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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

**DEFENDANTS BILL LOCKYER'S AND JOHN GARAMENDI'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

**Filed concurrently with:**
(1) Defendants' Response to Statement of Undisputed Facts
(2) Appendix of Legislative and Other Authorities

Date of Submission: June 14, 2004
Courtroom: 3
Judge: Honorable Morrison C. England, Jr.

## I. INTRODUCTION [1/]

The states' exercise of their police power to protect consumers' privacy is of paramount importance. Indeed, the right to privacy has been elevated to the status of a constitutional right in California, making all the more clear California's obligation to safeguard its residents from violation of that right.

In 2003, California enacted the California Financial Information Privacy Act, California Financial Code sections 4050-4060 (popularly known as "SB1," after the Senate Bill that enacted it, attached as Exhibit A to Plaintiffs' complaint). SB1's purpose was to supplement the basic financial privacy standards ensured by the Gramm-Leach-Bliley Act of 1999 ("GLBA"), 15 U.S.C. §§ 6801-6809. SB1 provides consumers greater privacy protections, consistent with the congressional intent evident in the GLBA's savings clause. 15 U.S.C. § 6807(a)-(b).

In their motion for summary judgment, Plaintiffs American Bankers Association, the Financial Services Roundtable and Consumer Bankers Association (collectively "Plaintiffs") contend that the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681- 1681x, expressly preempts the portion of SB1 that regulates information sharing among affiliates. Plaintiffs rely on the preemption provision within the FCRA, which provides that no requirement or prohibition may be imposed under state law "with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2).

To support the overly broad scope of preemption they propose, Plaintiffs focus solely on these quoted words, ignoring both the broader context of the FCRA and the legislative history of the 1996 amendments that added Section 1681t(b)(2) to the FCRA. Supreme Court precedent, however, requires that words be examined in the context of the statute and the legislative scheme as a whole, with the purpose of discerning congressional intent. Applying these principles of statutory construction, with

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1. On May 14, 2004, defendants California Attorney General Bill Lockyer and California Insurance Commissioner John Garamendi (hereafter "Defendants") filed a motion to dismiss the complaint in this action, to be heard on June 14, 2004. Given that Defendants' motion to dismiss and Plaintiffs' motion for summary judgment address the same issue, Defendants incorporate their motion to dismiss by reference.

the view toward preserving the states' rights to legislate within their historic police power to protect consumers, it is apparent that the FCRA provision's preemptive effect does not extend beyond the domain of credit reporting, and so does not preempt SB1, a financial privacy law regulating disclosure of personal information by financial institutions.

Plaintiffs rely on the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), Pub. L. No. 108-159, to bolster their interpretation of the FCRA preemption provision.  Specifically, they cite portions of the FACT Act's legislative history to argue that Congress intended the FCRA's preemption provision to prevent state governments from enacting financial privacy laws regarding *any* information sharing among affiliates.

Contrary to Plaintiffs' argument, the FACT Act did not extend the reach of the FCRA preemption provision to nullify SB1.  The FACT Act's only impact on the FCRA preemption provision was to make it permanent; it would otherwise have sunsetted at the beginning of 2004.  The wording of the affiliate-sharing preemption provision itself remains the same today as when enacted in 1996. Moreover, comments by members of Congress in 2003 during hearings on the FACT Act, and failed legislative proposals considered during those hearings, are legally and logically irrelevant in discerning the intent of Congress when it added the affiliate-sharing preemption provision to the FCRA in 1996.

Finally, Plaintiffs argue that the decision of the district court for the Northern District in *Bank of America, N.A. v. City of Daly City*, 279 F.Supp.2d 1118 (N.D. Cal. 2003), is dispositive on the issue of whether the FCRA preempts SB1.  In that case, the court found the FCRA preempted local ordinances regulating the disclosure of consumers' personal information by financial institutions to their affiliates.  The judgment in that case, however, has now been vacated and therefore has no precedential value.  Moreover, as noted below, it should not be viewed as persuasive.

## II. STATEMENT OF FACTS

**CONGRESS ENACTED THE 1996 AMENDMENTS TO THE FCRA TO ENSURE THAT INFORMATION SHARING AMONG AFFILIATES WOULD NOT BE SUBJECT TO FEDERAL AND STATE CREDIT REPORTING LAWS**

The Fair Credit Reporting Act, as its name suggests, was intended to promote fair and accurate credit reporting. To achieve these ends, the FCRA governs consumer reporting agencies (the entities that create and distribute consumer reports), entities that furnish information for consumer reports, and users of consumer reports. These entities' conduct only falls within the scope of the FCRA if the information compiled, reported or used is a "consumer report," as that phrase is defined in the statute.[2/] Defendants' Motion To Dismiss at 6-7, 12-13.

