurance, the Department of Financial Institutions and the Department of Corporations all exercise police powers under SB1 to ensure that SB1 is adequately enforced. Cal. Fin. Code § 4057 (Deering's 2004). Accordingly, Plaintiffs threaten not only California's long-standing right to enact consumer protection laws, including statutes that protect a consumer from violations of their financial privacy, but also the ability of the Attorney General and other state officials to exercise their mandate to ensure compliance with those laws.

2. Congressional Intent To Preempt State Law Must Be Unambiguous, Particularly When Analyzing Consumer Protection Statutes.

In determining whether federal law preempts state law, the court's sole task is to ascertain the intent of Congress. *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 557-558 (9th Cir. 2002); *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). State law is preempted only if there is a clear Congressional intent to supersede state law. *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) ("[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.") (Frankfurter, J.).

Here, Plaintiffs allege that the FCRA expressly preempts SB1. Complaint ¶¶ 14, 17, 28, pp. 5-6, 9. In analyzing whether or not federal law expressly preempts state law, the courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). This presumption requires a "narrow reading of [the federal law provision]." *Id*.

The party claiming that Congress intended to preempt state law bears the burden of proving it. *Elsworth v. Beech Aircraft Corp*., 37 Cal. 3d 540, 548 (1984). This burden is high, as the courts are reluctant to infer preemption. *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

> [B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Medtronic, Inc., v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 313 U.S. at 230).

Thus, the "starting presumption" is that Congress has not intended to preempt state law. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). In areas traditionally regulated by the states, such as consumer protection, which is at issue here, establishing preemption is more difficult still. *Medtronic*, 518 U.S. at 485; *Nat'l Warranty Ins. Co. v. Greenfield*, 214 F.3d 1073, 1077 (9th Cir. 2000).

The presence of a savings clause, and the specific wording of that clause, remain of paramount importance. "The Supreme Court has given substantial weight in preemption analysis to evidence that Congress intended to preserve the states [sic] regulatory authority." *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000). "Just as courts may not find measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme." *Id*. (quoting *Cal. v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 497 (1990)).

C. THE FAIR CREDIT REPORTING ACT DOES NOT PREEMPT SB1.

1. The FCRA Regulates Only Consumer Reporting.

The FCRA regulates the compilation, dissemination, and use of "consumer reports," a term defined to include any communication by a consumer reporting agency of information bearing on specified characteristics used or expected to be used or collected in whole or part as a factor in determining a consumer's eligibility for credit, insurance, employment, or any other of the specifically enumerated permissible purposes. 15 U.S.C. § 1681a(d)(1). The FCRA regulates "consumer reporting agencies," defined generally as persons regularly engaged in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. 15 U.S.C. § 1681a(f).

The FCRA prohibits "consumer reporting agencies" from disseminating "consumer reports" unless the recipient has a "permissible purpose" for the information. 15 U.S.C. § 1681b(a). It is clear that if information does not constitute a consumer report, it is not governed by the Act – or by its preemption provision. *See, e.g., Individual Reference Serv. Group, Inc. v. Fed. Trade Comm'n*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) ("The FCRA does not regulate the dissemination of information that is not contained in a 'consumer report.'"), *aff'd, Trans Union LLC v. Fed. Trade Comm'n*, 295 F.3d 42 (2002).

Courts have confirmed that information-sharing that falls outside of the definition of "consumer report" is not within the scope of the FCRA. In *Salazar v. Golden State Warriors*, 124 F.Supp.2d 1155 (N.D. Cal. 2000), for example, the court determined that the FCRA did not apply to a surveillance videotape of an employee and the corresponding report because they fell within one of the exceptions to the definition of "consumer report."

Similarly, in *Ippolito v. WNS, Inc.*, 864 F.2d 440 (1988), the Seventh Circuit held that certain reports did not fall within the scope of the FCRA because they did not fall within the definition of "consumer reports." The court explained:

> As defined in §§ 1681a(d) and 1681b, not all reports containing information on a consumer are "consumer reports." To constitute a "consumer report," the information contained in the report must have been "used or expected to be used or collected in whole or in part" for one of the purposes set out in the FCRA.

864 F.2d at 449.

The court thus rejected plaintiffs' claim that dissemination of the reports at issue violated the FCRA because it found the reports were disseminated for business purposes, reasoning that "[i]n enacting the FCRA, Congress sought to regulate the dissemination of information used for consumer purposes, not business purposes." *Id.* at 452. The court relied on comments from one of the FCRA's sponsors, who explained the purpose of the FCRA as follows:

> The purpose of the fair credit reporting bill is to protect consumers from inaccurate or arbitrary information in a consumer report, which is used as a factor in determining an individual's eligibility for credit, insurance or employment. *It does not apply to reports utilized for business, commercial, or professional purposes*.

Id. (quoting 116 Cong. Rec. 36,572 (1970) (remarks of Rep. Sullivan) (emphasis in original)).

As the FCRA's legislative record confirms, the FCRA does not apply to anything *but* consumer reports. Accordingly, information that is *not* a consumer report is not regulated by the FCRA; and the preemption provision of the FCRA when read in context, as it must be, is not applicable to SB1.

2. <u>The FCRA Preemption Provision Relied on by Plaintiffs Applies Only to State Laws that Regulate Consumer Reports</u>.

The definition of a "consumer report" was amended in 1996 to exclude communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681a(d)(2)(A)(ii). The general preemption section of the FCRA was amended at the same time.

Prior to the 1996 amendments, the FCRA stated only that it does not preempt state laws "except to the extent that those laws are inconsistent with [the Act], and then only to the extent of any inconsistency." 15 U.S.C. § 1681t(a). Exceptions to this general statement were added by the 1996 amendments to the FCRA, including the following:

> No requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control.

15 U.S.C. § 1681t(b)(2).

These amendments responded to a concern raised in Congress by banks that information-sharing among affiliates could be construed as a consumer report and thus be made subject to all the requirements and prohibitions contained in credit reporting laws. Testimony from banks noted that while it was clear that divisions within the same company could share information without triggering the requirements of the FCRA, the result might not be the same for information-sharing among separate but affiliated legal entities. *To Correct Abuses Involving Credit Reporting Systems, Denying Consumers Jobs, Credit, Housing, and the Right to Cash a Check: Hearing on S. 783 Before the Senate Comm. on Banking, Hous., and Urban Affairs,* 103d Cong. at 70 (May 27, 1993) [App. Exh. 16].

The definition of "consumer report" was therefore amended to exclude information communicated among affiliated entities. The purpose of this amendment was to ensure that the provisions of the FCRA did not apply to such information sharing among affiliates:

> The Committee does not intend to broaden the type of information that is currently exempted from the definition of consumer report, but rather intends to permit the sharing of that information among a broader range of affiliated entities *without triggering the conditions governing the sharing of consumer reports under the FCRA*.

S. Rep. 103-209 at *9 (emphasis added) [App. Exh. 15].

Having ensured that sharing of information among affiliates would not be subject to the requirements of the *federal credit reporting law*, Congress added the affiliate-sharing preemption provision to the FCRA to ensure that the federal policy would not be altered by *state* law:

> Section 116 preempts any state law related to the exchange of information among persons affiliated by common ownership or common corporate control. The Committee intends that this provision will be applied to the modifications made by [other provisions] of the Committee bill which amend section 603 of the FCRA pertaining to exclusions from the definition of consumer report that permit, subject to certain restrictions, the sharing of information among affiliates.

S. Rep. 103-209 at *27 [App. Exh. 15]. The affiliate-sharing preemption provision was thus intended to apply to information shared among affiliates that would otherwise be covered by the FCRA.