In 1996, Congress amended the FCRA. Among other things, Congress responded to the financial industry's concern that the sharing of information among affiliated companies would be considered a "consumer report" and, as such, be subject to both the FCRA and state consumer reporting laws. Congress addressed this concern with two amendments that are relevant here. First, the definition of "consumer report" was amended to exclude 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). By excluding such information from the definition of "consumer report," it was no longer subject to the FCRA's requirements. Second, Congress revised Section 1681t to provide that no requirement or prohibition could be imposed under *state* law "with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . ." 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. The purpose and scope of this 1996 amendment, however, was to prevent information sharing among affiliates from being regulated by state *consumer*

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2. The term "credit report" is more commonly used than the term "consumer report." The FCRA uses the latter term, since the FCRA regulates communications of information that relate to consumers' access to insurance and employment, and not just extensions of credit. See Defendants' Motion To Dismiss at 6, n. 4, citing 15 U.S.C. § 1681a(d). "Consumer report" and "credit report" are used interchangeably in this brief.

*reporting* laws, and not to broadly preempt *all* state laws regulating information sharing by affiliates, whatever the purpose or context.

The 1996 legislation was the culmination of several years of congressional work on revising various provisions in the FCRA. In 1993, the Consumer Reporting Reform Act of 1994 was introduced and included amendments to the definition of a consumer report. Sen. Bill 783, 103d Cong. (1993) ("S. 783"). Although that legislation did not pass, the language in S. 783 excluding information sharing among affiliates from the definition of a consumer report did become law in 1996. Testimony presented during hearings on S. 783 is therefore relevant to this case and confirms that the overriding concern of Congress and those who testified -- including the Plaintiffs in this action -- was to ensure that information sharing among affiliates would *not* be treated as a consumer report, thereby triggering all the requirements and restrictions of the FCRA, and that such information sharing would not be subject to state consumer reporting laws.

For example, in testimony presented before the Senate Banking, Housing and Urban Affairs Committee regarding S. 783 in 1993, Plaintiffs American Bankers Association and others expressed this concern:

> The definition of "consumer report" included in the FCRA, which would be amended by S. 783, has created considerable uncertainty regarding the permissibility of sharing information among related entities. Generally, any communication of information bearing on a consumer's creditworthiness or other specified consumer characteristics may be covered by the definition of consumer report. *The entity furnishing such a communication runs the risk of becoming a consumer reporting agency and being subject to all applicable requirements of the FCRA*. On the one hand, it is clear that information shared among departments or divisions of the same legal entity is not covered by the definition of consumer report because the information is not communicated to a third party. On the other hand, it is less clear whether communications of information among separate affiliates of the same organization are covered. In this regard, separate but affiliated legal entities have been deemed to be third parties for purposes of the FCRA. As a result, organizations, such as bank holding companies, which are required by law to operate through separate legal entities in some contexts, such as interstate banking, are placed at a disadvantage when compared to organizations that are free to operate through departments or divisions of the same legal entity. Similarly, organizations that choose to operate through separate legal entities for sound business and legal reasons are also disadvantaged.

> The Associations believe that this disparity should be addressed in any federal legislation to amend the FCRA.

*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,* S. Hrg. 103-247 at 78, 103d Cong. (1993) (statement of Robert D. Hunter) (emphasis added). [Defendants' Appendix in Support of Opposition to Summary Judgment ("Appendix II"), Exh. 1.]

The definition of "consumer report" was therefore amended to exclude information communicated among affiliated entities.[3/] 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 . . . 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 (1993) (emphasis added). [Appendix in Support of Defendants' Motion To Dismiss ("App."), Exh. 15.]

The Report further summarizes the amendments' impact on affiliate sharing as follows:

> The Committee bill liberalizes the requirements that would otherwise apply to entities related by common ownership or affiliated by common corporate control *in connection with consumer reports*. Generally, under current law, when information concerning a consumer is shared, that information is deemed a "consumer report" under the FCRA, and the entity provided the information is considered a "consumer reporting agency", thereby triggering the requirements and consumer protections under the FCRA. The Committee bill specifies certain circumstances involving the sharing of information among affiliates where the permissible purpose and other provisions of the FCRA are inapplicable.

S. Rep. 103-209 at * 5 (emphasis added). [App. Exh. 15.]

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3. The amendment excluded from the definition of "consumer report" (1) communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report; and (2) any non-transaction/experience information, such as credit reports, shared among affiliates, provided that the consumer is given notice that such information might be shared and the consumer is given the opportunity to prohibit such sharing. 15 U.S.C. § 1681a(d)(2)(A)(ii)-(iii).

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 thus was linked to the amendment that excluded information sharing among affiliates from the definition of "consumer report." The amendments, taken together, were intended to ensure that the exchange of information among affiliates would be free from regulation under state or federal credit reporting laws.

In 1995, Congress considered Senate Bill 650 ("S. 650"), another predecessor bill to the 1996 amendments. Legislative history regarding S. 650, which was reintroduced and enacted as the 1996 amendments (Sections 603 and 116 of the FCRA) further demonstrates that the focus of the 1996 amendments was to exclude information sharing from the restrictions of the FCRA that would apply to consumer reports.[4/] The report on S. 650 explains:

> Title IV will clarify that affiliates within a Holding Company structure can share any application information (last year's bill was limited to credit applications) and consumer reports, consistent with the FCRA. Under current law, such information can be deemed a ''consumer report'' and the information sharing entity can be deemed a ''consumer reporting agency,'' thereby implicating all the restrictions of the FCRA. The affiliate sharing provisions of this Title will allow affiliates to share such information without being deemed a consumer reporting agency.

S. Rep. 104-185 at 18-19 (1995). [Appendix II, Exh. 2.]

The legislative history of S. 783 and S. 650, the predecessor bills to the 1996 amendments, demonstrates that the purpose of the 1993 amendments, in keeping with the purpose of the FCRA as a whole, was not to preclude all regulation of information sharing among affiliates, but rather to ensure that such information sharing would *not* be regulated by either federal or state credit reporting laws.

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4. The affiliate-sharing preemption provision in S. 783 and S. 650 is substantively identical to the language enacted in 1996.

Further, Plaintiffs have not cited anything in the legislative history of the 1996 amendments that supports their broad interpretation. There is simply nothing in the relevant legislative history supporting Plaintiffs' view that Congress intended the FCRA to reach beyond the scope of credit reporting to void states' financial privacy laws like SB1. Accordingly, states are free, as contemplated by the GLBA, to regulate such information sharing, provided they do not attempt to regulate it as a consumer report.

## III. ARGUMENT

### A. THE FCRA'S PREEMPTION CLAUSE IS LIMITED TO THE CONTEXT OF CREDIT REPORTING.

As described at length in Defendants' motion to dismiss and above, the FCRA's scope is limited to consumer reporting; sharing of information that is not a consumer report is neither regulated by the FCRA nor protected from state regulation by the FCRA preemption clause. This is apparent from an examination of the statutory scheme, which deals exclusively with consumer reporting, and from the legislative history of the preemption clause itself, which was concerned with putting information shared among affiliates outside the reach of federal and state credit reporting laws. Defendants' Motion To Dismiss, at 6-7, 12-13.

#### 1. The Preemption Provision Must Be Construed Within the Context of the FCRA and With the Goal of Discerning Congress's Intent.

In arguing that all sharing of information among affiliates is included within the scope of the FCRA preemption provision, Plaintiffs focus on the "plain language," which preempts state laws that regulate "the exchange of information among [affiliated entities]." Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Plaintiffs' Memo."), at 5-6. Statutory construction, however, goes far beyond the myopic focus on isolated words and phrases in a statute, because otherwise the result can be just the type of distorted interpretation that Plaintiffs propose here. Rather, words and phrases must be examined to determine how Congress intended them to function within the statutory scheme.

In particular, where federal law threatens to displace state laws that are within the states' historic police powers, evidence of congressional intent to preempt must be clear and manifest. This thorough analysis -- which, as discussed below, the Supreme Court has repeatedly endorsed -- results in a more narrow interpretation of the phrase at issue than the "plain language" of the statute suggests at first glance.

As the Supreme Court stated in *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996), while the existence of an express preemption provision means that Congress intended to preempt "at least some state law," the court "must nonetheless identify the domain expressly pre-empted by that language." Further, while the analysis of the scope of the preemption statute begins with its text, "[the court's] interpretation does not occur in a contextual vacuum." *Id.* at 485. It must be informed by two presumptions about preemption. First, the presumption against preemption of state police power regulations "support[s] a narrow interpretation of such an express command [of preemption]." *Id.* Second, the analysis of the scope of the express preemption clause must rest on a "fair understanding of *congressional purpose*":

> Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

*Id.* at 486 (internal quotations and citations omitted.)

At issue in *Medtronic* was whether the federal Medical Device Amendments' express preemption of state laws that imposed "requirements" in addition to, or different from, the federal requirements for medical device safety preempted plaintiff's state common law causes of action against a manufacturer of medical devices. Defendant had argued that the word "requirement" included state common law causes of action because they alter the incentives and duties imposed on manufacturers.