In their complaint, however, Plaintiffs contend that this preemption provision invalidates any state law that regulates information-sharing among affiliates, no matter what the nature of the information or the scope of the state law. This is simply not so. The preemption provision merely provides that the exclusion of the exchange of information among affiliates from the definition of a consumer report -- and thus from the scope of the FCRA -- may not be altered by state law. The conclusion that this provision is intended to preempt state credit reporting laws is confirmed by the fact that the one state law explicitly exempted from preemption, "section 2480e of title 9, Vermont Statutes Annotated," is just such a credit reporting statute. 15 U.S.C. § 1681t(b)(2).

Accordingly, the subject matter of affiliate sharing is excluded from the FCRA's requirements, not immunized from regulation by other statutes that govern other subject matters. The FCRA's preemption provision extends as far as, and no farther than, the scope of the rest of the FCRA.

3. The Context of the Preemption Provision Emphasizes Its Narrow Scope.

Any interpretation of the FCRA's preemption provision must place the measure within the context of the rest of the statute. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)); *Exxon Mobil Corp. v. EPA*, 217 F.3d at 1249 ("In interpreting the intent of Congress it is essential to consider the statute as a whole.").

Plaintiffs take the language of the provision out of context, mistakenly suggesting that it has broad preemptive scope. But it is improper to attempt, as Plaintiffs do, to remove this provision from its limited, credit-reporting context. "[W]e must fairly but -- in light of the strong presumption against pre-emption -- narrowly construe the precise language of [the statute at issue] and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted." *Cipollone*, 505 U.S. at 523. In analyzing whether or not federal law expressly preempts state law, the courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the federal law provision]." *Id.* at 518. See also *Sink v. Aden Enter.*, 352 F.3d 1197, 1200 (9th Cir. 2003) ("The language of a statute must be interpreted in its context to effectuate legislative intent.")

The Supreme Court has confirmed that taking the literal meaning of a provision within a statute out of context may fly in the face of Congress's intent in passing the statute. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the court reversed the Fourth Circuit's dismissal of a retaliation claim brought by a former employee pursuant to Title VII of the Civil Rights Act of 1964. The statute made it unlawful for an employer to discriminate "against any of his employees or applicants for employment" in retaliation for using or assisting others in using the protections of Title VII. The employer alleged -- and the Fourth Circuit agreed -- that only *current* employees could utilize Title VII. *Id.* at 339. The

Supreme Court reversed, holding that the retaliation provision within Title VII must be analyzed in the context of the statute as a whole. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Thus, even though the language of the retaliation provision "at first blush" appeared limited to those having an existing employment relationship with the employer, such a reading did not comport with the context of the statute as a whole. *Id.* Accordingly, even though Congress *could* have specifically identified both former and current employees, instead of referring only to "employees," the fact that Congress chose not to do so did not mean that Congress intended the statute to apply to current employees only. *Id.* at 342. In sum, it was only through examination of the statutory scheme as a whole that the provision at issue could be interpreted.

The same principle applies here. The fact that Congress did not expressly specify that the FCRA affiliate-sharing preemption provision is limited to state laws regulating consumer reporting does not compel the conclusion that *all* state laws touching upon information-sharing among affiliates, in any circumstance, are preempted. Rather, basic principles of statutory interpretation require that the language of a statute be considered in the context of the statute as a whole, and that the operation of a given provision of a statute be determined by reference to the scope of the entire statute. *Exxon Mobil Corp. v. EPA*, 217 F.3d at 1249; *Richards v. U.S.*, 369 U.S. 1, 11 (1962).

D. CONGRESS HAS EXPRESSLY PROVIDED THAT MORE PROTECTIVE STATE FINANCIAL PRIVACY LAWS ARE NOT PREEMPTED.

1. The GLBA Savings Clause Preserves States' Rights.

Any doubt about the permissibility of a state law that protects financial privacy by regulating the sharing of personal financial information among affiliates was removed by the passage of the GLBA. Efforts by states to further the protection of consumers' financial privacy are governed by section 507 of the Act, which explicitly permits such undertakings:

> (a) **In general.** This subchapter and the amendments made to this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or

> interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.
>
> (b) **Greater protection under State law.** For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

15 U.S.C. § 6807.

A statute must be construed to give effect to each of its provisions. *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (it is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir.1991) (statutes must be interpreted "as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute . . . superfluous."). In interpreting a statute, courts begin by "examin[ing] the statute's text." *Bedrock Limited, L.L.C. v. U.S.*, 314 F.3d 1080, 1083 (9th Cir. 2002) (citing *Siripongs v. Davis*, 282 F.3d 755, 758 (9th Cir. 2002)).