The Court rejected this broad interpretation. "[W]e cannot accept Medtronic's argument that by using the term 'requirement,' Congress clearly signaled its intent to deprive States of any role in protecting consumers from the dangers inherent in many medical devices." *Id.* at 489. The Court noted that Congress was "primarily concerned with the problem of specific, conflicting state statutes and regulations rather than general duties enforced by common-law actions." *Id.* This was confirmed by the legislative history, which contained nothing supporting the broad interpretation urged by defendant. *Id.* at 491. The Court concluded that "few, if any, common-law duties have been pre-empted by this statute," and held that none of plaintiff's common law claims was preempted. *Id.* at 503.

In *Department of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 344 (1994), as in *Medtronic*, the Supreme Court analyzed the disputed words and phrases of a statute in context and concluded that the statute should be construed more narrowly, and fewer state laws preempted, than the "plain language" suggested. In *ACF Industries*, railroad car lines challenged an Oregon state law that imposed an ad valorem tax on railroad property; that law exempted certain business property, but did not exempt railroad equipment. The rail lines argued that the state law violated the federal "Railroad Revitalization and Regulatory Reform Act" ("4-R Act"), which prohibited states from imposing certain types of discriminatory taxes on rail lines. Specifically, the rail lines argued that the Oregon tax fell within an apparent catchall provision in the 4-R Act which mandated that a state "may not . . . impose 'another tax' that discriminates against a rail carrier . . . ." 510 U.S. at 336 (quoting 49 U.S.C. § 11503(b)(4)). The Court of Appeals agreed, and enjoined the state from levying the tax, holding that "the 'most natural reading' of the provision dictates that '*any* exemption given to other taxpayers but not to railroads' is forbidden." 510 U.S. at 338.

The Supreme Court reversed. The Court noted that "the Carlines' reading of subsection (b)(4), while plausible when viewed in isolation, is untenable in light of § 11503 as a whole." *Id*. at 343. The Court found Section 11503 primarily concerned the prohibition of discriminatory tax *rates*, not tax *exemptions* like those in the Oregon law. 510 U.S. at 343. Accordingly, while Oregon's tax law disfavored rail lines and was therefore a tax that discriminated against rail carriers, it was not the type of discriminatory tax that fell within the scope of the federal statute. Indeed, the Court noted that the 4-R Act's legislative history manifested Congress's general concern with the discriminatory taxation of rail carriers; nothing in the legislative record suggested that Congress had any particular concern with property tax exemptions, or that Congress intended to prohibit exemptions in subsection (b)(4). *Id.* at 345.

Moreover, the Court emphasized that "[p]rinciples of federalism support, in fact compel, our view." *Id*. "When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope." *Id*. (citations omitted). The Court's narrow construction of the federal statute was in keeping with these principles. *Id.* at 345-346.

Similarly, the Supreme Court's decision in *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19 (1988), demonstrates the necessity of narrowly construing a state law preemption clause within a federal statute. In *Shell Oil*, plaintiffs claimed that a federal statute, the Outer Continental Shelf Lands Act ("OCSLA"), preempted Iowa's apportionment taxation formula as applied to the sale of oil and gas from the outer Continental Shelf.

Plaintiffs had argued that the express language of the OCSLA evidenced a clear intent by Congress to ban states from including in their apportionment formulas income arising from the sale of outer Continental Shelf oil and gas. Specifically, plaintiffs looked to the following text from the OCSLA:

> *State taxation laws shall not apply to the outer Continental Shelf*. . . . The provisions of this section for adoption of State law as the law of the United States *shall never be interpreted as a basis for claiming any interest in* or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, *or the property and natural resources thereof or the revenues therefrom.*

488 U.S. at 24-25 (quoting 43 U.S.C. §§ 1333(a)(2)(A) and (a)(3)) (alteration in original).

The Supreme Court rejected plaintiffs' interpretation and affirmed the lower courts' rulings that there was no preemption, based upon a review of the text and history of the federal statute. The Court explained that "the meaning of words depends on their context." 488 U.S. at 25. "As Judge Learned Hand so eloquently noted: 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other but all in their aggregate take their purport from the setting in which they are used . . . .'" *Id*. at 25, fn. 6 (citations omitted).

Looking at the entire section in which the text relied on by plaintiffs appeared, the Court found that Congress's intent was more narrow than the wide-sweeping preemption plaintiffs advocated:

> Reading the statutory provisions in the context of the *entire* section in which they appear, we therefore believe that in enacting subsections 1333(a)(2)(A) and 1333 (a)(3), Congress had the

> more limited purpose of prohibiting adjacent States from claiming that it followed from the incorporation of their civil and criminal law that their tax codes were also directly applicable to the OCS.

488 U.S. at 26 (alteration in original).

Moreover, principles of statutory construction demonstrate the importance of viewing the words of a statute, not only by looking at the statute as a whole, but by looking at the problem the legislation was addressing and the prior history of congressional action regarding the problem. By undergoing such an examination, the Court may "'reconstitute the gamut of values current at the time when the words were uttered.'" *Nat'l Woodwork Mfrs. Ass'n v. Nat'l Labor Relations Bd.*, 386 U.S. 612, 620 (1967) (quoting Letter of Judge Learned Hand, quote in Lesnick, The Gravamen of the Secondary Boycott, 62 Col. L. Rev. 1363, 1393-1394, n. 155 (1962)).

> 'Before the true meaning of a statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation.'

*Id.* at 620, n. 5 (quoting 2 Sutherland, Statutory Construction 321 (Horack ed. 1943)). "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'" *Id*. at 619 (citation omitted).

These principles should inform the analysis here, which requires viewing the statutory scheme holistically and with due respect for the principles of federalism and congressional purpose. The proper interpretation requires a reading of the preemption provision, and the words within it, in the context of the FCRA, as well as application of the same hesitation to extend a federal statute beyond its scope as demonstrated by the Supreme Court in the cases cited above. As the testimony of the banking representatives and the Senate Report on S. 783 demonstrate, the intent of Congress in enacting the 1996 amendments was to ensure that information sharing among affiliates *not* be subject to the FCRA or state credit reporting laws. Given the absence of evidence to support Plaintiffs' overly broad interpretation, Plaintiffs cannot prove, as they must, that it was the clear and manifest intent of Congress to preempt state privacy laws that regulate information sharing among affiliates.

### 2. Omission of the Phrase "Consumer Reports" from Section 1681t(b)(2) Does Not Demonstrate That Congress Intended the Affiliate-Sharing Provision To Extend Beyond the Scope of the FCRA.

To support their reading of Section 1681t(b)(2), Plaintiffs contend that other preemption provisions in the FCRA demonstrate that Congress intended to preempt the states from regulating *all* information sharing by affiliates, and not just information sharing in the context of credit reporting. Specifically, Plaintiffs note that limiting references, such as "consumer reports" and "consumer's files," appear in other preemption clauses in Section 1681t(b)(1). Plaintiffs' Memo., at 7. Plaintiffs reason that the absence of such phrases in the affiliate-sharing provision demonstrates Congress's intent that the affiliate-sharing provision not be limited to consumer reports or consumer reporting.

Plaintiffs cite *Russello v. United States*, 464 U.S. 16 (1983), to support their claim that Section 1681t(b)(2) is not limited to the consumer reporting context. Plaintiffs' Memo., at 7 (quoting *Russello*, 464 U.S. at 23 ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").) That presumption, however, is appropriate only in limited circumstances, and cannot be mechanically applied, as can be seen in the *Russello* case itself.

The Court in *Russello* construed the meaning of the word "interest" broadly in one provision of Racketeer Influenced and Corrupt Organization Act. In doing so, the Court noted that a phrase limiting that word was present in another subsection, but had been excluded from the subdivision at issue. "[W]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Id.* at 23-24 (alteration in original) (citation omitted).

Here, such evidence of congressional intent is absent from Section 1681t(b)(2). There is no evidence that Congress intentionally deleted "consumer report" or any similar phrase from the affiliate-sharing preemption provision, or that Congress did not intend Section 1681t(b)(2) to be construed as limited to consumer reports and consumer reporting.

The Supreme Court has repeatedly found application of the so-called *Russello* presumption to be inappropriate, as it is here. For example, in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002), the Court addressed a federal preemption provision that prohibited "a State [or] political subdivision of a State" from enacting certain regulations governing motor carriers. *Id.* at 428 (quoting 49 U.S.C. § 14501(c)(1)). As an exception to this general rule of preemption, Congress provided that "the preemption directive shall not restrict the safety regulatory authority *of a State* with respect to motor vehicles." 536 U.S. at 428 (quoting 49 U.S.C. § 14501(c)(2)(A)) (emphasis added). Tow truck operators challenged a municipal regulation on the grounds of preemption. Relying on *Russello*, the plaintiffs contrasted the inclusion of "political subdivisions of a State" in the preemption clause with the absence of that phrase from the savings clause. 536 U.S. at 433-434.

The Court disagreed, holding that the municipal regulation fell within the scope of the savings clause. The Court began by reiterating the strong presumption that the historic police powers of state and local governments are not to be superseded absent a clear indication that Congress intended that result. *Id.* at 433-434 (citations omitted). The Court further noted that "[t]he *Russello* presumption -- that the presence of a phrase in one provision and its absence in another reveals Congress's design -- grows weaker with each difference in the formulation of the provisions under inspection." 536 U.S. at 435-436 (citing *Russello v. United States*, 464 U.S. 16). The Court concluded that it should not be applied in the case before it. The Court observed that "§ 14501(c)'s 'disparate inclusion [and] exclusion' of the words 'political subdivisions' support an argument of some force . . . ." 536 U.S. at 434. Nevertheless, upon examination of the statute as a whole "and with a view to the basic tenets of our federal system . . . we conclude that the statute does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority." *Id.* (citations omitted).