Both the text and the context of the GLBA demonstrate that Congress intended to allow states to enact financial privacy measures more protective than those set forth in the federal statute. The specific language of the state-law savings clause in the GLBA is unambiguous. It expressly permits states to enact financial privacy laws that provide greater protection than that provided by Title V of the GLBA.

GLBA's legislative record also demonstrates that Congress intended to permit states to enact stricter financial privacy laws such as SB1. The Conference Report provides the most reliable evidence of Congress' intent in enacting the GLBA state-law savings clause. *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996) ("congressional conference report is recognized as the most reliable evidence of congressional intent because it 'represents the final statement of the terms agreed to by both houses'") (quoting *Dep't of Health and Welfare v. Block*, 784 F.2d 895, 901 (9th Cir. 1986).

The Conference Report demonstrates that Congress intended to allow states to adopt more stringent laws regarding the privacy of consumer financial information held by financial institutions. According to Senator Sarbanes -- author of the so-called "Sarbanes Amendment" (the state-law savings clause in the GLBA) -- "[o]n privacy, States can continue to enact legislation of a higher standard than the Federal standard." 145 Cong. Rec. S13913, at S13915 (Nov. 4, 1999) (statement of Sen. Sarbanes) [App. Exh. 10]. Senator Sarbanes further explained the state-law savings provision in the GLBA:

> [W]e were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate.

145 Cong. Rec. S13788, at S13789 (Nov. 3, 1999) (statement of Sen. Sarbanes) [App. Exh. 7].

As Senator Grams emphasized, the savings clause of the GLBA "preserves all existing and all future State privacy protections above and beyond the national floor established in this bill." 145 Cong. Rec. S13889, at S13890 (Nov. 4, 1999) (statement of Sen. Grams) [App. Exh. 8]. Senator Grams further noted that the GLBA represents "the establishment of a national floor of privacy protections." *Id.* at S13889.

Members of the House interpreted the GLBA state-law savings clause the same way. Representative LaFalce, for example, unequivocally stated that "the conference report totally safeguards stronger state consumer protection laws in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. 8, 1999) (statement of Rep. LaFalce, Ranking Member, House Banking & Fin. Svces. Comm.) [App. Exh. 1]. Representative Vento further explained that "[w]e were successful in improving upon the House provisions by agreeing to allow states to give even more privacy protection to consumers at their discretion." 145 Cong. Reg. H11539, at H11540 (Nov. 4, 1999) (statement of Rep. Vento) [App. Exh. 6]. Further, Senator Kerry explained:

> The conference report gives customers of financial services companies only limited control over their personal financial information. . . . Fortunately, the conference report does not preempt stronger state privacy laws.

145 Cong. Rec. S13903, at S13905 (Nov. 4, 1999) (statement of Sen. Kerry) [App. Exh. 9]. Representative Roukema also confirmed that "[s]tricter State privacy laws are not preempted." 145

Cong. Rec. H11515, at H11516 (Nov. 4, 1999) (statement of Rep. Roukema) [App. Exh. 5]. The Secretary of the Treasury expressed the same understanding, noting that "[t]he bill also expressly preserves the ability of states to provide stronger privacy protections." 145 Cong. Rec. S13915 (Nov. 4, 1999) (statement of Lawrence H. Summers, Secretary of the Treasury) [App. Exh. 11]. It is therefore clear that Congress intended states to play a role in the area of consumer financial privacy by preserving the rights of the states to adopt statutes that are more protective than the provisions in the GLBA.

2. <u>The FCRA Exclusion Clause in the GLBA Does Not Limit the State-Law Savings Clause</u>.