The Court similarly refused to apply the *Russello* presumption in *Field v. Mans*, 516 U.S. 59, 60 (1995). In that case, the Supreme Court examined the Bankruptcy Code's provision that debts induced by a fraudulent misrepresentation are not dischargeable. *Id.* (citing 11 U.S.C. §

523(a)(2)(A) ("Section 2(A)")). The issue was what level of reliance on the misrepresentation was required to exempt the debt from discharge under Section 2(A). The creditors made a "negative pregnant argument," which is the "rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." *Id.* at 67 (citing *Russello,* 464 U.S. at 23). The creditors argued that Section 2(A) required only "actual reliance"; they claimed that the inclusion of a reasonable reliance requirement in another subsection (section 2(B)) meant that it was deliberately excluded from Section 2(A). 516 U.S. at 66. The Court rejected the "negative pregnant argument," observing that it "should not be elevated to the level of interpretive trump card . . . ." *Id.* at 67, 75 (the negative pregnant rule of construction "is not illegitimate, but merely limited"). Likewise, this limited rule of construction should not be applied here to expand the scope of the affiliate-sharing preemption provision far beyond its intended reach.

Plaintiffs' reliance on the absence of "consumer report" or similar phrase in the affiliate-sharing preemption provision is misplaced for another reason as well. The preemption clauses from Section 1681t(b)(1) that Plaintiffs cite in support of their argument all contain a reference to a specific section in the FCRA that contains substantive regulations relating to the subject matter referred to in the preemption clause. For example, Section 1681t(b)(1) preempts state law with respect to any subject matter regulated under: Section 1681b(c) or (e), relating to the prescreening of consumer reports; Section 1681m(d), relating to the duties of persons who use a consumer report in connection with a credit transaction that is not initiated by the consumer; and Section 1681c, relating to information contained in consumer reports. 15 U.S.C. § 1681t(b)(1)(A), (D), and (E).

Such reference to subject matter regulation could not have been included in the affiliate-sharing preemption provision for the simple reason that the FCRA does not regulate information sharing among affiliates. Although the FCRA imposes rather extensive requirements and restrictions on subject matter such as prescreening and content of consumer reports, and duties of users of consumer reports, it does *not* include any such regulation of affiliate sharing. Thus, Congress could not include any references to substantive regulation of affiliate sharing in the affiliate-sharing preemption provision.

## B. NEITHER THE TEXT NOR THE LEGISLATIVE HISTORY OF THE FACT ACT IS RELEVANT TO THE FCRA PREEMPTION PROVISION AT ISSUE HERE.

Plaintiffs contend that the FACT Act of 2003 dispositively establishes that the FCRA preemption provision preempts state laws such as SB1. Plaintiffs' Memo, at 7-8. Plaintiffs, however, misconstrue the intent and impact of the FACT Act. The FACT Act did not substantively alter the FCRA's preemption provision, nor does the legislative history of the FACT Act provide any support for Plaintiffs' overly expansive interpretation of the FCRA preemption provision.

### 1. <u>The FACT Act Did Not Impact the FCRA Affiliate-Sharing Preemption Provision</u>.

#### a. <u>The FACT Act Only Eliminated the Sunset Clause of the Preemption Provision</u>.

Congress enacted the Fair and Accurate Credit Transactions Act ("FACT Act") late last year, amending the FCRA. Contrary to Plaintiffs' assertions, *nothing* in the FACT Act alters the substance or effect of the preemption provision in the FCRA that is relied on by Plaintiffs. The affiliate-sharing preemption provision reads the same now as it did prior to enactment of the FACT Act: "No requirement or prohibition may be imposed under the laws of any State . . . (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2).

The FACT Act did delete the sunset clause in the FCRA preemption provision. The sunset clause provided that the preemption provisions in Section 1681t(b) would not apply to any state law that was enacted after January 1, 2004, and that gave greater protection to consumers than the FCRA. Former 15 U.S.C. § 1681t(d)(2). The deletion of this sunset clause, however, had no effect on the substance of the affiliate-sharing preemption provision, which remained unchanged. Morever, whether the sunset clause was deleted or permitted to remain could have no effect on SB1, because SB1 was enacted in 2003, not "after January 1, 2004" as required by the sunset clause. 15 U.S.C. § 1681t(d)(2). Since the FACT Act did not alter any provision of law at issue here, neither the FACT Act nor its legislative history are relevant to this case.

b. <u>The FACT Act's Substantive Amendments to the FCRA Addressed Other Provisions, and Did Not Alter the Preemption Provision</u>.

Plaintiffs contend that with the FACT Act, "Congress decided to regulate the sharing of customer information among affiliated financial institutions pursuant to uniform federal standards . . . ." Plaintiffs' Memo., at 8. Contrary to Plaintiffs' assertion, the FACT Act does not restrict or prohibit the sharing of information among affiliates.

To support their argument, Plaintiffs rely on Section 214 of the FACT Act (15 U.S.C. § 1681s-3). Plaintiffs' Memo., at 3. Section 214 does not regulate the disclosure or sharing of any information. It merely provides that information received from an affiliate that would be a consumer report, but for the exclusion from "consumer report" of information shared among affiliates, may not be used "to make a solicitation for marketing purposes . . . " unless the consumer is given an opportunity to prohibit such solicitations. 15 U.S.C. § 1681s-3(a)(1).

The FACT Act does not restrict, condition or prohibit the *sharing* of information among affiliates; it simply gives consumers the choice of opting out of receiving marketing solicitations. Section 214 therefore functions like other laws or regulations that allow consumers to protect themselves from unwanted marketing, such as the Federal Trade Commission's do-not-call rule (16 C.F.R. § 310.4(b)(1)(iii)) or the FCRA provision that allows consumers to block some unsolicited credit offers (15 U.S.C. § 1681b(e)). Neither these provisions nor Section 214 of the FACT Act regulates the disclosure or sharing of information among affiliates.

2. <u>The Legislative History of the FACT Act, Including Any Discussions Regarding SB1, Is Not Probative of Congress's Intent in 1996 in Enacting the FCRA's Preemption Provision</u>.

In their motion, Plaintiffs cite statements by Senators Feinstein and Boxer and their unsuccessful effort to amend the FACT Act. Specifically, during the FACT Act debate, Senators Feinstein and Boxer proposed an amendment that would have established a national opt-out standard, similar to the opt-out provision in SB1. Plaintiffs refer to statements by Senators

Feinstein and Boxer as support for Plaintiffs' contention that both Senators recognized that renewal of the FCRA preemption provision would preempt SB1. Plaintiffs' Memo., at 8-9.[5/]

This amendment subsequently failed, and Plaintiffs have seized upon this failure to conclude that, with the FACT Act, "Congress intended to preempt all state laws imposing requirements on the exchange of information among affiliates to achieve national uniformity, including SB1." Plaintiffs' Memo., at 9. Plaintiffs' arguments, however, are devoid of factual, legal and logical support.

a. <u>Statements by Opponents of Legislation Should be Accorded No Weight</u>.

Any doomsday statements by Senators Boxer and Feinstein regarding the consequences if Congress did not pass their amendment -- or did pass the FACT Act, which the Senators opposed -- must be disregarded. Statements by opponents of a bill are of limited value in ascertaining legislative intent. *Shell Oil Company v. Iowa Dep't of Revenue*, 488 U.S. at 29 ("This Court does not usually accord much weight to the statements of a bill's opponents. "'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' [citations]"). As the Supreme Court has explained, in rejecting the use of statements by a bill's opponents, "`in their zeal to defeat a bill, they understandably tend to overstate its reach.'" *Bryan v. United States*, 534 U.S. 184, 196 (1998) (citation omitted). *See also Nat'l Woodwork Mfrs. Ass'n v. Nat'l Labor Relations Bd.*, 386 U.S. at 639-640.

b. <u>Opinions of Subsequent Congresses on the Intent of Previously Enacted Legislation Are Not Relevant to Legislative Intent</u>.

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5. One of the statements is not a quote from Senator Feinstein, but rather is a letter the Senator read into the record from Jackie Speier, the California legislator who introduced SB1 in the California Legislature. Plaintiffs take Senator Speier's quote out of context. Senator Speier was commenting on the contrary positions advocated by banking industry representatives, who she contends supported SB1 enthusiastically and without reservation. The gravamen of Senator Speier's letter was to chide these industry representatives who now criticized Boxer's and Feinstein's amendment to the FACT Act that would have imposed opt-out requirements similar to SB1 nationally. Thus, Senator Speier remarked on their marked change in position: "Now the story is different, as industry sees a political opportunity to preempt California's standard on affiliate sharing with a weaker one." 149 Cong. Rec. S13680 - S13681 (Nov. 4, 2003)(statement of Sen. Feinstein). [App. II, Exh 3.]