In addition to the GLBA's state-law savings clause, Title V also includes an FCRA "savings" clause providing that "nothing in this title [Title V] shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act."[6/] 15 U.S.C. § 6806. This provision was intended to preserve the FCRA's specific consumer protections with respect to consumer reporting, not to limit the GLBA's explicit preservation of states' rights to enact financial privacy laws.

The FCRA exclusion clause was added in conference in order to "clarify the relation between Title V's privacy provisions and other consumer protections already in law." H.R. Conf. Rep. No. 106-434 at 171 (1999) [App. Exh. 14]. The potential problem the exclusion clause was meant to address was raised in testimony by the Federal Trade Commission (FTC), expressing a concern that the GLBA might otherwise be read as weakening the consumer reporting protections of the FCRA. *Financial Privacy: Hearings Before the House Subcommittee on Financial Institutions and Consumer Credit, Comm. on Banking and Financial Services*, 106th Cong. (July 20, 21, 1999). Chairman Pitofsky explained:

> [The GLBA's] broad definition of "nonpublic personal information," . . . can include the type of information that would otherwise constitute a credit report; in fact, it could even include credit reports obtained from credit bureaus. . . . . If construed to supersede the FCRA, the [GLBA] privacy provisions would be a major retreat in privacy protections for consumers. . . . The Commission believes it essential to eliminate the potential for such an interpretation by adding a savings clause indicating that, notwithstanding any provisions of [the GLBA], the full protections of the FCRA continue to apply where applicable.

Id. at 437-438 [App. Exh. 12].

The concern that the provisions of the GLBA might displace the more stringent and specific protection of the FCRA was magnified by the fact that consumer reporting agencies are themselves "financial institutions" and therefore subject to the GLBA. *Trans Union*, 295 F.3d at 48-49. The

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6. Section 6806 is sometimes referred to as the FCRA "savings" clause. To avoid confusion with the state-law savings clause set forth in Section 6807, the savings clause referring to the FCRA will be referred to as the "FCRA exclusion clause."

FCRA exclusion clause simply made it clear that Title V does not take the place of the protections of the FCRA, where those provisions apply, i.e., to the matter of consumer reporting.

The *Trans Union* court's analysis of the FCRA exclusion clause also supports the conclusion that activities not regulated by the FCRA may be regulated under other laws, such as the GLBA or SB1. One of the issues in the *Trans Union* case was the FTC's authority to regulate consumer reporting agencies and the disclosure of consumer report information under the GLBA. Trans Union contended that the FCRA exclusion clause precluded the FTC from regulating a consumer reporting agency's disclosure of consumer report information under Title V of the GLBA. 295 F.3d at 49, n.4. This argument was based on the assertion that because the FCRA authorizes a consumer reporting agency to provide consumer reports, the FTC could not, pursuant to the GLBA, restrict the consumer reporting agency's disclosure of consumer report information. 295 F.3d at 49, n. 4.

The Court of Appeals rejected this argument, noting that the FCRA "limits a [consumer reporting agency's] authority to furnish reports to specific, enumerated types of information, see 15 U.S.C. § 1681a(d), and to specific, enumerated 'circumstances *and no other*,' 15 U.S.C. § 1681b(a)." 295 F.3d at 49, n.4 (emphasis added). Thus, the provisions of the FCRA do not limit the ability of the FTC to regulate disclosure of *other* "unenumerated types of information" or under *other* "unenumerated circumstances." *Id*.

A similar analysis applies here. Regulation of certain subject matter by the FCRA does not limit the ability to regulate other subject matter, or to regulate under different circumstances. Neither the preemption provision in the FCRA nor the FCRA exclusion clause in the GLBA alters the right of the states to enact more protective financial privacy laws.

E. A DISTRICT COURT'S RECENT ANALYSIS OF THE FCRA READS THE FCRA PREEMPTION CLAUSE TOO BROADLY.

In their complaint, Plaintiffs cite *Bank of America, N.A. v. City of Daly City* (*Daly City*), 279 F.Supp.2d 1118 (N.D. Cal. 2003), appealed on other grounds, 9th Cir. 03-16682, for the proposition that the preemption clause in the FCRA expressly preempts the affiliate-sharing provisions of SB1. The

Daly City decision, however, reads the FCRA preemption clause too broadly, and fails to consider that the subject matter of the GLBA and the FCRA are entirely distinct.