Statements in 2003 by Senator Boxer, Senator Feinstein or any other member of Congress regarding the meaning of the FCRA's preemption provision and its impact on state financial privacy laws regulating affiliate sharing should similarly be accorded no weight, for they cannot be used to illustrate a prior Congress's intent in passing the 1996 amendments.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Supreme Court rejected an interpretation of the 1967 Age Discrimination in Employment Act ("ADEA") that was based on comments in a 1978 committee report that accompanied amendments to the ADEA. The Court emphatically stated that the 1978 committee report "was written 11 years after the ADEA was passed in 1967, and such `[l]egislative observations . . . are in no sense part of the legislative history.' 'It is the intent of Congress that enacted [the section] . . . that controls.'" 441 U.S. at 759 (citations omitted). *See also United States v. X-Citement Video*, 513 U.S. 64, 77, fn. 6 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight [citations] . . . .")

To paraphrase the Supreme Court, legislators' comments during the 2003 debate on the FACT Act "are in no sense part of the legislative history" of the 1996 amendments to the FCRA and should not be considered. Indeed, to interpret a law based on the opinions of legislators expressed years after the law's passage would create perpetual uncertainty as to the law's meaning. Thus, as a matter of law and logic, legislators' opinions expressed seven years after the fact about what the 1996 amendments to the FCRA were intended to, or did, accomplish should be disregarded.

c. <u>The Court Should Draw No Inference From Failed Legislation</u>.

Plaintiffs argue that Congress's failure in 2003 to impose SB1-type standards nationally should be construed as a decision to impose "national uniformity." Plaintiffs' Memo., at 9. Congressional inaction on the national level, however, is not equivalent to a prohibition of action on the state level. If anything, the failure to impose a national standard could be construed as congressional endorsement of state regulation in the area, which would result in the *absence* of national uniformity.

Because of such conflicting inferences that can be drawn from congressional inaction, the Supreme Court has made clear that it is unwise to draw *any* inferences from failed legislation. "'[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'' A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. United States Army Corp of Engineers*, 531 U.S. 159, 169-170 (2001) (citations omitted). See also *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change").

Regardless of Congress's reasons for failing to impose SB1's information-sharing requirements nationally, that inaction left California and other states free to pass such requirements as long as they did not impact affiliate sharing in the context of credit reporting. That is precisely what the GLBA contemplates, and what California accomplished in enacting SB1.

### C. THE DISTRICT COURT'S OPINION IN *DALY CITY* IS NEITHER PROBATIVE NOR PERSUASIVE.

Plaintiffs rely heavily on the district court's decision in *Bank of America v. City of Daly City*, 279 F.Supp.2d 1118 (N.D. Cal. 2003), to support their interpretation of the FCRA's preemption provision. That decision is not, of course, binding on this Court. More important, the judgment in the case was vacated by the Ninth Circuit shortly after Plaintiffs' motion for summary judgment was filed. [App. II, Exh.4.] "[A] decision that has been vacated has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir.1991).

Moreover, Plaintiffs grossly overstate the effect of the *Daly City* decision, even if it were relevant, and mischaracterize its application. Specifically, in their motion, Plaintiffs contend that the court in *Daly City* confirmed Plaintiffs' interpretation that "the whole point" of the 1996 amendment to the definition of "consumer report" (15 U.S.C. § 1681a(d)(2)(A)) was to ensure that corporations could obtain and utilize the information of their affiliates obtained through their dealings with customers. See Plaintiffs' Memo., at 8. Similarly, Plaintiffs contend that the 1996 amendments were designed to permit companies to use information obtained by affiliates for marketing purposes. *Id*.

However, the "whole point" of the 1996 amendments was not to permit the unfettered exchange of information between affiliates for marketing purposes, but rather simply to ensure that such information was *not* regulated as a credit report. As noted above, testimony from Plaintiffs during the 1993 hearings on S. 783, the predecessor to these amendments, confirms that the banking industry -- like Congress -- viewed the amendments as necessary to ensure that such information sharing did not fall within the definition of a credit report. See e.g. *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,* S. Hrg. 103-247 at 78 and 82-83. [App. II, Exh. 1.]

Accordingly, as noted above, Congress's efforts to remove information sharing by affiliates from the ambit of the FCRA does not presumptively mean that such sharing cannot be regulated by state laws; it simply means that such information cannot be viewed as a credit report and regulated as such, pursuant to federal or state credit reporting laws. 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. See Defendants' Motion To Dismiss, at 22-23.

## IV. CONCLUSION

The FCRA's preemption provision must be viewed within the context of the statute as a whole. The presumption against preemption of states' exercise of their police powers and the legislative history of the 1996 FCRA amendments support a narrow interpretation of the preemption provision. The scope of that provision is limited to state laws regulating credit reporting, and does not extend to prohibit the states from regulating all affiliate sharing, in every circumstance.

The passage of the FACT Act does not alter this conclusion because it did not alter the FCRA preemption provision relied on by Plaintiffs. Plaintiffs' reliance on *Daly City* is equally misplaced because the Ninth Circuit has vacated that decision. Accordingly, for all the foregoing reasons, Plaintiffs' motion for summary judgment must be denied.

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