The court in *Daly City* found that the GLBA "does not regulate information-sharing among affiliates" and therefore concluded the affiliate-sharing portion of the financial privacy ordinances at issue was not preserved by the GLBA savings clause. *Daly City*, 279 F.Supp.2d at 1126. The court also found that the FCRA "does regulate affiliate information-sharing ". *Id.* The court therefore concluded there was no conflict between the GLBA state-law savings clause and the FCRA preemption provision, and that the latter preempted state laws that impose requirements or prohibitions on such information-sharing. *Id.*

The court's reasoning was based on a faulty finding: that the GLBA does not regulate affiliate sharing, while the FCRA does. In fact, GLBA requires financial institutions to provide consumers with a disclosure at least annually of their policies and practices with respect to "disclosing nonpublic personal information to affiliates . . . . " and mandates a federal study of affiliate sharing. 15 U.S.C. §§ 6803(a)(1) and 6808(a).

Congress clearly intended affiliate sharing to be included in the subject matter regulated by Title V. While Congress declined to provide an opt-out choice to consumers with respect to affiliate sharing, it did provide consumers with the ability to exercise a choice with respect to affiliate sharing through a consumer's selection of the financial institutions with which he chooses to do business. The purpose of the disclosure requirement was to allow consumers to make fully informed choices regarding the disclosure of their personal information, to affiliates as well as third parties.

Congress recognized during the GLBA debate that an increasing amount of personal information was being collected and stored by financial institutions, and that "[c]onsumers have a reasonable expectation of confidentiality" with respect to that information. H.R. Rep. No. 106-74, pt. 3, at 117 [App. Exh. 13]. *See also id.* at 106-107 (1999) (the privacy of "personal financial information has become an increasingly significant concern of consumers"); and 145 Cong. Rec. H5313 (daily ed. July 1, 1999) (Rep. Gillmor) [App. Exh. 3] ("Consumers feel they have lost control . . .").

The GLBA depends on a structure of notice and choice to give consumers some control, with the intent that consumers can take their business elsewhere if they are dissatisfied with their financial institutions' information practices as described in the mandatory annual notices. H.R. Rep. 106-74, pt. 3, at 118 (1999) [App. Exh. 13] ("These requirements are designed to provide consumers with greater privacy protection through competition--as a result of the ability consumers will have to choose among the privacy policies disclosed by competing financial institutions . . ."); 145 Cong. Rec. H5310, at H5311 (daily ed. July 1, 1999) (Rep. Oxley) [App. Exh. 2] ("If they do not like that privacy policy or they think that they are having their information passed on, they can simply change companies and vote with their feet."). *See also*, 145 Cong. Rec. H5315 (statement of Rep. Oxley) [App. Exh. 4]. Clearly Congress viewed the annual privacy disclosures as a means of regulating information-sharing among affiliates through the mechanism of ensuring that consumers could make their own informed choices.

It is also arguably inaccurate to state that the FCRA does "regulate affiliate information-sharing." In fact, as noted in Section IV.C.2 above, information-sharing among affiliates is excluded from the definition of a consumer report and therefore is not regulated by the FCRA. By contrast, affiliate sharing as it relates to consumers' financial privacy is a the focus of the GLBA. Thus, Plaintiffs' reliance on *Daly City* is misplaced, and that case should not be followed by this Court.

V. CONCLUSION

The FCRA does not preempt SB1 because the preemption clause contained within the FCRA is limited to the context of credit reporting. SB1, by contrast, addresses financial privacy. Accordingly, for all the foregoing reasons, defendants Bill Lockyer, Attorney General of the State of California, and John Garamendi, Commissioner of the Department of Insurance of the State of California, request that the Court grant their motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted.

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